Documentación

EL DERECHO DE LA UE EN MATERIA DE DISCAPACIDAD Y LA CONVENCION DE NACIONES UNIDAS SOBRE LOS DERECHOS DE LAS PERSONAS CON DISCAPACIDAD

SEMINARIO PARA JUECES

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VERSIÓN CONSOLIDADA DEL TRATADO DE LA UNIÓN EUROPEA

Diario Oficial de la Unión Europea C 83, 30.3.2010

Artículo 2

La Unión se fundamenta en los valores de respeto de la dignidad humana, libertad, democracia, igualdad, Estado de Derecho y respeto de los derechos humanos, incluidos los derechos de las personas pertenecientes a minorías. Estos valores son comunes a los Estados miembros en una sociedad caracterizada por el pluralismo, la no discriminación, la tolerancia, la justicia, la solidaridad y la igualdad entre mujeres y hombres.

Artículo 3

(antiguo artículo 2 TUE)

1. La Unión tiene como finalidad promover la paz, sus valores y el bienestar de sus pueblos.

2. La Unión ofrecerá a sus ciudadanos un espacio de libertad, seguridad y justicia sin fronteras interiores, en el que esté garantizada la libre circulación de personas conjuntamente con medidas adecuadas en materia de control de las fronteras exteriores, asilo, inmigración y de prevención y lucha contra la delincuencia.

3. La Unión establecerá un mercado interior. Obrará en pro del desarrollo sostenible de Europa basado en un crecimiento económico equilibrado y en la estabilidad de los precios, en una economía social de mercado altamente competitiva, tendente al pleno empleo y al progreso social, y en un nivel elevado de protección y mejora de la calidad del medio ambiente. Asimismo, promoverá el progreso científico y técnico.

La Unión combatirá la exclusión social y la discriminación y fomentará la justicia y la protección sociales, la igualdad entre mujeres y hombres, la solidaridad entre las generaciones y la protección de los derechos del niño.

La Unión fomentará la cohesión económica, social y territorial y la solidaridad entre los Estados miembros.

La Unión respetará la riqueza de su diversidad cultural y lingüística y velará por la conservación y el desarrollo del patrimonio cultural europeo.

4. La Unión establecerá una unión económica y monetaria cuya moneda es el euro.

5. En sus relaciones con el resto del mundo, la Unión afirmará y promoverá sus valores e intereses y contribuirá a la protección de sus ciudadanos. Contribuirá a la

paz, la seguridad, el desarrollo sostenible del planeta, la solidaridad y el respeto mutuo entre los pueblos, el comercio libre y justo, la erradicación de la pobreza y la protección de los derechos humanos, especialmente los derechos del niño, así como al estricto respeto y al desarrollo del Derecho internacional, en particular el respeto de los principios de la Carta de las Naciones Unidas.

6. La Unión perseguirá sus objetivos por los medios apropiados, de acuerdo con las competencias que se le atribuyen en los Tratados.

Artículo 6

(antiguo artículo 6 TUE)

1. La Unión reconoce los derechos, libertades y principios enunciados en la Carta de los Derechos Fundamentales de la Unión Europea de 7 de diciembre de 2000, tal como fue adaptada el 12 de diciembre de 2007 en Estrasburgo, la cual tendrá el mismo valor jurídico que los Tratados.

Las disposiciones de la Carta no ampliarán en modo alguno las competencias de la Unión tal como se definen en los Tratados.

Los derechos, libertades y principios enunciados en la Carta se interpretarán con arreglo a las disposiciones generales del título VII de la Carta por las que se rige su interpretación y aplicación y teniendo debidamente en cuenta las explicaciones a que se hace referencia en la Carta, que indican las fuentes de dichas disposiciones.

2 La Unión se adherirá al Convenio Europeo para la Protección de los Derechos Humanos y de las Libertades Fundamentales. Esta adhesión no modificará las competencias de la Unión que se definen en los Tratados.

3. Los derechos fundamentales que garantiza el Convenio Europeo para la Protección de los Derechos Humanos y de las Libertades Fundamentales y los que son fruto de las tradiciones constitucionales comunes a los Estados miembros formarán parte del Derecho de la Unión como principios generales.

VERSIÓN CONSOLIDADA DEL TRATADO DE FUNCIONAMIENTO DE LA UNIÓN EUROPEA

Diario Oficial de la Unión Europea C 83/57 C 83, 30.3.2010

Artículo 10

En la definición y ejecución de sus políticas y acciones, la Unión tratará de luchar contra toda discriminación por razón de sexo, raza u origen étnico, religión o convicciones, discapacidad, edad u orientación sexual.

Artículo 19

(antiguo artículo 13 TCE)

1. Sin perjuicio de las demás disposiciones de los Tratados y dentro de los límites de las competencias atribuidas a la Unión por los mismos, el Consejo, por unanimidad con arreglo a un procedimiento legislativo especial, y previa aprobación del Parlamento Europeo, podrá adoptar acciones adecuadas para luchar contra la discriminación por motivos de sexo, de origen racial oétnico, religión o convicciones, discapacidad, edad u orientación sexual.

2. No obstante lo dispuesto en el apartado 1, el Parlamento Europeo y el Consejo podrán adoptar, con arreglo al procedimiento legislativo ordinario, los principios básicos de las medidas de la Unión de estímulo, con exclusión de toda armonización de las disposiciones legales y reglamentarias de los Estados miembros, para apoyar las acciones de los Estados miembros emprendidas con el fin de contribuir a la consecución de los objetivos enunciados en el apartado 1.

CARTA DE LOS DERECHOS FUNDAMENTALES DE LA UNIÓN EUROPEA

Diario Oficial de la Unión Europea C 83/389 30.3.2010

Artículo 20

Igualdad ante la ley

Todas las personas son iguales ante la ley.

Artículo 21

No discriminación

1. Se prohíbe toda discriminación, y en particular la ejercida por razón de sexo, raza, color, orígenes étnicos o sociales, características genéticas, lengua, religión o convicciones, opiniones políticas o de cualquier otro tipo, pertenencia a una minoría nacional, patrimonio, nacimiento, discapacidad, edad u orientación sexual.

2. Se prohíbe toda discriminación por razón de nacionalidad en el ámbito de aplicación de los Tratados y sin perjuicio de sus disposiciones particulares.

Artículo 22

Diversidad cultural, religiosa y lingüística

La Unión respeta la diversidad cultural, religiosa y lingüística.

Artículo 25

Derechos de las personas mayores

La Unión reconoce y respeta el derecho de las personas mayores a llevar una vida digna e independiente y a participar en la vida social y cultural.

Artículo 26

Integración de las personas discapacitadas

La Unión reconoce y respeta el derecho de las personas discapacitadas a beneficiarse de medidas que garanticen su autonomía, su integración social y profesional y su participación en la vida de la comunidad.

COMISIÓN EUROPEA

Bruselas, 15.11.2010
COM(2010) 636 final

COMUNICACIÓN DE LA COMISIÓN AL PARLAMENTO EUROPEO, AL CONSEJO, AL COMITÉ ECONÓMICO Y SOCIAL EUROPEO Y AL COMITÉ DE LAS REGIONES

Estrategia Europea sobre Discapacidad 2010-2020: un compromiso renovado para una Europa sin barreras

{SEC(2010) 1323}
{SEC(2010) 1324}

COMUNICACIÓN DE LA COMISIÓN AL PARLAMENTO EUROPEO, AL CONSEJO, AL COMITÉ ECONÓMICO Y SOCIAL EUROPEO Y AL COMITÉ DE LAS REGIONES

Estrategia Europea sobre Discapacidad 2010-2020:
un compromiso renovado para una Europa sin barreras

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1. INTRODUCCIÓN

Una de cada seis personas de la Unión Europea (UE) tiene una discapacidad[1] entre leve y grave, lo que suma unos 80 millones de personas que, con frecuencia, no pueden participar plenamente en la sociedad y la economía a causa de barreras físicas y de la actitud del resto de la sociedad. Las personas con discapacidad registran un índice de pobreza un 70 % superior a la media[2], en parte por tener un menor acceso al empleo.

Más de un tercio de las personas mayores de setenta y cinco años sufre algún tipo de discapacidad que restringe en cierta medida sus posibilidades, y más del 20 % tienen capacidades muy limitadas[3]. Además, es previsible que estas cifras aumenten por el envejecimiento de la población de la UE.

La UE y sus Estados miembros tienen un mandato muy sólido para mejorar la situación social y económica de las personas con discapacidad.

- De conformidad con el artículo 1 de la Carta de los Derechos Fundamentales de la Unión Europea («la Carta»), «la dignidad humana es inviolable. Será respetada y protegida». El artículo 26 establece que «la Unión reconoce y respeta el derecho de las personas discapacitadas a beneficiarse de medidas que garanticen su autonomía, su integración social y profesional y su participación en la vida de la comunidad». Asimismo, el artículo 21 prohíbe toda discriminación por razón de discapacidad.

- El Tratado de Funcionamiento de la Unión Europea (TFUE) estipula que la Unión, en la definición y ejecución de sus políticas y acciones, tratará de luchar contra toda discriminación por razón de discapacidad (artículo 10) y que podrá adoptar acciones adecuadas para luchar contra la discriminación por motivo de discapacidad (artículo 19).

- La Convención sobre los derechos de las personas con discapacidad de las Naciones Unidas («la Convención»), primer instrumento internacional jurídicamente vinculante en el ámbito de los derechos humanos del que son Partes la UE y sus Estados miembros, se aplicará en breve en toda la Unión[4]. La Convención exige a los Estados Partes que protejan y salvaguarden todos los derechos humanos y libertades fundamentales de las personas con discapacidad.

Conforme a la Convención, entre las personas con discapacidad se encuentran aquellas que tengan deficiencias físicas, mentales, intelectuales o sensoriales a largo plazo que, al interactuar con diversas barreras, puedan impedir su participación plena y efectiva en la sociedad, en igualdad de condiciones con las demás.

La Comisión colaborará con los Estados miembros para luchar contra los obstáculos que impiden tener una Europa sin barreras, suscribiendo Resoluciones recientes a este respecto del

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1 Módulo *ad hoc* sobre el empleo de las personas con discapacidad en el marco de la Encuesta de la población activa de la Unión Europea (LFS AHM) de 2002.

2 Estadísticas sobre la renta y las condiciones de vida en la UE (EU-SILC), de 2004.

3 LFS AHM y EU-SILC de 2007.

4 Acordada en 2007 y firmada por todos los Estados miembros y la UE; ratificada en octubre de 2010 por dieciséis Estados miembros (BE, CZ, DK, DE, ES, FR, IT, LV, LT, HU, AT, PT, SI, SK, SE y UK), el resto de los países están en proceso de ratificación. Esta Convención será vinculante en la UE y formará parte del ordenamiento jurídico de la Unión.

Parlamento Europeo y del Consejo[5]. Esta Estrategia proporciona un marco de acción a escala europea y nacional para abordar las distintas situaciones de hombres, mujeres y niños con discapacidad.

Es esencial que las personas con discapacidad participen plenamente en la vida económica y social para que tenga éxito la Estrategia Europa 2020 de la UE[6] en su empeño de generar un crecimiento inteligente, sostenible e integrador. Construir una sociedad que incluya a todos también sirve para ofrecer oportunidades de mercado y promover la innovación. Además, hay argumentos empresariales contundentes a favor de que los servicios y productos sean «accesibles para todos», dada la demanda de un número creciente de consumidores de edades avanzadas. Cabe mencionar, como ejemplo, la fragmentación del mercado de la UE de dispositivos de apoyo (con un valor anual estimado superior a 30 000 millones EUR[7]), lo que revierte en unos precios elevados de estos dispositivos. Los marcos político y regulatorio no reflejan adecuadamente las necesidades de las personas con discapacidad, como tampoco es el caso de los desarrollos de productos y servicios. Muchos productos y servicios, y buena parte del entorno construido, no son lo suficientemente accesibles.

La crisis económica ha repercutido negativamente en la situación de las personas con discapacidad, de manera que es aún más imperativo actuar. La presente Estrategia pretende mejorar las vidas de estas personas y aportar mayores beneficios a la sociedad y la economía sin imponer una burocracia innecesaria a la industria y las administraciones.

2. OBJETIVOS Y MEDIDAS

El objetivo general de esta Estrategia es capacitar a las personas con discapacidad para que puedan disfrutar de todos sus derechos y beneficiarse plenamente de una participación en la economía y la sociedad europeas, especialmente a través del mercado único. Lograr este objetivo y asegurar una puesta en práctica efectiva de la Convención en toda la UE exige coherencia. La Estrategia identifica medidas a escala de la UE complementarias a actuaciones nacionales y determina los mecanismos[8] necesarios para aplicar la Convención en la Unión, sin olvidar las propias instituciones de la UE. También expone el apoyo que se necesita para la financiación, la investigación, la sensibilización, la recopilación de datos y la elaboración de estadísticas.

La Estrategia se centra en la supresión de barreras[9]. La Comisión ha identificado ocho ámbitos primordiales de actuación: **accesibilidad, participación, igualdad, empleo, educación y formación, protección social, sanidad y acción exterior**. Se determinan medidas clave respecto a cada ámbito, con el objetivo principal para la UE destacado en un recuadro. Estos ámbitos se eligieron por su potencial para contribuir a los objetivos generales de la Estrategia y la Convención, así como a partir de los documentos políticos en esta materia de las instituciones de la UE y del Consejo de Europa, los resultados del Plan de Acción de la UE en materia de discapacidad (2003-2010) y una consulta de los Estados miembros, las

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5 Resoluciones SOC 375, de 2 de junio de 2010, y 2008/C 75/01 del Consejo y Resolución B6-0194/2009, P6_TA(2009)0334 del Parlamento Europeo.

6 COM(2010) 2020.

7 Deloitte & Touche: *Access to Assistive Technology in the EU* [Acceso a tecnologías de asistencia en la UE] (2003) y el informe de BCC Research en este ámbito (2008).

8 Artículo 33 de la Convención.

9 Eurobarómetro de 2006: un 91 % de la población considera que debería invertirse más en la supresión de barreras físicas para las personas con discapacidad.

partes interesadas y el público en general. Las referencias a actuaciones en los Estados miembros tienen por objeto complementar las medidas a escala de la UE, y no pretenden cubrir todas las obligaciones nacionales derivadas de la Convención. La Comisión también abordará la situación de las personas con discapacidad a través de la Estrategia Europa 2020, sus iniciativas emblemáticas y el relanzamiento del mercado único.

2.1. Ámbitos de actuación

1. Accesibilidad

Por «accesibilidad» se entiende el acceso de las personas con discapacidad, en las mismas condiciones que el resto de la población, al entorno físico, al transporte, a las tecnologías y los sistemas de la información y las comunicaciones (TIC), y a otras instalaciones y servicios. Todavía hay barreras importantes en todos estos ámbitos. Así, de media, en EU-27 solo el 5 % de los sitios web públicos se ajustan completamente a las normas de accesibilidad de internet, si bien un porcentaje más alto es parcialmente accesible. Muchas cadenas de televisión facilitan un número todavía muy reducido de programas subtitulados o que ofrezcan descripciones auditivas[10].

La accesibilidad es una condición previa a la participación en la sociedad y en la economía, y la UE tiene un largo camino que recorrer para conseguirla. La Comisión propone utilizar instrumentos legislativos y de otro tipo, como la normalización, para optimizar la accesibilidad al entorno construido, el transporte y las TIC, en consonancia con las iniciativas emblemáticas de la «Agenda digital» y la «Unión por la innovación». Partiendo de los principios de una regulación más inteligente, la Comisión estudiará los beneficios de adoptar medidas legislativas que garanticen la accesibilidad de los productos y los servicios, incluidas las medidas encaminadas a intensificar el recurso a la contratación pública (que ha demostrado una elevada efectividad en los EE.UU.[11]). Asimismo, fomentará la incorporación de la accesibilidad y el «diseño para todos» en los planes de estudios educativos y de formación profesional de las profesiones pertinentes y potenciará un mercado de la UE para tecnologías de apoyo. Una vez haya realizado más consultas con los Estados miembros y otras partes interesadas, la Comisión se planteará proponer un «acta de accesibilidad europea» para 2012. Esta «acta» podría englobar el desarrollo de normas específicas para determinados sectores, de modo que se mejore sustancialmente el funcionamiento del mercado interior de productos y servicios accesibles.

La intervención de la UE apoyará y complementará actividades nacionales destinadas a poner en práctica la accesibilidad y eliminar las barreras actuales, y a mejorar la disponibilidad y la variedad de tecnologías de apoyo.

Garantizar la accesibilidad a los bienes y servicios, en especial los servicios públicos y los dispositivos de apoyo para las personas con discapacidad.

2. Participación

[10] Documento de trabajo de la Comisión SEC(2007) 1469, p. 7.

[11] Artículo 508 de la Ley de rehabilitación *(Rehabilitation Act)* y de la Ley de las barreras arquitectónicas *(Architectural Barriers Act).*

Persisten múltiples obstáculos que impiden que las personas con discapacidad puedan ejercer plenamente sus derechos fundamentales —en especial sus derechos como ciudadanos de la Unión— y que limitan su participación en la sociedad en las mismas condiciones que otras personas. Estos derechos incluyen el derecho a la libre circulación, a elegir dónde y cómo se quiere vivir, y a tener pleno acceso a las actividades culturales, recreativas y deportivas. Por ejemplo, una persona con una discapacidad reconocida que se traslada a otro país de la UE puede perder su acceso a prestaciones nacionales como la posibilidad de utilizar el transporte público de forma gratuita o a precios reducidos.

La Comisión se dedicará a:

– superar los obstáculos al ejercicio de los derechos como personas, consumidores, estudiantes o actores económicos y políticos; abordar los problemas relacionados con la movilidad interna en la UE, así como facilitar y promover el uso de un modelo europeo de tarjeta de estacionamiento para personas con discapacidad;

– promover la transición de una asistencia institucional a una asistencia de carácter local mediante el uso de los Fondos Estructurales y del Fondo de Desarrollo Rural para respaldar la evolución de los servicios de asistencia locales y sensibilizar sobre la situación de personas con discapacidad alojadas en centros residenciales, especialmente los niños y las personas mayores;

– mejorar la accesibilidad de organizaciones, actividades, actos, instalaciones, bienes y servicios, comprendidos los de tipo audiovisual, en los campos del deporte, el ocio, la cultura y la diversión; promover la participación en actos deportivos y la organización de actos específicos para las personas con discapacidad; estudiar maneras de facilitar el uso del lenguaje de los signos y del alfabeto Braille en los contactos con las instituciones de la UE; abordar la accesibilidad al voto para facilitar el ejercicio de los derechos electorales que asisten a los ciudadanos de la UE; promover la transferencia transfronteriza de obras protegidas por derechos de autor en un formato accesible; intensificar el uso de las excepciones que admite la Directiva sobre derechos de autor[12].

La actuación de la UE apoyará actividades nacionales destinadas a:

– lograr la transición de una asistencia institucional a una asistencia de carácter local, también mediante la utilización de los Fondos Estructurales y el Fondo de Desarrollo Rural, a efectos de la formación de recursos humanos y la adaptación de las infraestructuras sociales, el desarrollo de sistemas de financiación para ayudas personalizadas, la promoción de condiciones laborales adecuadas para los cuidadores profesionales y el apoyo a las familias y a los cuidadores no profesionales;

– facilitar la accesibilidad de organizaciones y actividades en los campos del deporte, el ocio, la cultura y la diversión, y acogerse a las excepciones que admite la Directiva sobre derechos de autor.

Lograr una plena participación en la sociedad de las personas con discapacidad: - permitiéndoles disfrutar de todos los beneficios de la ciudadanía de la UE;

[12] Directiva 2001/29/CE. Memorándum de acuerdo de las partes interesadas firmado el 14.9.2009.

- suprimiendo las trabas administrativas y las barreras actitudinales a la participación plena y por igual;

- proporcionando servicios de calidad de ámbito local que comprendan el acceso a una ayuda personalizada.

3. Igualdad

Más de la mitad de los europeos consideran que la discriminación por discapacidad o edad está muy extendida en la UE[13]. Conforme a los requisitos de los artículos 1, 21 y 26 de la Carta y de los artículos 10 y 19 del TFUE, la Comisión promoverá la igualdad de trato de las personas con discapacidad a través de un enfoque de doble vertiente. Por una parte, se utilizará la legislación de la UE vigente para proteger de la discriminación y, por otra, se aplicará una política activa destinada a luchar contra la discriminación y promover la igualdad de oportunidades en las políticas de la UE. La Comisión también prestará una atención especial al impacto acumulativo de la discriminación que pueden experimentar las personas con discapacidad, si se suman otros motivos de discriminación como la nacionalidad, la edad, la raza o el origen étnico, el sexo, la religión o las convicciones, o bien la orientación sexual.

También velará por la plena aplicación de la Directiva 2000/78/CE[14], por la que se prohíbe la discriminación en el empleo; favorecerá la diversidad y luchará contra la discriminación a través de campañas de sensibilización a escala nacional y de la UE, y apoyará la labor en la Unión de ONG que trabajan en este terreno.

La actuación de la UE apoyará y complementará políticas y programas nacionales encaminados a fomentar la igualdad, por ejemplo, promoviendo la conformidad de la legislación de los Estados miembros en materia de capacidad jurídica con la Convención.

Erradicar en la UE la discriminación por razón de discapacidad.

4. Empleo

Los empleos de calidad aseguran una independencia económica, fomentan los logros personales y ofrecen la mejor protección frente a la pobreza. Sin embargo, la tasa de empleo de las personas con discapacidad se sitúa solo en torno al 50 %[15]. Para alcanzar las metas de crecimiento que se ha propuesto la UE, es necesario que un número mayor de personas con discapacidad ejerzan una actividad laboral remunerada en el mercado de trabajo «abierto». La Comisión explotará el pleno potencial de la Estrategia Europa 2020 y de su «Agenda de nuevas cualificaciones y empleos» facilitando a los Estados miembros análisis, orientaciones políticas, intercambios de información y otro tipo de apoyo. Dará también a conocer mejor la situación de las mujeres y los hombres con discapacidad respecto al empleo, identificará retos y propondrá soluciones. Prestará especial atención a los jóvenes con discapacidad en su transición de la educación al empleo. Abordará la movilidad interna en el mercado laboral «abierto» y en talleres protegidos a través del intercambio de información y del aprendizaje mutuo. Asimismo, tratará la cuestión de las actividades por cuenta propia y de los empleos de

[13] Eurobarómetro especial nº 317.
[14] Directiva 2000/78/CE del Consejo (DO L 303 de 2.12.2000, p. 16).
[15] LFS AHM de 2002.

calidad, sin descuidar aspectos como las condiciones de trabajo y la promoción profesional, contando con la participación de los interlocutores sociales. La Comisión intensificará su apoyo a las iniciativas voluntarias que promueven la gestión de la diversidad en el lugar de trabajo, tales como «cartas de la diversidad» firmadas por la empresa o iniciativas de empresa social.

La actuación de la UE apoyará y complementará los esfuerzos nacionales destinados a: analizar la situación de las personas con discapacidad en el mercado laboral; luchar para evitar que las personas con discapacidad caigan en la trampa o entren en la cultura de las prestaciones por discapacidad, que les disuaden de entrar en el mercado laboral; contribuir a su integración en el mercado laboral a través del Fondo Social Europeo (FSE); desarrollar políticas activas del mercado; mejorar la accesibilidad de los lugares de trabajo; desarrollar servicios de colocación profesional, estructuras de apoyo y formación en el lugar de trabajo; promover el uso del Reglamento general de exención por categorías[16], que permite conceder ayudas estatales sin notificación previa a la Comisión.

Posibilitar que muchas personas con discapacidad tengan ingresos por actividades laborales en el mercado de trabajo «abierto».

5. Educación y formación

En el grupo de edad entre dieciséis y diecinueve años, la tasa de personas con limitaciones importantes que no prosiguen sus estudios se sitúa en el 37 %, frente a un 25 % de las personas con ciertas limitaciones, y un 17 % de las personas sin limitación alguna[17]. El acceso a la educación general es difícil para los niños con discapacidad grave, y a veces tiene lugar de forma segregada. Las personas con discapacidad y, especialmente, los niños, deben integrarse adecuadamente en el sistema educativo general, con el apoyo individual necesario, en interés de los propios niños. Sin perjuicio de la responsabilidad de los Estados miembros respecto al contenido de los planes de estudios y la organización de los sistemas educativos, la Comisión respaldará el objetivo de una educación y formación inclusivas y de calidad en el marco de la iniciativa «Juventud en movimiento». Además, difundirá más información sobre los niveles educativos y las oportunidades que se ofrecen a las personas con discapacidad, y aumentará la movilidad de este colectivo facilitando su participación en el Programa de aprendizaje permanente.

La actuación de la UE respaldará mediante «ET 2020», marco estratégico para la cooperación europea en educación y formación[18], los esfuerzos nacionales encaminados, en primer lugar, a suprimir las barreras jurídicas y organizativas que se presentan a las personas con discapacidad en los sistemas generales de educación y de aprendizaje permanente; en segundo lugar, a apoyar oportunamente una educación inclusiva, un aprendizaje personalizado y una identificación temprana de necesidades especiales; y, por último, a facilitar una formación y un apoyo adecuados a los profesionales que trabajan a todos los niveles educativos e informar sobre tasas y resultados de participación.

Promover una educación y un aprendizaje permanente inclusivos para todos los alumnos

16 Reglamento (CE) nº 800/2008 de la Comisión (DO L 214 de 9.8.2008, p. 3).
17 LFS AHM de 2002.
18 Conclusiones del Consejo de 12 de mayo de 2009 (DO C 119 de 28.5.2009, p. 2).

con discapacidad.

6. Protección social

Una participación menor en la educación general y en el mercado laboral conlleva desigualdades en los niveles de ingresos y pobreza para las personas con discapacidad, y es motivo de exclusión social y aislamiento. Este colectivo debe poder beneficiarse de los sistemas de protección social y de los programas de reducción de la pobreza, de ayudas a la discapacidad, de planes de vivienda pública y de otros servicios de facilitación, así como de programas de prestaciones y jubilación. La Comisión prestará atención a estos asuntos a través de la «Plataforma europea contra la pobreza», lo que incluye evaluar la adecuación y sostenibilidad de los sistemas de protección social y de las ayudas del FSE. Sin perjuicio de las competencias de los Estados miembros, la UE apoyará las medidas nacionales encaminadas a garantizar la calidad y la sostenibilidad de los sistemas de protección social para las personas con discapacidad, en particular, a través de los intercambios de información sobre políticas y del aprendizaje mutuo.

Promover condiciones de vida dignas para las personas con discapacidad.

7. Sanidad

Las personas con discapacidad pueden tener un acceso limitado a los servicios sanitarios, incluidos los tratamientos médicos ordinarios, lo que puede revertir en desigualdades respecto a la salud independientes de su discapacidad. Estas personas tienen derecho al mismo acceso a la asistencia sanitaria que el resto de la población, también a la asistencia de carácter preventivo, y a beneficiarse de unos servicios sanitarios y de rehabilitación específicos que sean asequibles, de calidad y que tengan en cuenta sus necesidades, incluidas las derivadas del género. Esta tarea es competencia básicamente de los Estados miembros, que son responsables de la organización y la prestación de servicios sanitarios y de asistencia médica. La Comisión apoyará el desarrollo de medidas encaminadas a la igualdad de acceso a la asistencia sanitaria que comprendan unos servicios sanitarios y de rehabilitación de calidad diseñados para las personas con discapacidad. También prestará una atención especial a las personas con discapacidad a la hora de poner en práctica medidas destinadas a luchar contra las desigualdades en el campo de la salud; promoverá la adopción de medidas en el ámbito de la salud y la seguridad en el trabajo para reducir los riesgos de sufrir una discapacidad durante la vida laboral y mejorar la reinserción laboral de los trabajadores con discapacidad[19]; y se dedicará a prevenir estos riesgos.

La actuación de la UE apoyará las medidas nacionales cuyo objeto sea proporcionar unos servicios y unas instalaciones sanitarias accesibles y no discriminatorias; fomentar la sensibilización hacia las discapacidades en las escuelas de medicina y en los planes de estudios de los profesionales de la salud; ofrecer unos servicios adecuados de rehabilitación; promover la asistencia sanitaria psíquica y el desarrollo de servicios de intervención temprana y de evaluación de necesidades.

Potenciar la igualdad de acceso a los servicios sanitarios y a las instalaciones vinculadas

[19] Estrategia de salud y seguridad en el trabajo de la UE 2007-2012, COM(2007) 62.

para las personas con discapacidad.

8. Acción exterior

La UE y los Estados miembros deben promover los derechos de las personas con discapacidad en su acción exterior, incluidas las ampliaciones de la Unión, la política de vecindad y los programas de desarrollo. La Comisión trabajará, en su caso, en un marco más amplio de no discriminación para hacer hincapié en la discapacidad como un componente de los derechos humanos en la acción exterior de la UE; realizará labores de sensibilización respecto a la Convención y las necesidades de las personas con discapacidad, incluida la accesibilidad, en el campo de las actuaciones de emergencia y la ayuda humanitaria; consolidará la red de corresponsales en materia de discapacidad de manera que se conciencie a las delegaciones de la UE de todo lo concerniente a la discapacidad; garantizará que los países candidatos potenciales o efectivos avancen en la promoción de los derechos de las personas con discapacidad y se asegurará de que los instrumentos financieros destinados a las ayudas previas a la adhesión se utilicen para mejorar la situación de este colectivo.

La intervención de la UE servirá para apoyar y complementar iniciativas nacionales encaminadas a plantear cuestiones de discapacidad en los diálogos con los países no pertenecientes a la Unión y, en su caso, incluirá la discapacidad y la puesta en práctica de la Convención tomando en consideración los compromisos de Accra sobre la eficacia de la ayuda. También fomentará los acuerdos y compromisos sobre cuestiones de discapacidad en foros internacionales (Naciones Unidas, Consejo de Europa, OCDE).

Promover los derechos de las personas con discapacidad en la acción exterior de la UE.

2.2. Puesta en práctica de la Estrategia

Esta Estrategia requiere un compromiso conjunto y renovado de las instituciones de la UE y de todos los Estados miembros. Las medidas en los principales ámbitos mencionados anteriormente deben sustentarse en los instrumentos generales que se citan a continuación:

1 — Sensibilización

La Comisión velará por que las personas con discapacidad sean conscientes de sus derechos, prestando particular atención a la accesibilidad de los materiales y los canales de información. Promoverá asimismo la sensibilización hacia los enfoques de tipo «diseño para todos» en los productos, servicios y entornos.

La actuación de la UE respaldará y complementará las campañas nacionales de sensibilización sobre las capacidades y las contribuciones de las personas con discapacidad y potenciará el intercambio de buenas prácticas en el Grupo de Alto Nivel en materia de Discapacidad.

Concienciar a la sociedad de todo lo referente a la discapacidad e informar en mayor medida a las personas con discapacidad de sus derechos y la manera de ejercerlos.

2 — Apoyo financiero

La Comisión se asegurará de que los programas de la UE en ámbitos de actuación que afecten particularmente a las personas con discapacidad ofrezcan posibilidades de financiación, por ejemplo, en los programas de investigación. El coste de las medidas destinadas a posibilitar la participación de las personas con discapacidad en los programas de la UE debe poder ser objeto de reembolso. Los instrumentos de financiación de la UE, con una mención especial a los Fondos Estructurales, deben aplicarse de modo accesible y no discriminatorio.

La intervención de la UE servirá para apoyar y complementar iniciativas nacionales encaminadas a mejorar la accesibilidad y luchar contra la discriminación a través de una financiación integrada, de la aplicación oportuna del artículo 16 del Reglamento general sobre los Fondos Estructurales[20], y del establecimiento de exigencias máximas por lo que se refiere a la accesibilidad en la contratación pública. Todas las medidas deben aplicarse de conformidad con la legislación europea en materia de competencia, en particular, las normas sobre ayudas estatales.

Optimizar el uso de los instrumentos de financiación de la UE para favorecer la accesibilidad y la no discriminación y aumentar la visibilidad de las posibilidades de financiación en los programas posteriores a 2013 por lo que se refiere a la discapacidad.

3 — Estadísticas y recopilación y seguimiento de datos

La Comisión procurará racionalizar la información sobre discapacidad recopilada mediante diversas encuestas de la UE de ámbito social (Estadísticas sobre la renta y las condiciones de vida en la UE, el módulo *ad hoc* de la Encuesta sobre la población activa o la Encuesta comunitaria de salud por entrevista), desarrollará una encuesta específica sobre barreras a la integración social de las personas con discapacidad y presentará una serie de indicadores para hacer un seguimiento de su situación respecto a los objetivos principales de Europa 2020 (educación, empleo y reducción de la pobreza). Se pedirá a la Agencia de los Derechos Fundamentales de la Unión Europea que contribuya a esta tarea, en el marco de su mandato, mediante la recopilación de datos, la investigación y el análisis.

La Comisión establecerá también una herramienta de internet que ofrezca una perspectiva de las medidas prácticas y de la legislación empleada para aplicar la Convención.

La actuación de la UE apoyará y complementará los esfuerzos de los Estados miembros por recoger datos y elaborar estadísticas que pongan de relieve las barreras que impiden a las personas con discapacidad ejercer sus derechos.

Complementar la elaboración de estadísticas periódicas sobre cuestiones de discapacidad a fin de estar al tanto de la situación de las personas de este colectivo.

4 — Mecanismos que requiere la Convención

El marco de gobernanza que establece el artículo 33 de la Convención (organismos gubernamentales, mecanismo de coordinación, mecanismo independiente y participación de las personas con discapacidad y sus organizaciones) debe abordarse a dos niveles: respecto a los Estados miembros, en una amplia gama de políticas de la UE, y en el marco de las

[20] Reglamento (CE) nº 1083/2006 del Consejo (DO L 210 de 31.7.2006, p. 25).

instituciones de la Unión. A escala de la UE, se establecerán mecanismos de coordinación basados en instrumentos existentes tanto entre los servicios de la Comisión y las instituciones de la Unión como entre la UE y los Estados miembros. La puesta en práctica de esta Estrategia y de la Convención se debatirá periódicamente en el Grupo de Alto Nivel en materia de Discapacidad con representantes de los Estados miembros y de sus organismos gubernamentales nacionales, con la Comisión, con personas con discapacidad y sus organizaciones, y con otras partes interesadas. Se seguirán facilitando informes de evolución para las reuniones ministeriales informales.

También se establecerá un marco de seguimiento que incluya uno o más mecanismos independientes para fomentar, proteger y supervisar la aplicación de la Convención. Una vez se haya ratificado la Convención y tras considerar la posible función de algunos organismos e instituciones de la UE, la Comisión propondrá un marco de gobernanza, que no añada burocracia innecesaria, para facilitar la aplicación de la Convención en Europa.

A finales de 2013, la Comisión informará sobre los avances logrados mediante la presente Estrategia, concretamente acerca de la puesta en práctica de medidas, de los progresos nacionales y del informe que remite la UE al Comité de las Naciones Unidas sobre los Derechos de las Personas con Discapacidad[21]. La Comisión recogerá estadísticas y recopilará datos para ilustrar los cambios en las disparidades entre las personas con discapacidad y la población en general, así como a fin de establecer indicadores sobre discapacidad relacionados con los objetivos de la Estrategia Europa 2020 de educación, empleo y reducción de la pobreza. Ello permitirá revisar la Estrategia y sus acciones. Está previsto preparar otro informe para 2016.

3. CONCLUSIÓN

Esta Estrategia pretende sacar partido del potencial combinado de la Carta de los Derechos Fundamentales de la Unión Europea, del Tratado de Funcionamiento de la Unión Europea y de la Convención sobre los derechos de las personas con discapacidad de las Naciones Unidas, y aprovechar plenamente las posibilidades que ofrecen la Estrategia Europa 2020 y sus instrumentos. Asimismo, pone en marcha un proceso destinado a capacitar a las personas con discapacidad de manera que puedan participar plenamente en la sociedad, en unas condiciones de igualdad con el resto de la población. Dado el envejecimiento de la población de la Unión, estas medidas repercutirán visiblemente en la calidad de vida de una proporción creciente de los ciudadanos europeos. Se exhorta a las instituciones de la UE y a los Estados miembros a colaborar en el marco de esta Estrategia con el fin de construir una Europa para todos libre de barreras.

[21] Artículos 35 y 36 de la Convención.

IV

(Actos adoptados, antes del 1 de diciembre de 2009, en aplicación del Tratado CE, del Tratado UE y del Tratado Euratom)

DECISIÓN DEL CONSEJO

de 26 de noviembre de 2009

relativa a la celebración, por parte de la Comunidad Europea, de la Convención de las Naciones Unidas sobre los derechos de las personas con discapacidad

(2010/48/CE)

EL CONSEJO DE LA UNIÓN EUROPEA,

Visto el Tratado constitutivo de la Comunidad Europea y, en particular, sus artículos 13 y 95 en relación con su artículo 300, apartado 2, párrafo primero, segunda frase, y apartado 3, párrafo primero,

Vista la propuesta de la Comisión,

Visto el dictamen del Parlamento Europeo [1],

Considerando lo siguiente:

(1) En mayo de 2004, el Consejo autorizó a la Comisión a llevar a cabo las negociaciones, en nombre de la Comunidad Europea, relativas a la Convención de las Naciones Unidas sobre la protección y la promoción de los derechos y la dignidad de las personas con discapacidad (en lo sucesivo, «la Convención de las Naciones Unidas»).

(2) La Convención de las Naciones Unidas fue aprobada por la Asamblea General de las Naciones Unidas el 13 de diciembre de 2006 y entró en vigor el 3 de mayo de 2008.

(3) La Convención de las Naciones Unidas fue firmada en nombre de la Comunidad el 30 de marzo de 2007, a reserva de su posible celebración en fecha posterior.

(4) La Convención de las Naciones Unidas constituye un pilar pertinente y eficaz para la promoción y protección de los derechos de las personas con discapacidad dentro de la Unión Europea, a lo que conceden suma importancia tanto la Comunidad como sus Estados miembros.

(5) Procede, por tanto, que la Convención de las Naciones Unidas sea aprobada en nombre de la Comunidad a la mayor brevedad.

(6) No obstante, dicha aprobación deberá ir acompañada de una reserva que será presentada por la Comunidad Europea en relación con el artículo 27, apartado 1, de la Convención de las Naciones Unidas, con el fin de declarar que la celebración de dicha Convención por parte de la Comunidad se entenderá sin perjuicio del Derecho comunitario, basado en la ley y establecido en el artículo 3, apartado 4, de la Directiva 2000/78/CE del Consejo [2], de que gozan los Estados miembros de no aplicar a las fuerzas armadas el principio de igualdad de trato por lo que se refiere a la discapacidad.

(7) Tanto la Comunidad como sus Estados miembros gozan de competencias en los ámbitos cubiertos por la Convención de las Naciones Unidas. Por tanto, es de desear que la Comunidad y los Estados miembros sean Partes contratantes, para que puedan cumplir juntos las obligaciones que dicha Convención les impone y ejercer conjuntamente los derechos que les confiere en las situaciones de competencias compartidas, de manera coherente.

(8) Al depositar el instrumento de confirmación oficial, la Comunidad también deberá depositar, con arreglo al artículo 44, apartado 1, de la Convención de las Naciones Unidas, una declaración en la que se especifiquen las materias regidas por dicha Convención respecto de las cuales los Estados miembros le hayan transferido competencias.

DECIDE:

Artículo 1

1. Queda aprobada, en nombre de la Comunidad, la Convención de las Naciones Unidas sobre los derechos de las personas con discapacidad, sin perjuicio de una reserva en relación con su artículo 27, apartado 1.

2. El texto de la Convención de las Naciones Unidas figura adjunto a la presente Decisión.

El texto de la reserva se halla en el anexo III de la presente Decisión.

[1] Dictamen emitido el 27 de abril de 2009 (no publicado aun en el Diario Oficial).

[2] DO L 303 de 2.12.2000, p. 16.

Artículo 2

1. Se autoriza al Presidente del Consejo para que designe a la(s) persona(s) facultadas(s) para depositar ante el Secretario General de las Naciones Unidas, en nombre de la Comunidad Europea, el instrumento de confirmación oficial de la Convención de las Naciones Unidas, con arreglo a lo dispuesto en los artículos 41 y 43 de dicha Convención.

2. Conforme al artículo 44, apartado 1, de la Convención de las Naciones Unidas, al depositar el instrumento de confirmación oficial, la(s) persona(s) designada(s) depositará(n) la declaración de competencia establecida en el anexo III de la presente Decisión y la reserva establecida en el anexo II de la misma.

Artículo 3

Con respecto a los asuntos que sean competencia de la Comunidad, y sin perjuicio del respeto de la competencias de los Estados miembros, la Comisión centralizará las cuestiones relativas a la aplicación de la Convención de las Naciones Unidas con arreglo a su artículo 33, apartado 1. Los detalles de la función centralizadora a este respecto se indicarán en un código de conducta antes de que se deposite el instrumento de confirmación oficial en nombre de la Comunidad.

Artículo 4

1. En los asuntos que sean de competencia exclusiva de la Comunidad, la Comisión representará a la Comunidad en las reuniones de los órganos creados por la Convención de las Naciones Unidas, en particular en la Conferencia de los Estados Partes mencionada en su artículo 40, y actuará en su nombre en relación con las cuestiones que sean competencia de dichos órganos.

2. En los asuntos cuya competencia sea compartida por la Comunidad y los Estados miembros, ambos establecerán con antelación las disposiciones que corresponda para representar la posición de la Comunidad en las reuniones de los órganos creados por la Convención de las Naciones Unidas. Los detalles de esta representación se indicarán en un código de conducta que deberá aprobarse antes de que se deposite el instrumento de confirmación oficial en nombre de la Comunidad.

3. En las reuniones mencionadas en los apartados 1 y 2, la Comisión y los Estados miembros, si fuera necesario previa consulta de otras instituciones pertinentes de la Comunidad, colaborarán estrechamente en lo que se refiere, en particular, a las disposiciones en materia de control, información y votación. Las disposiciones destinadas a garantizar una estrecha colaboración también deberán tratarse en el código de conducta mencionado en el apartado 2.

Artículo 5

La presente Decisión se publicará en el *Diario Oficial de la Unión Europea*.

Hecho en Bruselas, el 26 de noviembre de 2009.

Por el Consejo
El Presidente
J. BJÖRKLUND

ANEXO I

CONVENCIÓN SOBRE LOS DERECHOS DE LAS PERSONAS CON DISCAPACIDAD

Preámbulo

LOS ESTADOS PARTES EN LA PRESENTE CONVENCIÓN,

a) Recordando los principios de la Carta de las Naciones Unidas que proclaman que la libertad, la justicia y la paz en el mundo tienen por base el reconocimiento de la dignidad y el valor inherentes y de los derechos iguales e inalienables de todos los miembros de la familia humana;

b) Reconociendo que las Naciones Unidas, en la Declaración Universal de Derechos Humanos y en los Pactos Internacionales de Derechos Humanos, han reconocido y proclamado que toda persona tiene los derechos y libertades enunciados en esos instrumentos, sin distinción de ninguna índole;

c) Reafirmando la universalidad, indivisibilidad, interdependencia e interrelación de todos los derechos humanos y libertades fundamentales, así como la necesidad de garantizar que las personas con discapacidad los ejerzan plenamente y sin discriminación;

d) Recordando el Pacto Internacional de Derechos Económicos, Sociales y Culturales, el Pacto Internacional de Derechos Civiles y Políticos, la Convención Internacional sobre la Eliminación de todas las Formas de Discriminación Racial, la Convención sobre la eliminación de todas las formas de discriminación contra la mujer, la Convención contra la Tortura y Otros Tratos o Penas Crueles, Inhumanos o Degradantes, la Convención sobre los Derechos del Niño y la Convención Internacional sobre la protección de los derechos de todos los trabajadores migratorios y de sus familiares;

e) Reconociendo que la discapacidad es un concepto que evoluciona y que resulta de la interacción entre las personas con deficiencias y las barreras debidas a la actitud y al entorno que evitan su participación plena y efectiva en la sociedad, en igualdad de condiciones con las demás;

f) Reconociendo la importancia que revisten los principios y las directrices de política que figuran en el Programa de Acción Mundial para los Impedidos y en las Normas Uniformes sobre la Igualdad de Oportunidades para las Personas con Discapacidad como factor en la promoción, la formulación y la evaluación de normas, planes, programas y medidas a nivel nacional, regional e internacional destinados a dar una mayor igualdad de oportunidades a las personas con discapacidad;

g) Destacando la importancia de incorporar las cuestiones relativas a la discapacidad como parte integrante de las estrategias pertinentes de desarrollo sostenible;

h) Reconociendo también que la discriminación contra cualquier persona por razón de su discapacidad constituye una vulneración de la dignidad y el valor inherentes del ser humano;

i) Reconociendo, además, la diversidad de las personas con discapacidad;

j) Reconociendo la necesidad de promover y proteger los derechos humanos de todas las personas con discapacidad, incluidas aquellas que necesitan un apoyo más intenso;

k) Observando con preocupación que, pese a estos diversos instrumentos y actividades, las personas con discapacidad siguen encontrando barreras para participar en igualdad de condiciones con las demás en la vida social y que se siguen vulnerando sus derechos humanos en todas las partes del mundo;

l) Reconociendo la importancia de la cooperación internacional para mejorar las condiciones de vida de las personas con discapacidad en todos los países, en particular en los países en desarrollo;

m) Reconociendo el valor de las contribuciones que realizan y pueden realizar las personas con discapacidad al bienestar general y a la diversidad de sus comunidades, y que la promoción del pleno goce de los derechos humanos y las libertades fundamentales por las personas con discapacidad y de su plena participación tendrán como resultado un mayor sentido de pertenencia de estas personas y avances significativos en el desarrollo económico, social y humano de la sociedad y en la erradicación de la pobreza;

n) Reconociendo la importancia que para las personas con discapacidad reviste su autonomía e independencia individual, incluida la libertad de tomar sus propias decisiones;

o) Considerando que las personas con discapacidad deben tener la oportunidad de participar activamente en los procesos de adopción de decisiones sobre políticas y programas, incluidos los que les afectan directamente;

p) Preocupados por la difícil situación en que se encuentran las personas con discapacidad que son víctimas de múltiples o agravadas formas de discriminación por motivos de raza, color, sexo, idioma, religión, opinión política o de cualquier otra índole, origen nacional, étnico, indígena o social, patrimonio, nacimiento, edad o cualquier otra condición;

q) Reconociendo que las mujeres y las niñas con discapacidad suelen estar expuestas a un riesgo mayor, dentro y fuera del hogar, de violencia, lesiones o abuso, abandono o trato negligente, malos tratos o explotación;

r) Reconociendo también que los niños y las niñas con discapacidad deben gozar plenamente de todos los derechos humanos y las libertades fundamentales en igualdad de condiciones con los demás niños y niñas, y recordando las obligaciones que a este respecto asumieron los Estados Partes en la Convención sobre los Derechos del Niño;

s) Subrayando la necesidad de incorporar una perspectiva de género en todas las actividades destinadas a promover el pleno goce de los derechos humanos y las libertades fundamentales por las personas con discapacidad;

t) Destacando el hecho de que la mayoría de las personas con discapacidad viven en condiciones de pobreza y reconociendo, a este respecto, la necesidad fundamental de mitigar los efectos negativos de la pobreza en las personas con discapacidad;

u) Teniendo presente que, para lograr la plena protección de las personas con discapacidad, en particular durante los conflictos armados y la ocupación extranjera, es indispensable que se den condiciones de paz y seguridad basadas en el pleno respeto de los propósitos y principios de la Carta de las Naciones Unidas y se respeten los instrumentos vigentes en materia de derechos humanos;

v) Reconociendo la importancia de la accesibilidad al entorno físico, social, económico y cultural, a la salud y la educación y a la información y las comunicaciones, para que las personas con discapacidad puedan gozar plenamente de todos los derechos humanos y las libertades fundamentales;

w) Conscientes de que las personas, que tienen obligaciones respecto a otras personas y a la comunidad a la que pertenecen, tienen la responsabilidad de procurar, por todos los medios, que se promuevan y respeten los derechos reconocidos en la Carta Internacional de Derechos Humanos;

x) Convencidos de que la familia es la unidad colectiva natural y fundamental de la sociedad y tiene derecho a recibir protección de esta y del Estado, y de que las personas con discapacidad y sus familiares deben recibir la protección y la asistencia necesarias para que las familias puedan contribuir a que las personas con discapacidad gocen de sus derechos plenamente y en igualdad de condiciones;

y) Convencidos de que una convención internacional amplia e integral para promover y proteger los derechos y la dignidad de las personas con discapacidad contribuirá significativamente a paliar la profunda desventaja social de las personas con discapacidad y promoverá su participación, con igualdad de oportunidades, en los ámbitos civil, político, económico, social y cultural, tanto en los países en desarrollo como en los desarrollados.

CONVIENEN EN LO SIGUIENTE:

Artículo 1

Propósito

El propósito de la presente Convención es promover, proteger y asegurar el goce pleno y en condiciones de igualdad de todos los derechos humanos y libertades fundamentales por todas las personas con discapacidad, y promover el respeto de su dignidad inherente.

Las personas con discapacidad incluyen a aquellas que tengan deficiencias físicas, mentales, intelectuales o sensoriales a largo plazo que, al interactuar con diversas barreras, puedan impedir su participación plena y efectiva en la sociedad, en igualdad de condiciones con las demás.

Artículo 2

Definiciones

A los fines de la presente Convención:

La «comunicación» incluirá los lenguajes, la visualización de textos, el Braille, la comunicación táctil, los macrotipos, los dispositivos multimedia de fácil acceso, así como el lenguaje escrito, los sistemas auditivos, el lenguaje sencillo, los medios de voz digitalizada y otros modos, medios y formatos aumentativos o alternativos de comunicación, incluida la tecnología de la información y las comunicaciones de fácil acceso;

Por «lenguaje» se entenderá tanto el lenguaje oral como la lengua de señas y otras formas de comunicación no verbal;

Por «discriminación por motivos de discapacidad» se entenderá cualquier distinción, exclusión o restricción por motivos de discapacidad que tenga el propósito o el efecto de obstaculizar o dejar sin efecto el reconocimiento, goce o ejercicio, en igualdad de condiciones, de todos los derechos humanos y libertades fundamentales en los ámbitos político, económico, social, cultural, civil o de otro tipo. Incluye todas las formas de discriminación, entre ellas, la denegación de ajustes razonables;

Por «ajustes razonables» se entenderán las modificaciones y adaptaciones necesarias y adecuadas que no impongan una carga desproporcionada o indebida, cuando se requieran en un caso particular, para garantizar a las personas con discapacidad el goce o ejercicio, en igualdad de condiciones con las demás, de todos los derechos humanos y libertades fundamentales;

Por «diseño universal» se entenderá el diseño de productos, entornos, programas y servicios que puedan utilizar todas las personas, en la mayor medida posible, sin necesidad de adaptación ni diseño especializado. El «diseño universal» no excluirá las ayudas técnicas para grupos particulares de personas con discapacidad, cuando se necesiten.

Artículo 3

Principios generales

Los principios de la presente Convención serán:

a) el respeto de la dignidad inherente, la autonomía individual, incluida la libertad de tomar las propias decisiones, y la independencia de las personas;

b) la no discriminación;

c) la participación e inclusión plenas y efectivas en la sociedad;

d) el respeto por la diferencia y la aceptación de las personas con discapacidad como parte de la diversidad y la condición humanas;

e) la igualdad de oportunidades;

f) la accesibilidad;

g) la igualdad entre el hombre y la mujer;

h) el respeto a la evolución de las facultades de los niños y las niñas con discapacidad y de su derecho a preservar su identidad.

Artículo 4

Obligaciones generales

1. Los Estados Partes se comprometen a asegurar y promover el pleno ejercicio de todos los derechos humanos y las libertades fundamentales de las personas con discapacidad sin discriminación alguna por motivos de discapacidad. A tal fin, los Estados Partes se comprometen a:

a) adoptar todas las medidas legislativas, administrativas y de otra índole que sean pertinentes para hacer efectivos los derechos reconocidos en la presente Convención;

b) tomar todas las medidas pertinentes, incluidas medidas legislativas, para modificar o derogar leyes, reglamentos, costumbres y prácticas existentes que constituyan discriminación contra las personas con discapacidad;

c) tener en cuenta, en todas las políticas y todos los programas, la protección y promoción de los derechos humanos de las personas con discapacidad;

d) abstenerse de actos o prácticas que sean incompatibles con la presente Convención y velar por que las autoridades e instituciones públicas actúen conforme a lo dispuesto en ella;

e) tomar todas las medidas pertinentes para que ninguna persona, organización o empresa privada discrimine por motivos de discapacidad;

f) emprender o promover la investigación y el desarrollo de bienes, servicios, equipo e instalaciones de diseño universal, con arreglo a la definición del artículo 2 de la presente Convención, que requieran la menor adaptación posible y el menor costo para satisfacer las necesidades específicas de las personas con discapacidad, promover su disponibilidad y uso, y promover el diseño universal en la elaboración de normas y directrices;

g) emprender o promover la investigación y el desarrollo, y promover la disponibilidad y el uso de nuevas tecnologías, incluidas las tecnologías de la información y las comunicaciones, ayudas para la movilidad, dispositivos técnicos y tecnologías de apoyo adecuadas para las personas con discapacidad, dando prioridad a las de precio asequible;

h) proporcionar información que sea accesible para las personas con discapacidad sobre ayudas a la movilidad, dispositivos técnicos y tecnologías de apoyo, incluidas nuevas tecnologías, así como otras formas de asistencia y servicios e instalaciones de apoyo;

i) promover la formación de los profesionales y el personal que trabajan con personas con discapacidad respecto de los derechos reconocidos en la presente Convención, a fin de prestar mejor la asistencia y los servicios garantizados por esos derechos.

2. Con respecto a los derechos económicos, sociales y culturales, los Estados Partes se comprometen a adoptar medidas hasta el máximo de sus recursos disponibles y, cuando sea necesario, en el marco de la cooperación internacional, para lograr, de manera progresiva, el pleno ejercicio de estos derechos, sin perjuicio de las obligaciones previstas en la presente Convención que sean aplicables de inmediato en virtud del Derecho internacional.

3. En la elaboración y aplicación de legislación y políticas para hacer efectiva la presente Convención, y en otros procesos de adopción de decisiones sobre cuestiones relacionadas con las personas con discapacidad, los Estados Partes celebrarán consultas estrechas y colaborarán activamente con las personas con discapacidad, incluidos los niños y las niñas con discapacidad, a través de las organizaciones que las representan.

4. Nada de lo dispuesto en la presente Convención afectará a las disposiciones que puedan facilitar, en mayor medida, el ejercicio de los derechos de las personas con discapacidad y que puedan figurar en la legislación de un Estado Parte o en el Derecho internacional en vigor en dicho Estado. No se restringirán ni derogarán ninguno de los derechos humanos y las libertades fundamentales reconocidos o existentes en los Estados Partes en la presente Convención de conformidad con la ley, las convenciones y los convenios, los reglamentos o la costumbre con el pretexto de que en la presente Convención no se reconocen esos derechos o libertades o se reconocen en menor medida.

5. Las disposiciones de la presente Convención se aplicarán a todas las partes de los Estados federales sin limitaciones ni excepciones.

Artículo 5

Igualdad y no discriminación

1. Los Estados Partes reconocen que todas las personas son iguales ante la ley y en virtud de ella y que tienen derecho a igual protección legal y a beneficiarse de la ley en igual medida sin discriminación alguna.

2. Los Estados Partes prohibirán toda discriminación por motivos de discapacidad y garantizarán a todas las personas con discapacidad protección legal igual y efectiva contra la discriminación por cualquier motivo.

3. A fin de promover la igualdad y eliminar la discriminación, los Estados Partes adoptarán todas las medidas pertinentes para asegurar la realización de ajustes razonables.

4. No se considerarán discriminatorias, en virtud de la presente Convención, las medidas específicas que sean necesarias para acelerar o lograr la igualdad de hecho de las personas con discapacidad.

Artículo 6

Mujeres con discapacidad

1. Los Estados Partes reconocen que las mujeres y niñas con discapacidad están sujetas a múltiples formas de discriminación y, a ese respecto, adoptarán medidas para asegurar que puedan disfrutar plenamente y en igualdad de condiciones de todos los derechos humanos y libertades fundamentales.

2. Los Estados Partes tomarán todas las medidas pertinentes para asegurar el pleno desarrollo, adelanto y potenciación de la mujer, con el propósito de garantizarle el ejercicio y goce de los derechos humanos y las libertades fundamentales establecidos en la presente Convención.

Artículo 7

Niños y niñas con discapacidad

1. Los Estados Partes tomarán todas las medidas necesarias para asegurar que todos los niños y las niñas con discapacidad gocen plenamente de todos los derechos humanos y libertades fundamentales en igualdad de condiciones con los demás niños y niñas.

2. En todas las actividades relacionadas con los niños y las niñas con discapacidad, una consideración primordial será la protección del interés superior del niño.

3. Los Estados Partes garantizarán que los niños y las niñas con discapacidad tengan derecho a expresar su opinión libremente sobre todas las cuestiones que les afecten, opinión que recibirá la debida consideración teniendo en cuenta su edad y madurez, en igualdad de condiciones con los demás niños y niñas, y a recibir asistencia apropiada con arreglo a su discapacidad y edad para poder ejercer ese derecho.

Artículo 8

Toma de conciencia

1. Los Estados Partes se comprometen a adoptar medidas inmediatas, efectivas y pertinentes para:

a) sensibilizar a la sociedad, incluso a nivel familiar, para que tome mayor conciencia respecto de las personas con discapacidad y fomentar el respeto de los derechos y la dignidad de estas personas;

b) luchar contra los estereotipos, los prejuicios y las prácticas nocivas respecto de las personas con discapacidad, incluidos los que se basan en el género o la edad, en todos los ámbitos de la vida;

c) promover la toma de conciencia respecto de las capacidades y aportaciones de las personas con discapacidad.

2. Las medidas a este fin incluyen:

a) poner en marcha y mantener campañas efectivas de sensibilización pública destinadas a:

i) fomentar actitudes receptivas respecto de los derechos de las personas con discapacidad,

ii) promover percepciones positivas y una mayor conciencia social respecto de las personas con discapacidad,

iii) promover el reconocimiento de las capacidades, los méritos y las habilidades de las personas con discapacidad y de sus aportaciones en relación con el lugar de trabajo y el mercado laboral;

b) fomentar en todos los niveles del sistema educativo, incluso entre todos los niños y las niñas desde una edad temprana, una actitud de respeto de los derechos de las personas con discapacidad;

c) alentar a todos los órganos de los medios de comunicación a que difundan una imagen de las personas con discapacidad que sea compatible con el propósito de la presente Convención;

d) promover programas de formación sobre sensibilización que tengan en cuenta a las personas con discapacidad y los derechos de estas personas.

Artículo 9

Accesibilidad

1. A fin de que las personas con discapacidad puedan vivir en forma independiente y participar plenamente en todos los aspectos de la vida, los Estados Partes adoptarán medidas pertinentes para asegurar el acceso de las personas con discapacidad, en igualdad de condiciones con las demás, al entorno físico, el transporte, la información y las comunicaciones, incluidos los sistemas y las tecnologías de la información y las comunicaciones, y a otros servicios e instalaciones abiertos al público o de uso público, tanto en zonas urbanas como rurales. Estas medidas, que incluirán la identificación y eliminación de obstáculos y barreras de acceso, se aplicarán, entre otras cosas, a:

a) los edificios, las vías públicas, el transporte y otras instalaciones exteriores e interiores como escuelas, viviendas, instalaciones médicas y lugares de trabajo;

b) los servicios de información, comunicaciones y de otro tipo, incluidos los servicios electrónicos y de emergencia.

2. Los Estados Partes también adoptarán las medidas pertinentes para:

a) desarrollar, promulgar y supervisar la aplicación de normas mínimas y directrices sobre la accesibilidad de las instalaciones y los servicios abiertos al público o de uso público;

b) asegurar que las entidades privadas que proporcionan instalaciones y servicios abiertos al público o de uso público tengan en cuenta todos los aspectos de su accesibilidad para las personas con discapacidad;

c) ofrecer formación a todas las personas involucradas en los problemas de accesibilidad a que se enfrentan las personas con discapacidad;

d) dotar a los edificios y otras instalaciones abiertas al público de señalización en Braille y en formatos de fácil lectura y comprensión;

e) ofrecer formas de asistencia humana o animal e intermediarios, incluidos guías, lectores e intérpretes profesionales de la lengua de señas, para facilitar el acceso a edificios y otras instalaciones abiertas al público;

f) promover otras formas adecuadas de asistencia y apoyo a las personas con discapacidad para asegurar su acceso a la información;

g) promover el acceso de las personas con discapacidad a los nuevos sistemas y tecnologías de la información y las comunicaciones, incluida Internet;

h) promover el diseño, el desarrollo, la producción y la distribución de sistemas y tecnologías de la información y las comunicaciones accesibles en una etapa temprana, a fin de que estos sistemas y tecnologías sean accesibles al menor costo.

Artículo 10

Derecho a la vida

Los Estados Partes reafirman el derecho inherente a la vida de todos los seres humanos y adoptarán todas las medidas necesarias para garantizar el goce efectivo de ese derecho por las personas con discapacidad en igualdad de condiciones con las demás.

Artículo 11

Situaciones de riesgo y emergencias humanitarias

Los Estados Partes adoptarán, en virtud de las responsabilidades que les corresponden con arreglo al Derecho internacional, y en concreto el Derecho internacional humanitario y el Derecho internacional de los derechos humanos, todas las medidas necesarias para garantizar la seguridad y la protección de las personas con discapacidad en situaciones de riesgo, incluidas situaciones de conflicto armado, emergencias humanitarias y desastres naturales.

Artículo 12

Igual reconocimiento como persona ante la ley

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

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

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

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

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

Artículo 13

Acceso a la justicia

1. Los Estados Partes asegurarán que las personas con discapacidad tengan acceso a la justicia en igualdad de condiciones con las demás, incluso mediante ajustes de procedimiento y adecuados a la edad, para facilitar el desempeño de las funciones efectivas de esas personas como participantes directos e indirectos, incluida la declaración como testigos, en todos los procedimientos judiciales, con inclusión de la etapa de investigación y otras etapas preliminares.

2. A fin de asegurar que las personas con discapacidad tengan acceso efectivo a la justicia, los Estados Partes promoverán la capacitación adecuada de los que trabajan en la administración de justicia, incluido el personal policial y penitenciario.

Artículo 14

Libertad y seguridad de la persona

1. Los Estados Partes asegurarán que las personas con discapacidad, en igualdad de condiciones con las demás:

a) disfruten del derecho a la libertad y seguridad de la persona;

b) no se vean privadas de su libertad ilegal o arbitrariamente y que cualquier privación de libertad sea de conformidad con la ley, y que la existencia de una discapacidad no justifique en ningún caso una privación de la libertad.

2. Los Estados Partes asegurarán que las personas con discapacidad que se vean privadas de su libertad en razón de un proceso tengan, en igualdad de condiciones con las demás, derecho a garantías de conformidad con el Derecho internacional de los derechos humanos y a ser tratadas de conformidad con los objetivos y principios de la presente Convención, incluida la realización de ajustes razonables.

Artículo 15

Protección contra la tortura y otros tratos o penas crueles, inhumanos o degradantes

1. Ninguna persona será sometida a tortura u otros tratos o penas crueles, inhumanos o degradantes. En particular, nadie será sometido a experimentos médicos o científicos sin su libre consentimiento.

2. Los Estados Partes tomarán todas las medidas de carácter legislativo, administrativo, judicial o de otra índole que sean efectivas para evitar que las personas con discapacidad, en igualdad de condiciones con las demás, sean sometidas a torturas u otros tratos o penas crueles, inhumanos o degradantes.

Artículo 16

Protección contra la explotación, la violencia y el abuso

1. Los Estados Partes adoptarán todas las medidas de carácter legislativo, administrativo, social, educativo y de otra índole que sean pertinentes para proteger a las personas con discapacidad, tanto en el seno del hogar como fuera de él, contra todas las formas de explotación, violencia y abuso, incluidos los aspectos relacionados con el género.

2. Los Estados Partes también adoptarán todas las medidas pertinentes para impedir cualquier forma de explotación, violencia y abuso asegurando, entre otras cosas, que existan formas adecuadas de asistencia y apoyo que tengan en cuenta el género y la edad para las personas con discapacidad y sus familiares y cuidadores, incluso proporcionando información y educación sobre la manera de prevenir, reconocer y denunciar los casos de explotación, violencia y abuso. Los Estados Partes asegurarán que los servicios de protección tengan en cuenta la edad, el género y la discapacidad.

3. A fin de impedir que se produzcan casos de explotación, violencia y abuso, los Estados Partes asegurarán que todos los servicios y programas diseñados para servir a las personas con discapacidad sean supervisados efectivamente por autoridades independientes.

4. Los Estados Partes tomarán todas las medidas pertinentes para promover la recuperación física, cognitiva y psicológica, la rehabilitación y la reintegración social de las personas con discapacidad que sean víctimas de cualquier forma de explotación, violencia o abuso, incluso mediante la prestación de servicios de protección. Dicha recuperación e integración tendrán lugar en un entorno que sea favorable para la salud, el bienestar, la autoestima, la dignidad y la autonomía de la persona y que tenga en cuenta las necesidades específicas del género y la edad.

5. Los Estados Partes adoptarán legislación y políticas efectivas, incluidas legislación y políticas centradas en la mujer y en la infancia, para asegurar que los casos de explotación, violencia y abuso contra personas con discapacidad sean detectados, investigados y, en su caso, juzgados.

Artículo 17

Protección de la integridad personal

Toda persona con discapacidad tiene derecho a que se respete su integridad física y mental en igualdad de condiciones con las demás.

Artículo 18

Libertad de desplazamiento y nacionalidad

1. Los Estados Partes reconocerán el derecho de las personas con discapacidad a la libertad de desplazamiento, a la libertad para elegir su residencia y a una nacionalidad, en igualdad de condiciones con las demás, incluso asegurando que las personas con discapacidad:

a) tengan derecho a adquirir y cambiar una nacionalidad y a no ser privadas de la suya de manera arbitraria o por motivos de discapacidad;

b) no sean privadas, por motivos de discapacidad, de su capacidad para obtener, poseer y utilizar documentación relativa a su nacionalidad u otra documentación de identificación, o para utilizar procedimientos pertinentes, como el procedimiento de inmigración, que puedan ser necesarios para facilitar el ejercicio del derecho a la libertad de desplazamiento;

c) tengan libertad para salir de cualquier país, incluido el propio;

d) no se vean privadas, arbitrariamente o por motivos de discapacidad, del derecho a entrar en su propio país.

2. Los niños y las niñas con discapacidad serán inscritos inmediatamente después de su nacimiento y tendrán desde el nacimiento derecho a un nombre, a adquirir una nacionalidad y, en la medida de lo posible, a conocer a sus padres y ser atendidos por ellos.

Artículo 19

Derecho a vivir de forma independiente y a ser incluido en la comunidad

Los Estados Partes en la presente Convención reconocen el derecho en igualdad de condiciones de todas las personas con discapacidad a vivir en la comunidad, con opciones iguales a las de las demás, y adoptarán medidas efectivas y pertinentes para facilitar el pleno goce de este derecho por las personas con discapacidad y su plena inclusión y participación en la comunidad, asegurando en especial que:

a) las personas con discapacidad tengan la oportunidad de elegir su lugar de residencia y dónde y con quién vivir, en igualdad de condiciones con las demás, y no se vean obligadas a vivir con arreglo a un sistema de vida específico;

b) las personas con discapacidad tengan acceso a una variedad de servicios de asistencia domiciliaria, residencial y otros servicios de apoyo de la comunidad, incluida la asistencia personal que sea necesaria para facilitar su existencia y su inclusión en la comunidad y para evitar su aislamiento o separación de esta;

c) las instalaciones y los servicios comunitarios para la población en general estén a disposición, en igualdad de condiciones, de las personas con discapacidad y tengan en cuenta sus necesidades.

Artículo 20

Movilidad personal

Los Estados Partes adoptarán medidas efectivas para asegurar que las personas con discapacidad gocen de movilidad personal con la mayor independencia posible, entre ellas:

a) facilitar la movilidad personal de las personas con discapacidad en la forma y en el momento que deseen a un costo asequible;

b) facilitar el acceso de las personas con discapacidad a formas de asistencia humana o animal e intermediarios, tecnologías de apoyo, dispositivos técnicos y ayudas para la movilidad de calidad, incluso poniéndolos a su disposición a un costo asequible;

c) ofrecer a las personas con discapacidad y al personal especializado que trabaje con estas personas capacitación en habilidades relacionadas con la movilidad;

d) alentar a las entidades que fabrican ayudas para la movilidad, dispositivos y tecnologías de apoyo a que tengan en cuenta todos los aspectos de la movilidad de las personas con discapacidad.

Artículo 21

Libertad de expresión y de opinión y acceso a la información

Los Estados Partes adoptarán todas las medidas pertinentes para que las personas con discapacidad puedan ejercer el derecho a la libertad de expresión y opinión, incluida la libertad de recabar, recibir y facilitar información e ideas en igualdad de condiciones con las demás y mediante cualquier forma de comunicación que elijan con arreglo a la definición del artículo 2 de la presente Convención, entre ellas:

a) facilitar a las personas con discapacidad información dirigida al público en general, de manera oportuna y sin costo adicional, en formatos accesibles y con las tecnologías adecuadas a los diferentes tipos de discapacidad;

b) aceptar y facilitar la utilización de la lengua de señas, el Braille, los modos, medios, y formatos aumentativos y alternativos de comunicación y todos los demás modos, medios y formatos de comunicación accesibles que elijan las personas con discapacidad en sus relaciones oficiales;

c) alentar a las entidades privadas que presten servicios al público en general, incluso mediante Internet, a que proporcionen información y servicios en formatos que las personas con discapacidad puedan utilizar y a los que tengan acceso;

d) alentar a los medios de comunicación, incluidos los que suministran información a través de Internet, a que hagan que sus servicios sean accesibles para las personas con discapacidad;

e) reconocer y promover la utilización de lenguas de señas.

Artículo 22

Respeto de la privacidad

1. Ninguna persona con discapacidad, independientemente de cuál sea su lugar de residencia o su modalidad de convivencia, será objeto de injerencias arbitrarias o ilegales en su vida privada, familia, hogar, correspondencia o cualquier otro tipo de comunicación, o de agresiones ilícitas contra su honor y su reputación. Las personas con discapacidad tendrán derecho a ser protegidas por la ley frente a dichas injerencias o agresiones.

2. Los Estados Partes protegerán la privacidad de la información personal y relativa a la salud y a la rehabilitación de las personas con discapacidad en igualdad de condiciones con las demás.

Artículo 23

Respeto del hogar y de la familia

1. Los Estados Partes tomarán medidas efectivas y pertinentes para poner fin a la discriminación contra las personas con discapacidad en todas las cuestiones relacionadas con el matrimonio, la familia, la paternidad y las relaciones personales, y lograr que las personas con discapacidad estén en igualdad de condiciones con las demás, a fin de asegurar que:

a) se reconozca el derecho de todas las personas con discapacidad en edad de contraer matrimonio, a casarse y fundar una familia sobre la base del consentimiento libre y pleno de los futuros cónyuges;

b) se respete el derecho de las personas con discapacidad a decidir libremente y de manera responsable el número de hijos que quieren tener y el tiempo que debe transcurrir entre un nacimiento y otro, y a tener acceso a información, educación sobre reproducción y planificación familiar apropiados para su edad, y se ofrezcan los medios necesarios que les permitan ejercer esos derechos;

c) las personas con discapacidad, incluidos los niños y las niñas, mantengan su fertilidad, en igualdad de condiciones con las demás.

2. Los Estados Partes garantizarán los derechos y obligaciones de las personas con discapacidad en lo que respecta a la custodia, la tutela, la guarda, la adopción de niños o instituciones similares, cuando esos conceptos se recojan en la legislación nacional; en todos los casos se velará al máximo por el interés superior del niño. Los Estados Partes prestarán la asistencia apropiada a las personas con discapacidad para el desempeño de sus responsabilidades en la crianza de los hijos.

3. Los Estados Partes asegurarán que los niños y las niñas con discapacidad tengan los mismos derechos con respecto a la vida en familia. Para hacer efectivos estos derechos, y a fin de prevenir la ocultación, el abandono, la negligencia y la segregación de los niños y las niñas con discapacidad, los Estados Partes velarán por que se proporcione con anticipación información, servicios y apoyo generales a los menores con discapacidad y a sus familias.

4. Los Estados Partes asegurarán que los niños y las niñas no sean separados de sus padres contra su voluntad, salvo cuando las autoridades competentes, con sujeción a un examen judicial, determinen, de conformidad con la ley y los procedimientos aplicables, que esa separación es necesaria en el interés superior del niño. En ningún caso se separará a un menor de sus padres en razón de una discapacidad del menor, de ambos padres o de uno de ellos.

5. Los Estados Partes harán todo lo posible, cuando la familia inmediata no pueda cuidar de un niño con discapacidad, por proporcionar atención alternativa dentro de la familia extensa y, de no ser esto posible, dentro de la comunidad en un entorno familiar.

Artículo 24

Educación

1. Los Estados Partes reconocen el derecho de las personas con discapacidad a la educación. Con miras a hacer efectivo este derecho sin discriminación y sobre la base de la igualdad de oportunidades, los Estados Partes asegurarán un sistema de educación inclusivo a todos los niveles así como la enseñanza a lo largo de la vida, con miras a:

a) desarrollar plenamente el potencial humano y el sentido de la dignidad y la autoestima y reforzar el respeto por los derechos humanos, las libertades fundamentales y la diversidad humana;

b) desarrollar al máximo la personalidad, los talentos y la creatividad de las personas con discapacidad, así como sus aptitudes mentales y físicas;

c) hacer posible que las personas con discapacidad participen de manera efectiva en una sociedad libre.

2. Al hacer efectivo este derecho, los Estados Partes asegurarán que:

a) las personas con discapacidad no queden excluidas del sistema general de educación por motivos de discapacidad, y que los niños y las niñas con discapacidad no queden excluidos de la enseñanza primaria gratuita y obligatoria ni de la enseñanza secundaria por motivos de discapacidad;

b) las personas con discapacidad puedan acceder a una educación primaria y secundaria inclusiva, de calidad y gratuita, en igualdad de condiciones con las demás, en la comunidad en que vivan;

c) se hagan ajustes razonables en función de las necesidades individuales;

d) se preste el apoyo necesario a las personas con discapacidad, en el marco del sistema general de educación, para facilitar su formación efectiva;

e) se faciliten medidas de apoyo personalizadas y efectivas en entornos que fomenten al máximo el desarrollo académico y social, de conformidad con el objetivo de la plena inclusión.

3. Los Estados Partes brindarán a las personas con discapacidad la posibilidad de aprender habilidades para la vida y desarrollo social, a fin de propiciar su participación plena y en igualdad de condiciones en la educación y como miembros de la comunidad. A este fin, los Estados Partes adoptarán las medidas pertinentes, entre ellas:

a) facilitar el aprendizaje del Braille, la escritura alternativa, otros modos, medios y formatos de comunicación aumentativos o alternativos y habilidades de orientación y de movilidad, así como la tutoría y el apoyo entre pares;

b) facilitar el aprendizaje de la lengua de señas y la promoción de la identidad lingüística de las personas sordas;

c) asegurar que la educación de las personas, y en particular los niños y las niñas ciegos, sordos o sordociegos se imparta en los lenguajes y los modos y medios de comunicación más apropiados para cada persona y en entornos que permitan alcanzar su máximo desarrollo académico y social.

4. A fin de contribuir a hacer efectivo este derecho, los Estados Partes adoptarán las medidas pertinentes para emplear a maestros, incluidos maestros con discapacidad, que estén cualificados en lengua de señas o Braille y para formar a profesionales y personal que trabajen en todos los niveles educativos. Esa formación incluirá la toma de conciencia sobre la discapacidad y el uso de modos, medios y formatos de comunicación aumentativos y alternativos apropiados, y de técnicas y materiales educativos para apoyar a las personas con discapacidad.

5. Los Estados Partes asegurarán que las personas con discapacidad tengan acceso general a la educación superior, la formación profesional, la educación para adultos y el aprendizaje durante toda la vida sin discriminación y en igualdad de condiciones con las demás. A tal fin, los Estados Partes asegurarán que se realicen ajustes razonables para las personas con discapacidad.

Artículo 25

Salud

Los Estados Partes reconocen que las personas con discapacidad tienen derecho a gozar del más alto nivel posible de salud sin discriminación por motivos de discapacidad. Los Estados Partes adoptarán las medidas pertinentes para asegurar el acceso de las personas con discapacidad a servicios de salud que tengan en cuenta las cuestiones de género, incluida la rehabilitación relacionada con la salud. En particular, los Estados Partes:

a) proporcionarán a las personas con discapacidad programas y atención de la salud gratuitos o a precios asequibles de la misma variedad y calidad que a las demás personas, incluso en el ámbito de la salud sexual y reproductiva, y programas de salud pública dirigidos a la población;

b) proporcionarán los servicios de salud que necesiten las personas con discapacidad específicamente como consecuencia de su discapacidad, incluidas la pronta detección e intervención, cuando proceda, y servicios destinados a prevenir y reducir al máximo la aparición de nuevas discapacidades, incluidos los niños y las niñas y las personas mayores;

c) proporcionarán esos servicios lo más cerca posible de las comunidades de las personas con discapacidad, incluso en las zonas rurales;

d) exigirán a los profesionales de la salud que presten a las personas con discapacidad atención de la misma calidad que a las demás personas sobre la base de un consentimiento libre e informado, entre otras formas mediante la sensibilización respecto de los derechos humanos, la dignidad, la autonomía y las necesidades de las personas con discapacidad a través de la capacitación y la promulgación de normas éticas para la atención de la salud en los ámbitos público y privado;

e) prohibirán la discriminación contra las personas con discapacidad en la prestación de seguros de salud y de vida cuando estos estén permitidos en la legislación nacional, y velarán por que esos seguros se presten de manera justa y razonable;

f) impedirán que se nieguen, de manera discriminatoria, servicios de salud o de atención de la salud o alimentos sólidos o líquidos por motivos de discapacidad.

Artículo 26

Habilitación y rehabilitación

1. Los Estados Partes adoptarán medidas efectivas y pertinentes, incluso mediante el apoyo de personas que se hallen en las mismas circunstancias, para que las personas con discapacidad puedan lograr y mantener la máxima independencia, capacidad física, mental, social y vocacional, y la inclusión y participación plena en todos los aspectos de la vida. A tal fin, los Estados Partes organizarán, intensificarán y ampliarán servicios y programas generales de habilitación y rehabilitación, en particular en los ámbitos de la salud, el empleo, la educación y los servicios sociales, de forma que esos servicios y programas:

a) comiencen en la etapa más temprana posible y se basen en una evaluación multidisciplinar de las necesidades y capacidades de la persona;

b) apoyen la participación e inclusión en la comunidad y en todos los aspectos de la sociedad, sean voluntarios y estén a disposición de las personas con discapacidad lo más cerca posible de su propia comunidad, incluso en las zonas rurales.

2. Los Estados Partes promoverán el desarrollo de formación inicial y continua para los profesionales y el personal que trabajen en los servicios de habilitación y rehabilitación.

3. Los Estados Partes promoverán la disponibilidad, el conocimiento y el uso de tecnologías de apoyo y dispositivos destinados a las personas con discapacidad, a efectos de habilitación y rehabilitación.

Artículo 27

Trabajo y empleo

1. Los Estados Partes reconocen el derecho de las personas con discapacidad a trabajar, en igualdad de condiciones con las demás; ello incluye el derecho a tener la oportunidad de ganarse la vida mediante un trabajo libremente elegido o aceptado en un mercado y un entorno laborales que sean abiertos, inclusivos y accesibles a las personas con discapacidad. Los Estados Partes salvaguardarán y promoverán el ejercicio del derecho al trabajo, incluso para las personas que adquieran una discapacidad durante el empleo, adoptando medidas pertinentes, incluida la promulgación de legislación, entre ellas:

a) prohibir la discriminación por motivos de discapacidad con respecto a todas las cuestiones relativas a cualquier forma de empleo, incluidas las condiciones de selección, contratación y empleo, la continuidad en el empleo, la promoción profesional y unas condiciones de trabajo seguras y saludables;

b) proteger los derechos de las personas con discapacidad, en igualdad de condiciones con las demás, a condiciones de trabajo justas y favorables, y en particular a igualdad de oportunidades y de remuneración por trabajo de igual valor, a condiciones de trabajo seguras y saludables, incluida la protección contra el acoso, y a la reparación por agravios sufridos;

c) asegurar que las personas con discapacidad puedan ejercer sus derechos laborales y sindicales, en igualdad de condiciones con las demás;

d) permitir que las personas con discapacidad tengan acceso efectivo a programas generales de orientación técnica y vocacional, servicios de colocación y formación profesional y continua;

e) alentar las oportunidades de empleo y la promoción profesional de las personas con discapacidad en el mercado laboral, y apoyarlas para la búsqueda, obtención, mantenimiento del empleo y retorno al mismo;

f) promover oportunidades empresariales, de empleo por cuenta propia, de constitución de cooperativas y de inicio de empresas propias;

g) emplear a personas con discapacidad en el sector público;

h) promover el empleo de personas con discapacidad en el sector privado mediante políticas y medidas pertinentes, que pueden incluir programas de acción afirmativa, incentivos y otras medidas;

i) velar por que se realicen ajustes razonables para las personas con discapacidad en el lugar de trabajo;

j) promover la adquisición por las personas con discapacidad de experiencia laboral en el mercado de trabajo abierto;

k) promover programas de rehabilitación vocacional y profesional, mantenimiento del empleo y reincorporación al trabajo dirigidos a personas con discapacidad.

2. Los Estados Partes asegurarán que las personas con discapacidad no sean sometidas a esclavitud ni servidumbre y que estén protegidas, en igualdad de condiciones con las demás, contra el trabajo forzoso u obligatorio.

Artículo 28

Nivel de vida adecuado y protección social

1. Los Estados Partes reconocen el derecho de las personas con discapacidad a un nivel de vida adecuado para ellas y sus familias, lo cual incluye alimentación, vestido y vivienda adecuados, y a la mejora continua de sus condiciones de vida, y adoptarán las medidas pertinentes para salvaguardar y promover el ejercicio de este derecho sin discriminación por motivos de discapacidad.

2. Los Estados Partes reconocen el derecho de las personas con discapacidad a la protección social y a gozar de ese derecho sin discriminación por motivos de discapacidad, y adoptarán las medidas pertinentes para proteger y promover el ejercicio de ese derecho, entre ellas:

a) asegurar el acceso en condiciones de igualdad de las personas con discapacidad a servicios de agua potable y su acceso a servicios, dispositivos y asistencia de otra índole adecuados a precios asequibles para atender las necesidades relacionadas con su discapacidad;

b) asegurar el acceso de las personas con discapacidad, en particular las mujeres y niñas y las personas mayores con discapacidad, a programas de protección social y estrategias de reducción de la pobreza;

c) asegurar el acceso de las personas con discapacidad y de sus familias que vivan en situaciones de pobreza a asistencia del Estado para sufragar gastos relacionados con su discapacidad, incluidos capacitación, asesoramiento, asistencia financiera y servicios de cuidados temporales adecuados;

d) asegurar el acceso de las personas con discapacidad a programas de vivienda pública;

e) asegurar el acceso en igualdad de condiciones de las personas con discapacidad a programas y beneficios de jubilación.

Artículo 29

Participación en la vida política y pública

Los Estados Partes garantizarán a las personas con discapacidad los derechos políticos y la posibilidad de gozar de ellos en igualdad de condiciones con las demás y se comprometerán a:

a) asegurar que las personas con discapacidad puedan participar plena y efectivamente en la vida política y pública en igualdad de condiciones con las demás, directamente o a través de representantes libremente elegidos, incluidos el derecho y la posibilidad de las personas con discapacidad a votar y ser elegidas, entre otras formas mediante:

   i) la garantía de que los procedimientos, instalaciones y materiales electorales sean adecuados, accesibles y fáciles de entender y utilizar,

   ii) la protección del derecho de las personas con discapacidad a emitir su voto en secreto en elecciones y referéndum públicos sin intimidación, y a presentarse efectivamente como candidatas en las elecciones, ejercer cargos y desempeñar cualquier función pública a todos los niveles de gobierno, facilitando el uso de nuevas tecnologías y tecnologías de apoyo cuando proceda,

   iii) la garantía de la libre expresión de la voluntad de las personas con discapacidad como electores y a este fin, cuando sea necesario y a petición de ellas, permitir que una persona de su elección les preste asistencia para votar;

b) promover activamente un entorno en el que las personas con discapacidad puedan participar plena y efectivamente en la dirección de los asuntos públicos, sin discriminación y en igualdad de condiciones con las demás, y fomentar su participación en los asuntos públicos y, entre otras cosas:

   i) su participación en organizaciones y asociaciones no gubernamentales relacionadas con la vida pública y política del país, incluidas las actividades y la administración de los partidos políticos,

   ii) la constitución de organizaciones de personas con discapacidad que representen a estas personas a nivel internacional, nacional, regional y local, y su incorporación a dichas organizaciones.

Artículo 30

Participación en la vida cultural, las actividades recreativas, el esparcimiento y el deporte

1. Los Estados Partes reconocen el derecho de las personas con discapacidad a participar, en igualdad de condiciones con las demás, en la vida cultural y adoptarán todas las medidas pertinentes para asegurar que las personas con discapacidad:

a) tengan acceso a material cultural en formatos accesibles;

b) tengan acceso a programas de televisión, películas, teatro y otras actividades culturales en formatos accesibles;

c) tengan acceso a lugares en donde se ofrezcan representaciones o servicios culturales tales como teatros, museos, cines, bibliotecas y servicios turísticos y, en la medida de lo posible, tengan acceso a monumentos y lugares de importancia cultural nacional.

2. Los Estados Partes adoptarán las medidas pertinentes para que las personas con discapacidad puedan desarrollar y utilizar su potencial creativo, artístico e intelectual, no solo en su propio beneficio sino también para el enriquecimiento de la sociedad.

3. Los Estados Partes tomarán todas las medidas pertinentes, de conformidad con el Derecho internacional, a fin de asegurar que las leyes de protección de los derechos de propiedad intelectual no constituyan una barrera excesiva o discriminatoria para el acceso de las personas con discapacidad a materiales culturales.

4. Las personas con discapacidad tendrán derecho, en igualdad de condiciones con las demás, al reconocimiento y el apoyo de su identidad cultural y lingüística específica, incluidas la lengua de señas y la cultura de los sordos.

5. A fin de que las personas con discapacidad puedan participar en igualdad de condiciones con las demás en actividades recreativas, de esparcimiento y deportivas, los Estados Partes adoptarán las medidas pertinentes para:

a) alentar y promover la participación, en la mayor medida posible, de las personas con discapacidad en las actividades deportivas generales a todos los niveles;

b) asegurar que las personas con discapacidad tengan la oportunidad de organizar y desarrollar actividades deportivas y recreativas específicas para dichas personas y de participar en dichas actividades y, a ese fin, alentar a que se les ofrezca, en igualdad de condiciones con las demás, instrucción, formación y recursos adecuados;

c) asegurar que las personas con discapacidad tengan acceso a instalaciones deportivas, recreativas y turísticas;

d) asegurar que los niños y las niñas con discapacidad tengan igual acceso con los demás niños y niñas a la participación en actividades lúdicas, recreativas, de esparcimiento y deportivas, incluidas las que se realicen dentro del sistema escolar;

e) asegurar que las personas con discapacidad tengan acceso a los servicios de quienes participan en la organización de actividades recreativas, turísticas, de esparcimiento y deportivas.

Artículo 31

Recopilación de datos y estadísticas

1. Los Estados Partes recopilarán información adecuada, incluidos datos estadísticos y de investigación, que les permita formular y aplicar políticas, a fin de dar efecto a la presente Convención. En el proceso de recopilación y mantenimiento de esta información se deberá:

a) respetar las garantías legales establecidas, incluida la legislación sobre protección de datos, a fin de asegurar la confidencialidad y el respeto de la privacidad de las personas con discapacidad;

b) cumplir las normas aceptadas internacionalmente para proteger los derechos humanos y las libertades fundamentales, así como los principios éticos en la recopilación y el uso de estadísticas.

2. La información recopilada de conformidad con el presente artículo se desglosará, en su caso, y se utilizará como ayuda para evaluar el cumplimiento por los Estados Partes de sus obligaciones conforme a la presente Convención, así como para identificar y eliminar las barreras con que se enfrentan las personas con discapacidad en el ejercicio de sus derechos.

3. Los Estados Partes asumirán la responsabilidad de difundir estas estadísticas y asegurar que sean accesibles para las personas con discapacidad y otras personas.

Artículo 32

Cooperación internacional

1. Los Estados Partes reconocen la importancia de la cooperación internacional y su promoción, en apoyo de los esfuerzos nacionales para hacer efectivos el propósito y los objetivos de la presente Convención, y tomarán las medidas pertinentes y efectivas a este respecto, entre los Estados y, cuando corresponda, en asociación con las organizaciones internacionales y regionales pertinentes y la sociedad civil, en particular organizaciones de personas con discapacidad. Entre esas medidas cabría incluir:

a) velar por que la cooperación internacional, incluidos los programas de desarrollo internacionales, sea inclusiva y accesible para las personas con discapacidad;

b) facilitar y apoyar el fomento de la capacidad, incluso mediante el intercambio y la distribución de información, experiencias, programas de formación y prácticas recomendadas;

c) facilitar la cooperación en la investigación y el acceso a conocimientos científicos y técnicos;

d) proporcionar, según corresponda, asistencia apropiada, técnica y económica, incluso facilitando el acceso a tecnologías accesibles y de asistencia y compartiendo esas tecnologías, y mediante su transferencia.

2. Las disposiciones del presente artículo se aplicarán sin perjuicio de las obligaciones que incumban a cada Estado Parte en virtud de la presente Convención.

Artículo 33

Aplicación y seguimiento nacionales

1. Los Estados Partes, de conformidad con su sistema organizativo, designarán uno o más organismos gubernamentales encargados de las cuestiones relativas a la aplicación de la presente Convención y considerarán detenidamente la posibilidad de establecer o designar un mecanismo de coordinación para facilitar la adopción de medidas al respecto en diferentes sectores y a diferentes niveles.

2. Los Estados Partes, de conformidad con sus sistemas jurídicos y administrativos, mantendrán, reforzarán, designarán o establecerán, a nivel nacional, un marco, que constará de uno o varios mecanismos independientes, para promover, proteger y supervisar la aplicación de la presente Convención. Cuando designen o establezcan esos mecanismos, los Estados Partes tendrán en cuenta los principios relativos a la condición jurídica y el funcionamiento de las instituciones nacionales de protección y promoción de los derechos humanos.

3. La sociedad civil, y en particular las personas con discapacidad y las organizaciones que las representan, estarán integradas y participarán plenamente en todos los niveles del proceso de seguimiento.

Artículo 34

Comité sobre los derechos de las personas con discapacidad

1. Se creará un Comité sobre los Derechos de las Personas con Discapacidad (en adelante, «el Comité») que desempeñará las funciones que se enuncian a continuación.

2. El Comité constará, en el momento en que entre en vigor la presente Convención, de 12 expertos. Cuando la Convención obtenga otras 60 ratificaciones o adhesiones, la composición del Comité se incrementará en seis miembros más, con lo que alcanzará un máximo de 18 miembros.

3. Los miembros del Comité desempeñarán sus funciones a título personal y serán personas de gran integridad moral y reconocida competencia y experiencia en los temas a que se refiere la presente Convención. Se invita a los Estados Partes a que, cuando designen a sus candidatos, tomen debidamente en consideración la disposición que se enuncia en el párrafo 3 del artículo 4 de la presente Convención.

4. Los miembros del Comité serán elegidos por los Estados Partes, que tomarán en consideración una distribución geográfica equitativa, la representación de las diferentes formas de civilización y los principales ordenamientos jurídicos, una representación de género equilibrada y la participación de expertos con discapacidad.

5. Los miembros del Comité se elegirán mediante voto secreto de una lista de personas designadas por los Estados Partes de entre sus nacionales en reuniones de la Conferencia de los Estados Partes. En estas reuniones, en las que dos tercios de los Estados Partes constituirán quórum, las personas elegidas para el Comité serán las que obtengan el mayor número de votos y una mayoría absoluta de votos de los representantes de los Estados Partes presentes y votantes.

6. La elección inicial se celebrará antes de que transcurran seis meses a partir de la fecha de entrada en vigor de la presente Convención. Por lo menos cuatro meses antes de la fecha de cada elección, el Secretario General de las Naciones Unidas dirigirá una carta a los Estados Partes invitándolos a que presenten sus candidatos en un plazo de dos meses. El Secretario General preparará después una lista en la que figurarán, por orden alfabético, todas las personas así propuestas, con indicación de los Estados Partes que las hayan propuesto, y la comunicará a los Estados Partes en la presente Convención.

7. Los miembros del Comité se elegirán por un período de cuatro años. Podrán ser reelegidos si se presenta de nuevo su candidatura. Sin embargo, el mandato de seis de los miembros elegidos en la primera elección expirará al cabo de dos años; inmediatamente después de la primera elección, los nombres de esos seis miembros serán sacados a suerte por el presidente de la reunión a que se hace referencia en el párrafo 5 del presente artículo.

8. La elección de los otros seis miembros del Comité se hará con ocasión de las elecciones ordinarias, de conformidad con las disposiciones pertinentes del presente artículo.

9. Si un miembro del Comité fallece, renuncia o declara que, por alguna otra causa, no puede seguir desempeñando sus funciones, el Estado Parte que lo propuso designará otro experto que posea las cualificaciones y reúna los requisitos previstos en las disposiciones pertinentes del presente artículo para ocupar el puesto durante el resto del mandato.

10. El Comité adoptará su propio reglamento.

11. El Secretario General de las Naciones Unidas proporcionará el personal y las instalaciones que sean necesarios para el efectivo desempeño de las funciones del Comité con arreglo a la presente Convención y convocará su reunión inicial.

12. Con la aprobación de la Asamblea General de las Naciones Unidas, los miembros del Comité establecido en virtud de la presente Convención percibirán emolumentos con cargo a los recursos de las Naciones Unidas en los términos y condiciones que la Asamblea General decida, tomando en consideración la importancia de las responsabilidades del Comité.

13. Los miembros del Comité tendrán derecho a las facilidades, prerrogativas e inmunidades que se conceden a los expertos que realizan misiones para las Naciones Unidas, con arreglo a lo dispuesto en las secciones pertinentes de la Convención sobre Prerrogativas e Inmunidades de las Naciones Unidas.

Artículo 35

Informes presentados por los Estados Partes

1. Los Estados Partes presentarán al Comité, por conducto del Secretario General de las Naciones Unidas, un informe exhaustivo sobre las medidas que hayan adoptado para cumplir sus obligaciones conforme a la presente Convención y sobre los progresos realizados al respecto en el plazo de dos años contado a partir de la entrada en vigor de la presente Convención en el Estado Parte de que se trate.

2. Posteriormente, los Estados Partes presentarán informes ulteriores al menos cada cuatro años y en las demás ocasiones en que el Comité se lo solicite.

3. El Comité decidirá las directrices aplicables al contenido de los informes.

4. El Estado Parte que haya presentado un informe inicial exhaustivo al Comité no tendrá que repetir, en sus informes ulteriores, la información previamente facilitada. Se invita a los Estados Partes a que, cuando preparen informes para el Comité, lo hagan mediante un procedimiento abierto y transparente y tengan en cuenta debidamente lo dispuesto en el párrafo 3 del artículo 4 de la presente Convención.

5. En los informes se podrán indicar factores y dificultades que afecten al grado de cumplimiento de las obligaciones contraídas en virtud de la presente Convención.

Artículo 36

Consideración de los informes

1. El Comité considerará todos los informes, hará las sugerencias y las recomendaciones que estime oportunas respecto a ellos y se las remitirá al Estado Parte de que se trate. Este podrá responder enviando al Comité cualquier información que desee. El Comité podrá solicitar a los Estados Partes más información con respecto a la aplicación de la presente Convención.

2. Cuando un Estado Parte se haya demorado considerablemente en la presentación de un informe, el Comité podrá notificarle la necesidad de examinar la aplicación de la presente Convención en dicho Estado Parte, sobre la base de información fiable que se ponga a disposición del Comité, en caso de que el informe pertinente no se presente en un plazo de tres meses desde la notificación. El Comité invitará al Estado Parte interesado a participar en dicho examen. Si el Estado Parte respondiera presentando el informe pertinente, se aplicará lo dispuesto en el párrafo 1 del presente artículo.

3. El Secretario General de las Naciones Unidas pondrá los informes a disposición de todos los Estados Partes.

4. Los Estados Partes darán amplia difusión pública a sus informes en sus propios países y facilitarán el acceso a las sugerencias y recomendaciones generales sobre esos informes.

5. El Comité transmitirá, según estime apropiado, a los organismos especializados, los fondos y los programas de las Naciones Unidas, así como a otros órganos competentes, los informes de los Estados Partes, a fin de atender una solicitud o una indicación de necesidad de asesoramiento técnico o asistencia que figure en ellos, junto con las observaciones y recomendaciones del Comité, si las hubiera, sobre esas solicitudes o indicaciones.

Artículo 37

Cooperación entre los Estados Partes y el Comité

1. Los Estados Partes cooperarán con el Comité y ayudarán a sus miembros a cumplir su mandato.

2. En su relación con los Estados Partes, el Comité tomará debidamente en consideración medios y arbitrios para mejorar la capacidad nacional de aplicación de la presente Convención, incluso mediante la cooperación internacional.

Artículo 38

Relación del Comité con otros órganos

A fin de fomentar la aplicación efectiva de la presente Convención y de estimular la cooperación internacional en el ámbito que abarca:

a) los organismos especializados y demás órganos de las Naciones Unidas tendrán derecho a estar representados en el examen de la aplicación de las disposiciones de la presente Convención que entren dentro de su mandato. El Comité podrá invitar también a los organismos especializados y a otros órganos competentes que considere apropiados a que proporcionen asesoramiento especializado sobre la aplicación de la Convención en los ámbitos que entren dentro de sus respectivos mandatos. El Comité podrá invitar a los organismos especializados y a otros órganos de las Naciones Unidas a que presenten informes sobre la aplicación de la Convención en las esferas que entren dentro de su ámbito de actividades;

b) al ejercer su mandato, el Comité consultará, según proceda, con otros órganos pertinentes instituidos en virtud de tratados internacionales de derechos humanos, con miras a garantizar la coherencia de sus respectivas directrices de presentación de informes, sugerencias y recomendaciones generales y a evitar la duplicación y la superposición de tareas en el ejercicio de sus funciones.

Artículo 39

Informe del Comité

El Comité informará cada dos años a la Asamblea General y al Consejo Económico y Social sobre sus actividades y podrá hacer sugerencias y recomendaciones de carácter general basadas en el examen de los informes y datos recibidos de los Estados Partes en la Convención. Esas sugerencias y recomendaciones de carácter general se incluirán en el informe del Comité, junto con los comentarios, si los hubiera, de los Estados Partes.

Artículo 40

Conferencia de los Estados Partes

1. Los Estados Partes se reunirán periódicamente en una Conferencia de los Estados Partes, a fin de considerar todo asunto relativo a la aplicación de la presente Convención.

2. El Secretario General de las Naciones Unidas convocará la Conferencia de los Estados Partes en un plazo que no superará los seis meses contados a partir de la entrada en vigor de la presente Convención. Las reuniones ulteriores, con periodicidad bienal o cuando lo decida la Conferencia de los Estados Partes, serán convocadas por el Secretario General.

Artículo 41

Depositario

El Secretario General de las Naciones Unidas será el depositario de la presente Convención.

Artículo 42

Firma

La presente Convención estará abierta a la firma de todos los Estados y las organizaciones regionales de integración en la Sede de las Naciones Unidas, en Nueva York, a partir del 30 de marzo de 2007.

Artículo 43

Consentimiento en obligarse

La presente Convención estará sujeta a la ratificación de los Estados signatarios y a la confirmación oficial de las organizaciones regionales de integración signatarias. Estará abierta a la adhesión de cualquier Estado u organización regional de integración que no la haya firmado.

Artículo 44

Organizaciones regionales de integración

1. Por «organización regional de integración» se entenderá una organización constituida por Estados soberanos de una región determinada a la que sus Estados miembros hayan transferido competencia respecto de las cuestiones regidas por la presente Convención. Esas organizaciones declararán, en sus instrumentos de confirmación oficial o adhesión, su grado de competencia con respecto a las cuestiones regidas por la presente Convención. Posteriormente, informarán al depositario de toda modificación sustancial de su grado de competencia.

2. Las referencias a los «Estados Partes» con arreglo a la presente Convención serán aplicables a esas organizaciones dentro de los límites de su competencia.

3. A los efectos de lo dispuesto en el párrafo 1 del artículo 45 y en los párrafos 2 y 3 del artículo 47 de la presente Convención, no se tendrá en cuenta ningún instrumento depositado por una organización regional de integración.

4. Las organizaciones regionales de integración, en asuntos de su competencia, ejercerán su derecho de voto en la Conferencia de los Estados Partes, con un número de votos igual al número de sus Estados miembros que sean Partes en la presente Convención. Dichas organizaciones no ejercerán su derecho de voto si sus Estados miembros ejercen el suyo, y viceversa.

Artículo 45

Entrada en vigor

1. La presente Convención entrará en vigor el trigésimo día a partir de la fecha en que haya sido depositado el vigésimo instrumento de ratificación o adhesión.

2. Para cada Estado y organización regional de integración que ratifique la Convención, se adhiera a ella o la confirme oficialmente una vez que haya sido depositado el vigésimo instrumento a sus efectos, la Convención entrará en vigor el trigésimo día a partir de la fecha en que haya sido depositado su propio instrumento.

Artículo 46

Reservas

1. No se permitirán reservas incompatibles con el objeto y el propósito de la presente Convención.

2. Las reservas podrán ser retiradas en cualquier momento.

Artículo 47

Enmiendas

1. Los Estados Partes podrán proponer enmiendas a la presente Convención y presentarlas al Secretario General de las Naciones Unidas. El Secretario General comunicará las enmiendas propuestas a los Estados Partes, pidiéndoles que le notifiquen si desean que se convoque una conferencia de Estados Partes con el fin de examinar la propuesta y someterla a votación. Si dentro de los cuatro meses siguientes a la fecha de esa notificación, al menos un tercio de los Estados Partes se declara a favor de tal convocatoria, el Secretario General convocará una conferencia bajo los auspicios de las Naciones Unidas. Toda enmienda adoptada por mayoría de dos tercios de los Estados Partes presentes y votantes en la conferencia será sometida por el Secretario General a la Asamblea General de las Naciones Unidas para su aprobación y posteriormente a los Estados Partes para su aceptación.

2. Toda enmienda adoptada y aprobada conforme a lo dispuesto en el párrafo 1 del presente artículo entrará en vigor el trigésimo día a partir de la fecha en que el número de instrumentos de aceptación depositados alcance los dos tercios del número de Estados Partes que había en la fecha de adopción de la enmienda. Posteriormente, la enmienda entrará en vigor para todo Estado Parte el trigésimo día a partir de aquel en que hubiera depositado su propio instrumento de aceptación. Las enmiendas serán vinculantes exclusivamente para los Estados Partes que las hayan aceptado.

3. En caso de que así lo decida la Conferencia de los Estados Partes por consenso, las enmiendas adoptadas y aprobadas de conformidad con lo dispuesto en el párrafo 1 del presente artículo que guarden relación exclusivamente con los artículos 34, 38, 39 y 40 entrarán en vigor para todos los Estados Partes el trigésimo día a partir de aquel en que el número de instrumentos de aceptación depositados alcance los dos tercios del número de Estados Partes que hubiera en la fecha de adopción de la enmienda.

Artículo 48

Denuncia

Los Estados Partes podrán denunciar la presente Convención mediante notificación escrita dirigida al Secretario General de las Naciones Unidas. La denuncia tendrá efecto un año después de que el Secretario General haya recibido la notificación.

Artículo 49

Formato accesible

El texto de la presente Convención se difundirá en formatos accesibles.

Artículo 50

Textos auténticos

Los textos en árabe, chino, español, francés, inglés y ruso de la presente Convención serán igualmente auténticos.

EN TESTIMONIO DE LO CUAL, los plenipotenciarios abajo firmantes, debidamente autorizados por sus respectivos gobiernos, firman la presente Convención.

ANEXO II

DECLARACIÓN SOBRE LA COMPETENCIA DE LA COMUNIDAD EUROPEA EN LO QUE SE REFIERE A LAS CUESTIONES REGIDAS POR LA CONVENCIÓN DE LAS NACIONES UNIDAS SOBRE LOS DERECHOS DE LAS PERSONAS CON DISCAPACIDAD

(Declaración formulada en virtud del artículo 44, apartado 1, de la Convención)

El artículo 44, apartado 1, de la Convención de las Naciones Unidas sobre los derechos de las personas con discapacidad (en lo sucesivo, «la Convención») establece que las organizaciones regionales de integración declararán en sus instrumentos de confirmación oficial o de adhesión su grado de competencia con respecto a las cuestiones regidas por la Convención.

Actualmente son miembros de la Comunidad Europea el Reino de Bélgica, la República de Bulgaria, la República Checa, el Reino de Dinamarca, la República Federal de Alemania, la República de Estonia, Irlanda, la República Helénica, el Reino de España, la República Francesa, la República Italiana, la República de Chipre, la República de Letonia, la República de Lituania, el Gran Ducado de Luxemburgo, la República de Hungría, la República de Malta, el Reino de los Países Bajos, la República de Austria, la República de Polonia, la República Portuguesa, Rumanía, la República de Eslovenia, la República Eslovaca, la República de Finlandia, el Reino de Suecia y el Reino Unido de Gran Bretaña e Irlanda del Norte.

La Comunidad Europea observa que, a efectos de la Convención, la expresión «Estados Partes» se aplica a las organizaciones regionales de integración dentro de los límites de su competencia.

La Convención de las Naciones Unidas sobre los derechos de las personas con discapacidad se aplicará, en lo que respecta a la competencia de la Comunidad Europea, a los territorios en los que se aplique el Tratado constitutivo de la Comunidad Europea y en las condiciones que se fijan en dicho Tratado, en particular en su artículo 299.

De conformidad con el mismo artículo 299, la presente declaración no se aplicará a los territorios de los Estados miembros en los que no se aplica el susodicho Tratado y se entenderá sin perjuicio de las medidas o posiciones que puedan adoptar al amparo de la Convención los Estados miembros de que se trate en nombre y en interés de dichos territorios.

De acuerdo con el artículo 44, apartado 1, de la Convención, la presente declaración indica las competencias transferidas por los Estados miembros a la Comunidad, en virtud del Tratado constitutivo de la Comunidad Europea, en las materias que aborda la Convención.

El alcance y el ejercicio de la competencia comunitaria están, por su propia naturaleza, sujetos a continua evolución, de modo que la Comunidad completará o modificará la presente declaración, si fuera necesario, de conformidad con el artículo 44, apartado 1, de la Convención.

En determinadas materias, la Comunidad Europea tiene competencia exclusiva, y en otras la competencia se encuentra compartida entre la Comunidad Europea y los Estados miembros. En todas las materias en las que no se ha transferido ninguna competencia a la Comunidad Europea, los Estados miembros siguen siendo competentes.

En la actualidad:

1) la Comunidad tiene competencia exclusiva en lo que se refiere a la compatibilidad de las ayudas públicas con el mercado común y el arancel aduanero común.

   En la medida en que algunas disposiciones del Derecho comunitario se vean afectadas por lo dispuesto en la Convención, la Comunidad Europea tiene competencia exclusiva para aceptar las obligaciones de que se trate en lo que se refiere a su propia administración pública. A este respecto, la Comunidad declara que está facultada para ocuparse de la regulación de la selección de personal, condiciones de trabajo, remuneración, formación, etc., de los funcionarios no electivos, de acuerdo con el Estatuto de los funcionarios y sus disposiciones de aplicación [1];

2) la Comunidad comparte competencias con los Estados miembros en materia de acciones para luchar contra la discriminación por motivos de discapacidad, libre circulación de mercancías, personas, servicios y capitales, agricultura, transporte por ferrocarril, carretera, y navegación marítima y aérea, fiscalidad, mercado interior, igualdad de retribución entre trabajadores y trabajadoras, política relativa a las redes transeuropeas y estadísticas.

[1] Reglamento (CEE, Euratom, CECA) nº 259/68, de 29 de febrero de 1968, por el que se establece el Estatuto de los funcionarios de las Comunidades Europeas y el régimen aplicable a los otros agentes de estas Comunidades (DO L 56 de 4.3.1968, p. 1).

La Comunidad Europea tiene competencia exclusiva para adherirse al presente Convenio en lo que se refiere a las materias antes mencionadas únicamente en la medida en que las disposiciones de la Convención o los instrumentos jurídicos adoptados en aplicación de la misma afecten a normas previamente establecidas por la Comunidad Europea. Cuando haya normas comunitarias que no se vean afectadas, como en el caso de las disposiciones comunitarias que establecen únicamente normas mínimas, los Estados miembros tienen competencia, sin perjuicio de la competencia de la Comunidad Europea, para actuar en dicho ámbito. En los demás casos, la competencia sigue siendo de los Estados miembros. En el apéndice adjunto se recoge una lista de actos pertinentes adoptados por la Comunidad Europea. La extensión de la competencia de la Comunidad Europea que se deriva de dichos actos deberá evaluarse en relación con las disposiciones concretas que correspondan a cada medida, y en particular, con la amplitud con que dichas disposiciones establezcan normas comunes;

3) las siguientes políticas de la Comunidad Europea también pueden ser pertinentes para la Convención de las Naciones Unidas: los Estados miembros y la Comunidad se esforzarán por desarrollar una estrategia coordinada para el empleo; la Comunidad contribuirá al desarrollo de una educación de calidad fomentando la cooperación entre los Estados miembros y, si fuere necesario, apoyando y completando la acción de estos; la Comunidad desarrollará una política de formación profesional que refuerce y complete las acciones de los Estados miembros; a fin de promover un desarrollo armonioso del conjunto de la Comunidad, esta desarrollará y proseguirá su acción encaminada a reforzar su cohesión económica y social; la Comunidad promoverá una política de cooperación al desarrollo y la cooperación económica, financiera y técnica con terceros países, sin perjuicio de las competencias respectivas de los Estados miembros.

Apéndice

ACTOS COMUNITARIOS RELATIVOS A LAS MATERIAS REGIDAS POR LA CONVENCIÓN

Los actos comunitarios que a continuación se enumeran ilustran el alcance de las competencias de la Comunidad, conforme al Tratado constitutivo de la Comunidad Europea. En particular, la Comunidad Europea tiene competencia exclusiva en relación con determinadas materias, mientras que para otras materias la competencia es compartida por la Comunidad y los Estados miembros. La extensión de la competencia de la Comunidad Europea que se deriva de dichos actos deberá evaluarse en relación con las disposiciones concretas que correspondan a cada medida, y en particular, con la amplitud con que dichas disposiciones establezcan normas comunes que se vean afectadas por las disposiciones de la Convención.

— en el ámbito de la accesibilidad

Directiva 1999/5/CE del Parlamento Europeo y del Consejo, de 9 de marzo de 1999, sobre equipos radioeléctricos y equipos terminales de telecomunicación y reconocimiento mutuo de su conformidad (DO L 91 de 7.4.1999, p. 10).

Directiva 2001/85/CE del Parlamento Europeo y del Consejo, de 20 de noviembre de 2001, relativa a las disposiciones especiales aplicables a los vehículos utilizados para el transporte de viajeros con más de ocho plazas además del asiento del conductor, y por la que se modifican las Directivas 70/156/CEE y 97/27/CE (DO L 42 de 13.2.2002, p. 1).

Directiva 96/48/CE del Consejo, de 23 de julio de 1996, relativa a la interoperabilidad del sistema ferroviario transeuropeo de alta velocidad (DO L 235 de 17.9.1996, p. 6), modificada por la Directiva 2004/50/CE del Parlamento Europeo y del Consejo (DO L 164 de 30.4.2004, p. 114).

Directiva 2001/16/CE del Parlamento Europeo y del Consejo, de 19 de marzo de 2001, relativa a la interoperabilidad del sistema ferroviario transeuropeo convencional (DO L 110 de 20.4.2001, p. 1), modificada por la Directiva 2004/50/CE (DO L 164 de 30.4.2004, p. 114).

Directiva 2006/87/CE del Parlamento Europeo y del Consejo, de 12 de diciembre de 2006, por la que se establecen las prescripciones técnicas de las embarcaciones de la navegación interior y se deroga la Directiva 82/714/CEE del Consejo (DO L 389 de 30.12.2006, p. 1).

Directiva 2003/24/CE del Parlamento Europeo y del Consejo, de 14 de abril de 2003, por la que se modifica la Directiva 98/18/CE del Consejo sobre reglas y normas de seguridad aplicables a los buques de pasaje (DO L 123 de 17.5.2003, p. 18).

Directiva 2007/46/CE del Parlamento Europeo y del Consejo, de 5 de septiembre de 2007, por la que se crea un marco para la homologación de los vehículos de motor y de los remolques, sistemas, componentes y unidades técnicas independientes destinados a dichos vehículos (Directiva marco) (DO L 263 de 9.10.2007, p. 1).

Decisión 2008/164/CE de la Comisión, de 21 de diciembre de 2007, sobre la especificación técnica de interoperabilidad relativa a las personas de movilidad reducida en los sistemas ferroviarios transeuropeos convencional y de alta velocidad (DO L 64 de 7.3.2008, p. 72).

Directiva 95/16/CE del Parlamento Europeo y del Consejo, de 29 de junio de 1995, sobre la aproximación de las legislaciones de los Estados miembros relativas a los ascensores (DO L 213 de 7.9.1995, p. 1), modificada por la Directiva 2006/42/CE (DO L 157 de 9.6.2006, p. 24).

Directiva 2002/21/CE del Parlamento Europeo y del Consejo, de 7 de marzo de 2002, relativa a un marco regulador común de las redes y los servicios de comunicaciones electrónicas (Directiva marco) (DO L 108 de 24.4.2002, p. 33).

Directiva 2002/22/CE del Parlamento Europeo y del Consejo, de 7 de marzo de 2002, relativa al servicio universal y los derechos de los usuarios en relación con las redes y los servicios de comunicaciones electrónicas (Directiva de servicio universal) (DO L 108 de 24.4.2002, p. 51).

Directiva 97/67/CE del Parlamento Europeo y del Consejo, de 15 de diciembre de 1997, relativa a las normas comunes para el desarrollo del mercado interior de los servicios postales de la Comunidad y la mejora de la calidad del servicio (DO L 15 de 21.1.1998, p. 14), modificada por la Directiva 2002/39/CE del (DO L 176 de 5.7.2002, p. 21), y por la Directiva 2008/6/CE (DO L 52 de 27.2.2008, p. 3).

Reglamento (CE) nº 1083/2006 del Consejo, de 11 de julio de 2006, por el que se establecen las disposiciones generales relativas al Fondo Europeo de Desarrollo Regional, al Fondo Social Europeo y al Fondo de Cohesión y se deroga el Reglamento (CE) nº 1260/1999 (DO L 210 de 31.7.2006, p. 25).

Directiva 2004/17/CE del Parlamento Europeo y del Consejo, de 31 de marzo de 2004, sobre la coordinación de los procedimientos de adjudicación de contratos en los sectores del agua, de la energía, de los transportes y de los servicios postales (DO L 134 de 30.4.2004, p. 1).

Directiva 2004/18/CE del Parlamento Europeo y del Consejo, de 31 de marzo de 2004, sobre coordinación de los procedimientos de adjudicación de los contratos públicos de obras, de suministro y de servicios (DO L 134 de 30.4.2004, p. 114).

Directiva 92/13/CEE del Consejo, de 25 de febrero de 1992, relativa a la coordinación de los disposiciones legales, reglamentarias y administrativas referentes a la aplicación de las normas comunitarias en los procedimientos de formalización de contratos de las entidades que operen en los sectores del agua, de la energía, de los transportes y de las telecomunicaciones (DO L 76 de 23.3.1992, p. 14), modificada por la Directiva 2007/66/CE del Parlamento Europeo y del Consejo (DO L 335 de 20.12.2007, p. 31).

Directiva 89/665/CEE del Consejo, de 21 de diciembre de 1989, relativa a la coordinación de las disposiciones legales, reglamentarias y administrativas referentes a la aplicación de los procedimientos de recurso en materia de adjudicación de los contratos públicos de suministros y de obras (DO L 395 de 30.12.1989, p. 33), modificada por la Directiva 2007/66/CE del Parlamento Europeo y del Consejo (DO L 335 de 20.12.2007, p. 31).

— en el ámbito de la vida independiente y la inclusión social, el trabajo y el empleo

Directiva 2000/78/CE del Consejo, de 27 de noviembre de 2000, relativa al establecimiento de un marco general para la igualdad de trato en el empleo y la ocupación (DO L 303 de 2.12.2000, p. 16).

Reglamento (CE) nº 800/2008 de la Comisión, de 6 de agosto de 2008, por el que se declaran determinadas categorías de ayuda compatibles con el mercado común en aplicación de los artículos 87 y 88 del Tratado (Reglamento general de exención por categorías) (DO L 214 de 9.8.2008, p. 3).

Reglamento (CEE) nº 2289/83 de la Comisión, de 29 de julio de 1983, por el que se establecen las disposiciones de aplicación de los artículos 70 a 78 del Reglamento (CEE) nº 918/83 del Consejo, relativo al establecimiento de un régimen comunitario de franquicias aduaneras (DO L 220 de 11.8.1983, p. 15).

Directiva 83/181/CEE del Consejo, de 28 de marzo de 1983, que delimita el ámbito de aplicación de la letra d) del apartado 1 del artículo 14 de la Directiva 77/388/CEE en lo referente a la exención del impuesto sobre el valor añadido de algunas importaciones definitivas de bienes (DO L 105 de 23.4.1983, p. 38).

Directiva 2006/54/CE del Parlamento Europeo y del Consejo, de 5 de julio de 2006, relativa a la aplicación del principio de igualdad de oportunidades e igualdad de trato entre hombres y mujeres en asuntos de empleo y ocupación (DO L 204 de 26.7.2006, p. 23).

Reglamento (CEE) nº 918/83 del Consejo, de 28 de marzo de 1983, relativo al establecimiento de un régimen comunitario de franquicias aduaneras (DO L 105 de 23.4.1983, p. 1).

Directiva 2006/112/CE del Consejo, de 28 de noviembre de 2006, relativa al sistema común del impuesto sobre el valor añadido (DO L 347 de 11.12.2006, p. 1), modificada por la Directiva 2009/47/CE (DO L 116 de 9.5.2009, p. 18).

Reglamento (CE) nº 1698/2005 del Consejo, de 20 de septiembre de 2005, relativo a la ayuda al desarrollo rural a través del Fondo Europeo Agrícola de Desarrollo Rural (Feader) (DO L 277 de 21.10.2005, p. 1).

Directiva 2003/96/CE del Consejo, de 27 de octubre de 2003, por la que se reestructura el régimen comunitario de imposición de los productos energéticos y de la electricidad (DO L 283 de 31.10.2003, p. 51).

— en el ámbito de la movilidad personal

Directiva 91/439/CEE del Consejo, de 29 de julio de 1991, sobre el permiso de conducción (DO L 237 de 24.8.1991, p. 1).

Directiva 2006/126/CE del Parlamento Europeo y del Consejo, de 20 de diciembre de 2006, sobre el permiso de conducción (DO L 403 de 30.12.2006, p. 18).

Directiva 2003/59/CE del Parlamento Europeo y del Consejo, de 15 de julio de 2003, relativa a la cualificación inicial y la formación continua de los conductores de determinados vehículos destinados al transporte de mercancías o de viajeros por carretera, por la que se modifican el Reglamento (CEE) nº 3820/85 del Consejo y la Directiva 91/439/CEE del Consejo y se deroga la Directiva 76/914/CEE del Consejo (DO L 226 de 10.9.2003, p. 4).

Reglamento (CE) nº 261/2004 del Parlamento Europeo y del Consejo, de 11 de febrero de 2004, por el que se establecen normas comunes sobre compensación y asistencia a los pasajeros aéreos en caso de denegación de embarque y de cancelación o gran retraso de los vuelos, y se deroga el Reglamento (CEE) nº 295/91 (DO L 46 de 17.2.2004, p. 1).

Reglamento (CE) nº 1107/2006 del Parlamento Europeo y del Consejo, de 5 de julio de 2006, sobre los derechos de las personas con discapacidad o movilidad reducida en el transporte aéreo (DO L 204 de 26.7.2006, p. 1).

Reglamento (CE) nº 1899/2006 del Parlamento Europeo y del Consejo, de 12 de diciembre de 2006, por el que se modifica el Reglamento (CEE) nº 3922/91 del Consejo relativo a la armonización de normas técnicas y procedimientos administrativos aplicables a la aviación civil (DO L 377 de 27.12.2006, p. 1).

Reglamento (CE) nº 1371/2007 del Parlamento Europeo y del Consejo, de 23 de octubre de 2007, sobre los derechos y las obligaciones de los viajeros de ferrocarril (DO L 315 de 3.12.2007, p. 14).

Reglamento (CE) nº 1370/2007 del Parlamento Europeo y del Consejo, de 23 de octubre de 2007, sobre los servicios públicos de transporte de viajeros por ferrocarril y carretera y por el que se derogan los Reglamentos (CEE) nº 1191/69 y (CEE) nº 1107/70 del Consejo (DO L 315 de 3.12.2007, p. 1).

Reglamento (CE) nº 8/2008 de la Comisión, de 11 de diciembre de 2007, por el que se modifica el Reglamento (CEE) nº 3922/91 del Consejo en lo relativo a los requisitos técnicos y los procedimientos administrativos comunes aplicables al transporte comercial por avión (DO L 10 de 12.1.2008, p. 1).

— en el ámbito del acceso a la información

Directiva 2001/83/CE del Parlamento Europeo y del Consejo, de 6 de noviembre de 2001, por la que se establece un código comunitario sobre medicamentos para uso humano (DO L 311 de 28.11.2001, p. 67), modificada por la Directiva 2004/27/CE (DO L 136 de 30.4.2004, p. 34).

Directiva 2007/65/CE del Parlamento Europeo y del Consejo, de 11 de diciembre de 2007, por la que se modifica la Directiva 89/552/CEE del Consejo sobre la coordinación de determinadas disposiciones legales, reglamentarias y administrativas de los Estados miembros relativas al ejercicio de actividades de radiodifusión televisiva (DO L 332 de 18.12.2007, p. 27).

Directiva 2000/31/CE del Parlamento Europeo y del Consejo, de 8 de junio de 2000, relativa a determinados aspectos jurídicos de los servicios de la sociedad de la información, en particular el comercio electrónico en el mercado interior (Directiva sobre el comercio electrónico) (DO L 178 de 17.7.2000, p. 1).

Directiva 2001/29/CE del Parlamento Europeo y del Consejo, de 22 de mayo de 2001, relativa a la armonización de determinados aspectos de los derechos de autor y derechos afines a los derechos de autor en la sociedad de la información (DO L 167 de 22.6.2001, p. 10).

Directiva 2005/29/CE del Parlamento Europeo y del Consejo, de 11 de mayo de 2005, relativa a las prácticas comerciales desleales de las empresas en sus relaciones con los consumidores en el mercado interior, que modifica la Directiva 84/450/CEE del Consejo, las Directivas 97/7/CE, 98/27/CE y 2002/65/CE del Parlamento Europeo y del Consejo y el Reglamento (CE) nº 2006/204 del Parlamento Europeo y del Consejo (Directiva sobre las prácticas comerciales desleales) (DO L 149 de 11.6.2005, p. 22).

— en el ámbito de las estadísticas y de la recogida de datos

Directiva 95/46/CE del Parlamento Europeo y del Consejo, de 24 de octubre de 1995, relativa a la protección de las personas físicas en lo que respecta al tratamiento de datos personales y a la libre circulación de estos datos (DO L 281 de 23.11.1995, p. 31).

Reglamento (CE) nº 577/98 del Consejo, de 9 de marzo de 1998, relativo a la organización de una encuesta muestral sobre la población activa en la Comunidad (DO L 77 de 14.3.1998, p. 3), y sus reglamentos de aplicación correspondientes

Reglamento (CE) nº 1177/2003 del Parlamento Europeo y del Consejo, de 16 de junio de 2003, relativo a las estadísticas comunitarias sobre la renta y las condiciones de vida (EU-SILC) (DO L 165 de 3.7.2003, p. 1), y sus Reglamentos de aplicación correspondientes.

Reglamento (CE) nº 458/2007 del Parlamento Europeo y del Consejo, de 25 de abril de 2007, sobre el Sistema Europeo de Estadísticas Integradas de Protección Social (SEEPROS) (DO L 113 de 30.4.2007, p. 3), y sus Reglamentos de aplicación correspondientes.

Reglamento (CE) nº 1338/2008 del Parlamento Europeo y del Consejo, de 16 de diciembre de 2008, sobre estadísticas comunitarias de salud pública y de salud y seguridad en el trabajo (DO L 354 de 31.12.2008, p. 70).

— en el ámbito de la cooperación internacional

Reglamento (CE) nº 1905/2006 del Parlamento Europeo y del Consejo, de 18 de diciembre de 2006, por el que se establece un Instrumento de Financiación de la Cooperación al Desarrollo (DO L 378 de 27.12.2006, p. 41).

Reglamento (CE) nº 1889/2006 del Parlamento Europeo y del Consejo, de 20 de diciembre de 2006, por el que se establece un instrumento financiero para la promoción de la democracia y de los derechos humanos a escala mundial (DO L 386 de 29.12.2006, p. 1).

Reglamento (CE) nº 718/2007 de la Comisión, de 12 de junio de 2007, relativo a la aplicación del Reglamento (CE) nº 1085/2006 del Consejo por el que se establece un Instrumento de Ayuda Preadhesión (IAP) (DO L 170 de 29.6.2007, p. 1).

ANEXO III

RESERVA DE LA COMUNIDAD EUROPEA SOBRE EL ARTÍCULO 27, APARTADO 1, DE LA CONVENCIÓN DE LAS NACIONES UNIDAS SOBRE LOS DERECHOS DE LAS PERSONAS CON DISCAPACIDAD

La Comunidad Europea declara que, en virtud del Derecho comunitario (y en particular de la Directiva 2000/78/CE del Consejo, de 27 de noviembre de 2000, relativa al establecimiento de un marco general para la igualdad de trato en el empleo y la ocupación), los Estados miembros pueden, en su caso, formular sus propias reservas en relación con el artículo 27, apartado 1, de la Convención sobre los derechos de las personas con discapacidad, en la medida en que el artículo 3, apartado 4, de dicha Directiva del Consejo confiere a los Estados miembros el derecho de excluir del ámbito de aplicación de esa misma Directiva la no discriminación por motivos de discapacidad en el ámbito de las fuerzas armadas. Por ello, la Comunidad declara que su adhesión a la Convención se entiende sin perjuicio del Derecho antes mencionado que en virtud del derecho comunitario se confiere a los Estados miembros.

Protocolo facultativo de la Convención sobre los derechos de las personas con discapacidad

Los Estados Partes en el presente Protocolo acuerdan lo siguiente :

Artículo 1

1. Todo Estado Parte en el presente Protocolo ("Estado Parte") reconoce la competencia del Comité sobre los Derechos de las Personas con Discapacidad ("el Comité") para recibir y considerar las comunicaciones presentadas por personas o grupos de personas sujetos a su jurisdicción que aleguen ser víctimas de una violación por ese Estado Parte de cualquiera de las disposiciones de la Convención, o en nombre de esas personas o grupos de personas.

2. El Comité no recibirá comunicación alguna que concierna a un Estado Parte en la Convención que no sea parte en el presente Protocolo.

Artículo 2

El Comité considerará inadmisible una comunicación cuando:

a) Sea anónima;

b) Constituya un abuso del derecho a presentar una comunicación o sea incompatible con las disposiciones de la Convención;

c) Se refiera a una cuestión que ya haya sido examinada por el Comité o ya haya sido o esté siendo examinada de conformidad con otro procedimiento de investigación o arreglo internacionales;

d) No se hayan agotado todos los recursos internos disponibles, salvo que la tramitación de esos recursos se prolongue injustificadamente o sea improbable que con ellos se logre un remedio efectivo;

e) Sea manifiestamente infundada o esté insuficientemente sustanciada; o

f) Los hechos objeto de la comunicación hubieran sucedido antes de la fecha de entrada en vigor del presente Protocolo para el Estado Parte interesado, salvo que esos hechos continuasen produciéndose después de esa fecha.

Artículo 3

Sin perjuicio de lo dispuesto en el artículo 2 del presente Protocolo, el Comité pondrá en conocimiento del Estado Parte, de forma confidencial, toda comunicación que reciba con arreglo al presente Protocolo. En un plazo de seis meses, ese Estado Parte presentará al Comité por escrito explicaciones o declaraciones en las que se aclare la cuestión y se indiquen las medidas correctivas que hubiere adoptado el Estado Parte, de haberlas.

Artículo 4

1. Tras haber recibido una comunicación y antes de llegar a una conclusión sobre el fondo de ésta, el Comité podrá remitir en cualquier momento al Estado Parte interesado, a los fines de su examen urgente, una solicitud para que adopte las medidas provisionales necesarias a fin de evitar posibles daños irreparables a la víctima o las víctimas de la supuesta violación.

2. El ejercicio por el Comité de sus facultades discrecionales en virtud del párrafo 1 del presente artículo, no implicará juicio alguno sobre la admisibilidad o sobre el fondo de la comunicación.

Artículo 5

El Comité examinará en sesiones privadas las comunicaciones que reciba en virtud del presente Protocolo. Tras examinar una comunicación, el Comité hará llegar sus sugerencias y recomendaciones, si las hubiere, al Estado Parte interesado y al comunicante.

Artículo 6

1. Si el Comité recibe información fidedigna que revele violaciones graves o sistemáticas por un Estado Parte de los derechos recogidos en la Convención, el Comité invitará a ese Estado Parte a colaborar en el examen de la información y, a esos efectos, a presentar observaciones sobre dicha información.

2. Tomando en consideración las observaciones que haya presentado el Estado Parte interesado, así como toda información fidedigna que esté a su disposición, el Comité podrá encargar a uno o más de sus miembros que lleven a cabo una investigación y presenten, con carácter urgente, un informe al Comité. Cuando se justifique y con el consentimiento del Estado Parte, la investigación podrá incluir una visita a su territorio.

3. Tras examinar las conclusiones de la investigación, el Comité las transmitirá al Estado Parte interesado, junto con las observaciones y recomendaciones que estime oportunas.

4. En un plazo de seis meses después de recibir las conclusiones de la investigación y las observaciones y recomendaciones que le transmita el Comité, el Estado Parte interesado presentará sus propias observaciones al Comité.

5. La investigación será de carácter confidencial y en todas sus etapas se solicitará la colaboración del Estado Parte.

Artículo 7

1. El Comité podrá invitar al Estado Parte interesado a que incluya en el informe que ha de presentar con arreglo al artículo 35 de la Convención pormenores sobre cualesquiera medidas que hubiere adoptado en respuesta a una investigación efectuada con arreglo al artículo 6 del presente Protocolo.

2. Transcurrido el período de seis meses indicado en el párrafo 4 del artículo 6, el Comité podrá, si fuera necesario, invitar al Estado Parte interesado a que le informe sobre cualquier medida adoptada como resultado de la investigación.

Artículo 8

Todo Estado Parte podrá, al momento de la firma o ratificación del presente Protocolo, o de la adhesión a él, declarar que no reconoce la competencia del Comité establecida en los artículos 6 y 7.

Artículo 9

El Secretario General de las Naciones Unidas será el depositario del presente Protocolo.

Artículo 10

El presente Protocolo estará abierto a la firma de todos los Estados y las organizaciones regionales de integración signatarios de la Convención en la Sede de las Naciones Unidas, en Nueva York, a partir del 30 de marzo de 2007.

Artículo 11

El presente Protocolo estará sujeto a la ratificación de los Estados signatarios de este Protocolo que hayan ratificado la Convención o se hayan adherido a ella. Estará sujeto a la confirmación oficial de las organizaciones regionales de integración signatarias del presente Protocolo que hayan confirmado oficialmente la Convención o se hayan adherido a ella. Estará abierto a la adhesión de cualquier Estado u organización regional de integración que haya ratificado la Convención, la haya confirmado oficialmente o se haya adherido a ella y que no haya firmado el presente Protocolo.

Artículo 12

1. Por "organización regional de integración" se entenderá una organización constituida por Estados soberanos de una región determinada a la que sus Estados miembros hayan transferido competencia respecto de las cuestiones regidas por la Convención y el presente Protocolo. Esas organizaciones declararán, en sus instrumentos de confirmación oficial o adhesión, su grado de competencia con respecto a las cuestiones regidas por la Convención y el presente Protocolo. Posteriormente, informarán al depositario de toda modificación sustancial de su grado de competencia.

2. Las referencias a los "Estados Partes" con arreglo al presente Protocolo se aplicarán a esas organizaciones dentro de los límites de su competencia.

3. A los efectos de lo dispuesto en el párrafo 1 del artículo 13 y en el párrafo 2 del artículo 15, no se tendrá en cuenta ningún instrumento depositado por una organización regional de integración.

4. Las organizaciones regionales de integración, en asuntos de su competencia, ejercerán su derecho de voto en la reunión de los Estados Partes, con un número de votos igual al número de sus Estados miembros que sean Partes en el presente Protocolo. Dichas organizaciones no ejercerán su derecho de voto si sus Estados miembros ejercen el suyo, y viceversa.

Artículo 13

1. Con sujeción a la entrada en vigor de la Convención, el presente Protocolo entrará en vigor el trigésimo día después de que se haya depositado el décimo instrumento de ratificación o adhesión.

2. Para cada Estado u organización regional de integración que ratifique el Protocolo, lo confirme oficialmente o se adhiera a él una vez que haya sido depositado el décimo instrumento a sus efectos, el Protocolo entrará en vigor el trigésimo día a partir de la fecha en que haya sido depositado su propio instrumento.

Artículo 14

1. No se permitirán reservas incompatibles con el objeto y el propósito del presente Protocolo.

2. Las reservas podrán ser retiradas en cualquier momento.

Artículo 15

1. Todo Estado Parte podrá proponer una enmienda al presente Protocolo y presentarla al Secretario General de las Naciones Unidas. El Secretario General comunicará la enmienda propuesta a los Estados Partes, pidiéndoles que le notifiquen si desean que se convoque una conferencia de Estados Partes con el fin de examinar la propuesta y someterla a votación. Si dentro de los cuatro meses siguientes a la fecha de esa notificación, al menos un tercio de los Estados Partes se declara a favor de tal convocatoria, el Secretario General convocará una conferencia bajo los auspicios de las Naciones Unidas. Toda enmienda adoptada por mayoría de dos tercios de los Estados Partes presentes y votantes en la conferencia será sometida por el Secretario General a la Asamblea General para su aprobación y posteriormente a todos los Estados Partes para su aceptación.

2. Las enmiendas adoptadas y aprobadas conforme a lo dispuesto en el párrafo 1 del presente artículo entrarán en vigor el trigésimo día a partir de la fecha en que el número de instrumentos de aceptación depositados alcance los dos tercios del número de Estados Partes que hubiera en la fecha de adopción de la enmienda. Posteriormente, las enmiendas entrarán en vigor para todo Estado Parte el trigésimo día a partir de aquel en que hubieran depositado su propio instrumento de aceptación. Las enmiendas serán vinculantes exclusivamente para los Estados Partes que las hayan aceptado.

Artículo 16

Los Estados Partes podrán denunciar el presente Protocolo mediante notificación escrita dirigida al Secretario General de las Naciones Unidas. La denuncia tendrá efecto un año después de que el Secretario General haya recibido la notificación.

Artículo 17

El texto del presente Protocolo se difundirá en formato accesible.

Artículo 18

Los textos en árabe, chino, español, francés, inglés y ruso del presente Protocolo serán igualmente auténticos.

En testimonio de lo cual , los plenipotenciarios abajo firmantes, debidamente autorizados por sus respectivos gobiernos, firman el presente Protocolo.

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.

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

<u>- Un effort sans précédent des pouvoirs publics pour l'accessibilité :</u>

- 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;

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

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

<u>- Un nouveau plan pour l'emploi des travailleurs handicapés :</u>

- 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],

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[77] R. Sendi, B. Černič Mali, B. K. Kebler, B. Tominc, S. Mijukič, B. Kobal, S. Smolej and M. Nagode, (2008). *Ukrepi za uresničevanje pravic invalidov do dostopa brez ovir, končno poročilo* (Measures for the implementation of the rights of persons with disabilities for obstacle-free access, final report). Ljubljana: Urban planning institute of the Republic of Slovenia.

[78] Official Gazette of the Republic of Slovenia, No. 94/2010

[79] Available at: http://www.mddsz.gov.si/fileadmin/mddsz.gov.si/pageuploads/dokumenti_pdf/api_07_13.pdf (10 December 2010).

[80] Official Gazette of the Republic of Slovenia, No. 113/2005

[81] Official Gazette of the Republic of Slovenia, No. 110/2002 (8/2003 corr.), amendments: Official Gazette of the Republic of Slovenia, No. 58/2003-ZZK-1 (Land Register Act) , 33/2007-ZPNaèrt (Spatial Planning Act) 108/2009-ZGO-1C (Act amending the Construction Act), 79/2010 Odl.US (Ruling of the Constitutional Court): U-I-85/09-8, 80/2010-ZUPUDPP (Spatial Planning of Arrangements of National Significance Act).

[82] Official Gazette of the Republic of Slovenia, No. 110/2002, amendments: Official Gazette of the Republic of Slovenia, No. 97/2003 Odl.US (Ruling of the Constitutional Court): U-I-152/00-23, 41/2004-ZVO-1

the Rules on the requirements for free access to, entry to and use of public buildings and facilities and multi-apartment buildings[83], and the SIST ISO/TR 9527 National standard – building construction: needs of persons with disabilities and other functionally impaired persons in buildings[84] and the Use of Slovenian Sign Language Act [85].

Accessibility is also one of the objectives of the housing policy, based on the implementation of the National Housing Programme[86].

b. General law, technical regulations and standards

The majority of provisions on accessibility are determined in the sectoral legislative provisions, while more detailed technical requirements are given in regulations or standards.

Example:
The Construction Act regulates the conditions for construction of all kinds of works, sets out the essential requirements and the fulfilment thereof regarding the characteristics of works, prescribes the method and conditions for pursuit of the activities (Article 1 of ZGO-1), while the Rules on railway stations and stops facilities[87] specify the equipment of railway stations and stops that enables passengers and other persons equal, independent and safe access to trains and movement at train stations.

c. Role of national, European and international standards

The Slovenian legislation is developed on the grounds of European recommendations and directives, and UN recommendations and documents from the area of human rights and provision of equal opportunities to persons with disabilities for inclusion in society and for overcoming obstacles.

Example:
With the Construction Act, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market has been transposed into Slovenian law (Official Gazette of the Republic of Slovenia, No. 376 of 27 December 2006, p. 36); also, the Directive of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications has been transposed (Official Gazette of the Republic of Slovenia, No. 255 of 30 September 2005, p.22) (Article 2 of the Construction Act).

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

(Environment Protection Act), 45/2004, 47/2004, 62/2004 Odl.US (Ruling of the Constitutional Court): U-I-1/03-15, 102/2004-official consolidated text (14/2005 corr.), 92/2005-ZJC-B (Act Amending Public Roads Act), 93/2005-ZVMS (Veterinary Compliance Criteria Act), 111/2005 Odl.US (Ruling of the Constitutional Court): U-I-150-04-19, 120/2006 Odl.US (Ruling of the Constitutional Court): U-I-286/04-46, 126/2007, 57/2009 Skl.US (Constitutional Court Order): U-I-165/09-8, 108/2009, 61/2010-ZRud-1 (Mining Act), (62/2010 corr.).

[83] Official Gazette of the Republic of Slovenia, No. 97/2003, amendments: Official Gazette of the Republic of Slovenia, No. 77/2009 Odl.US (Ruling of the Constitutional Court): U-I-138/08-9.

[84] Official Gazette of the Republic of Slovenia, No. 92/1999, amendments: Official Gazette of the Republic of Slovenia, No. 97/2003

[85] Official Gazette of the Republic of Slovenia, No. 96/2002.

[86] Official Gazette of the Republic of Slovenia, No. 43/2000.

[87] Official Gazette of the Republic of Slovenia, No. 53/2002, amendments: 61/2007-ZVZelP (Railway Traffic Safety Act), 72/2009.

Ratification of the UN Convention on the Rights of Persons with Disabilities initiated the preparation and adoption of the Equalisation of Opportunities for Persons with Disabilities Act, the Electronic Communications Act[88] and amendments to the Vocational Rehabilitation and Employment of Disabled Persons Act[89].

e. Services regulated for accessibility

Unhindered movement of functionally impaired persons is guaranteed by Article 17 of the Construction Act (ZGO-1). The Act determines that all works in public use that are newly constructed, and works in public use that are reconstructed, must ensure that functionally impaired persons are able to access, enter and use the works without physical obstructions or communicational barriers.

The second paragraph of Article 17 lays down that every newly constructed or reconstructed works in public use, whose construction is carried out pursuant to the provisions of this Act and that does not have all its premises on the ground floor must be equipped with at least one lift or other appropriate device for such purposes.

With regard to the reconstruction of works in public use that are protected in accordance with regulations on cultural heritage, the essential requirements attained for the works may differ from those prescribed, but only under the condition that the deviation is not such that because of it there would be a threat to the safety of the works, to the lives and health of people, to traffic, to neighbouring works or to the environment (Article 17(3) of ZGO-1).

With regard to apartment buildings with more than ten apartments constructed pursuant to the provisions of this act, the requirement for ensuring unhindered access, entry and use must be fulfilled by at least one-tenth of all the apartments, and all joint premises intended for such apartments (Article 17(4) of ZGO-1).

Access, entry and use without physical obstructions or communicational barriers shall be ensured through project design and construction (Article 17(5) of ZGO-1).

In Article 2, the ZGO-1 defines that works in public use are works whose use is intended for all under the same conditions; such works are divided in terms of manner of use into public areas and non-residential buildings intended for public use. A public area is an area whose use is intended for all under the same conditions. A non-residential building intended for public use is a building whose use is intended for all under the same conditions. Public infrastructure works are civil engineering works that form a network serving a specific type of public utility of national or local importance or forms a network of general benefit to the public.

[88] Official Gazette of the Republic of Slovenia, Nos. 43/2004, 86/2004-ZVOP-1 (Personal Data Protection Act), 129/2006, 13/2007-official consolidated text, 102/2007-ZDRad (Digital Broadcasting Act), 110/2009, 33/2011.

[89] Vocational Rehabilitation and Employment of Disabled Persons Act (ZZRZI), Official Gazette of the Republic of Slovenia, Nos. 63/2004, 72/2005, 100/2005-official consolidated text, 114/2006, 16/2007-official consolidated text, 14/2009 Odl.US (Ruling of the Constitutional Court) : U-I-36/06-18, 84/2011 Odl.US (Ruling of the Constitutional Court): U-I-245/10-13, U-I-181/10-6, Up-1002/10-7, 87/2011.

The Use of Slovenian Sign Language Act, adopted in 2002, grants deaf persons the right to use Slovenian sign language, to be informed in techniques adjusted to their needs and lays down the scope and method of exercising the right to a sign language interpreter.

f. Goods regulated for accessibility as part of a service

The legislation referred to in point a. determines: accessibility of services provided in works in public use (in point e. in more detail); accessibility of public transport; public use of the Slovenian sign language (interpretation), and the right to assistive devices.

g. Goods regulated for accessibility

Based on legislation and public tenders, goods from the areas stated in point f. are adapted to and accessible to persons with disabilities, for example: books, medicinal products, public toilets, automated teller machines, phone booths, buses, vessels, aeroplanes, public transport ticket machines (in Ljubljana), and lifts.

h. Enforcement of accessibility legislation

The legislation contains penal provisions for non-implementing legal provisions and their violations; the transgressions are adjudicated by inspection services.

Example of penal provision:
Article 164 of the Construction Act determines that a fine of EUR 1,500 to EUR 30,000 shall be imposed upon a legal person if it "…fails to ensure that functionally impaired persons are able to access, enter and use a facility in public use of which it is the investor without physical obstructions or communicational barriers."

In article 96, the ZGO-1 lays down that in the procedure of issuing a permit for use, the relevant administrative body shall deny the issue of the permit if it establishes, inter alia, that the construction is non-compliant and the changes that arose during construction caused change in the location's conditions or other conditions and elements determined by the building permit that could affect health conditions, the environment, the safety of the works or a change in the prescribed essential requirements, provision of unhindered access and movement of functionally impaired persons.

i. Non-compliance and litigation

The right to judicial protection is declared in Article 23 of the Constitution, under which "Everyone has the right to have any decision regarding his rights, duties and any charges brought against him made without undue delay by an independent, impartial court constituted by law." (Kresal Šoltes, 2007[90]).

[90] K. Kresal Šoltes (2007): *Uveljavljanje in varstvo pravic* (Enforcement and protection of rights) in Barbara Kresal et al. (editor): *Vodnik po pravicah invalidov v slovenski zakonodaji*, (Guide to the rights of persons with disabilities in Slovenian law pp. 139-148. Ljubljana: Institute for Labour Law at the Faculty of Law, University of Ljubljana.

Anyone who believes that his right(s) were violated by an act or action of a state authority, local self-government body or bearer of public authorities, can turn to the Ombudsman, her four deputies or professional associates.
The Ombudsman can:

- warn the authority that has violated the right(s) to rectify the violation or the irregularity committed or even propose that it compensate for the damage caused;
- submit proposals for amendments to laws and other regulations to the Government or the Parliament;
- propose to all authorities that fall within her competence that they improve their operation and relations with clients;
- give her opinion on any case involving the violation of rights and freedoms. It does not matter what kind of proceeding is involved, or what phase the proceeding is at before the authority concerned.

The Ombudsman has no statutory powers in relation to the private sector and cannot intervene in cases in which rights are violated by, for example, a private company. In such cases, she can put pressure on state authorities, local self-government bodies and bearers of public authorities responsible for supervising the work of a private undertaking (Ombudsman's website[91]).

The Advocate of the Principle of Equality prevents and eliminates discrimination in Slovenia. He examines petitions or complaints concerning alleged cases of discrimination. He issues legally non-binding opinions on whether a person has been discriminated against in a certain situation (subject to unequal treatment because of personal circumstances). At the same time, he recommends to the offender ways to eliminate the violation, its causes and consequences. Through such non-formal intervention, the Advocate tries to eliminate the violation and provides help to improve future practice. When an issue cannot be resolved in this way, the Advocate may ask inspection authorities to prosecute for minor offences. A proceeding before the Advocate is cost-free and confidential. The Advocate also provides assistance to persons who were discriminated against during legal and other proceedings, i.e. by giving advice on legal remedies and how to use them before other state authorities. Anyone has the right to ask the Advocate for advice on whether their actions could result in discrimination, on how to act in order to avoid discrimination or how to more effectively respect the right to equal treatment. In addition, the Advocate provides general information on discrimination issues and the situation in this area in Slovenia (website of the Office for Equal Opportunities[92]).

[91] Available at: http://www.varuh-rs.si/ (9 February 2012).
[92] Available at: http://www.uem.gov.si/ (9 February 2012).

Spain

a. Accessibility legislation: its place in the legal and regulatory framework

The idea of integral accessibility that is promoted under the Law of Equal Opportunities, Non-Discrimination and Universal Accessibility of People with Disabilities (hereinafter referred to as LIONDAU; Ley de Igualdad de Oportunidades, No Discriminación y Accesibilidad Universal de las Personas con Discapacidad), means that the built environment has to be considered as a chain in which all links must be accessible, so that the accomplishment of the activities of a person with disability are not interrupted or impeded because one of the links in the chain, an environment or a space, is not accessible and does not let them advance along their journey by themselves.

The First National Plan of Accessibility contains the commitment of Governments in relation to the promotion of accessibility, which will be developed in successive three-year periods until 2012.

The Spanish Disability Strategy 2012-2020, approved in November 2011, is inspired by principles of Law 26/2011, 1 August, for the normative adaptation to the Convention on the Rights of Persons with Disabilities and Law 51/2003, 2 December, of equal opportunities, non discrimination and universal accessibility of people with disability (LIONDAU) that defines the concept of Universal Accessibility. One of the main objectives of this Strategy is Accessibility understood as the right of persons with disabilities to access the physical environment, transport, information technology and communications systems, and other facilities and services with the same conditions than the rest of the population. The first strategic measure on accessibility is to support the “European Accessibility Act” mentioned in the EU Disability Strategy 2010-2020.

In the Spanish legislative system, Autonomous Communities (Regional Governments) have the competencies for the development of laws to be applied within their territory. In particular, every Autonomous Community has its own accessibility legislation, which includes technical guidelines for its implementation.

Furthermore, in order to harmonize and to establish a general framework to be considered by all the regional authorities, the national government has issued the Law 51/2003 of equal opportunities, non discrimination and universal accessibility for people with disabilities.

In this Law 51/2003, lack of accessibility is seen as indirect discrimination. The technical issues related with its implementation are specified in several royal decrees and orders.

- Royal Decree 1417/2006, of 1 December, that establishes the Arbitral System for resolving complaints on equal opportunities, non discrimination and accessibility on the basis of disability.
- Royal Decree 366/2007 of 16 March, which sets forth the conditions of accessibility and non-discrimination of people with disabilities in their relations with the General State Administration.
- Royal Decree 505/2007 of 20 April, which sets forth the basic conditions of accessibility and non-discrimination of people with disabilities for accessing and using public spaces and buildings.
- Royal Decree 1494/2007, of 12 November, by which the Regulations on basic conditions for access for persons with disabilities to technologies, products and services related to the information society and social communication media are passed.

- Royal Decree 1544/2007, of 23 November, by which the basic conditions of accessibility and non-discrimination for access to and the use of means of transportation by people with disabilities are regulated.
- Royal Decree 173/2010, of 19 February, amending the Technical Building Code, approved by Royal Decree 314/2006 of March 17, in terms of accessibility and non discrimination of persons with disabilities.
- Royal Decree 422/2011, of 25 March, by which the Regulation on basic conditions for participation of persons with disabilities in political life and electoral processes are regulated.

All these regulations are available in both Spanish and English at http://sid.usal.es/spanishlawsondisability

Work is currently underway on the two Royal Decrees that are missing in order to complete the development of the LIONDAU, in accordance with what is foreseen in the aforementioned Law:

- Basic conditions of accessibility and non-discrimination for access to and the use of goods and services at the public's disposal.
- Training curriculum on universal access and the training of professionals.

b. General law, technical regulations and standards

In those areas where accessibility is regulated by a law as a general framework, its technical requirements are specified by different pieces of law within the Spanish legal system: Royal Decrees and Orders. Examples of these are listed under point g.

Besides, some technical standards are recognised as mandatory by law. An example of this is the UNE EN 81-70-2004 on accessibility to lifts for persons including persons with disability, which is included in the Spanish Technical Building Code, the normative framework that establishes the safety and habitability requirements of buildings set out in the Building Act.

c. Role of national, European and international standards

European standards are adopted and translated in Spain by AENOR, the Spanish Association for Standardization and Certification. AENOR also elaborates its own standards applicable only in Spain.

Some references (www.aenor.es):

- UNE 41510:2001 Accesibilidad en el urbanismo.
- UNE 41522:2001 Accesibilidad en la edificación. Accesos a los edificios.
- UNE 41520:2002 Accesibilidad en la edificación. Espacios de comunicación horizontal.
- UNE 41523:2001 Accesibilidad en la edificación. Espacios higiénico-sanitarios.
- UNE 41524:2010 Accesibilidad en la edificación. Reglas generales de diseño de los espacios y elementos que forman el edificio. Relación, dotación y uso.
- UNE 41500:2001 IN Accesibilidad en la edificación y el urbanismo. Criterios generales de diseño.
- UNE 200007:2007 IN Accesibilidad en las interfaces de las instalaciones eléctricas de baja tensión.
- UNE 153030:2008 IN Accesibilidad en televisión digital.
- UNE 139801:2003 Aplicaciones informáticas para personas con discapacidad. Requisitos de accesibilidad al ordenador. Hardware.

- UNE 139803:2004 Aplicaciones informáticas para personas con discapacidad. Requisitos de accesibilidad para contenidos en la Web.
- UNE-EN 81-70:2004 Reglas de seguridad para la construcción e instalación de ascensores. Aplicaciones particulares para los ascensores de pasajeros y de pasajeros y cargas. Parte 70: Accesibilidad a los ascensores de personas, incluyendo personas con discapacidad.
- UNE-EN 81-70:2004/A1:2005 Reglas de seguridad para la construcción e instalación de ascensores. Aplicaciones particulares para los ascensores de pasajeros y de pasajeros y cargas. Parte 70: Accesibilidad a los ascensores de personas, incluyendo personas con discapacidad.
- UNE-CEN/TS 81-82:2008 EX Reglas de seguridad para la construcción e instalación de ascensores. Ascensores existentes. Parte 82: Mejora de la accesibilidad a los ascensores de personas, incluyendo personas con discapacidad.
- UNE 139802:2009 Requisitos de accesibilidad del software
- UNE 170002:2009 Requisitos de accesibilidad para la rotulación.
- UNE 170002:2009 ERRATUM: 2009. Requisitos de accesibilidad para la rotulación.
- UNE 41501:2002 Símbolo de accesibilidad para la movilidad. Reglas y grados de uso.
- UNE-ISO/IEC 24751-1:2012 Tecnologías de la información. Adaptabilidad y accesibilidad individualizadas en aprendizaje electrónico, en educación y formación. Parte 1: Marco y modelo de referencia.
- UNE-ISO/IEC 24751-2:2012 Tecnologías de la Información. Adaptabilidad y accesibilidad individualizadas en aprendizaje electrónico, en educación y formación. Parte 2: Necesidades y preferencias para la prestación digital del "acceso para todos".
- UNE-ISO/IEC 24751-3:2012 Tecnologías de la Información. Adaptabilidad y accesibilidad individualizadas en aprendizaje electrónico, en educación y formación. Parte 3: Descripción de recurso digital "acceso para todos".

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Spain has signed and ratified the UN Convention on the Rights of Persons with Disabilities. Taking this into consideration, relevant legislation has been revised and, when necessary, modified in order to comply with the Convention. All modifications came into force by adoption of the Law 26/2011 on the normative adaptation to the International Convention on the Rights of Persons with Disabilities, dated 1 August 2011 (Available at: http://www.boe.es/boe/dias/2011/08/02/pdfs/BOE-A-2011-13241.pdf)

In Spain everything regarding accessibility for people with disabilities concerning guides, orientations, etc. that have been drawn up in this field, have used the obligations set forth in Art. 9 of the UN Convention as a reference.

e. Services regulated for accessibility

The scope of the Law 51/2003 of equal opportunities, non discrimination and universal accessibility for people with disabilities, modified by the mentioned Law 26/2011, applies to the following services:

- Telecommunications and information society
- Urban built environment, infrastructures and buildings
- Transports
- Goods and services available to the public
- Communication with the public administration
- Access to justice
- Cultural heritage, in accordance with heritage legislation.

f. Goods regulated for accessibility as part of a service

Accessibility to goods used in the provision of services is considered under the scope of the Law 51/2003, as above listed. Details about its technical implementation are still under study.

g. Goods regulated for accessibility

- Technologies, services and products related with the information society and social communication means. Regulated by Royal Decree 1494/2007 (http://www.boe.es/aeboe/consultas/bases_datos/doc.php?id=BOE-A-2007-19968)
- Means of transport, including buses, stations, etc. Regulated by Royal Decree 1544/2007 (http://www.boe.es/aeboe/consultas/bases_datos/doc.php?id=BOE-A-2007-20785)
- Most of construction products, such as doors, etc., are regulated in the relevant accessibility legislation of the Autonomous Communities. Furthermore, provisions for accessibility in goods related with urban built environment, such as street furniture, as stated in Law 51/2003, are regulated by the Royal Decree 505/2007 (http://www.boe.es/aeboe/consultas/bases_datos/doc.php?id=BOE-A-2007-9607)

h. Enforcement of accessibility legislation

The Law 51/2003 includes provisions in this regard under Chapter III “Promotion and defence”. In particular, the law provides for two mechanisms of enforcement:

1. A system for infractions and sanctions for equal opportunities, non-discrimination and universal accessibility of persons with disabilities, passed to keep watch over the degree of fulfilment and efficiency of what has been set forth in both the LIONDAU and in the development of these regulations. Eleventh final provision, specified by Law 49/2007.

2. An arbitrating system. Article 17 of Law 51/2003, specified by Royal Decree 1417/2006.

Besides, accessibility legislation issued by the Autonomous Communities has its own system for infractions and sanctions. Apart from this, within the procedures for public works contracts (build environment and building), administrations has to examine accessibility requirements before granting permits.

i. Non-compliance and litigation

Any individual, NGO or state body can bring a claim to court. Besides to the arbitrating system above mentioned, claims can be brought to the Permanent Specialised Office (Oficina Permanente Especializada), a body of the National Disability Council, under the scope of the Spanish Ministry of Health, Social Services and Equality.

Sweden

a. Accessibility legislation: its place in the legal and regulatory framework

In Sweden lack of accessibility is seen as discrimination in the area of employment and of higher education.

The Swedish Discrimination Act prohibits discrimination in cases where the employer, by taking reasonable support and adaptation measures, can see to it that an employee, a job applicant or a trainee with a disability is put in a comparable situation to people without such a disability.

The Discrimination Act also prohibits discrimination in cases where an education provider, by taking reasonable measures regarding the accessibility and usability of the premises, can see to it that a person with a disability who is applying or has been accepted for education under the Higher Education Act (1992:1434) or for education that can lead to a qualification under the Act concerning authority to award certain qualifications (1993:792), is put in a comparable situation to people without such a disability.

A new Planning and Building Act entered into force in Sweden on 2 May 2011. The Act replaces regulation from 1987 and 1994 and includes significant improvements. For increased accessibility an assessment of the accessibility and usability of a building for people with impaired mobility or orientation is to be made at the planning permission stage. This will ensure that accessibility is provided for correctly from the very start.

The National Board of Housing, Building and planning is responsible for the general supervision of the planning and building administration within the country. The National Board issues for example regulations and general recommendations on the removal of easily eliminated obstacles.

b. General law, technical regulations and standards

Accessibility requirements are provided both in general law and in technical regulations or standards. Se under e. about the Planning and building Act (PBL) which includes accessibility and usability for persons with impaired movement or orientation as one of several technical requirements for construction works.

The work on standardisation is a basic precondition in the accessibility work in Sweden for example in the work on e-inclusion. Handisam has produced a proposed action plan for e-inclusion that highlights initiative areas within various policy areas, with the aim of contributing towards everyone being able to share in the information society and for this to be as easy as possible. Proposals for a future structure for following up e-accessibility have been prepared in an investigation.

Within the accessibility work, according to the Government, the State should set a good example in order to effectively achieve results. Authorities under the Government should therefore formulate and conduct their activities bearing in mind the goals of the disability policy. The Ordinance on the government authorities' responsibility for the implementation of the disability policies provides support for this work. According to the Ordinance (2001:526), government authorities must, by conducting inventories and drawing up action plans, work to

make their premises, their operations and information more accessible to persons with disabilities. The Ordinance has been important for the accessibility work, although other measures have also been of importance, such as regulations regarding easily eliminated obstacles.

The Act on Housing Adaptation Grants instructs the municipalities to provide grants for adaptation in order to increase the accessibility to and usability of existing housing for persons with disabilities or elderly people. Sweden's Government allocates approximately SEK 40 million annually in grants for the conversion of public meeting areas and non-governmental cultural premises. Around half of the total of 100 projects in 2009 used the funds they had been granted to make the premises accessible and usable for persons with disabilities.

Stringent demands are stipulated as regards the form and function of public information symbols, in order for them to make life easier for citizens. The Swedish Institute of Assistive Technology has developed graphic symbols in a national standard in order to increase the use of non-verbal information presentation in buildings and other public locations, particular consideration has been given to persons with various disabilities. This relates particularly to disabilities that affect vision, cognitive capacity or movement. They should be seen as part of the work of making society accessible for many more people. The symbols that are included in the new Swedish standard conform to the requirements for form and function that exist for the standardisation of public information symbols. All have been tested for comprehension in accordance with an international ISO standard for test methods (ISO 9186-1).

c. Role of national, European and international standards

The Swedish National Guidelines for Public Sector Websites give public sector organisations practical advice and examples on how to procure, create and evaluate websites and eServices in order to improve accessibility, usability, search ability and comply with the international standards and EU i2010 goals. The guidelines have had a huge impact on the accessibility and usability of public websites and eServices in Sweden.

EU law places demands on transporters and station managers regarding rights for persons with disabilities or reduced mobility; the Regulation on rail passengers' rights and obligations and the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air. These legal instruments establish that persons with disabilities and persons with reduced mobility are entitled to travel with the relevant form of transport and to receive assistance in conjunction with their journey.

For shipping, the Swedish Maritime Administration has issued national regulations and general advice about the adaptation of passenger vessels with regard to persons with disabilities. There is also EU legislation that regulates technical requirements for vehicles within the various transport types, which is intended for example to ensure that they are accessible to persons with disabilities.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

In recent years, the government has intensified the work in the fields of an accessible civil service, easily eliminated obstacles in the built environment and accessible public transport.

The Swedish government is investigating the possibility to include discrimination on grounds of inaccessibility on other areas than working life and higher education.

e. Services regulated for accessibility

The Swedish Planning and Building Act (PBL) includes accessibility and usability for persons with impaired movement or orientation as one of several technical requirements for construction works. The requirements apply to buildings, plots, public locations and areas with facilities other than buildings. Swedish building regulations also contain detailed requirements regarding accessibility in housing. In all new and converted accommodation, for example, there must be accessible wet rooms. All new buildings must, for example, have accessible entrances, and newly built accommodation must have a turning area for indoor wheelchairs. The building regulations also require lifts in new and converted housing buildings of more than three floors, and for storage areas, mailboxes, laundry rooms, waste areas, refuse disposal and other accom-modation supplements to be accessible and usable. The requirement for lifts also exists for buildings that contain working premises to which the general public have access, as well as public premises.

A new Planning and Building Act entered into force on 2 May 2011. An assessment of the accessibility and usability of a building for people with impaired mobility or orientation is to be made at the planning permission stage. This will ensure that accessibility is provided for correctly from the very start. The municipalities are responsible for the requirements in the Planning and Building Act being satisfied on a local level. In order to drive through developments locally and regionally, the Government has supported municipalities in the creation of indicators and systems for open comparisons of accessibility and accessibility work for persons with disabilities.

More and more municipalities are already working voluntarily to observe accessibility issues in the production of detailed plans, in-depth overview plans and regular overview plans. The Swedish National Board of Housing, Building and Planning has been working since 2006 on guidance for municipalities regarding overview planning, for example via a series of publications that include accessibility. The National Board is responsible for the general supervision of the planning and building administration within the country. The National Board issues for example regulations and general recommendations on the removal of easily eliminated obstacles.

The Government and Parliament have decided on specific transport policy goals and funds for achieving an accessible and usable transport system. Among the 13 prioritised areas, the accessibility goal has been specified as follows: The transport system must be designed so that it can be used by persons with disabilities.

The Disability and Public Transportation Act (1979:558) contains provisions to the effect that the body that supervises public transport and the body that plans and exercises such transport must ensure that the services and the means of transport that are used are accessible to persons with disabilities as far as possible.

The Special Transport Services Act (SFS 1997:736) regulates an obligation for each municipality to arrange passenger transport for individuals who, due to a disability that is not only temporary, have significant difficulties in moving about themselves or in travelling by public transport.

Local and regional public transport is the responsibility of the country's municipalities, that are performing comprehensive work to adapt public transport to the needs of persons with disabilities. Public transport vehicles are accessible to an increasingly great extent: two-thirds of the buses operating local services are low-floor vehicles, and more than half of the buses have automatic stop announcements.

The State is speeding up the work in the municipalities by providing state grants for vehicles, terminals, stops, training, information and payment systems, pedestrian and cycle paths, wheelchair lifts, lifts, co-ordination measures, etc. As a rule, the State pays half the costs for each measure.

Over the past 10 years, government authorities have conducted a range of projects aimed at promoting the issue of making public transport accessible, as well as to integrate the work of the State, municipalities and the private sector. This relates to both physical measures in the infrastructure and vehicles, as well as 'softer' initiatives such as training personnel in how to treat persons with disabilities in an appropriate manner. These projects have been conducted in collaboration with the disabled people's movement.

There have also been major improvements aimed at increasing accessibility in the road transport system. More than half of all bus-stops in the national road network have been converted to make it possible for more and more persons with disabilities to travel by bus.

Identification of obstacles in the physical environment, both indoors and outdoors, and in both private and public properties, is performed by the municipalities. Various tools for analysing accessibility at an overall level are being developed in municipalities and regions.

A concrete example of measures that have been implemented are the regulations regarding public procurement. The Public Procurement Act stipulates that the technical specifications in tender documentation should, where possible, be determined with regard to the criteria in respect of accessibility for persons with disabilities or be formulated with a view to the needs of all users. The specifications should ensure that the properties of materials, goods and services are suitable for the area of application, both in the works contract and the service and supply contract.

The National Board of Health and Welfare has investigated whether persons with disabilities can apply for care and support on the same terms as the rest of the population. This has taken place by means of charting accessibility to Sweden's social welfare offices and healthcare centers. In this context, accessibility also refers to how accessible the environment is, as well as how usable services and products are for persons with disabilities. The conclusions of the charting process are that accessibility is high for persons with mobility disabilities, which indicates that the national regulations and the targeted information efforts in recent years have been effective. In the majority of healthcare centers and social welfare offices, however, there are major deficiencies as regards accessibility for persons with other types of disability, in particular impaired vision, impaired hearing and cognitive disabilities. This means that the Government needs to become clearer in its communication of what accessibility is.

The Government has implemented measures to drive through developments in order to break the cycle of isolation entailed by the inability to use IT. In addition to increased access to

broadband and new technical solutions, the Government has invested in increased usability and accessibility of established and new services for persons with disabilities.

For example, the Swedish Post and Telecom Agency (PTS) is developing electronic services for persons with disabilities in conjunction with affected players. PTS has conducted trials with 'streaming' talking books and talking newspapers on mobile phones. In a report that was submitted to the Government in autumn 2009, the Swedish Agency for Disability Policy Coordination, Handisam, submitted a proposed action plan for e-Inclusion, in the report "Rätt från början" ["Right from the beginning"]. Several measures from the action plan have already been implemented within various policy areas.

The Electronic Communications Act (2003:389) aims at ensuring that private individuals, legal entities and public authorities shall have access to secure and efficient electronic communications. Universal services shall always be available for everybody on equivalent terms throughout Sweden at affordable prices.

If it is necessary for the universal services to be available at affordable prices, the party that is considered appropriate for this may be ordered to, at an affordable price, provide access for people with disability to services according to the same extent and on equivalent terms as for other end-users and satisfy the needs of people with disability for such special services.

Access to universal services shall be safeguarded through procurement by the State if this is called for especially having regard to the costs for the provision of the service or the network.

The Discrimination Act (2008:567) also grants that a job applicant or a trainee with a disability is put in a comparable situation to people without such a disability. The provision is applicable in cases concerning the digital work environment.

f. Goods regulated for accessibility as part of a service

The Swedish National Guidelines for Public Sector Websites takes an integrated approach to usability, accessibility and standardization. The Guidelines support the procurement, development, and maintenance of a website or eService by a public administration so that it offers equal opportunity usage for all citizens. The guidelines contain criteria which cover the entire lifecycle of a website or eService. The guidelines are intended for several target groups and give recommendations concerning strategic planning as well as design, development and administration. As follows from the principle of mainstreaming accessibility, the Guidelines present web accessibility as an integral part of the overall development process.

g. Enforcement of accessibility legislation

The Planning and Building Act specifies sanctions for transgressions of the requirements for construction works, including accessibility in new and altered buildings, as a fixed sum and/or prohibition on the use of the building or a part thereof, until the faults have been rectified.

In the event of transgressions, the municipal building committee decides whether the consequences are to be financial fines and/or demands to rectify the deficient accessibility solutions. Financial fines are not earmarked for accessibility-improving measures.

h. Non-compliance and litigation

The Equality Ombudsman supervises compliance with the law and is entitled to bring a case in the courts on behalf of an individual who considers himself or herself to have been discriminated against. Certain non-profit organisations are also entitled to take legal action. The Equality Ombudsman must also work to ensure that discrimination that is linked to disability does not occur in any area of social life, and work to achieve equal rights and opportunities regardless of disability. The Ombudsman must, through advice and in other ways, contribute to the person who has been subjected to discrimination being able to utilise his or her rights. Furthermore, the authority is tasked for example with providing information and training, suggesting constitutional amendments to counteract discrimination, as well as implementing other suitable measures.

United Kingdom

a. Accessibility legislation: its place in the legal and regulatory framework

Accessibility legislation is in force in the UK, with this issue generally being treated as an aspect of discrimination law. In England, Scotland and Wales, section 20 of the Equality Act 2010 builds on all previous discrimination legislation. It formally recognises the rights of disabled people to access everyday services, whether they are paid for or not. It consolidates and expands the previous duty on public authorities to think about the implications of their programmes and policies from the perspective of race, gender and disability. It imposes a duty to make reasonable adjustments for disabled people in specified circumstances. A tribunal or court can determine that non-compliance with this duty is unlawful discrimination.

The duty to make reasonable adjustments applies in the following areas:

- Services and public functions (Part 3 and Schedule 2)
- Premises (Part 4 and Schedule 4)
- Work (Part 5 and Schedule 8)
- Education (Part 6 and Schedule 13)
- Associations (Part 7 and Schedule 21)
- Each of the Parts mentioned above (Schedule 21)

The duty comprises three requirements:

1) changing the way things are done, such as changing a rule or policy;
2) making changes to a physical feature, such as providing a ramp to allow wheelchair users access to a building; and
3) providing auxiliary aids and services, such as providing special computer software or providing a different service.

In each case, the duty applies where a disabled person is put at a substantial disadvantage in comparison with a person who is not disabled. The duty holder then has to take reasonable steps to avoid the disadvantage.

Information on the Equality Act 2010 Act can be found at: at
http://www.legislation.gov.uk/ukpga/2010/15/contents/enacted

The Disability Discrimination Act 1995 provides similar protection in Northern Ireland.

The UK has guidelines and voluntary standards covering a wide range of areas, e.g. the "Lifetime Homes" standard which defines standards and guidelines to ensure homes are accessible to everyone. All social housing will be built to these standards from 2011, with the aim that all housing will be by 2013[93]. Building Regulations in England and Wales impose certain accessibility requirements on domestic and non-domestic buildings.[94]

[93] Information on the Lifetime Homes standard can be found at:
http://www.communities.gov.uk/publications/housing/lifetimehomesneighbourhoods

[94] Information can be found in Approved Document M at :
http://www.planningportal.gov.uk/england/professionals/en/4000000000988.html
Information on the Public Service Accessibility Regulations 2000 for public transports can be found at http://www.dft.gov.uk/topics/access/buses-and-coaches/legislation/ and at http://www.dft.gov.uk/topics/access/rail/rail-vehicles/

UK airports like others in the EU, must comply with EU Regulation 1107/2006, which require that they provide services to ensure that disabled passengers can move through the airport, board, disembark and transit between flights.

The Communications Act 2003 sets minimum targets for subtitling, signing and audio description on television channels. The Code of Television Access Services produced by the UK communications regulator Ofcom gives guidance on these targets and how access to television services can be improved for people with hearing or visual impairments[95].

Regulations similarly exist covering Scotland and Northern Ireland.

The "Five Principles for Improving Provision of Information for Disabled People" sets out guidelines on how disabled people's access to information on public services can be improved[96].

b. General law, technical regulations and standards

As above, all service providers are required to comply with the provisions of the Equality Act 2010 or the Disability Discrimination Act 1995 in Northern Ireland. There are, however, some areas such as transport and buildings where there are also specific technical regulations and standards in place. Meeting a specific technical regulation may not be sufficient to meet the wider provisions of the Equality Act 2010 and the Equality Act 2010 does not set specific technical regulations or standards.

c. Role of national, European and international standards

European accessibility standards have been developed and are used in the context of the following EU mandates:

- Mandate 283 - Mandate to the European Standards Bodies for a guidance document in the field of safety and usability of products by people with special needs (e.g. elderly and disabled).
- Mandate 273 - Mandate to the European Standards Bodies for standardization in the field of information and communications technologies (ICT) for disabled and elderly people.
- Mandate 292 - Mandate to the European Standards Bodies for a guidance document in the field of safety of consumers and children - Product information.
- Mandate 293 - Mandate to the European Standards Bodies for a guidance document in the field of safety of consumers and children - Child safety.
- M/376: Standardization Mandate to CEN, CENELEC and ETSI in support of European Accessibility Requirements for Public Procurement of Products and Services in the ICT Domain (PDF) (7 December 2005)
- M/420: Standardization Mandate to CEN, CENELEC and ETSI in support of European Accessibility Requirements for Public Procurement in the Built Environment (PDF) (21 December 2007).

BSI (the national standards body) refers to the following legislation when developing British Standards:

- Equality Act 2010
- UN Convention on the Human Rights of Disabled People
- EU Employment Equality Directive.

There are also the following relevant EU resolutions:

[95] http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/ctas.pdf
[96] Information on the five principles can be found at: http://odi.dwp.gov.uk/common/publications-index.php

- EU Policy (1) CoE Resolution ResAp (2001)1 “on the introduction of the principles of universal design into the curricula of all occupations working on the built environment” (“Tomar Resolution”) “Universal design” ResAP(2007)3 “Achieving full participation through Universal Design”
- Recommendation Rec(2006)5 of the Committee of Ministers to member states on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015 EU Disability Action Plan (DAP) 2008-2009

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

The reasonable adjustments duty in the Equality Act 2010, and previously for England, Scotland and Wales the Disability Discrimination Act 1995, are in accordance with the provisions of Article 9 of the UN Convention on the Rights of Persons with Disabilities. The Equality Act 2010 continues to build on the good work already achieved – one example of a significant change to the reasonable adjustment duty is a single threshold for the ‘trigger point’ of when a disabled person is put at a ‘substantial disadvantage’.

e. Services regulated for accessibility

In the UK, all service providers in both the public and private sectors are under a duty to make reasonable adjustments in certain circumstances where a disabled person is put at a ‘substantial disadvantage compared to non-disabled people’. Reasonable steps must be taken to avoid the disadvantage or to adopt a reasonable alternative method of providing the service.

The duty for service providers is anticipatory. This means that a service provider cannot wait until a disabled person wants to use its services but must think in advance (and on an ongoing basis) about what disabled people with a range of impairments might reasonably need. This is because the relationship between, for example, a shop and its customers is transitory and, whilst a service provider can reasonably be expected to anticipate such things as ramps for mobility-impaired customers, it would not be expected to provide personalised adjustments in the same way as is expected of employers.

However, section 20 of the Act recognises the need to strike a balance between the rights of disabled people and the interests of service providers. Thus, the reasonable adjustment duty only requires service providers to make adjustments that are reasonable in all the circumstances, depending on a number of factors including the size and nature of the organisation, the financial resources available to it and the nature of the services provided.

Section 20 of the Act specifically provides that the duty to make reasonable adjustments does not require a service provider to take a step that would fundamentally alter the nature of the service they provide.

f. Goods regulated for accessibility as part of a service

The duty to make reasonable adjustments applies to the provision of both goods and services under Part 3 of the Equality Act 2010. To the extent that the provision of a service includes access to goods, that is covered by the duty.

g. Goods regulated for accessibility

In general, manufactured goods are not regulated for accessibility in the UK. However, the requirement for services to be accessible means that that goods used in providing a service must be accessible or the service provider must provide an alternative way of accessing their service. For example, a bank would need to ensure that its ATMs are accessible or provide ATM services in a reasonable alternative manner; a bath manufacturing company is not required to manufacture accessible baths but must ensure that their sales processes are accessible.

Public Transport Accessibility is covered by a number of regulations:

- The Public Service Accessibility Regulations 2000 and its amendments require improved accessibility of buses and coaches. All single-decker buses, double-decker buses, and coaches on scheduled services must comply by 2016, 2017 and 2020 respectively - http://www.dft.gov.uk/topics/access/buses-and-coaches/legislation/
- Since December 1998, all new and refurbished rail vehicles have had to meet Rail Vehicle Accessibility Regulations - All rail vehicles, both heavy and light rail, must be accessible by no later than 1 January 2020 - http://www.dft.gov.uk/topics/access/rail/rail-vehicles/
- UK airports like others in the EU, must comply with EU Regulation 1107/2006, which require that they provide services to ensure that disabled passengers can move through the airport, board, disembark and transit between flights - http://europa.eu/legislation_summaries/transport/mobility_and_passenger_rights/l24132_en.htm The Civil Aviation Authority promotes and enforces compliance of air regulations within the UK.
- Part M (Access to and use of buildings) of the Building Regulations 2010 sets out minimum requirements to ensure that a broad range of people are able to access and use facilities within buildings. http://www.planningportal.gov.uk/buildingregulations/approveddocuments/partm/
- The Communications Act 2003 sets minimum targets for subtitling, signing and audio description on television channels. The Code of Television Access Services produced by the UK communications regulator Ofcom gives guidance on these targets and how access to television services can be improved for people with hearing or visual impairments. http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/ctas.pdf
- The BSI (British Standards Institution) Group is the UK's National Standards Body. It works with manufacturing and service industries, businesses, the UK and other national governments and consumers to facilitate the production of British, European and international standards including those relating to disability accessibility.
- BSI also runs a consumer network including a representative who focuses on ‘Design for All’. There is a Disabled Experts’ Reference Group (DERG), who provides advice and input to standards in development. http://www.bsigroup.com/en/Standards-and-Publications/How-to-get-involved/Disabled-Experts-Reference-Group/
- ISO Guide 71 (also known as CEN/CENELEC Guide 6) provides Guidelines for standards developers to address the needs of older persons and persons with disabilities. http://www.iso.org/iso/catalogue_detail?csnumber=33987
- The BS 8878 Web Accessibility Code of Practice published in November 2010 presents a fully up-to-date, detailed guide for businesses and organizations to make their web products more accessible to disabled and older users - http://shop.bsigroup.com/en/ProductDetail/?pid=000000000030180388BS 8878 Web accessibility. Code of Practice.

h. Enforcement of accessibility legislation, non-compliance and litigation

The Equality Act 2010 provides for enforcement where an individual disabled person considers that they have been discriminated against because of a failure to comply with the duty to make reasonable adjustments. Depending on the circumstances, the individual may bring a claim before a tribunal or court. Remedies can include damages, declarations, quashing orders, mandatory orders and injunctions. This means that the tribunal or court can

require that certain adjustments are made in order to make the service or goods accessible to the claimant.

In addition, the Equality and Human Rights Commission, an independent statutory body with a remit including the elimination of discrimination and the reduction of inequality, has enforcement powers in this regard under the Equality Act.

Accessibility legislation in the UK is enforced by the application of case law, brought by individuals or bodies on behalf of individuals when they believe there rights have been infringed or a law broken in regards to them accessing a product or service.

European Union

The European Commission is committed to removing the economic and social barriers that prevent people with disabilities from enjoying their rights and full and complete participation in all areas of life.

Equality of opportunity for people with disabilities is at the centre of the multiannual European Disability Strategy 2010-2020 which was adopted on 15 November 2010[97], and its predecessor the EU Disability Action Plan 2003-2010[98].

The overarching goal of the EU Strategy is the continuous and sustainable improvement in the situation of persons with disabilities in economic, social and participatory terms.

The European Disability Strategy 2010-2020[99] provides the key elements of accessibility policies in the EU. It defines 'accessibility' as meaning that people with disabilities have access, on an equal basis with others, to the physical environment, transportation, information and communications including technologies and systems (ICT), and other facilities and services in line with Art. 9 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD), to which the EU is a party.

Accessibility concept

Accessibility is considered as a wide concept that includes the prevention and elimination of obstacles that pose problems for persons with disabilities in using products, services and infrastructures. General accessibility measures address in a anticipatory manner the most common problems that persons with disability face. Accessibility and Reasonable accommodation are two related concepts that have to be understood within the "social model of disability". They are both contributing to solutions to ensure equal access for person with disabilities when interacting with goods and services and performing a task.

Accessibility targets the general group of person with disabilities addressing their most common needs and needs to be complemented by measures of reasonable accommodation, namely appropriate measures to be taken, where needed in a particular case, to enable a person with a disability to have access to a product or a service that target a particular individual with a disability.

Achieving accessibility requires acting on the design and functioning of the product, service or infrastructure itself to be "more usable" by persons with disabilities in general while taking into account the diversity of requirements coming from various impairments. Accessibility is thus mostly preventive and proactive while reasonable accommodation is often reactive.

The implementation of accessibility is often supported by general guidelines or standards that describe how products or services should be built.

EU policy background

In the EU, persons with disabilities and older persons constitute a substantial and strongly growing part of the population that can benefit from accessibility measures. Older persons often have chronic illnesses that have associated impairments. Furthermore, even with good

[97] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0636:EN:NOT

[98] http://ec.europa.eu/social/main.jsp?catId=430&langId=en.

[99] COM (2010) 636

health, mobility and dexterity are reduced and the functional performance of the senses diminishes. This leads to activity limitations. Over 32 % of those between 55 and 65 years of age report a disability. That figure increases to over 40 %, 60 % and 70 % for each additional ten years.

While the ageing of the population can raise the visibility of the market potential of products with good accessibility features in the most commercial areas, particularly health care, there are other areas where the economic potential is often overlooked by industry. Industry's response is limited and disabled persons do not benefit from the opportunities created by the single market as much as other citizens do. But also the myriad of national, regional and local accessibility rules and regulations does not make things easier for industry. These can *de facto* act as obstacles to the free movement of goods, persons and services in the EU and to potential economies of scale.

Addressing accessibility at EU level

At EU level, accessibility has been addressed mainly in three thematic policy areas: ICT, transport and built environment. It has been a core element of the EU policy since the nineties. Accessibility was already addressed in the European Disability Action plan 2003 -2010.

At EU level there are various legislative acts that contain certain accessibility provisions regulating some goods and services. The detailed list of EU legal acts addressing accessibility is contained in the Declaration of Competences annexed to the Council Decision on the conclusion by the EU of the UN Convention on the Rights of Persons with Disabilities (UNCRPD)[100]. In general, accessibility is not the main purpose of these legal instruments, but one of the many issues addressed:

- There are some legal instruments that contain general accessibility provisions like the Structural Funds Regulation[101] or the Public Procurement Directives[102]. Some legal instruments, like the Copyright Directive, are of enabling nature and permit the Member States to develop exceptions in national legislation that aim to improve accessibility for persons with disabilities but do not impose obligations[103].
- There are some acts that require specific products to be accessible. This is the case of lifts[104] and vehicles with more than eight seats[105] or even for some specific groups of persons with disabilities, like the Braille requirement for packaging of medicines[106].
- There are some sector regulations that have some general provisions for persons with disabilities addressing accessibility to some extent or indirectly, like the eCommunication package in the area of Information and Communication Technologies[107] and the various Regulations on the rights of persons with reduced mobility[108] in the area of transport.

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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.

Focal Point: Ministry of Children, Equality and Social Inclusion.
Phone +47 22 249090
Email: Postmottak@bld.dep.no
Post address: Akersgt 59, Postboks 8036 , 0030 Oslo
Coordination mechanism: Ministry of Children, Equality and Social Inclusion

Independent mechanism: Equality and anti-discrimination ombud.
Phone + 47 23 157301,
Email: post@LDO.no

Contacts:
Petter Sørlien, Counsellor for Equality & Non-Discrimination
Mission of Norway to the European Union
Address: Rue Archimède 17 / B-1000 Brussels / Belgium
Office: +32 22387451
Mobile: +32 (0)499 05 79 82
Fax: +32 22387490
e-mail: kps@mfa.no

Ann-Marit Sæbønes, Special Adviser,
Ministry of Children, Equality and Inclusion,
Email: Ann-Marit.Sabones@bld.dep.no
Mobile: +47 904 02 110
Tel: +33 140728615

DIRECTIVA 2000/78/CE DEL CONSEJO

de 27 de noviembre de 2000

relativa al establecimiento de un marco general para la igualdad de trato en el empleo y la ocupación

EL CONSEJO DE LA UNIÓN EUROPEA,

Visto el Tratado constitutivo de la Comunidad Europea, y en particular, su artículo 13,

Vista la propuesta de la Comisión [1],

Visto el dictamen del Parlamento Europeo [2],

Visto el dictamen del Comité Económico y Social [3],

Visto el dictamen del Comité de las Regiones [4],

Considerando lo siguiente:

(1) De conformidad con el artículo 6 del Tratado de la Unión Europea, la Unión Europea se basa en los principios de libertad, democracia, respeto de los derechos humanos y de las libertades fundamentales y el Estado de Derecho, principios que son comunes a todos los Estados miembros y respeta los derechos fundamentales tal y como se garantizan en el Convenio Europeo para la Protección de los Derechos Humanos y de las Libertades Fundamentales y tal como resultan de las tradiciones constitucionales comunes a los Estados miembros, como principios generales del Derecho comunitario.

(2) El principio de igualdad de trato entre mujeres y hombres está firmemente establecido en un amplio conjunto de normas comunitarias, en especial en la Directiva 76/207/CEE del Consejo, de 9 de febrero de 1976, relativa a la aplicación del principio de igualdad de trato entre hombres y mujeres en lo que se refiere al empleo, a la formación y a la promoción profesionales, y a las condiciones de trabajo [5].

(3) En la aplicación del principio de igualdad de trato, la Comunidad, en virtud del apartado 2 del artículo 3 del Tratado CE, debe proponerse la eliminación de las desigualdades y el fomento de la igualdad entre hombres y mujeres, en particular considerando que, a menudo, las mujeres son víctimas de discriminaciones múltiples.

(4) El derecho de toda persona a la igualdad ante la ley y a estar protegida contra la discriminación constituye un derecho universal reconocido en la Declaración Universal de Derechos Humanos, la Convención de las Naciones Unidas sobre la eliminación de todas las formas de discriminación contra la mujer, los Pactos de las Naciones Unidas de Derechos Civiles y Políticos y sobre Derechos Económicos, Sociales y Culturales, así como en el Convenio Europeo para la Protección de los Derechos Humanos y de las Libertades Fundamentales, de los que son partes todos los Estados miembros. El Convenio nº 111 de la Organización Internacional del Trabajo prohíbe la discriminación en el ámbito del empleo y la ocupación.

(5) Es importante respetar estos derechos y estas libertades fundamentales. La presente Directiva se entenderá sin perjuicio de la libertad de asociación, incluido el derecho de fundar, con otros, sindicatos y a afiliarse a estos para defender sus intereses.

(6) La Carta comunitaria de los derechos sociales fundamentales de los trabajadores reconoce la importancia de combatir toda forma de discriminación y, especialmente, la necesidad de adoptar medidas adecuadas para la integración social y económica de las personas mayores y de las personas con discapacidad.

(7) El Tratado CE incluye entre sus objetivos el fomento de la coordinación de las políticas de empleo de los Estados miembros. A tal efecto, se ha incorporado al Tratado CE un nuevo título sobre empleo como medio para desarrollar una estrategia europea coordinada para el empleo, con el fin de potenciar una mano de obra cualificada, formada y adaptable.

(8) Las Directrices para el empleo del año 2000, aprobadas por el Consejo Europeo de Helsinki los días 10 y 11 de diciembre de 1999, subrayan la necesidad de promover un mercado de trabajo favorable a la integración social, mediante la formulación de una serie coherente de políticas dirigidas a combatir la discriminación respecto de grupos como las personas con discapacidad. Subrayan asimismo la necesidad de prestar especial atención al apoyo concedido a los trabajadores de más edad, a fin de prolongar su participación en la población activa.

(9) El empleo y la ocupación son elementos esenciales para garantizar la igualdad de oportunidades para todos y contribuyen decisivamente a la participación plena de los ciudadanos en la vida económica, cultural y social, así como a su desarrollo personal.

(10) El Consejo adoptó, el 29 de junio de 2000, la Directiva 2000/43/CE [6] relativa a la aplicación del principio de igualdad de trato de las personas independientemente de su origen racial o étnico, que garantiza ya una protección contra dichas discriminaciones en el ámbito del empleo y la ocupación.

(11) La discriminación por motivos de religión o convicciones, discapacidad, edad u orientación sexual puede poner en peligro la consecución de los objetivos del Tratado CE, en particular el logro de un alto nivel de

[1] DO C 177 E de 27.6.2000, p. 42.
[2] Dictamen emitido el 12.10.2000 (no publicado aún en el Diario Oficial).
[3] DO C 204 de 18.7.2000, p. 82.
[4] DO C 226 de 8.8.2000, p. 1.
[5] DO L 39 de 14.2.1976, p. 40.
[6] DO L 180 de 19.7.2000, p. 22.

empleo y de protección social, la elevación del nivel y de la calidad de vida, la cohesión económica y social, la solidaridad y la libre circulación de personas.

(12) A tal fin, se deberá prohibir en toda la Comunidad cualquier discriminación directa o indirecta por motivos de religión o convicciones, discapacidad, edad u orientación sexual en los ámbitos a que se refiere la presente Directiva. Esta prohibición de discriminación se aplicará asimismo a los nacionales de terceros países, pero no se refiere a las diferencias de trato basadas en la nacionalidad y se entiende sin perjuicio de las disposiciones que regulan la entrada y la residencia de los nacionales de terceros países y su acceso al empleo y la ocupación.

(13) Las disposiciones de la presente Directiva no se aplicarán a los regímenes de seguridad social y de protección social cuyas ventajas no están equiparadas a una retribución en el sentido conferido a este término para la aplicación del artículo 141 del Tratado CE ni a los pagos de cualquier naturaleza efectuados por el Estado cuyo objetivo es el acceso al empleo o el mantenimiento de los trabajadores en el empleo.

(14) La presente Directiva se entiende sin perjuicio de las disposiciones nacionales que establecen la edad de jubilación.

(15) La apreciación de los hechos de los que pueda resultar la presunción de haberse producido una discriminación directa o indirecta corresponde a los órganos judiciales u otros órganos competentes nacionales, con arreglo a las legislaciones o prácticas nacionales. Estas normas podrán disponer que la discriminación indirecta se establezca por cualquier medio, incluso a partir de pruebas estadísticas.

(16) La adopción de medidas de adaptación a las necesidades de las personas con discapacidad en el lugar de trabajo desempeña un papel importante a la hora de combatir la discriminación por motivos de discapacidad.

(17) La presente Directiva no obliga a contratar, ascender, mantener en un puesto de trabajo o facilitar formación a una persona que no sea competente o no esté capacitada o disponible para desempeñar las tareas fundamentales del puesto de que se trate o para seguir una formación dada, sin perjuicio de la obligación de realizar los ajustes razonables para las personas con discapacidad.

(18) Concretamente, la presente Directiva no puede tener el efecto de obligar a las fuerzas armadas, como tampoco a los servicios de policía, penitenciarios, o de socorro, a contratar o mantener en su puesto de trabajo a personas que no tengan las capacidades necesarias para desempeñar cuantas funciones puedan tener que ejercer en relación con el objetivo legítimo de mantener el carácter operativo de dichos servicios.

(19) Además, para que los Estados miembros puedan seguir manteniendo la capacidad de sus fuerzas armadas, podrán optar por no aplicar las disposiciones de la presente Directiva relativas a la discapacidad y a la edad a todas o parte de sus fuerzas armadas. Los Estados miembros que ejerzan esta opción deberán determinar el ámbito de aplicación de esta excepción.

(20) Es preciso establecer medidas adecuadas, es decir, medidas eficaces y prácticas para acondicionar el lugar de trabajo en función de la discapacidad, por ejemplo adaptando las instalaciones, equipamientos, pautas de trabajo, asignación de funciones o provisión de medios de formación o encuadre.

(21) Para determinar si las medidas en cuestión dan lugar a una carga desproporcionada, deberían tenerse en cuenta, particularmente, los costes financieros y de otro tipo que éstas impliquen, el tamaño, los recursos financieros y el volumen de negocios total de la organización o empresa y la disponibilidad de fondos públicos o de otro tipo de ayuda.

(22) Lo dispuesto en la presente Directiva se entiende sin perjuicio de la legislación nacional sobre el estado civil y de las prestaciones que dependen del estado civil.

(23) En muy contadas circunstancias, una diferencia de trato puede estar justificada cuando una característica vinculada a la religión o convicciones, a una discapacidad, a la edad o a la orientación sexual constituya un requisito profesional esencial y determinante, cuando el objetivo sea legítimo y el requisito, proporcionado. Dichas circunstancias deberán figurar en la información que facilitarán los Estados miembros a la Comisión.

(24) La Unión Europea, en su Declaración nº 11 sobre el estatuto de las iglesias y las organizaciones no confesionales, adjunta al Acta final del Tratado de Amsterdam, ha reconocido explícitamente que respeta y no prejuzga el estatuto reconocido, en virtud del Derecho nacional, a las iglesias y las asociaciones o comunidades religiosas en los Estados miembros, que respeta asimismo el estatuto de las organizaciones filosóficas y no confesionales. Desde esta perspectiva, los Estados miembros pueden mantener o establecer disposiciones específicas sobre los requisitos profesionales esenciales, legítimos y justificados que pueden exigirse para ejercer una actividad profesional.

(25) La prohibición de discriminación por razones de edad constituye un elemento fundamental para alcanzar los objetivos establecidos por las directrices sobre el empleo y para fomentar la diversidad en el mismo. No obstante, en determinadas circunstancias se pueden justificar diferencias de trato por razones de edad, y requieren por lo tanto disposiciones específicas que pueden variar según la situación de los Estados miembros. Resulta pues esencial distinguir las diferencias de trato justificadas, concretamente por objetivos legítimos de las políticas de empleo, del mercado laboral y de la formación profesional, y debe prohibirse la discriminación.

(26) La prohibición de discriminación no debe obstar al mantenimiento o la adopción de medidas concebidas para prevenir o compensar las desventajas sufridas por un grupo de personas con una religión o convicciones, una discapacidad, una edad o una orientación sexual determinadas, y dichas medidas pueden permitir la existencia de organizaciones de personas de una religión o convicciones, una discapacidad, una edad o una orientación sexual determinadas organizarse cuando su finalidad principal sea promover de las necesidades específicas de esas personas.

(27) El Consejo, en su Recomendación 86/379/CEE, de 24 de julio de 1986, sobre el empleo de los minusválidos en la Comunidad [1], estableció un marco de orientación que enumera ejemplos de acciones positivas para el fomento del empleo y de la formación profesional de los minusválidos, y en su Resolución de 17 de junio de 1999 [2] relativa a la igualdad de oportunidades laborales de las personas con minusvalías afirmó la importancia de prestar una atención específica, en particular, a la contratación, al mantenimiento de los trabajadores en el empleo y a la formación y formación permanente de los minusválidos.

(28) Las disposiciones de la presente Directiva establecen requisitos mínimos, reconociendo a los Estados miembros la facultad de introducir o mantener disposiciones más favorables. La aplicación de la presente Directiva no puede servir para justificar retroceso alguno con respecto a la situación ya existente en cada Estado miembro.

(29) Las personas que hayan sido objeto de discriminación basada en la religión o convicciones, la discapacidad, la edad o la orientación sexual deben disponer de medios de protección jurídica adecuados. A fin de asegurar un nivel de protección más efectivo, también se debe facultar a las asociaciones o personas jurídicas para que puedan iniciar procedimientos, con arreglo a lo que dispongan los Estados miembros, en nombre de cualquier víctima o en su apoyo, sin perjuicio de la normativa nacional de procedimiento en cuanto a la representación y defensa ante los tribunales.

(30) La aplicación efectiva del principio de igualdad exige una protección judicial adecuada contra las represalias.

(31) Las normas relativas a la carga de la prueba deben modificarse cuando haya un caso de presunta discriminación y en el caso en que se verifique tal situación a fin de que la carga de la prueba recaiga en la parte demandada. No obstante, no corresponde a la parte demandada probar que la parte demandante pertenece a una determinada religión, posee determinadas convicciones, presenta una determinada discapacidad, es de una determinada edad o tiene una determinada orientación sexual.

(32) Los Estados miembros no estarán obligados a aplicar las normas sobre la carga de la prueba a los procedimientos en los que corresponda a los tribunales o a otro órgano competente investigar los hechos. Se considerarán procedimientos de esta índole aquéllos en que el demandante no está obligado a probar sus alegaciones sino que corresponde al tribunal o al órgano competente investigarlas.

(33) Los Estados miembros deben fomentar el diálogo entre los interlocutores sociales y, según las prácticas propias de cada país, con las organizaciones no gubernamentales, para estudiar y combatir las distintas formas de discriminación en el lugar de trabajo.

(34) La necesidad de promover la paz y la reconciliación entre las principales comunidades de Irlanda del Norte exige la inclusión de disposiciones especiales en la presente Directiva.

(35) Los Estados miembros deben prever sanciones efectivas, proporcionadas y disuasorias en caso de que se contravengan las obligaciones derivadas de la presente Directiva.

(36) Los Estados miembros podrán confiar la aplicación de la presente Directiva a los interlocutores sociales, a petición conjunta de éstos, en lo relativo a las disposiciones que entran en el ámbito de los convenios colectivos, siempre y cuando los Estados miembros tomen todas las disposiciones necesarias para poder garantizar en todo momento los resultados establecidos por la presente Directiva.

(37) De conformidad con el principio de subsidiariedad contemplado en el artículo 5 del Tratado CE, los objetivos de la presente Directiva, en particular el establecimiento en la Comunidad de un marco para la igualdad en el empleo y la ocupación, no pueden alcanzarse de manera suficiente por los Estados miembros. Por consiguiente, pueden lograrse mejor, debido a la dimensión y repercusión de la acción propuesta, en el ámbito comunitario. Conforme al principio de proporcionalidad tal y como se enuncia en el mencionado artículo, la presente Directiva no excede de lo necesario para alcanzar dicho objetivo.

HA ADOPTADO LA PRESENTE DIRECTIVA:

CAPÍTULO I

DISPOSICIONES GENERALES

Artículo 1

Objeto

La presente Directiva tiene por objeto establecer un marco general para luchar contra la discriminación por motivos de religión o convicciones, de discapacidad, de edad o de orientación sexual en el ámbito del empleo y la ocupación, con el fin de que en los Estados miembros se aplique el principio de igualdad de trato.

Artículo 2

Concepto de discriminación

1. A efectos de la presente Directiva, se entenderá por principio de igualdad de trato la ausencia de toda discriminación directa o indirecta basada en cualquiera de los motivos mencionados en el artículo 1.

2. A efectos de lo dispuesto en el apartado 1:

a) existirá discriminación directa cuando una persona sea, haya sido o pudiera ser tratada de manera menos favorable que otra en situación análoga por alguno de los motivos mencionados en el artículo 1;

b) existirá discriminación indirecta cuando una disposición, criterio o práctica aparentemente neutros pueda ocasionar una desventaja particular a personas con una religión o convicción, con una discapacidad, de una edad, o con una orientación sexual determinadas, respecto de otras personas, salvo que:

   i) dicha disposición, criterio o práctica pueda justificarse objetivamente con una finalidad legítima y salvo que los medios para la consecución de esta finalidad sean adecuados y necesarios; o que

[1] DO L 225 de 12.8.1986, p. 43.
[2] DO C 186 de 2.7.1999, p. 3.

ii) respecto de las personas con una discapacidad determinada, el empresario o cualquier persona u organización a la que se aplique lo dispuesto en la presente Directiva, esté obligado, en virtud de la legislación nacional, a adoptar medidas adecuadas de conformidad con los principios contemplados en el artículo 5 para eliminar las desventajas que supone esa disposición, ese criterio o esa práctica.

3. El acoso constituirá discriminación a efectos de lo dispuesto en el apartado 1 cuando se produzca un comportamiento no deseado relacionado con alguno de los motivos indicados en el artículo 1 que tenga como objetivo o consecuencia atentar contra la dignidad de la persona y crear un entorno intimidatorio, hostil, degradante, humillante u ofensivo. A este respecto, podrá definirse el concepto de acoso de conformidad con las normativas y prácticas nacionales de cada Estado miembro.

4. Toda orden de discriminar a personas por alguno de los motivos indicados en el artículo 1 se considerará discriminación con arreglo a lo dispuesto en el apartado 1.

5. La presente Directiva se entenderá sin perjuicio de las medidas establecidas en la legislación nacional que, en una sociedad democrática, son necesarias para la seguridad pública, la defensa del orden y la prevención de infracciones penales, la protección de la salud y la protección de los derechos y libertades de los ciudadanos.

Artículo 3

Ámbito de aplicación

1. Dentro del límite de las competencias conferidas a la Comunidad, la presente Directiva se aplicará a todas las personas, por lo que respecta tanto al sector público como al privado, incluidos los organismos públicos, en relación con:

a) las condiciones de acceso al empleo, a la actividad por cuenta propia y al ejercicio profesional, incluidos los criterios de selección y las condiciones de contratación y promoción, independientemente de la rama de actividad y en todos los niveles de la clasificación profesional, con inclusión de lo relativo a la promoción;

b) el acceso a todos los tipos y niveles de orientación profesional, formación profesional, formación profesional superior y reciclaje, incluida la experiencia laboral práctica;

c) las condiciones de empleo y trabajo, incluidas las de despido y remuneración;

d) la afiliación y participación en una organización de trabajadores o de empresarios, o en cualquier organización cuyos miembros desempeñen una profesión concreta, incluidas las prestaciones concedidas por las mismas.

2. La presente Directiva no afectará a la diferencia de trato por motivos de nacionalidad y se entenderá sin perjuicio de las disposiciones y condiciones por las que se regulan la entrada y residencia de nacionales de terceros países y de apátridas en el territorio de los Estados miembros y del trato que se derive de la situación jurídica de los nacionales de terceros países y de los apátridas.

3. La presente Directiva no se aplicará a los pagos de cualquier tipo efectuados por los regímenes públicos o asimilados, incluidos los regímenes públicos de seguridad social o de protección social.

4. Los Estados miembros podrán prever la posibilidad de que la presente Directiva no se aplique a las fuerzas armadas por lo que respecta a la discriminación basada en la discapacidad y en la edad.

Artículo 4

Requisitos profesionales

1. No obstante lo dispuesto en los apartados 1 y 2 del artículo 2, los Estados miembros podrán disponer que una diferencia de trato basada en una característica relacionada con cualquiera de los motivos mencionados en el artículo 1 no tendrá carácter discriminatorio cuando, debido a la naturaleza de la actividad profesional concreta de que se trate o al contexto en que se lleve a cabo, dicha característica constituya un requisito profesional esencial y determinante, siempre y cuando el objetivo sea legítimo y el requisito, proporcionado.

2. Los Estados miembros podrán mantener en su legislación nacional vigente el día de adopción de la presente Directiva, o establecer en una legislación futura que incorpore prácticas nacionales existentes el día de adopción de la presente Directiva, disposiciones en virtud de las cuales en el caso de las actividades profesionales de iglesias y de otras organizaciones públicas o privadas cuya ética se base en la religión o las convicciones de una persona, por lo que respecta a las actividades profesionales de estas organizaciones, no constituya discriminación una diferencia de trato basada en la religión o las convicciones de una persona cuando, por la naturaleza de estas actividades o el contexto en el que se desarrollen, dicha característica constituya un requisito profesional esencial, legítimo y justificado respecto de la ética de la organización. Esta diferencia de trato se ejercerá respetando las disposiciones y principios constitucionales de los Estados miembros, así como los principios generales del Derecho comunitario, y no podrá justificar una discriminación basada en otro motivo.

Siempre y cuando sus disposiciones sean respetadas, las disposiciones de la presente Directiva se entenderán sin perjuicio del derecho de las iglesias y de las demás organizaciones públicas o privadas cuya ética se base en la religión o las convicciones, actuando de conformidad con las disposiciones constitucionales y legislativas nacionales, podrán exigir en consecuencia a las personas que trabajen para ellas una actitud de buena fe y de lealtad hacia la ética de la organización.

Artículo 5

Ajustes razonables para las personas con discapacidad

A fin de garantizar la observancia del principio de igualdad de trato en relación con las personas con discapacidades, se realizarán ajustes razonables. Esto significa que los empresarios tomarán las medidas adecuadas, en función de las necesidades de cada situación concreta, para permitir a las personas con discapacidades acceder al empleo, tomar parte en el mismo o progresar profesionalmente, o para que se les ofrezca formación, salvo que esas medidas supongan una carga excesiva para el empresario. La carga no se considerará excesiva cuando sea paliada en grado suficiente mediante medidas existentes en la política del Estado miembro sobre discapacidades.

Artículo 6

Justificación de diferencias de trato por motivos de edad

1. No obstante lo dispuesto en el apartado 2 del artículo 2, los Estados miembros podrán disponer que las diferencias de trato por motivos de edad no constituirán discriminación si

están justificadas objetiva y razonablemente, en el marco del Derecho nacional, por una finalidad legítima, incluidos los objetivos legítimos de las políticas de empleo, del mercado de trabajo y de la formación profesional, y si los medios para lograr este objetivo son adecuados y necesarios.

Dichas diferencias de trato podrán incluir, en particular:

a) el establecimiento de condiciones especiales de acceso al empleo y a la formación profesional, de empleo y de trabajo, incluidas las condiciones de despido y recomendación, para los jóvenes, los trabajadores de mayor edad y los que tengan personas a su cargo, con vistas a favorecer su inserción profesional o garantizar la protección de dichas personas;

b) el establecimiento de condiciones mínimas en lo que se refiere a la edad, la experiencia profesional o la antigüedad en el trabajo para acceder al empleo o a determinadas ventajas vinculadas al mismo;

c) el establecimiento de una edad máxima para la contratación, que esté basada en los requisitos de formación del puesto en cuestión o en la necesidad de un período de actividad razonable previo a la jubilación.

2. No obstante lo dispuesto en el apartado 2 del artículo 2, los Estados miembros podrán disponer que no constituirán discriminación por motivos de edad, la determinación, para los regímenes profesionales de seguridad social, de edades para poder beneficiarse de prestaciones de jubilación o invalidez u optar a las mismas, incluidos el establecimiento para dichos regímenes de distintas edades para trabajadores o grupos o categorías de trabajadores y la utilización, en el marco de dichos regímenes, de criterios de edad en los cálculos actuariales, siempre que ello no suponga discriminaciones por razón de sexo.

Artículo 7

Acción positiva y medidas específicas

1. Con el fin de garantizar la plena igualdad en la vida profesional, el principio de igualdad de trato no impedirá que un Estado miembro mantenga o adopte medidas específicas destinadas a prevenir o compensar las desventajas ocasionadas por cualquiera de los motivos mencionados en el artículo 1.

2. Por lo que respecta a las personas con discapacidad, el principio de igualdad de trato no constituirá un obstáculo al derecho de los Estados miembros de mantener o adoptar disposiciones relativas a la protección de la salud y la seguridad en el lugar de trabajo, ni para las medidas cuya finalidad sea crear o mantener disposiciones o facilidades con objeto de proteger o fomentar la inserción de dichas personas en el mundo laboral.

Artículo 8

Requisitos mínimos

1. Los Estados miembros podrán adoptar o mantener disposiciones más favorables para la protección del principio de igualdad de trato que las previstas en la presente Directiva.

2. La aplicación de la presente Directiva no constituirá en ningún caso motivo para reducir el nivel de protección contra la discriminación ya garantizado por los Estados miembros en los ámbitos cubiertos por la misma.

CAPÍTULO II

RECURSOS Y CUMPLIMIENTO

Artículo 9

Defensa de derechos

1. Los Estados miembros velarán por la existencia de procedimientos judiciales o administrativos, e incluso, cuando lo consideren oportuno, procedimientos de conciliación, para exigir el cumplimiento de las obligaciones establecidas mediante la presente Directiva para todas las personas que se consideren perjudicadas por la no aplicación, en lo que a ellas se refiere, del principio de igualdad de trato, incluso tras la conclusión de la relación en la que supuestamente se ha producido la discriminación.

2. Los Estados miembros velarán por que las asociaciones, organizaciones u otras personas jurídicas que, de conformidad con los criterios establecidos en el Derecho nacional, tengan un interés legítimo en velar por el cumplimiento de lo dispuesto en la presente Directiva, puedan iniciar, en nombre del demandante o en su apoyo, y con su autorización, cualquier procedimiento judicial o administrativo previsto para exigir el cumplimiento de las obligaciones derivadas de la presente Directiva.

3. Los apartados 1 y 2 se entenderán sin perjuicio de las normas nacionales en materia de plazos de interposición de recursos en relación con el principio de igualdad de trato.

Artículo 10

Carga de la prueba

1. Los Estados miembros adoptarán con arreglo a su ordenamiento jurídico nacional, las medidas necesarias para garantizar que corresponda a la parte demandada demostrar que no ha habido vulneración del principio de igualdad de trato, cuando una persona que se considere perjudicada por la no aplicación, en lo que a ella se refiere, de dicho principio alegue, ante un tribunal u otro órgano competente, hechos que permitan presumir la existencia de discriminación directa o indirecta.

2. Lo dispuesto en el apartado 1 se entenderá sin perjuicio de que los Estados miembros adopten normas sobre la prueba más favorables a la parte demandante.

3. Lo dispuesto en el apartado 1 no se aplicará a los procedimientos penales.

4. Lo dispuesto en los apartados 1, 2 y 3 se aplicarán asimismo a toda acción judicial emprendida de conformidad con el apartado 2 del artículo 9.

5. Los Estados miembros no estarán obligados a aplicar lo dispuesto en el apartado 1 a los procedimientos en los que la instrucción de los hechos relativos al caso corresponda a los órganos jurisdiccionales o a otro órgano competente.

Artículo 11

Protección contra las represalias

Los Estados miembros adoptarán en sus ordenamientos jurídicos las medidas que resulten necesarias para proteger a los trabajadores contra el despido o cualquier otro trato desfavorable adoptado por parte del empresario como reacción ante una reclamación efectuada en la empresa o ante una acción judicial destinada a exigir el cumplimiento del principio de igualdad de trato.

Artículo 12

Divulgación de información

Los Estados miembros velarán por que las disposiciones adoptadas en virtud de la presente Directiva, además de las disposiciones correspondientes ya en vigor, sean puestas en conocimiento de las personas a las que sea aplicable, por todos los medios apropiados, por ejemplo en el lugar de trabajo, y en todo su territorio.

Artículo 13

Diálogo social

1. Los Estados miembros, con arreglo a sus respectivas tradiciones y prácticas nacionales, adoptarán las medidas adecuadas para fomentar el diálogo entre los interlocutores sociales, a fin de promover la igualdad de trato, incluido el control de las prácticas en el lugar de trabajo, convenios colectivos, códigos de conducta, y mediante la investigación o el intercambio de experiencias y buenas prácticas.

2. Siempre que ello sea coherente con sus respectivas tradiciones y prácticas nacionales, los Estados miembros fomentarán entre empresarios y trabajadores, sin perjuicio de su autonomía, la celebración al nivel apropiado, de convenios que establezcan normas antidiscriminatorias en los ámbitos mencionados en el artículo 3 que entren dentro de las competencias de la negociación colectiva. Estos convenios respetarán los requisitos mínimos establecidos en la presente Directiva y las correspondientes medidas nacionales de aplicación.

Artículo 14

Diálogo con las organizaciones no gubernamentales

Los Estados miembros fomentarán el diálogo con las correspondientes organizaciones no gubernamentales que tengan, con arreglo a las legislaciones y prácticas nacionales, un interés legítimo en contribuir a la lucha contra la discriminación basada en alguno de los motivos contemplados en al artículo 1, con el fin de promover el principio de igualdad de trato.

CAPÍTULO III

DISPOSICIONES PARTICULARES

Artículo 15

Irlanda del Norte

1. Para hacer frente a la infrarrepresentación de una de las principales comunidades religiosas en los servicios policiales de Irlanda del Norte, las diferencias de trato en materia de contratación en dichos servicios, incluido el personal de apoyo, no constituirán discriminación, en la medida en que dichas diferencias de trato estén explícitamente autorizadas por la legislación nacional.

2. Con objeto de mantener el equilibrio de las posibilidades de empleo para el cuerpo docente en Irlanda del Norte, contribuyendo al mismo tiempo a superar las divisiones históricas entre las principales comunidades religiosas existentes, las disposiciones de la presente Directiva en materia de religión o de convicciones no se aplicarán a la contratación de cuerpo docente en las escuelas de Irlanda del Norte, en la medida en que ello esté explícitamente autorizado por la legislación nacional.

CAPÍTULO IV

DISPOSICIONES FINALES

Artículo 15

Cumplimiento

Los Estados miembros adoptarán las medidas necesarias para velar por que:

a) se supriman las disposiciones legales, reglamentarias y administrativas contrarias al principio de igualdad de trato;

b) se declaren o puedan declararse nulas e inválidas o se modifiquen todas las disposiciones contrarias al principio de igualdad de trato que figuren en los contratos o convenios colectivos, en los reglamentos internos de las empresas o en los estatutos de las profesiones independientes y de las organizaciones sindicales y empresariales.

Artículo 17

Sanciones

Los Estados miembros establecerán el régimen de sanciones aplicables en caso de incumplimiento de las disposiciones nacionales adoptadas en aplicación de la presente Directiva y adoptarán todas las medidas necesarias para garantizar su cumplimiento. Dichas sanciones, que podrán incluir la indemnización a la víctima, serán efectivas, proporcionadas y disuasorias. Los Estados miembros comunicarán dichas disposiciones a la Comisión a más tardar el 2 de diciembre de 2003 y le notificarán, sin demora, cualquier modificación de aquéllas.

Artículo 18

Aplicación

Los Estados miembros adoptarán las disposiciones legales, reglamentarias y administrativas necesarias para dar cumplimiento a lo establecido en la presente Directiva a más tardar el 2 de diciembre de 2003 o bien podrán confiar su aplicación, por lo que se refiere a las disposiciones que dependen de los convenios colectivos, a los interlocutores sociales, a petición conjunta de éstos. En tal caso, los Estados miembros se asegurarán de que, a más tardar el 2 de diciembre de 2003, los interlocutores sociales hayan establecido de mutuo acuerdo las disposiciones necesarias; los Estados miembros interesados deberán tomar todas las disposiciones necesarias para poder garantizar, en todo momento, los resultados fijados por la presente Directiva. Informarán inmediatamente de ello a la Comisión.

A fin de tener en cuenta condiciones particulares, los Estados miembros podrán disponer, cuando sea necesario, de un plazo adicional de tres años a partir del 2 de diciembre de 2003, es decir, de un máximo de 6 años en total, para poner en aplicación las disposiciones de la presente Directiva relativas a la discriminación por motivos de edad y discapacidad. En este caso, lo comunicarán de inmediato a la Comisión. Los Estados miembros que opten por recurrir a este período adicional informarán anualmente a la Comisión sobre las medidas que adopten para luchar contra la discriminación por motivos de edad y discapacidad, y sobre los progresos realizados para la aplicación de la presente Directiva. La Comisión informará anualmente al Consejo.

Cuando los Estados miembros adopten dichas disposiciones, éstas harán referencia a la presente Directiva o irán acompañadas de dicha referencia en su publicación oficial. Los Estados miembros establecerán las modalidades de la mencionada referencia.

Artículo 19

Informe

1. Los Estados miembros comunicarán a la Comisión, a más tardar el 2 de diciembre de 2005 y, posteriormente, cada cinco años, toda la información necesaria para que la Comisión elabore un informe dirigido al Parlamento Europeo y al Consejo sobre la aplicación de la presente Directiva.

2. El informe de la Comisión tendrá en cuenta, cuando proceda, los puntos de vista de los interlocutores sociales y de las organizaciones no gubernamentales correspondientes. Con arreglo a la consideración sistemática del principio de igualdad de oportunidades entre el hombre y la mujer, dicho informe facilitará, entre otras cosas, una evaluación de la incidencia de las medidas tomadas sobre mujeres y hombres. A la luz de la información recibida, el informe incluirá, en caso necesario, propuestas de revisión y actualización de la presente Directiva.

Artículo 20

Entrada en vigor

La presente Directiva entrará en vigor el día de su publicación en el *Diario Oficial de las Comunidades Europeas*.

Artículo 21

Destinatarios

Los destinatarios de la presente Directiva serán los Estados miembros.

Hecho en Bruselas, el 27 de noviembre de 2000.

Por el Consejo

El Presidente

É. GUIGOU

SENTENCIA DEL TRIBUNAL DE JUSTICIA (Sala Segunda)

6 de diciembre de 2012 (*)

«Igualdad de trato en el empleo y la ocupación – Directiva 2000/78/CE – Prohibición de cualquier discriminación basada en la edad y en la discapacidad – Indemnización por despido – Plan social que prevé la reducción del importe de la indemnización por despido abonada a los trabajadores con discapacidad»

En el asunto C-152/11,

que tiene por objeto una petición de decisión prejudicial, planteada con arreglo a lo dispuesto en el artículo 267 TFUE por el Arbeitsgericht München (Alemania), mediante resolución de 17 de febrero de 2011, recibida en el Tribunal de Justicia el 28 de marzo de 2011, en el procedimiento entre

Johann Odar

y

Baxter Deutschland GmbH,

EL TRIBUNAL DE JUSTICIA (Sala Segunda),

integrado por el Sr. A. Rosas, en funciones de Presidente de la Sala Segunda, y los Sres. U. Lõhmus, A. Ó Caoimh, A. Arabadjiev (Ponente) y C.G. Fernlund, Jueces,

Abogado General: Sra. E. Sharpston;

Secretario: Sr. K. Malacek, administrador;

habiendo considerado los escritos obrantes en autos y celebrada la vista el 18 de abril de 2012;

consideradas las observaciones presentadas:

– en nombre del Sr. Odar, por los Sres. S. Saller y B. Renkl, Rechtsanwälte;

– en nombre de Baxter Deutschland GmbH, por la Sra. C. Grundmann, Rechtsanwältin;

– en nombre del Gobierno alemán, por los Sres. T. Henze, J. Möller y N. Graf Vitzthum, en calidad de agentes;

– en nombre de la Comisión Europea, por los Sres. J. Enegren y V. Kreuschitz, en calidad de agentes;

oídas las conclusiones de la Abogado General, presentadas en audiencia pública el 12 de julio de 2012;

dicta la siguiente

Sentencia

1 La petición de decisión prejudicial versa sobre la interpretación de los artículos 2 y 6, apartado 1, párrafo segundo, letra a), de la Directiva 2000/78/CE del Consejo, de 27 de noviembre de 2000, relativa al establecimiento de un marco general para la igualdad de trato en el empleo y la ocupación (DO L 303, p. 16).

2 Esta petición se ha presentado en un litigio entre el Sr. Odar y su antiguo empleador, Baxter Deutschland GmbH (en lo sucesivo, «Baxter»), en relación con el importe de la indemnización por despido que percibió de acuerdo con el plan de previsión social (en lo sucesivo, «PPS»), concertado entre dicha sociedad y su comité de empresa.

Marco jurídico

Derecho de la Unión

3 Los considerandos 8, 11, 12 y 15 de la Directiva 2000/78 están redactados en los siguientes términos:

«(8) Las Directrices para el empleo del año 2000, aprobadas por el Consejo Europeo de Helsinki los días 10 y 11 de diciembre de 1999, subrayan la necesidad de promover un mercado de trabajo favorable a la integración social, mediante la formulación de una serie coherente de políticas dirigidas a combatir la discriminación respecto de grupos como las personas con discapacidad. Subrayan asimismo la necesidad de prestar especial atención al apoyo concedido a los trabajadores de más edad, a fin de prolongar su participación en la población activa.

[…]

(11) La discriminación por motivos de religión o convicciones, discapacidad, edad u orientación sexual puede poner en peligro la consecución de los objetivos del Tratado CE, en particular el logro de un alto nivel de empleo y de protección social, la elevación del nivel y de la calidad de vida, la cohesión económica y social, la solidaridad y la libre circulación de personas.

(12) A tal fin, se deberá prohibir en toda la Comunidad cualquier discriminación directa o indirecta por motivos de religión o convicciones, discapacidad, edad u orientación sexual en los ámbitos a que se refiere la presente Directiva. […]

[…]

(15) La apreciación de los hechos de los que pueda resultar la presunción de haberse producido una discriminación directa o indirecta corresponde a los órganos judiciales u otros órganos competentes nacionales, con arreglo a las legislaciones o prácticas nacionales. Estas normas podrán disponer que la discriminación indirecta se establezca por cualquier medio, incluso a partir de pruebas estadísticas.»

4 Con arreglo a lo establecido en su artículo 1, dicha Directiva «tiene por objeto establecer un marco general para luchar contra la discriminación por motivos de religión o convicciones, de discapacidad, de edad o de orientación sexual en el ámbito del empleo y la ocupación, con el fin de que en los Estados miembros se aplique el principio de igualdad de trato.»

5 El artículo 2 de la misma Directiva, rubricado «Concepto de discriminación», establece en sus apartados 1 y 2:

«1. A efectos de la presente Directiva, se entenderá por principio de igualdad de trato la ausencia de toda discriminación directa o indirecta basada en cualquiera de los motivos mencionados en el artículo 1.

2. A efectos de lo dispuesto en el apartado 1:

a) existirá discriminación directa cuando una persona sea, haya sido o pudiera ser tratada de manera menos favorable que otra en situación análoga por alguno de los motivos mencionados en el artículo 1;

b) existirá discriminación indirecta cuando una disposición, criterio o práctica aparentemente neutros pueda ocasionar una desventaja particular a personas con una religión o convicción, con una discapacidad, de una edad, o con una orientación sexual determinadas, respecto de otras personas, salvo que:

i) dicha disposición, criterio o práctica pueda justificarse objetivamente con una finalidad legítima y salvo que los medios para la consecución de esta finalidad sean adecuados y necesarios; o que

ii) respecto de las personas con una discapacidad determinada, el empresario o cualquier persona u organización a la que se aplique lo dispuesto en la presente Directiva, esté obligado, en virtud de la legislación nacional, a adoptar medidas adecuadas de conformidad con los principios contemplados en el artículo 5 para eliminar las desventajas que supone esa disposición, ese criterio o esa práctica.»

6 El artículo 3 de la Directiva 2000/78, rubricado «Ámbito de aplicación», establece lo siguiente en su apartado 1:

«Dentro del límite de las competencias conferidas a la Comunidad, la presente Directiva se aplicará a todas las personas, por lo que respecta tanto al sector público como al privado, incluidos los organismos públicos, en relación con:

[…]

c) las condiciones de empleo y trabajo, incluidas las de despido y remuneración;

[…]»

7 El artículo 6 de la misma Directiva, bajo la rúbrica «Justificación de diferencias de trato por motivos de edad», establece en su apartado 1:

«No obstante lo dispuesto en el apartado 2 del artículo 2, los Estados miembros podrán disponer que las diferencias de trato por motivos de edad no constituirán discriminación si están justificadas objetiva y razonablemente, en el marco del Derecho nacional, por una finalidad legítima, incluidos los objetivos legítimos de las políticas de empleo, del mercado de trabajo y de la formación profesional, y si los medios para lograr este objetivo son adecuados y necesarios.

Dichas diferencias de trato podrán incluir, en particular:

a) el establecimiento de condiciones especiales de acceso al empleo y a la formación profesional, de empleo y de trabajo, incluidas las condiciones de despido y [remuneración], (1) para los jóvenes, los trabajadores de mayor edad y los que tengan personas a su cargo, con vistas a favorecer su inserción profesional o garantizar la protección de dichas personas;

[…]»

8 El artículo 16 de la Directiva dispone lo siguiente:

«Los Estados miembros adoptarán las medidas necesarias para velar por que:

a) se supriman las disposiciones legales, reglamentarias y administrativas contrarias al principio de igualdad de trato;

b) se declaren o puedan declararse nulas e inválidas o se modifiquen las disposiciones contrarias al principio de igualdad de trato que figuren en los contratos o convenios colectivos, en los reglamentos internos de las empresas o en los estatutos de las profesiones independientes y de las organizaciones sindicales y empresariales […]»

Derecho alemán

Legislación alemana

9 La adaptación del Derecho alemán a la Directiva 2000/78 se llevó a efecto en virtud de la Allgemeines Gleichbehandlungsgesetz (Ley general de igualdad de trato), de 14 de agosto de 2006 (BGBl. I, p. 1897; en lo sucesivo, «AGG»). A tenor del artículo 1 de dicha Ley, que lleva como epígrafe «Objetivo de la Ley»:

«El objetivo de la presente Ley es impedir o eliminar toda discriminación por motivos de raza u origen étnico, sexo, religión o creencias, discapacidad, edad u orientación sexual.»

10 El artículo 10 de la AGG, que lleva como epígrafe «Admisibilidad de la diferencia de trato por motivos de edad», establece lo siguiente:

«No obstante lo dispuesto en el artículo 8, también será admisible una diferencia de trato por motivos de edad cuando un objetivo legítimo la justifique de manera objetiva y razonable. Los medios aplicados para lograr dicho objetivo han de ser razonables y necesarios. Tales diferencias de trato pueden comprender, en particular:

[…]

6. Diferentes prestaciones en planes sociales en el sentido de la Betriebsverfassungsgesetz (Ley sobre la organización de las empresas), cuando los interlocutores en la empresa han adoptado un régimen de indemnizaciones que establece una graduación en función de la edad o de la antigüedad en que, dando una preponderancia relativamente marcada a la edad, se han tenido en cuenta de forma apreciable las oportunidades en el mercado laboral condicionadas por la edad, o cuando se ha excluido de las prestaciones del plan social a los empleados que están económicamente cubiertos porque, tras percibir, en su caso, la prestación por desempleo, tienen derecho a una pensión de jubilación.»

11 Los artículos 111 a 113 de la Betriebsverfassungsgesetz, en su versión de 25 de septiembre de 2001

(BGBl. 2001 I, p. 2518) exigen que se adopten medidas para mitigar las consecuencias adversas ocasionadas a los trabajadores a raíz de una reestructuración de la empresa. Los empresarios y comités de empresa tienen la obligación de acordar planes sociales a estos efectos.

12 El artículo 112 de la Betriebsverfassungsgesetz, rubricado «Acuerdo sobre las modificaciones estructurales en la empresa y plan social», prevé lo siguiente en su apartado 1:

«Si la dirección y el comité de empresa llegan a un acuerdo para equilibrar los intereses respectivos cuando se aborde una modificación estructural prevista para la empresa, el acuerdo se formalizará por escrito y se firmará por las dos partes. De igual modo se procederá en el caso del acuerdo que permita compensar o mitigar las consecuencias económicas para los trabajadores que resulten de la modificación prevista en la empresa (plan social). El plan social producirá los efectos de un acuerdo de empresa […]»

13 De conformidad con el artículo 127 del Código social, que figura en el libro III de éste, el abono de las prestaciones ordinarias por desempleo se efectúa por un tiempo limitado, determinado según la edad del trabajador y el tiempo cotizado. Un trabajador tiene derecho a una prestación por desempleo correspondiente a 12 meses de salario antes de cumplir 50 años, a 15 meses después de cumplir 50 años, a 18 meses después de cumplir 55 años y a 24 meses después de cumplir 58 años.

El plan de previsión social y el plan social complementario

14 Con fecha de 30 de abril de 2004, Baxter suscribió un PPS con el comité central de la empresa. El artículo 6, apartado 1, puntos 1.1 a 1.5, de dicho plan está redactado en los siguientes términos:

«1. Indemnización por extinción de la relación laboral (salvo casos de "jubilación anticipada")

1.1. Los trabajadores de la empresa a los que, a pesar de todos los esfuerzos realizados, no pueda ofrecerse un puesto de trabajo aceptable en la empresa Baxter [establecida en] Alemania, cuyo contrato no pueda resolverse anticipadamente con arreglo a lo dispuesto en el artículo 5, y que dejen la empresa (ya sea porque han sido despedidos por causas económicas, ya sea porque se ha puesto fin a su relación de trabajo de común acuerdo entre la empresa y el trabajador) percibirán una indemnización por la extinción de la relación de trabajo cuyo importe se calculará en euros, de acuerdo con la siguiente fórmula:

Indemnización = factor de edad x antigüedad en la empresa x salario mensual bruto (en lo sucesivo, "fórmula general")

1.2. Tabla según el factor de edad

Edad	Factor de edad	Edad	Factor de edad	Edad	Factor de edad	Edad	Factor de edad	Edad	Factor de edad
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. Para los trabajadores mayores de 54 años que sean despedidos por causas económicas o que resuelvan la relación laboral de mutuo acuerdo entre el trabajador y la empresa, la indemnización calculada con arreglo a lo dispuesto en el artículo 6, apartado 1, punto 1.1, se comparará con la obtenida con arreglo la siguiente fórmula:

Meses restantes hasta el momento más temprano posible de jubilación x 0,85 x salario mensual bruto (en lo sucesivo, "fórmula especial").

En caso de que la indemnización calculada [según la fórmula general] sea mayor que la indemnización calculada [según la fórmula especial], se abonará el menor de los dos importes, si bien dicho importe no podrá ser inferior a la mitad de [la indemnización calculada según la fórmula general].

En caso de que el resultado de la indemnización calculada [según la fórmula especial] sea igual a cero, se abonará la mitad de la indemnización calculada [según la fórmula general].»

15 El 13 de marzo de 2008, Baxter suscribió con el comité de empresa del grupo un plan social complementario (en lo sucesivo, el «PSC»). El artículo 7 de dicho plan, que se refiere a las indemnizaciones, es del siguiente tenor:

«Los trabajadores a los que se aplica el presente [PPS] y cuyo contrato de trabajo finalice debido a las modificaciones en la empresa percibirán las siguientes prestaciones:

7.1. Indemnización: los trabajadores percibirán una sola indemnización de acuerdo con lo previsto en el artículo 6, apartado 1, del [PPS].

7.2 Aclaración: Las partes acuerdan la siguiente aclaración del artículo 6, punto 1.5 del [PPS]: Se entenderá por momento más temprano posible de jubilación el momento en que el trabajador tiene por primera vez derecho a la pensión legal de jubilación, incluso si se trata de una pensión reducida por jubilación anticipada.

[…]»

Litigio principal y cuestiones prejudiciales

16 El Sr. Odar, demandante en el litigio principal, es un ciudadano austriaco nacido en 1950. Está casado, tiene dos hijos a su cargo y se le ha reconocido una discapacidad grave con un grado del 50 %. El Sr. Odar ocupaba un puesto de trabajo desde el 17 de abril de 1979 en Baxter y en la sociedad a la que sucedió Baxter. Al término de su relación laboral, desempeñaba las funciones de director de marketing.

17 Baxter puso fin a la relación de trabajo del Sr. Odar mediante carta de 25 de abril de 2008 y le propuso proseguir la citada relación en la sede de Munich-Unterschleißheim (Alemania). El Sr. Odar aceptó esta proposición y posteriormente decidió renunciar con fecha de 31 de diciembre de 2009, después de que las partes convinieran que la renuncia no menoscabaría su derecho a una indemnización.

18 Como se desprende de la resolución de remisión, el Sr. Odar puede invocar ante el régimen alemán de seguro de vejez el derecho a una pensión de jubilación ordinaria a la edad de 65 años, es decir, a partir del 1 de agosto de 2015, así como el derecho a obtener una pensión por discapacidad grave al cumplir 60 años, esto es, a partir del 1 de agosto de 2010.

19 Baxter abonó al Sr. Odar una indemnización con arreglo al PPS por un importe bruto de 308.253,31 euros. Aplicando la fórmula general, la indemnización que se le podría haber abonado se habría elevado a 616.506,63 euros brutos. Basándose, de acuerdo con la fórmula especial, en el supuesto de una jubilación en el momento más temprano posible, es decir, el 1 de agosto de 2010, Baxter calculó una indemnización que ascendía a 197.199,09 euros brutos. Por lo tanto, le abonó el importe mínimo garantizado, que corresponde a la mitad de 616.506,63 euros.

20 Mediante escrito de 30 de junio de 2010, el Sr. Odar interpuso un recurso ante el Arbeitsgericht München (Tribunal de lo Social de Munich), mediante el que solicitaba que se condenara a Baxter a abonarle una indemnización adicional por importe bruto de 271.982,22 euros. Esta suma equivale a la diferencia entre la indemnización que se le abonó y la suma que habría cobrado, con la misma antigüedad en la empresa, si hubiera tenido 54 años cuando finalizó su relación de trabajo con ella. El Sr. Odar considera que el cálculo de la indemnización establecido en el PPS le perjudica debido a su edad y a su discapacidad.

21 El órgano jurisdiccional remitente se pregunta sobre la compatibilidad con la Directiva 2000/78 del artículo 10, tercera frase, punto 6, de la AGG y de la norma contenida en el artículo 6, apartado 1, punto 1.5, del PPS. Dicho órgano señala que, si la primera de estas dos disposiciones nacionales no es conforme con el Derecho de la Unión y, por consiguiente, no es aplicable, procederá estimar el recurso interpuesto ante él por el Sr. Odar. En efecto, la segunda disposición mencionada no puede basarse en una norma incompatible con la citada Directiva.

22 En tales circunstancias, el Arbeitsgericht München decidió suspender el procedimiento y plantear al Tribunal de Justicia las siguientes cuestiones prejudiciales:

«1) ¿Vulnera el principio de no discriminación por motivos de edad conforme a los artículos 1 y 16 de la Directiva [2000/78] una normativa nacional que dispone que puede admitirse un trato diferenciado por razón de la edad si los interlocutores en la empresa, en el marco de un régimen profesional de seguridad social, han excluido de las prestaciones del plan social a los trabajadores que están económicamente cubiertos porque, tras percibir, en su caso, la prestación por desempleo, tienen derecho a una pensión de jubilación, o está justificada esa diferencia de trato en virtud del artículo 6, apartado 1, [párrafo segundo] letra a), de [esta Directiva]?

2) ¿Vulnera el principio de no discriminación por motivos de discapacidad conforme a los artículos 1 y 16 de la Directiva [2000/78] una normativa nacional que dispone que puede admitirse un trato diferenciado por razón de la edad si, en el marco de un régimen profesional de seguridad social, el empresario y los trabajadores han excluido de las prestaciones del plan social a los trabajadores que están económicamente cubiertos porque, tras percibir, en su caso, la prestación por desempleo, tienen derecho a una pensión de jubilación?

3) ¿Vulnera el principio de no discriminación por motivos de edad conforme a los artículos 1 y 16 de la Directiva [2000/78] una normativa de un régimen profesional de seguridad social que dispone que para los trabajadores mayores de 54 años despedidos por causas económicas se efectúe un cálculo alternativo de la indemnización sobre la base del momento de jubilación lo más cercano posible y, en comparación con el método general de cálculo, vinculado en particular a la antigüedad en la empresa, se ha de pagar la indemnización de menor cuantía, si bien, al menos, la mitad de la indemnización que correspondería con arreglo al método general, o está justificada esa diferencia de trato en virtud del artículo 6, apartado 1, [párrafo segundo], letra a), de [esta Directiva]?

4) ¿Vulnera el principio de no discriminación por motivos de discapacidad conforme a los artículos 1 y 16 de la Directiva [2000/78] una normativa de un régimen profesional de seguridad social que dispone que para los trabajadores mayores de 54 años despedidos por causas económicas se efectúe un cálculo alternativo de la indemnización sobre la base del momento de jubilación lo más cercano posible y, en comparación con el método general de cálculo, vinculado en particular a la antigüedad en la empresa, se ha de pagar la indemnización de menor cuantía, si bien, al menos, la mitad de la indemnización que correspondería con arreglo al método general, habida cuenta de que el método alternativo atiende a una pensión de jubilación por discapacidad?»

Sobre las cuestiones prejudiciales

Sobre las dos primeras cuestiones

23 Mediante sus dos primeras cuestiones, que procede examinar conjuntamente, el órgano jurisdiccional remitente pregunta, en esencia, si los artículos 2, apartado 2, y 6, apartado 1, de la Directiva 2000/78 deben interpretarse en el sentido de que se oponen a una normativa nacional que establece que una diferencia de trato basada en la edad puede ser lícita cuando, en un régimen de previsión social de una empresa, los interlocutores han excluido del beneficio de las prestaciones del plan social a trabajadores que disponen de protección económica debido a que tienen derecho a una pensión de jubilación, en su caso después de haber recibido prestaciones por desempleo.

24 A este respecto, ha de recordarse, de inmediato, la jurisprudencia reiterada del Tribunal de Justicia según la cual las cuestiones sobre la interpretación del Derecho comunitario planteadas por el juez nacional en el marco fáctico y normativo definido bajo su responsabilidad y cuya exactitud no corresponde verificar al Tribunal de Justicia disfrutan de una presunción de pertinencia. La negativa del Tribunal de Justicia a pronunciarse sobre una cuestión planteada por un órgano jurisdiccional nacional sólo es posible cuando resulta evidente que la interpretación solicitada del Derecho de la Unión no tiene relación alguna con la realidad o con el objeto del litigio principal, cuando el problema es de naturaleza hipotética o también cuando el Tribunal de Justicia no dispone de los elementos de hecho o de Derecho necesarios para responder de manera útil a las cuestiones planteadas (véanse, en particular, las sentencias de 22 de junio de 2010, Melki y Abdeli, C-188/10 y C-189/10, Rec.

p. I-5667, apartado 27; de 29 de marzo de 2012, SAG ELV Slovensko y otros, C-599/10, Rec. p. I-0000, apartado 15, y de 12 de julio de 2012, VALE Építési kft, C-378/10, Rec. p. I-0000, apartado 18).

25 Es preciso señalar que tal es precisamente el caso en este asunto.

26 Efectivamente, las dos primeras cuestiones se basan en la premisa, contemplada en el artículo 10, tercera frase, punto 6, de la AGG, de que los interlocutores de la empresa excluyan del beneficio de las prestaciones del plan social a los trabajadores que dispongan de una protección económica por tener derecho a una pensión de jubilación, en su caso después de haber recibido prestaciones por desempleo.

27 Sin embargo, nada en la resolución de remisión indica que el litigio principal se refiera a tal supuesto. Por el contrario, el órgano jurisdiccional remitente ha señalado que, en contraste con la facultad prevista en dicho precepto de la AGG, el PPS no permite excluir del beneficio de la indemnización por despido a los trabajadores próximos a la jubilación y tampoco prevé que se tenga en cuenta el derecho del trabajador a las prestaciones por desempleo. Como se desprende de los autos, el Sr. Odar obtuvo una indemnización por despido, pero ésta se redujo de conformidad con lo señalado en el articulo 6, apartado 1, punto 1.5, del PPS, interpretado conjuntamente con el artículo 7, punto 7.2, del PSC, lo cual impugna mediante su recurso ante dicho órgano jurisdiccional.

28 Por lo tanto, se advierte de manera manifiesta que la cuestión de la compatibilidad del artículo 10, tercera frase, punto 6, de la AGG con la Directiva 2000/78 tiene carácter abstracto y puramente hipotético, considerado el objeto del litigio principal.

29 En estas circunstancias, no procede responder a las cuestiones primera y segunda planteadas por el órgano jurisdiccional remitente.

Sobre la tercera cuestión prejudicial

30 Mediante su tercera cuestión, el órgano jurisdiccional remitente pregunta, en esencia, si los artículos 2, apartado 2, y 6, apartado 1, de la Directiva 2000/78 deben interpretarse en el sentido de que se oponen a una normativa contenida en un régimen de previsión social de una empresa que establece, para sus trabajadores de más de 54 años que son despedidos por causas económicas, que el importe de la indemnización a la que tienen derecho se calcule de acuerdo con la fecha más temprana posible de jubilación, contrariamente a lo previsto en el método general de cálculo, según el cual dicha indemnización se basa en particular en la antigüedad en la empresa, de tal modo que la indemnización abonada a esos trabajadores es inferior a la indemnización que resulta de aplicar ese método general, aunque es al menos igual a la mitad de ésta última.

31 En primer lugar, respecto a la cuestión acerca de si la normativa nacional en cuestión en el litigio principal está comprendida en el ámbito de aplicación de la Directiva 2000/78, ha de señalarse que, tanto del título y de los considerandos como del contenido y de la finalidad de dicha Directiva, se desprende que ésta tiene por objeto establecer un marco general para garantizar a cualquier persona la igualdad de trato «en el empleo y la ocupación», ofreciéndole una protección eficaz contra las discriminaciones basadas en alguno de los motivos previstos en el artículo 1 de dicha Directiva, entre los que figura la edad.

32 Más concretamente, se desprende del artículo 3, apartado 1, letra c), de la Directiva 2000/78 que éste se aplica, dentro del límite de las competencias conferidas a la Unión Europea, «a todas las

personas, por lo que respecta tanto al sector público como al privado, incluidos los organismos públicos», en relación, en particular, con «las condiciones de empleo y trabajo, incluidas las de despido y remuneración».

33 Al prever la reducción del importe de la indemnización por despido para los trabajadores de más de 54 años, el artículo 6, apartado 1, punto 1.5, del PPS afecta a las condiciones de despido de esos trabajadores, en el sentido de lo dispuesto en el artículo 3, apartado 1, letra c), de la Directiva 2000/78. Por lo tanto, un precepto nacional de ese tipo se encuentra dentro del ámbito de aplicación de dicha Directiva.

34 Como se desprende de la jurisprudencia reiterada del Tribunal de Justicia, al adoptar medidas comprendidas dentro del ámbito de aplicación de la Directiva 2000/78, que concreta en materia de empleo y ocupación el principio de no discriminación por razón de la edad, los interlocutores sociales deben actuar con observancia de dicha Directiva (sentencias de 13 de septiembre de 2011, Prigge y otros, C-447/09, Rec. p. I-0000, apartado 48, y de 7 de junio de 2012, Tyrolean Airways Tiroler Luftfahrt, C-132/11, Rec. p. I-0000, apartado 22).

35 Respecto a la cuestión acerca de si la normativa controvertida en el litigio principal contiene una diferencia de trato basada en la edad, en el sentido de lo dispuesto en el artículo 2, apartado 1, de la Directiva 2000/78, procede señalar que el artículo 6, apartado 1, punto 1.5, del PPS –respecto a los trabajadores que han sobrepasado la edad de 54 años y son despedidos por causas económicas o para los que ha terminado la relación de trabajo de común acuerdo entre la empresa y el trabajador– tiene el efecto de que la indemnización calculada de conformidad con la fórmula general se compara a la obtenida de acuerdo con la fórmula especial. El menor de esos dos importes se entrega al trabajador afectado, el cual tiene, no obstante, la garantía de percibir un importe equivalente a la mitad del que resulta de la aplicación de la fórmula general.

36 De conformidad con esos preceptos, se abonó al Sr. Odar un importe de 308.357,10 euros, equivalentes a la mitad de la indemnización que resulta de aplicar la fórmula general. Si hubiera tenido 54 años en el momento de su despido, el Sr. Odar habría tenido derecho, siendo las demás circunstancias iguales, a una indemnización que habría ascendido a 580.357,10 euros. El hecho de tener más de 54 años, por lo tanto, determinó la aplicación del método comparativo y el abono de un importe inferior al que habría tenido derecho a obtener si no hubiera superado esa edad. Por lo tanto, se evidencia que el método de cálculo establecido en el PPS en caso de despido por causas económicas implica una diferencia de trato basada directamente en la edad.

37 Procede examinar si dicha diferencia de trato puede estar justificada con arreglo a lo dispuesto en el artículo 6, apartado 1, de la Directiva 2000/78. Este precepto dispone, en efecto, que una diferencia de trato basada en la edad no constituirá discriminación si está justificada objetiva y razonablemente, en el marco del Derecho nacional, por una finalidad legítima, incluidos los objetivos legítimos de las políticas de empleo, del mercado de trabajo y de la formación profesional, y si los medios para lograr este objetivo son adecuados y necesarios.

38 Respecto al objetivo de las medidas nacionales controvertidas en el litigio principal, el órgano jurisdiccional remitente observa que los términos del artículo 6, apartado 1, punto 1.5, del PPS no proporcionan información alguna relativa a los objetivos perseguidos. No obstante, se desprende de los autos remitidos al Tribunal de Justicia que estos últimos se confunden con el objetivo de la norma contenida en el artículo 10, tercera frase, punto 6, de la AGG. Como señala el órgano jurisdiccional remitente, las normas específicas que se adopten con arreglo al plan social por los interlocutores sociales deben promover efectivamente el objetivo contemplado en ese precepto de la AGG, y no

menoscabar de forma desproporcionada los intereses de los grupos de edad desfavorecidos.

39 De acuerdo con el artículo 112 de la Betriebsverfassungsgesetz, en su versión de 25 de septiembre de 2001, el sentido y la finalidad de un plan social consisten en compensar o mitigar las consecuencias de las modificaciones estructurales en la empresa afectada. En sus observaciones escritas, el Gobierno alemán ha precisado a este respecto que las indemnizaciones abonadas con arreglo a un plan de previsión social no tienen por objeto específico facilitar la reanudación de la vida profesional.

40 Una diferenciación basada en la edad entre las indemnizaciones abonadas con arreglo a un plan de previsión social persigue, a su entender, un objetivo basado en la apreciación de que, puesto que se producen desventajas económicas en el futuro, algunos trabajadores que no se verán expuestos a dichas desventajas a raíz de la pérdida de su empleo, o que sólo se verán expuestos a ellas de forma atenuada en comparación con otros, pueden ser excluidos de esos derechos de forma general.

41 El Gobierno alemán señala a este respecto que un plan social debe prever un reparto de medios limitados, de manera que pueda cumplir su «función de transición» respecto al conjunto de los trabajadores y no sólo respecto a los más mayores de entre éstos. Un plan como ese, en principio, no puede llevar a poner en peligro la supervivencia de la empresa o los puestos de trabajo restantes. El artículo 10, tercera frase, punto 6, de la AGG permite igualmente, en su opinión, limitar las posibilidades de abuso consistentes en que un trabajador obtenga una indemnización destinada a apoyarle en la búsqueda de un nuevo empleo cuando se va a jubilar.

42 Dicha disposición nacional, por lo tanto, tiene por objeto la concesión de una compensación para el futuro, la protección de los trabajadores más jóvenes y la ayuda a su reincorporación al trabajo, teniendo en cuenta, en todo caso, la necesidad de un reparto justo de los recursos económicos limitados de un plan social.

43 Tales objetivos pueden justificar, por excepción al principio de interdicción de las discriminaciones basadas en la edad, diferencias de trato ligadas, en particular, «al establecimiento de condiciones especiales de empleo y de trabajo, incluidas las condiciones de despido y remuneración, para los jóvenes, los trabajadores de mayor edad […], con vistas a garantizar su inserción profesional o garantizar la protección de dichas personas», en el sentido de lo dispuesto en el artículo 6, apartado 1, párrafo segundo, de la Directiva 2000/78.

44 Además, debe considerarse legítimo el objetivo de evitar que dicha indemnización beneficie a personas que no buscan un nuevo empleo sino que van a percibir unos ingresos de sustitución en forma de pensión de jubilación (véase, en este sentido, la sentencia de 12 de octubre de 2010, Ingeniørforeningen i Danmark, C-499/08, Rec. p. I-9343, apartado 44).

45 En estas circunstancias, procede admitir que objetivos como los perseguidos por el artículo 6, apartado 1, punto 1.5, del PPS, en principio, deben ser considerados aptos para justificar «objetiva y razonablemente», «en el marco del [D]erecho nacional», una diferencia de trato basada en la edad, como prevé el artículo 6, apartado 1, párrafo primero, de la Directiva 2000/78.

46 Además, es necesario comprobar si los medios utilizados para realizar esos objetivos son adecuados y necesarios, y si no exceden lo de requerido para alcanzar el objetivo perseguido.

47 Procede recordar, a este respecto el amplio margen de apreciación reconocido a los Estados miembros y, en su caso, a los interlocutores sociales a nivel nacional no sólo en lo que atañe a la opción de perseguir un objetivo determinado en materia de política social y de empleo, sino también en

la definición de las medidas idóneas para alcanzarlo (véase, en este sentido, la sentencia de 5 de julio de 2012, Hörnfeldt, C-141/11, Rec. p. I-0000, apartado 32).

48 Respecto al carácter apropiado de los preceptos del PPS y del PSC en cuestión, procede señalar que la reducción del importe de la indemnización por despido concedida a los trabajadores que, en la fecha de su despido, gozan de una cobertura económica, no parece irrazonable atendida la finalidad de dichos planes sociales, consistente en aportar una mayor protección a los trabajadores para los que la transición a un nuevo empleo resulta difícil debido a sus limitados recursos económicos.

49 Por lo tanto, ha de considerarse que un precepto como el artículo 6, apartado 1, punto 1.5, del PPS no es manifiestamente inadecuado para alcanzar el objetivo legítimo de política de empleo que persigue el legislador alemán.

50 En cuanto al carácter necesario de estas disposiciones, procede señalar, ciertamente, que el artículo 7, punto 7.2, del PSC establece que la fecha más temprana posible de jubilación, a efectos de lo dispuesto en el artículo 6, apartado 1, punto 1.5, del PPS, corresponde a la fecha en que el trabajador puede obtener una pensión de jubilación, aun cuando se trate de una pensión que conlleve una disminución de los derechos por el hecho de que se haya accedido a ella de forma anticipada.

51 No obstante, como se ha señalado en el apartado 27 de la presente sentencia, el PPS sólo prevé la reducción del importe de la indemnización por despido concedida a esos trabajadores.

52 A este respecto, ha de observarse, por una parte, que el artículo 6, punto 1.5, del PPS establece que la indemnización concedida al trabajador afectado corresponde al importe, calculado de acuerdo con la fórmula general o de acuerdo con la fórmula especial, que es menos elevado, si bien el beneficiario siempre tiene la garantía de que el importe que se le abone efectivamente será al menos igual a la mitad del obtenido al aplicar la fórmula general. Además, como se desprende de la tabla reproducida en el apartado 14 de la presente sentencia, el factor de la edad, que es uno de los coeficientes de la fórmula general y de la fórmula especial, aumenta progresivamente a partir de los 18 años (0,35) hasta los 57 (1,70). Sólo a partir de los 59 años comienza a reducirse este factor (1,50) para alcanzar su valor mínimo a la edad de 64 años (0,30). Por otra parte, como establece el párrafo tercero de ese precepto, aun cuando la aplicación de la fórmula especial conduzca a un resultado igual a cero, el trabajador afectado tendrá derecho al abono de una indemnización igual a la mitad de la calculada de conformidad con la fórmula general.

53 Atendiendo a las apreciaciones del órgano jurisdiccional remitente, procede señalar que el artículo 6, apartado 1, punto 1.5, del PPS es fruto de un acuerdo negociado entre los representantes de los trabajadores y de los empresarios, en virtud del cual ambos ejercitaron el derecho a la negociación colectiva que se les reconoce en tanto que derecho fundamental. El hecho de encomendar así a los interlocutores sociales el cometido de definir un equilibrio entre sus respectivos intereses ofrece una flexibilidad nada desdeñable, al poder cada una de las partes, en su caso, denunciar el acuerdo (véase, en este sentido, la sentencia de 12 de octubre de 2010, Rosenbladt, C-45/09, Rec. p. I-9391, apartado 67).

54 Habida cuenta de las anteriores consideraciones, procede responder a la tercera cuestión que los artículos 2, apartado 2, y 6, apartado 1, de la Directiva 2000/78 deben interpretarse en el sentido de que no se oponen a una normativa encuadrada en el régimen de previsión social de una empresa que establece, respecto a sus trabajadores de más de 54 años y que son despedidos por causas económicas, que el importe de la indemnización a la que tienen derecho se calcule de acuerdo con la fecha más temprana posible de jubilación, contrariamente a lo previsto en el método general de

cálculo, según el cual dicha indemnización se basa, en particular, en la antigüedad en la empresa, de tal modo que la indemnización abonada a los citados trabajadores es inferior a la indemnización que resulta de aplicar ese método general, aunque es al menos igual a la mitad de ésta última.

Sobre la cuarta cuestión

55 Mediante su cuarta cuestión, el órgano jurisdiccional remitente pregunta, en esencia, si el artículo 2, apartado 2, de la Directiva 2000/78, debe interpretarse en el sentido de que se opone a una normativa encuadrada en un régimen de previsión social de una empresa que establece, respecto a sus trabajadores de más de 54 años y que son despedidos por causas económicas, que el importe de la indemnización a la que tienen derecho se calcule de acuerdo con la fecha más temprana posible de jubilación, contrariamente a lo previsto en el método de cálculo general, según el cual tal indemnización se basa, en particular, en la antigüedad en la empresa, de modo que la indemnización abonada es inferior a la indemnización que resulta de aplicar ese método general, aunque es al menos igual a la mitad de ésta última, y que toma en consideración, cuando se aplica ese otro método de cálculo, la posibilidad de obtener una pensión de jubilación anticipada por razón de una discapacidad.

56 En primer lugar, respecto a la cuestión acerca de si el artículo 6, apartado 1, punto 1.5, del PPS, interpretado conjuntamente con el artículo 7, punto 7.2, del PSC, contiene una diferencia de trato basada en la discapacidad, en el sentido de lo dispuesto en el artículo 2, apartado 1, de la Directiva 2000/78, procede señalar que el importe de la indemnización por despido abonado al trabajador afectado se reduce, de conformidad con dicho artículo 7, punto 7.2, teniendo en cuenta la fecha más temprana posible de jubilación. Ahora bien, la concesión de una pensión de jubilación se supedita a un requisito de edad mínima y esta edad es diferente en el caso de las personas con discapacidad grave.

57 Como ha señalado la Abogado General en el punto 50 de sus conclusiones, el primer elemento del método de cálculo según la fórmula especial siempre será más bajo para un trabajador gravemente discapacitado que para un trabajador sin discapacidad de la misma edad. En el caso de autos, el hecho de que el cálculo se base en la edad de jubilación, de manera aparentemente neutra, da como resultado que los trabajadores con grave discapacidad, que pueden jubilarse a una edad anterior, esto es, a los 60 años y no a los 63 como es el caso de los trabajadores sin discapacidad, obtienen una indemnización por despido de menor cuantía, y ello debido a su discapacidad grave.

58 Como se desprende de las observaciones del Sr. Odar y como admitió Baxter en la vista, el importe de la indemnización por despido que aquel habría obtenido, si no padeciera una discapacidad grave, habría ascendido a 570.839,47 euros.

59 De ello se deriva que el artículo 6, apartado 1, punto 1.5 del PPS, interpretado conjuntamente con el artículo 7, punto 7.2, del PSC, cuya aplicación tiene el efecto de que el importe de la indemnización por despido abonada a un trabajador con discapacidad grave es inferior al obtenido por un trabajador sin discapacidad, implica una diferencia de trato basada indirectamente en el criterio de la discapacidad, en el sentido de lo dispuesto en el artículo 1, en relación con el artículo 2, apartado 2, letra a), de la Directiva 2000/78.

60 En segundo lugar, procede examinar si, en un contexto como el regulado por el precepto controvertido en el litigio principal, los trabajadores que padecen una discapacidad grave y se encuentran en un intervalo de edad próximo a la jubilación están en una situación comparable –en el sentido de lo dispuesto en el artículo 2, apartado 2, letra a), de la Directiva 78/2000– a la de los trabajadores sin discapacidad que se encuentran en el mismo intervalo de edad. El Gobierno alemán, en efecto, alega que estas dos categorías de trabajadores están en situaciones de partida objetivamente

diferentes por lo que se refiere a su derecho a recibir una pensión.

61 Ha de ponerse de relieve, a este respecto, que los trabajadores comprendidos en intervalos de edad próximos a la jubilación están en una situación comparable a la de los otros trabajadores afectados por el plan social, ya que su relación de trabajo con la empresa cesa por el mismo motivo y en las mismas condiciones.

62 En efecto, la ventaja concedida a los trabajadores con discapacidad grave, que consiste en poder obtener una pensión de jubilación a partir de una edad tres años inferior a la fijada para los trabajadores sin discapacidad, no puede colocarlos en una situación específica con respecto a estos trabajadores.

63 De conformidad con el artículo 2, apartado 2, letra b), de la Directiva 2000/78, procede examinar si la diferencia de trato existente entre estos dos tipos de trabajadores está objetiva y razonablemente justificada por una finalidad legítima, si los medios para la consecución de esa finalidad son adecuados y si no exceden de lo necesario para alcanzar la finalidad perseguida por el legislador alemán.

64 A este respecto, por una parte, ya se ha señalado, en los apartados 43 a 45 de la presente sentencia, que objetivos como los perseguidos por el artículo 6, apartado 1, punto 1.5, del PPS deben, en principio, considerarse aptos para justificar «objetiva y razonablemente», «en el marco del Derecho nacional», como establece el artículo 6, apartado 1, párrafo primero, de la Directiva 2000/78, una diferencia de trato basada en la edad. Por otra parte, como se desprende de lo dicho en el apartado 49 de la presente sentencia, un precepto nacional como ese no parece manifiestamente inadecuado para alcanzar la finalidad legítima de una política de empleo como la que persigue el legislador alemán.

65 Con objeto de examinar si el artículo 6, apartado 1, punto 1.5, del PPS, interpretado conjuntamente con el artículo 7, punto 7.2, del PSC, excede de lo necesario para alcanzar las finalidades perseguidas, procede situar ese precepto en el contexto en que se inscribe y tomar en consideración el perjuicio que puede ocasionar a las personas a que se refiere.

66 Baxter y el Gobierno alemán alegan, en esencia, que la reducción del importe de la indemnización por despido obtenida por el Sr. Odar está justificada por la ventaja concedida a los trabajadores con grave discapacidad, que consiste en poder obtener la pensión de jubilación a partir de una edad tres años inferior a la fijada para los trabajadores sin discapacidad.

67 Sin embargo, este razonamiento no puede admitirse. En efecto, por una parte, hay discriminación basada en la discapacidad cuando la medida controvertida no está justificada por razones objetivas ajenas a tal discriminación (véase, en este sentido, y por analogía, las sentencias de 6 de abril de 2000, Jørgensen, C-226/98, Rec. p. I-2447, apartado 29; de 23 de octubre de 2003, Schönheit y Becker, C-4/02 y C-5/02, Rec. p. I-12575, apartado 67, y de 12 de octubre de 2004, Wippel, C-313/02, Rec. p. I-9483, apartado 43). Por otra parte, tal razonamiento comprometería la eficacia de las disposiciones nacionales que establecen dicha ventaja, cuya razón de ser es, en general, tener en cuenta las dificultades y los riesgos particulares que encuentran los trabajadores afectados por una discapacidad grave.

68 Se evidencia así que los interlocutores sociales, al perseguir la finalidad legítima de un reparto equitativo de los recursos económicos limitados afectados a un plan social y proporcionado con las necesidades de los trabajadores afectados, no tuvieron en cuenta datos relevantes que se refieren, en particular, a los trabajadores con discapacidad grave.

69 En efecto, ignoraron tanto el riesgo que corren las personas afectadas por una discapacidad grave, que en general encuentran más dificultades que los trabajadores sin discapacidad para reincorporarse al mercado de trabajo, como el hecho de que ese riesgo se incrementa a medida que se aproximan a la edad de jubilación. Ahora bien, esas personas tienen necesidades específicas ligadas tanto a la protección que requiere su estado como a la necesidad de hacer frente a una posible agravación de dicho estado. Como ha señalado la Abogado General en el punto 68 de sus conclusiones, ha de tenerse en cuenta el riesgo de que las personas afectadas por una discapacidad grave se vean expuestas a necesidades económicas ineludibles a causa de su discapacidad, o que, al hacerse más mayores, dichas necesidades económicas puedan aumentar.

70 De ello se desprende que, al conducir al abono de una indemnización de despido por causas económicas a un trabajador gravemente discapacitado de un importe inferior a la percibida por un trabajador sin discapacidad, la medida cuestionada en el litigio principal tiene el efecto de lesionar excesivamente los intereses legítimos de los trabajadores gravemente discapacitados, por lo que excede de lo necesario para alcanzar las finalidades de política social perseguidas por el legislador alemán.

71 Por lo tanto, la diferencia de trato que resulta de lo previsto en el artículo 6 apartado 1, punto 1.5, del PPS no puede considerarse justificada con arreglo a lo dispuesto en el artículo 2, apartado 2, letra b), inciso i), de la Directiva 2000/78.

72 Habida cuenta de las consideraciones anteriores, procede responder a la cuarta cuestión prejudicial que el artículo 2, apartado 2, de la Directiva 2000/78 debe interpretarse en el sentido de que se opone a una normativa encuadrada en un régimen de previsión social de una empresa que establece, respecto a sus trabajadores de más de 54 años y que son despedidos por causas económicas, que el importe de la indemnización a la que tienen derecho se calcule de acuerdo con la fecha más temprana posible de jubilación, contrariamente a lo previsto en el método de cálculo general, según el cual, tal indemnización se basa, en particular, en la antigüedad en la empresa, de modo que la indemnización abonada es inferior a la indemnización que resulta de aplicar ese método general, aunque es al menos igual a la mitad de esta última, y que toma en consideración, cuando se aplica ese otro método de cálculo, la posibilidad de obtener una pensión de jubilación anticipada por razón de una discapacidad.

Costas

73 Dado que el procedimiento tiene, para las partes del litigio principal, el carácter de un incidente promovido ante el órgano jurisdiccional nacional, corresponde a éste resolver sobre las costas. Los gastos efectuados por quienes, no siendo partes del litigio principal, han presentado observaciones ante el Tribunal de Justicia no pueden ser objeto de reembolso.

En virtud de todo lo expuesto, el Tribunal de Justicia (Sala Segunda) declara:

1) Los artículos 2, apartado 2, y 6, apartado 1, de la Directiva 2000/78 /CE del Consejo, de 27 de noviembre de 2000, relativa al establecimiento de un marco general para la igualdad de trato en el empleo y la ocupación, deben interpretarse en el sentido de que no se oponen a una normativa encuadrada en el régimen de previsión social de una empresa que establece, respecto a sus trabajadores de más de 54 años y que son despedidos por causas económicas, que el importe de la indemnización a la que tienen derecho se calcule de acuerdo con la fecha más temprana posible de jubilación,

contrariamente a lo previsto en el método general de cálculo, según el cual dicha indemnización se basa, en particular, en la antigüedad en la empresa, de tal modo que la indemnización abonada es inferior a la indemnización que resulta de aplicar esa fórmula general, aunque es al menos igual a la mitad de ésta última.

2) El artículo 2, apartado 2, de la Directiva 2000/78 debe interpretarse en el sentido de que se opone a una normativa encuadrada en un régimen de previsión social de una empresa que establece, respecto a sus trabajadores de más de 54 años y que son despedidos por causas económicas, que el importe de la indemnización a la que tienen derecho se calcule de acuerdo con la fecha más temprana posible de jubilación, contrariamente a lo previsto en el método de cálculo general, según el cual tal indemnización se basa, en particular, en la antigüedad en la empresa, de modo que la indemnización abonada es inferior a la indemnización que resulta de aplicar ese método general, aunque es al menos igual a la mitad de esta última, y que toma en consideración, al aplicar ese otro método de cálculo, la posibilidad de obtener una pensión de jubilación anticipada por razón de una discapacidad.

Firmas

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* Lengua de procedimiento: alemán.

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1 N. del T.: En la versión española de la Directiva se lee «recomendación».

Recurso interpuesto el 20 de junio de 2011 - Comisión Europea / República Italiana

(Asunto C-312/11)

Lengua de procedimiento: italiano

Partes

Demandante: Comisión Europea (representantes: J. Enegren y C. Cattabriga, agentes)

Demandada: República Italiana

Pretensiones de la parte demandante

Que se declare que la República Italiana ha incumplido la obligación de transponer de manera completa y correcta el artículo 5 de la Directiva 2000/78/CE del Consejo, de 27 de noviembre de 2000, relativa al establecimiento de un marco general para la igualdad de trato en el empleo y la ocupación, [1] al no imponer a todos los empresarios la obligación de realizar ajustes razonables aplicables a todas las personas con discapacidad.

Que se condene en costas a la República Italiana.

Motivos y principales alegaciones

1) La República Italiana ha incumplido la obligación de transponer de manera completa y correcta el artículo 5 de la Directiva 2000/78/CE del Consejo, de 27 de noviembre de 2000, relativa al establecimiento de un marco general para la igualdad de trato en el empleo y la ocupación, al no imponer a todos los empresarios la obligación de establecer ajustes razonables aplicables a todas las personas con discapacidad.

2) Dicha disposición impone a los Estados miembros una obligación de alcance general de realizar ajustes razonables para permitir a las personas con discapacidades acceder al empleo, tomar parte en el mismo, progresar profesionalmente o recibir formación. Dichos ajustes afectarán -sin perjuicio del principio de proporcionalidad y en función de las circunstancias concretas- a todas las personas con discapacidad-, a todos los distintos aspectos de la relación laboral y a todos los empresarios.

3) En la normativa italiana no existen medidas para la transposición de dicha obligación. Cierto es que cuenta con las disposiciones de la Ley nº 68/1999 que, desde algunos puntos de vista, ofrece garantías y facilidades incluso superiores a las que establece el artículo 5 de la Directiva. No obstante, dichas garantías y facilidades no se aplican a todas las personas con discapacidad, no obligan a todos los empresarios, no se refieren a todos los distintos aspectos de la relación laboral o tienen un contenido meramente programático.

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[1] - DO L 303, p. 16.

Petición de decisión prejudicial planteada por el Sø- og Handelsret (Dinamarca) el 1 de julio de 2011 - HK Danmark, en nombre de Jette Ring / Dansk almennyttigt Boligselskab DAB

(Asunto C-335/11)

Lengua de procedimiento: danés

Órgano jurisdiccional remitente

Sø- og Handelsret

Partes en el procedimiento principal

Demandante: HK Danmark, en nombre de Jette Ring

Demandada: Dansk almennyttigt Boligselskab DAB

Cuestiones prejudiciales

1) a) ¿Está comprendida en el concepto de discapacidad en el sentido de la Directiva la situación de una persona que, a causa de lesiones físicas, mentales o psicológicas, no puede llevar cabo su trabajo, o sólo puede hacerlo en medida limitada, durante un período de tiempo que se ajusta al requisito de duración especificado en el apartado 45 de la sentencia del Tribunal de Justicia en el asunto Chacón Navas (C-13/05)? [1]

¿Puede estar comprendida en el concepto de discapacidad en el sentido de la Directiva una condición causada por una enfermedad diagnosticada médicamente como incurable?

¿Puede estar comprendida en el concepto de discapacidad en el sentido de la Directiva una condición causada por una enfermedad diagnosticada médicamente como temporal?

2) ¿Puede considerarse como una discapacidad, en el sentido en que se utiliza ese término en la Directiva 2000/78/CE del Consejo, [2] una reducción permanente de la capacidad funcional que no origina la necesidad de medios auxiliares especiales o similares sino que sólo significa que la persona afectada no es capaz de trabajar a tiempo completo?

3) ¿Se incluye entre las medidas a las que se refiere el artículo 5 de la Directiva 2000/78/CE una reducción de la jornada laboral?

4) ¿Se opone la Directiva 2000/78/CE del Consejo a la aplicación de una norma legal nacional conforme a la que un empresario está facultado para despedir a un trabajador con un preaviso abreviado si el trabajador ha percibido su salario durante períodos de baja por enfermedad de un total de 120 días a lo largo de un período de doce meses consecutivos, en el caso de un trabajador al que se deba considerar discapacitado en el sentido de la Directiva, cuando

a) la baja laboral fue causada por la discapacidad, o

b) la baja laboral fue causada por el hecho de que el empresario no aplicó las medidas apropiadas en la situación concreta para permitir que la persona discapacitada llevara a cabo su trabajo?

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[1] - Sentencia de 11 de julio de 2006 (Rec. p. I-6467).

[2] - DO L 303, p. 16.

CONCLUSIONES DE LA ABOGADO GENERAL
SRA. JULIANE KOKOTT
de 6 de diciembre de 2012 (1)

Asuntos acumulados C-335/11 y C-337/11

HK Danmark, en nombre de Jette Ring
contra
Dansk Almennyttigt Boligselskab DAB

y

HK Danmark, en nombre de Lone Skouboe Werge
contra
Pro Display A/S en quiebra

[Petición de decisión prejudicial del Sø- og Handelsretten (Dinamarca)]

«Igualdad de trato en el empleo y la ocupación – Directiva 2000/78/CE – Principio de no discriminación por motivos de discapacidad – Concepto de discapacidad – Diferencia entre enfermedad y discapacidad – Ajustes razonables para las personas con discapacidad – Discriminación indirecta – Justificación»

I. Introducción

1. ¿Cuándo existe una discapacidad en el sentido de la Directiva 2000/78/CE, relativa al establecimiento de un marco general para la igualdad de trato en el empleo y la ocupación, (2) y cómo se ha de delimitar el concepto de discapacidad frente al de enfermedad? En torno a esta cuestión gira el presente procedimiento prejudicial. Por lo tanto, se pide al Tribunal de Justicia que precise su definición del concepto de discapacidad elaborado en el asunto Chacón Navas. (3)

2. Asimismo, este asunto versa sobre qué se ha de entender por ajustes razonables para las personas con discapacidad que ha de realizar el empresario con arreglo al artículo 5 de la Directiva 2000/78. Por último, el órgano jurisdiccional remitente pregunta si constituye una discriminación por motivos de discapacidad, cuando a causa de los períodos de baja por enfermedad se reduce el plazo de preaviso del despido.

II. Marco legal

A. Derecho internacional público

3. En la Convención de las Naciones Unidas de 13 de diciembre de 2006 sobre los derechos de las personas con discapacidad (4) se dice, en el preámbulo, letra e): «Reconociendo que la discapacidad es un concepto que evoluciona y que resulta de la interacción entre las personas con deficiencias y las barreras debidas a la actitud y al entorno que evitan su participación plena y efectiva en la sociedad, en igualdad de condiciones con las demás.»

4. El artículo 1, párrafo segundo, de la Convención contiene la siguiente definición:

«Las personas con discapacidad incluyen a aquellas que tengan deficiencias físicas, mentales, intelectuales o sensoriales a largo plazo que, al interactuar con diversas barreras, puedan impedir su participación plena y efectiva en la sociedad, en igualdad de condiciones con las demás.»

B. Derecho de la Unión

5. El vigésimo considerando de la Directiva 2000/78 declara:

«Es preciso establecer medidas adecuadas, es decir, medidas eficaces y prácticas para acondicionar el lugar de trabajo en función de la discapacidad, por ejemplo adaptando las instalaciones, equipamientos, pautas de trabajo, asignación de funciones o provisión de medios de formación o encuadre.»

6. Con arreglo al artículo 2, apartado 2, letra b), de la Directiva 2000/78, existirá discriminación indirecta «cuando una disposición, criterio o práctica aparentemente neutros pueda ocasionar una desventaja particular a personas con una religión o convicción, con una discapacidad, de una edad, o con una orientación sexual determinadas, respecto de otras personas, salvo que:

i) dicha disposición, criterio o práctica pueda justificarse objetivamente con una finalidad legítima y salvo que los medios para la consecución de esta finalidad sean adecuados y necesarios; o que

[…]»

7. El artículo 5 de la Directiva 2000/78, bajo el título «Ajustes razonables para las personas con discapacidad», establece lo siguiente:

«A fin de garantizar la observancia del principio de igualdad de trato en relación con las personas con discapacidades, se realizarán ajustes razonables. Esto significa que los empresarios tomarán las medidas adecuadas, en función de las necesidades de cada situación concreta, para permitir a las personas con discapacidades acceder al empleo, tomar parte en el mismo o progresar profesionalmente, o para que se les ofrezca formación, salvo que esas medidas supongan una carga excesiva para el empresario. La carga no se considerará excesiva cuando sea paliada en grado suficiente mediante medidas existentes en la política del Estado miembro sobre discapacidades.»

C. Derecho nacional

8. La transposición de la Directiva 2000/78 al Derecho danés se realizó mediante la Forskelsbehandlingslov. (5) Con arreglo al artículo 7 de dicha ley, existe la posibilidad de reclamar una indemnización en caso de infracción de la prohibición de discriminación o de omisión de las medidas

necesarias por el empresario.

9. La Funktionærlov (6) regula la relación jurídica entre empresario y trabajador/empleado.

10. El artículo 5, apartado 2, de la FL contiene una disposición especial sobre la resolución por despido de una relación laboral por enfermedad del trabajador, cuyo tenor es el siguiente:

«No obstante, podrá estipularse por escrito en el contrato de trabajo que el trabajador podrá ser despedido con un mes de preaviso, con efectos al término del mes siguiente al de la fecha de preaviso, si el trabajador hubiera percibido su salario durante períodos de baja por enfermedad de un total de 120 días a lo largo de cualquier período de doce meses consecutivos. La validez del preaviso requiere que éste se haya comunicado inmediatamente al cumplirse los 120 días de baja por enfermedad y que el trabajador aún se encuentre en esa situación, pero no afectará a su validez el hecho de que el trabajador vuelva a trabajar después de recibir el preaviso de despido. [...]»

III. Hechos y procedimiento principal

11. Los presentes procedimientos prejudiciales tienen su origen en dos demandas interpuestas por el Handels- og Kontorfunktionærernes Forbund Danmark (en lo sucesivo, «HK») (7) en nombre de las trabajadoras Jette Ring y Lone Skouboe Werge en el año 2006, con las que se reclamaba una indemnización con arreglo a la Forskelsbehandlingslov por discriminación por motivos de discapacidad. En ambas relaciones de trabajo se había pactado la aplicación del artículo 5, apartado 2, de la FL.

A. Asunto C-335/11

12. En el asunto Ring, al procedimiento nacional le subyacen los siguientes hechos:

13. Desde el año 2000, la señora Ring trabajó en la empresa Dansk Almennyttigt Boligslskab (en lo sucesivo, «DAB»), en el servicio de atención al cliente. Desde junio de 2005 hasta su despido en noviembre de 2005 estuvo de baja por enfermedad durante varios períodos, que sumaron en total más de 120 días. Los certificados médicos presentados para las bajas hacían referencia principalmente a dolores crónicos de espalda, debidos, entre otras causas, a una osteoartritis en las vértebras lumbares que se manifestaban en constantes dolores en la región lumbar. Tras pronosticar los médicos que la trataban un anquilosamiento de las vértebras lumbares mediante una soldadura natural, no quedaron otras opciones de tratamiento. Las posibles medidas de paliación de dichos dolores durante el horario de trabajo de la señora Ring, por ejemplo, la adquisición de una mesa de altura regulable para su puesto de trabajo o la oferta de una jornada a tiempo parcial, no se adoptaron. Sin embargo, DAB en principio sí que ofrecía puestos de trabajo a tiempo parcial.

14. La señora Ring fue despedida con el plazo de preaviso abreviado previsto en el artículo 5, apartado 2, de la FL, a causa de sus períodos de baja acumulados. Inmediatamente después del despido de la señora Ring, DAB anunció un puesto de trabajo a tiempo parcial con una descripción de funciones similar para una oficina regional cercana. La señora Ring comenzó a trabajar como recepcionista en otra empresa, donde se puso a su disposición una mesa de altura regulable y se le concedió una jornada de trabajo efectivo de 20 horas semanales. La contratación se efectuó como empleo a tiempo completo conforme al sistema danés de empleo flexible con un 50 % de reembolso de los costes salariales. (8)

B. Asunto C-337/11

15. En el asunto Skouboe Werge, el Sø- og Handelsret ha expuesto los siguientes hechos:

16. La señora Skouboe Werge trabajó desde el año 1998 como auxiliar administrativa en la compañía Pro Display. Tras sufrir en diciembre de 2003, a raíz de un accidente de tráfico, un traumatismo cervical que la mantuvo de baja durante tres semanas, inicialmente volvió a trabajar a tiempo completo en Pro Display. Cuando, a finales de 2004, quedó claro que la señora Skouboe Werge seguía sufriendo las secuelas del traumatismo cervical, le fue prescrita una baja parcial por enfermedad, provisionalmente durante cuatro semanas, en virtud de la cual sólo debía trabajar unas cuatro horas al día. En enero de 2005, debido a los constantes dolores, la señora Skouboe Werge presentó una baja por enfermedad a tiempo completo. A raíz de eso, fue despedida con un plazo de preaviso de un mes, siendo efectivo el despido el 31 de mayo de 2005, en virtud de la norma de los 120 días del artículo 5, apartado 2, de la FL.

17. Los dolores de la señora Skouboe Werge se manifestaban con distintos síntomas, principalmente en forma de dolores en el cuello que se extendían a los hombros, problemas maxilares, fatiga, problemas de concentración y memoria, dificultades de expresión verbal, hipersensibilidad al ruido, bajo umbral de estrés y mareos. En junio de 2006 se concedió a la señora Skouboe Werge la jubilación anticipada basada en una valoración de su capacidad laboral en cerca de ocho horas semanales, con ritmo lento. Asimismo, mediante resolución de la Oficina de accidentes laborales y enfermedades profesionales, se estableció en el 10 % el grado de discapacidad de la señora Skouboe Werge, y su incapacidad laboral, en el 65 %.

18. En el procedimiento principal, HK consideró que no procedía un despido de las trabajadoras con preaviso abreviado en el sentido del artículo 5, apartado 2, de la FL, pues era contrario al principio de no discriminación por motivos de discapacidad establecido en la Directiva 2000/78. Por lo tanto, al órgano jurisdiccional remitente se le plantea la cuestión de cómo se ha de definir la «discapacidad» a los efectos de dicha Directiva.

IV. Petición de decisión prejudicial y procedimiento ante el Tribunal de Justicia

19. Mediante sendos autos de 29 de junio de 2011, recibidos en la Secretaría del Tribunal de Justicia el 1 de julio de 2011, el Sø- og Handelsret suspendió los dos procedimientos y remitió al Tribunal de Justicia las siguientes cuestiones prejudiciales:

1a) ¿Está comprendida en el concepto de discapacidad en el sentido de la Directiva la situación de una persona que, a causa de lesiones físicas, mentales o psicológicas, no puede llevar cabo su trabajo, o sólo puede hacerlo en medida limitada, durante un período de tiempo que se ajusta al requisito de duración especificado en el apartado 45 de la sentencia del Tribunal de Justicia en el asunto Chacón Navas (C-13/05)?

1b) ¿Puede estar comprendida en el concepto de discapacidad en el sentido de la Directiva una condición causada por una enfermedad diagnosticada médicamente como incurable?

1c) ¿Puede estar comprendida en el concepto de discapacidad en el sentido de la Directiva una condición causada por una enfermedad diagnosticada médicamente como temporal?

2) ¿Puede considerarse como una discapacidad, en el sentido en que se utiliza ese término en la Directiva 2000/78/CE del Consejo, una reducción permanente de la capacidad funcional que no origina la necesidad de medios auxiliares especiales o similares sino que consiste, sólo o esencialmente, en que la persona afectada no es capaz de trabajar a tiempo completo?

3) ¿Se incluye entre las medidas a las que se refiere el artículo 5 de la Directiva 2000/78/CE una reducción de la jornada laboral?

4) ¿Se opone la Directiva 2000/78/CE del Consejo a la aplicación de una norma legal nacional conforme a la que un empresario está facultado para despedir a un trabajador con un preaviso abreviado si el trabajador ha percibido su salario durante períodos de baja por enfermedad de un total de 120 días a lo largo de un período de doce meses consecutivos, en el caso de un trabajador al que se deba considerar discapacitado en el sentido de la Directiva, cuando

a) la baja laboral fue causada por la discapacidad,

o

b) la baja laboral fue causada por el hecho de que el empresario no aplicó las medidas apropiadas en la situación concreta para permitir que la persona discapacitada llevara a cabo su trabajo?

20. Mediante auto del Presidente del Tribunal de Justicia de 4 de agosto de 2011, se ordenó la acumulación de los asuntos C-335/11 y C-337/11 a efectos de las fases escrita y oral del procedimiento y para su decisión conjunta.

21. Además de las partes de los procedimientos principales, han participado en el procedimiento escrito y oral ante el Tribunal de Justicia los Gobiernos de Dinamarca, Irlanda, Polonia y del Reino Unido, así como la Comisión Europea. Asimismo, han presentado observaciones escritas los Gobiernos de Bélgica y Grecia.

V. Apreciación

22. A las dos primeras cuestiones del Sø- og Handelsret se ha de responder conjuntamente, pues ambas versan sobre la definición del concepto de discapacidad (a continuación, sección A). La tercera cuestión tiene por objeto la configuración y el alcance de los ajustes que el empresario debe realizar con arreglo al artículo 5 de la Directiva 2000/78 (sección B). Por último, se ha de analizar la cuarta cuestión y, con ella, si la reducción del plazo de preaviso para los despidos por bajas por enfermedad es una disposición discriminatoria (sección C).

A. Primera y segunda cuestión prejudicial

1. Definición del concepto de discapacidad

23. La Directiva 2000/78 no ofrece por sí misma ninguna definición del concepto de discapacidad.

24. En el asunto Chacón Navas ya se solicitó al Tribunal de Justicia que definiese este concepto de una forma autónoma, propia del Derecho de la Unión. Conforme a ella, el concepto de discapacidad se refiere a una «limitación derivada de dolencias físicas, mentales o psíquicas y que suponga un obstáculo para que la persona de que se trate participe en la vida profesional». (9) Asimismo, se requiere la probabilidad de que tal limitación sea de larga duración. (10)

25. En el año 2010, es decir, algunos años después de la sentencia Chacón Navas, la Unión Europea ratificó la Convención de las Naciones Unidas sobre los Derechos de las Personas con Discapacidad. En primer lugar, dicha Convención señala en su preámbulo que el concepto de discapacidad se ha de entender de forma dinámica y que la forma de entender la discapacidad

evoluciona continuamente. (11) A continuación, el artículo 1 de la Convención contiene una definición, según la cual «las personas con discapacidad incluyen a aquellas que tengan deficiencias físicas, mentales, intelectuales o sensoriales a largo plazo que, al interactuar con diversas barreras, puedan impedir su participación plena y efectiva en la sociedad, en igualdad de condiciones con las demás».

26. Del artículo 216 TFUE, apartado 2, se desprende que los acuerdos internacionales celebrados por la Unión vinculan a las instituciones de la Unión y a los Estados miembros. Desde su entrada en vigor, los acuerdos internacionales celebrados por la Unión son parte esencial («integrante») del ordenamiento jurídico de la Unión. (12) Por esta razón, en la medida de lo posible han de interpretarse las disposiciones del Derecho derivado de la Unión de conformidad con las obligaciones contraídas por ésta a escala internacional. (13)

27. En consecuencia, el concepto de discapacidad de la Directiva 2000/78 no puede ofrecer una protección menor que la que brinda la Convención de la ONU. Conforme a la definición de dicha Convención, el obstáculo para la participación en la sociedad es producto de la «interacción con diversas barreras». A este respecto, en ciertas situaciones podría suceder que la definición de la sentencia Chacón Navas quedase por detrás de la de la Convención de la ONU y hubiese de ser interpretada conforme al Derecho internacional.

28. Sin embargo, en los presentes casos el problema esencial no gira en torno al elemento «barreras» de la definición. El órgano jurisdiccional remitente desea saber si un estado causado por una enfermedad diagnosticada médicamente como incurable o curable transitoriamente puede estar comprendida en el concepto de discapacidad. Ni la definición de la sentencia Chacón Navas ni la de la Convención de la ONU ofrecen por sí mismas una respuesta a las cuestiones del órgano jurisdiccional remitente, pues, al margen del requisito de una limitación duradera, ninguna de ellas contiene criterios explícitos para delimitar discapacidad y enfermedad.

29. Por lo tanto, para responder a las cuestiones del órgano jurisdiccional remitente procede analizar a continuación la delimitación entre enfermedad y discapacidad.

2. Delimitación entre discapacidad y enfermedad

30. En su sentencia Chacón Navas, el Tribunal de Justicia declaró que los trabajadores no se encuentran protegidos por la Directiva 2000/78 tan pronto como aparezca cualquier enfermedad. (14) Por lo tanto, el Tribunal de Justicia diferencia entre enfermedad y discapacidad, pues en la Directiva no se menciona la «enfermedad» como elemento de discriminación prohibido de manera autónoma.

31. Pero el Tribunal de Justicia sólo ha excluido del ámbito de aplicación de la Directiva la «enfermedad en cuanto tal». (15) De la sentencia Chacón Navas no se desprende que una enfermedad, como causa de una discapacidad, impida la calificación como discapacidad. Por último, en su segunda sentencia relativa a una discriminación por motivos de discapacidad, el Tribunal de Justicia precisó que de la sentencia Chacón Navas no se deduce que el alcance ratione personae de dicha Directiva deba interpretarse de manera restrictiva. (16)

32. En particular, no se aprecia que la Directiva 2000/78 sólo pretenda comprender las discapacidades de nacimiento o debidas a accidentes. Sería arbitrario diferenciar, a efectos del ámbito de aplicación de la Directiva, en función de la causa de la discapacidad y, por tanto, sería contrario al objetivo mismo de la Directiva de hacer realidad el principio de igualdad de trato.

33. Por lo tanto, se ha de distinguir entre la enfermedad como posible causa de la deficiencia y la

deficiencia resultante. También está comprendida en el ámbito de aplicación de la Directiva la limitación permanente resultante de una enfermedad y que constituya un obstáculo para la participación en la vida profesional.

34. En los presentes asuntos se trata de deficiencias físicas que se manifiestan, en particular, en dolores e inmovilidad. Por lo tanto, la diferenciación entre enfermedad y discapacidad es aquí más fácil que en el caso que hubo de resolver el Tribunal Supremo de los Estados Unidos de América y en que éste declaró que una infección asintomática con el virus VIH puede constituir una discapacidad a los efectos de la Anti-Discrimination Act. (17) Si las molestias que sufre una persona en una situación concreta constituyen una limitación es algo que debe valorar el órgano jurisdiccional nacional.

35. El tenor literal de la Directiva 2000/78 no ofrece ningún elemento que permita limitar el ámbito de aplicación a un cierto grado de gravedad de la discapacidad. (18) Sin embargo, dado que esta cuestión no ha sido planteada por el órgano jurisdiccional remitente ni ha sido objeto de debate entre las partes del procedimiento, no procede resolverla aquí.

36. Para que quepa hablar de discapacidad es determinante, además, la probabilidad de que la limitación sea «de larga duración». (19) La Convención de la ONU afirma a este respecto que se ha de tratar de una deficiencia «a largo plazo». (20) Aquí no aprecio yo ninguna diferencia de contenido.

37. En el caso de una limitación causada por una enfermedad incurable, por lo general habrá que apreciar la larga duración. Pero también una enfermedad en principio curable puede tener un proceso tan largo hasta la sanación total que convierta la limitación en una de larga duración. Y también en caso de una enfermedad en principio curable puede quedar una limitación a largo plazo. Precisamente en las enfermedades crónicas la transición de una enfermedad (tratable) a una limitación previsiblemente permanente, que sólo entonces tendrá carácter de discapacidad, puede manifestarse como un proceso de recorrido fluido. Sólo cuando se disponga de un pronóstico de limitación permanente podrá hablarse de discapacidad.

38. Por lo tanto, la sola determinación de si una enfermedad es en sí curable o incurable, permanente o temporal, no permite extraer una conclusión definitiva sobre la posterior existencia de una discapacidad permanente.

3. Necesidad de medios auxiliares especiales

39. El órgano jurisdiccional remitente pregunta, además, si la apreciación de una discapacidad requiere la necesidad de medios auxiliares especiales, o si basta con que ya no sea posible trabajar durante toda la jornada laboral.

40. El concepto de discapacidad de la Directiva no requiere la necesidad de medios auxiliares especiales.

41. El artículo 5 de la Directiva 2000/78 deja claro que en primer lugar se ha de determinar la existencia de una discapacidad para, a continuación, adoptar las medidas adecuadas y necesarias. El vigésimo considerando ofrece referencias de lo que se ha de entender por medidas adecuadas, y cita, entre otras, «acondicionar el lugar de trabajo en función de la discapacidad». La necesidad de acondicionamientos y medios auxiliares especiales, por tanto, es consecuencia de la apreciación de la discapacidad, y no parte de la definición del concepto de discapacidad.

42. Tampoco a la vista de la finalidad de la Directiva resulta convincente la necesidad de medios auxiliares especiales como parte de la definición. La discapacidad a los efectos de la Directiva puede

consistir en dolencias físicas, psíquicas o mentales, mientras que la exigencia de que se necesiten medios auxiliares especiales parece inspirada por el ideal de una persona que padece una limitación física. Si se exigiesen los medios auxiliares como elemento obligatorio del concepto de discapacidad, las dolencias psíquicas y mentales a que hace expresa referencia la Directiva quedarían excluidas, ya que por lo general éstas no implican la necesidad de medios auxiliares. Además, tal exigencia perjudicaría precisamente a las personas cuya discapacidad no se puede compensar o mitigar con medios auxiliares y que, por ese mismo motivo, se encuentran muchas veces en una situación más grave que otras.

43. Por lo tanto, lo único determinante es si existe un obstáculo para la participación en la vida profesional.

44. DAB y Pro Display han alegado que sólo puede considerarse discapacitado a quien está totalmente excluido de la vida profesional, por lo que no bastaría un rendimiento laboral reducido para calificarlo de discapacitado. No resulta convincente este argumento. En el propio sentido general de los términos, la expresión «obstáculo para la participación en la vida profesional» comprende también limitaciones parciales, y no únicamente una «exclusión» absoluta de la vida profesional.

45. También se puede aducir el decimoséptimo considerando de la Directiva a favor de la inclusión de las personas cuyo obstáculo para participar en la vida profesional consista en que no pueden trabajar la jornada completa. Afirma dicho considerando que el ámbito de protección de la Directiva comprende a los trabajadores que en principio sea[n] «competente[s] [...] capacitado[s] o disponible[s] para desempeñar las tareas fundamentales del puesto de que se trate». En consecuencia, la Directiva tiene por objeto, precisamente, proteger a las personas que en principio pueden participar en la vida profesional, si bien eventualmente también de forma limitada o con ajustes especiales. Por lo tanto, la aplicación de la Directiva no requiere la exclusión de la persona afectada de la vida profesional.

46. Como conclusión parcial procede declarar que el concepto de discapacidad comprende una limitación derivada de dolencias físicas, mentales o psíquicas y que suponga un obstáculo para que la persona de que se trate participe en la vida profesional. Para la definición de discapacidad es irrelevante que la dolencia haya sido causada por una enfermedad: lo único decisivo es que la dolencia sea de larga duración. Pero también se ha de considerar como discapacidad a los efectos de la Directiva 2000/78 una reducción permanente de la capacidad funcional que no origine la necesidad de medios auxiliares especiales sino que sólo o en esencia signifique que la persona afectada no sea capaz de trabajar a tiempo completo.

B. Tercera cuestión prejudicial

47. Con su tercera cuestión prejudicial, el Sø- og Handelsret desea saber si entre los ajustes razonables para las personas con discapacidad puede estar también una reducción de la jornada laboral.

48. El artículo 5, primera frase, de la Directiva 2000/78 dispone que se han de realizar ajustes razonables a fin de garantizar la observancia del principio de igualdad de trato en relación con las personas con discapacidades. Esto significa que los empresarios deben tomar las «medidas adecuadas, en función de las necesidades de cada situación concreta», para permitir a las personas con discapacidades acceder al empleo, tomar parte en el mismo o progresar profesionalmente, o para que se les ofrezca formación. Cesa la obligación del empresario si esas medidas suponen una carga excesiva para él.

49. El objetivo de dicha disposición no es sólo hacer realidad la igualdad de trato, sino la equiparación de las personas con discapacidad y posibilitarles con ello el ejercicio de una profesión.

50. El propio artículo 5 de la Directiva 2000/78 solamente dispone que las medidas deben ser «adecuadas, en función de las necesidades de cada situación concreta» para permitir acceder al empleo, etc.

51. Sin embargo, el vigésimo considerando de la Directiva hace una aclaración sobre dicha disposición: se han de establecer «medidas eficaces y prácticas para acondicionar el lugar de trabajo en función de la discapacidad, por ejemplo adaptando las instalaciones, equipamientos, pautas de trabajo, asignación de funciones o provisión de medios de formación o encuadre».

52. La reducción de la jornada de trabajo podría estar incluida en el ejemplo allí expresamente mencionado de adaptación de las pautas de trabajo. Sin embargo, DAB y Pro Display son del parecer de que las «pautas de trabajo» no se refieren precisamente a la jornada de trabajo, sino sólo al rendimiento y al ritmo de trabajo o a la distribución de las funciones entre los trabajadores.

53. Aunque se estuviera de acuerdo en que la reducción de la jornada de trabajo no está comprendida en la adaptación de las pautas de trabajo, en mi opinión la reducción de la jornada de trabajo sí está contemplada por el artículo 5 de la Directiva.

54. Del propio tenor literal del vigésimo considerando se deduce que éste contiene únicamente una enumeración ejemplificativa y que no se ha de entender de forma taxativa. Del mero hecho de que la reducción de la jornada laboral no esté allí expresamente citada no se puede deducir que no esté comprendida por el artículo 5 de la Directiva.

55. Por otro lado, DAB y Pro Display señalan que el concepto de jornada laboral no se menciona en la Directiva, y tampoco fue objeto de debate en sus trabajos preparatorios. Asimismo, el concepto de reducción de la jornada laboral está tan estrechamente vinculado a la Directiva 97/81 (21) que las solicitudes correspondientes sólo se deben valorar a la luz de ésta.

56. Sin embargo, el legislador de la Unión redactó de forma amplia el artículo 5 de la Directiva 2000/78: Habla en general de medidas que permiten a las personas con discapacidad acceder al empleo. Es indudable que una reducción de la jornada laboral puede permitir a una persona con discapacidad el ejercicio de una profesión.

57. A este respecto, también el vigésimo considerando respalda una interpretación amplia del artículo 5: De él se desprende que, en contra de la opinión de DAB y Pro Display, no sólo se prevén medidas físicas, sino también organizativas. La adaptación de las instalaciones o la de los equipamientos se refiere a la eliminación de barreras físicas, mientras que con la adaptación de las pautas de trabajo, asignación de funciones o previsión de medios de formación o encuadre se hace mención de medidas de carácter organizativo. Esto es coherente, en particular, con la concepción de discapacidad plasmada en la Convención de la ONU, conforme a la cual para la limitación no son relevantes sólo las barreras físicas, sino también las de otro tipo, especialmente las sociales.

58. También la finalidad de la Directiva 2000/78 se puede aducir a favor de incluir el empleo a tiempo parcial, pues exige medidas concebidas de forma individual para lograr la equiparación y, por tanto, una mejor participación de las personas con discapacidad en la vida profesional. (22) Por lo tanto, lo determinante ha de ser si una medida concreta puede contribuir a que una persona con discapacidad pueda emprender una profesión o seguir desempeñándola. Así las cosas, se corresponde

precisamente con la finalidad de la Directiva no excluir totalmente del mercado laboral a los trabajadores con discapacidad que, al menos, pueden trabajar parcialmente, sino posibilitarles la participación en la vida profesional mediante la oferta de un empleo a tiempo parcial. No parece razonable que la Directiva se limite a exigir medidas como la construcción de un ascensor o servicios adaptados a sillas de ruedas (lo que también puede implicar costes y esfuerzos importantes), pero no pueda contemplar una reducción de la jornada laboral.

59. Ciertamente, no se puede rechazar de antemano la objeción de DAB y Pro Display de que en ciertas circunstancias una actividad a tiempo parcial puede constituir una grave injerencia en la relación jurídica entre empresario y trabajador y puede generar una carga para él. Sin embargo, lo mismo podría decirse también de la adaptación de las instalaciones, mencionada como ejemplo. Por este motivo, el artículo 5, párrafo segundo, establece la obligación del empresario solamente con la condición de que las medidas no supongan una carga excesiva para el empresario. En ese sentido, la Directiva exige un equilibrio razonable entre el interés del trabajador discapacitado en que se tomen medidas a su favor y el del empresario en no tener que asumir incondicionalmente injerencias en su organización empresarial ni sacrificios económicos.

60. Por tanto, como conclusión parcial procede declarar que una reducción de la jornada laboral puede estar comprendida entre las medidas previstas por el artículo 5 de la Directiva 2000/78. Corresponde al órgano jurisdiccional remitente determinar en el caso concreto si tal medida puede constituir una carga excesiva para el empresario.

C. Cuarta cuestión prejudicial

1. Primera parte de la cuarta cuestión prejudicial

61. Con la primera parte de la cuarta cuestión prejudicial, el Sø- og Handelsret desea saber en si es contraria a la Directiva 2000/78 una disposición nacional que permite un despido con plazo de preaviso abreviado en caso de bajas por enfermedad, cuando se aplica también en casos en que la baja se debió a una discapacidad.

62. Con arreglo a su artículo 1, en relación con el artículo 2, apartado 2, la Directiva 2000/78 prohíbe la discriminación directa o indirecta por motivos de discapacidad en el ámbito del empleo y la ocupación. Establece que existe una discriminación directa cuando una persona es tratada de manera menos favorable que otra en situación análoga por una discapacidad. Existe discriminación indirecta cuando una disposición, criterio o práctica aparentemente neutros puedan ocasionar una desventaja particular a personas con discapacidad, respecto de otras personas, salvo cuando pueda ser justificado. El ámbito material de aplicación de la Directiva, con arreglo a su artículo 3, apartado 1, letra c), comprende expresamente las condiciones de despido. Por eso, a continuación procede analizar, en primer lugar, si en el preaviso abreviado se ha de apreciar una desventaja directa o indirecta y, en caso afirmativo, si puede estar justificada.

a) Desventaja

63. No obstante, antes que nada quisiera precisar el objeto del análisis. El órgano jurisdiccional remitente sólo pregunta por la conformidad con el Derecho de la Unión de la disposición de la que se deriva la reducción del plazo de preaviso para despidos a causa de bajas por enfermedad.

64. Otra cuestión, que se suscita a raíz de la situación del presente caso, sería si los períodos de baja relacionados con una discapacidad o una enfermedad a causa de una discapacidad pueden

siquiera ser un motivo admisible de despido. El Tribunal de Justicia ya ha declarado que la Directiva se opone a un despido que, habida cuenta de la obligación del empresario de realizar los ajustes razonables para las personas con discapacidad, no se justifique por el hecho de que la persona en cuestión no esté disponible para desempeñar las tareas fundamentales del puesto de que se trate. (23) De ahí podría deducirse a la inversa que un despido sería admisible si los ajustes necesarios para adaptar el puesto de trabajo supusieran una carga excesiva para el empresario o si el trabajador, debido a sus períodos de baja, no estuviera disponible para desempeñar las tareas fundamentales de su puesto. Sin embargo, a mi parecer, con esta declaración del Tribunal de Justicia sigue sin dilucidarse plenamente la cuestión de la admisibilidad de un despido debido a períodos de baja por enfermedad relacionada con una discapacidad. No obstante, en respuesta a la cuestión planteada, a continuación me ocuparé exclusivamente de la reducción del plazo de preaviso.

65. Cuando un trabajador con discapacidad está de baja por una enfermedad «común», la consideración de los períodos de enfermedad para abreviar el plazo de preaviso no constituye una desventaja en comparación con otro trabajador sin discapacidad. En efecto, la probabilidad de sufrir una enfermedad como pueda ser una gripe por lo general no guarda relación con la discapacidad, por lo que afecta por igual a trabajadores con y sin discapacidad.

66. Pero en el presente caso se trata de períodos de baja a causa de una discapacidad. El artículo 5, apartado 2, de la FL parece neutral a primera vista, pues se refiere a todos los trabajadores que hayan estado de baja por enfermedad durante más de 120 días. Por lo tanto, no conduce a una discriminación directa de los discapacitados, pues la disposición ni se basa directamente en el prohibido criterio de diferenciación de la discapacidad, ni establece una diferencia de trato por un criterio indisolublemente vinculado a la discapacidad. Ciertamente, no toda discapacidad da lugar necesariamente a enfermedades y a bajas por enfermedad, por lo que no se puede hablar de una vinculación indisoluble.

67. Sin embargo, a mi parecer sí existe una desventaja indirecta. Siempre que la enfermedad esté relacionada con una discapacidad, se estarán tratando igual situaciones diferentes. Los trabajadores con discapacidad tienen, por lo general, un riesgo mucho mayor de contraer una enfermedad relacionada con sus respectivas discapacidades que los trabajadores sin discapacidad, que sólo pueden contraer enfermedades «comunes». Pero los trabajadores con discapacidad también pueden contraer las enfermedades comunes, por lo que la disposición del plazo de preaviso abreviado perjudica indirectamente a los trabajadores discapacitados frente a los trabajadores sin discapacidad.

68. No resulta convincente la objeción de algunos de los que han presentado observaciones de que, debido al derecho del trabajador a no declarar la naturaleza de su enfermedad, no es factible una diferenciación entre enfermedades «comunes» y las causadas por la discapacidad. En efecto, existen opciones para conciliar ambos aspectos, por ejemplo, recurriendo a un médico de empresa.

b) Justificación

69. Con arreglo al artículo 2, apartado 2, letra b), inciso i), una disposición como la del artículo 5, apartado 2, de la FL está justificada si persigue una finalidad legítima y los medios para la consecución de esta finalidad son adecuados y necesarios. Esta redacción se corresponde con los requisitos generalmente reconocidos en el Derecho de la Unión de la justificación de una diferencia de trato. (24)

70. Por lo tanto, el régimen previsto debe ser adecuado para alcanzar una finalidad legítima. Además, debe ser necesario, es decir, que la finalidad legítima perseguida no ha de poder conseguirse con un medio menos gravoso e igualmente adecuado. Y, por último, la norma también debe ser

proporcionada en sentido estricto, es decir, no ha de causar ningún perjuicio que no guarde una proporción razonable con los objetivos perseguidos. (25)

71. Al examinar estos criterios se ha de tenerse en cuenta que en la jurisprudencia se reconoce que los Estados miembros disponen de un amplio margen de apreciación en la elección de los medios que permitan lograr sus objetivos en política laboral y social. (26)

72. La resolución de remisión no contiene ninguna información sobre los objetivos que persigue el artículo 5, apartado 2, de la FL, lo que hace difícil la valoración. Por lo tanto, corresponderá al órgano jurisdiccional remitente valorar la justificación de la normativa controvertida.

73. El Gobierno danés ha alegado que el artículo 5, apartado 2, de la FL pretende alcanzar un justo equilibrio entre los intereses de los empresarios y los de los trabajadores en caso de largos períodos de baja por enfermedad. Pero entiende que, en último término, defiende especialmente los intereses de los trabajadores. Con el plazo de preaviso abreviado en caso de baja prolongada por enfermedad se incentiva al empresario para no despedir al trabajador enfermo en el momento más temprano posible, sino a mantenerle empleado de momento, al saber el empresario que en caso de bajas muy prolongadas se reduce, como compensación, el plazo de preaviso.

74. Estos objetivos son legítimos y la normativa no es manifiestamente inadecuada para alcanzarlos, habida cuenta del margen de apreciación de que disponen los Estados miembros. (27) Cualquier medida alternativa y menos incisiva debería poder insertarse en el resto del sistema jurídico laboral. Por eso, sin más información resulta difícil valorar si es concebible tal otro medio.

75. Lo determinante es si los perjuicios causados al trabajador discapacitado por el plazo de preaviso abreviado, en su forma actual, guardan una razonable proporción con los objetivos perseguidos y, por tanto, si no producen a los afectados un perjuicio excesivo. Esto exige que se alcance el justo equilibrio entre los distintos intereses en juego. (28) A este respecto, cabe preguntarse si una normativa adecuada no debería tener en cuenta también la gravedad de la discapacidad y las posibilidades del trabajador afectado de conseguir un nuevo empleo. Cuanto más grave sea la discapacidad y más difícil la búsqueda de un nuevo empleo, más importante es la extensión del plazo de preaviso para el trabajador. Corresponde al órgano jurisdiccional remitente apreciar este extremo en el caso concreto.

76. Por lo tanto, como conclusión de la primera parte de la cuarta cuestión prejudicial procede declarar que la Directiva 2000/78 se ha de interpretar en el sentido de que se opone a una normativa nacional conforme a la cual un empresario está facultado para despedir a un trabajador con un preaviso abreviado a causa de los períodos de baja por enfermedad, si la enfermedad se debe a una discapacidad. No será así si la desventaja a que se refiere el artículo 2, apartado 2, letra b), inciso i), de la Directiva 2000/78 está objetivamente justificada por una finalidad legítima y los medios para la consecución de dicha finalidad son adecuados y necesarios.

2. Segunda parte de la cuarta cuestión prejudicial

77. Con la segunda parte de la cuarta cuestión prejudicial, el órgano jurisdiccional remitente desea saber, por último, si la Directiva 2000/78 se opone a una reducción del plazo de preaviso cuando la baja del trabajador se debe atribuir a que el empresario no ha realizado los ajustes razonables con arreglo al artículo 5 de la Directiva, para permitir que la persona discapacitada desempeñara su trabajo.

78. En el marco de la cuestión de qué ajustes son razonables en el sentido del artículo 5 de la Directiva ya se efectúa un examen de la proporcionalidad, en el que, ponderando los intereses del trabajador discapacitado y de su empresario se comprueba si cabe exigir al empresario dichos ajustes. Pero si el empresario no realiza los ajustes que quepan exigírsele y por tanto no cumple las obligaciones que le incumben con arreglo al artículo 5 de la Directiva, no debería obtener de ello ninguna ventaja jurídica. La obligación impuesta por el artículo 5 de la Directiva quedaría privada de contenido si la no adopción de medidas proporcionadas pudiera dar lugar a un perjuicio al trabajador. Por tanto, el sentido y la finalidad de dicha norma impide que los períodos de baja de trabajador causados por la no adopción de tales medidas justifiquen una reducción del plazo de preaviso.

79. Por lo tanto, si la aplicación del plazo de preaviso abreviado se basa en períodos de baja del trabajador causados por el hecho de que el empresario no realizó los ajustes razonables con arreglo al artículo 5 de la Directiva 2000/78, representa una desventaja no justificable.

VI. Conclusión

80. A la vista de lo que antecede, propongo al Tribunal de Justicia que responda del siguiente modo a las cuestiones prejudiciales:

1a) El concepto de discapacidad en el sentido de la Directiva 2000/78/CE, relativa al establecimiento de un marco general para la igualdad de trato en el empleo y la ocupación, comprende una limitación derivada de dolencias físicas, mentales o psíquicas y que suponga un obstáculo para que la persona de que se trate participe en la vida profesional.

1b) Para la definición de discapacidad es irrelevante que la dolencia haya sido causada por una enfermedad: lo único decisivo es que la dolencia probablemente vaya a ser de larga duración.

1c) También se ha de considerar discapacidad a los efectos de la Directiva 2000/78 una reducción de la capacidad funcional de larga duración que no origine la necesidad de medios auxiliares especiales sino que sólo o en esencia signifique que la persona afectada no sea capaz de trabajar a tiempo completo.

2) Una reducción de la jornada laboral puede estar comprendida entre las medidas previstas por el artículo 5 de la Directiva 2000/78. Corresponde al órgano jurisdiccional remitente determinar en el caso concreto si tal medida puede constituir una carga excesiva para el empresario.

3) La Directiva 2000/78 se ha de interpretar en el sentido de que se opone a una normativa nacional conforme a la cual un empresario está facultado para despedir a un trabajador con un preaviso abreviado a causa de los períodos de baja por enfermedad, si la enfermedad se debe a una discapacidad. No será así si la desventaja a que se refiere el artículo 2, apartado 2, letra b), inciso i), de la Directiva 2000/78 está objetivamente justificada por una finalidad legítima y los medios para la consecución de dicha finalidad son adecuados y necesarios. Sin embargo, si la aplicación del plazo de preaviso abreviado se basa en períodos de baja del trabajador causados por el hecho de que el empresario no realizó los ajustes razonables con arreglo al artículo 5 de la Directiva 2000/78, representa una desventaja no justificable.

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1 – Lengua original: alemán.

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2 – Directiva 2000/78/CE del Consejo, de 27 de noviembre de 2000, relativa al establecimiento de un

marco general para la igualdad de trato en el empleo y la ocupación (DO L 303, p. 16; en lo sucesivo, «Directiva 2000/78»).

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3 – Sentencia de 11 de julio de 2006, Chacón Navas (C-13/05, Rec. p. I-6467).

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4 – Ratificada por la Unión Europea el 23 de diciembre de 2010; en lo sucesivo, «Convención de la ONU». Véase la Decisión del Consejo 2010/48/CE, de 26 de noviembre de 2009, relativa a la celebración de la Convención (DO L 23, p. 35).

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5 – Lov om forbud mod forskelsbehandling på arbejdsmarkedet (Ley de igualdad de trato en el mercado laboral).

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6 – Lov om retsforholdet mellem arbejdsgivere og funktionærer Funktionærlov (Ley de trabajo; en lo sucesivo, «FL»).

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7 – Federación de Empleados de Comercio y Oficinas de Dinamarca.

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8 – El sistema de empleo flexible es un régimen danés de subvenciones salariales del Estado para el empleo de personas con incapacidad laboral parcial permanente.

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9 – Sentencia Chacón Navas, citada en la nota 3, apartado 43.

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10 – Ibídem, apartado 45.

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11 – En este mismo sentido, el Abogado General Geelhoed en sus conclusiones presentadas el 16 de marzo de 2006 en el asunto Chacón Navas, citado en la nota 3, punto 66.

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12 – Véanse, en este sentido, las sentencias de 10 de septiembre de 1996, Comisión/Alemania (C-61/94, Rec. p. I-3989), apartado 52; de 12 de enero de 2006, Algemene Scheeps Agentuur Dordrecht (C-311/04, Rec. p. I-609), apartado 25; de 3 de junio de 2008, Intertanko y otros (C-308/06, Rec. p. I-4057), apartado 42; de 3 de septiembre de 2008, Kadi y Al Barakaat International Foundation/Consejo y Comisión (C-402/05 P y C-415/05 P, Rec. p. I-6351), apartado 307, y de 21 de diciembre de 2011, Air Transport Association of America y otros (C-366/10, Rec. p. I-0000), apartado 50.

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13 – Véanse las sentencias Comisión/Alemania, citada en la nota 12, apartado 52; de 14 de julio de 1998, Bettati (C-341/95, Rec. p. I-4355), apartado 20; de 9 de enero de 2003, Petrotub y Republica (C-76/00, Rec. p. I-79), apartado 57, y de 14 de mayo de 2009, Internationaal Verhuis- en Transportbedrijf Jan de Lely (C-161/08, Rec. p. I-4075), apartado 38.

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14 – Sentencia Chacón Navas, citada en la nota 3, apartado 46.

15 – Ibídem, apartado 57.

16 – Sentencia de 17 de julio de 2008, Coleman (C-303/06, Rec. p. I-5603), apartado 46.

17 – En la sentencia del US Supreme Court, Bragdon c. Abbott, 524 US 624 [1998], § 12102 apartado 1 (A) del ADA 1990, se aprecia una discapacidad cuando existe «a physical […] impairment that substantially limits one or more of [an individual's] major life activities».

18 – También el Tribunal Europeo de Derechos Humanos ha calificado de discapacidad a los efectos de la protección frente a la discriminación un caso de diabetes mellitus tipo I, que las autoridades nacionales clasificaron como leve: TEDH, sentencia de 30 de abril de 2009 (Glor/Suiza, nº 13444/04).

19 – Sentencia Chacón Navas, citada en la nota 3, apartado 45.

20 – En la versión inglesa, «long-term [...] impairments»; en la francesa, «incapacités [...] durables».

21 – Directiva 97/81/CE del Consejo, de 15 de diciembre de 1997, relativa al Acuerdo marco sobre el trabajo a tiempo parcial concluido por la UNICE, el CEEP y la CES (DO L 14, p. 9; en lo sucesivo, «Directiva 97/81»).

22 – Véanse los considerandos octavo, noveno, undécimo y decimosexto de la Directiva 2000/78.

23 – Sentencia Chacón Navas, citada en la nota 3, apartado 51.

24 – Véanse mis conclusiones presentadas el 6 de mayo de 2010 en el asunto Andersen (C-499/08, Rec. p. I-9343), punto 42.

25 – Sentencias de 12 de julio de 2001, Jippes y otros (C-189/01, Rec. p. I-5689), apartado 81; de 7 de julio de 2009, S.P.C.M. y otros (C-558/07, Rec. p. I-5783), apartado 41, y de 8 de julio de 2010, Afton Chemical (C-343/09, Rec. p. I-7023), apartado 45 y la jurisprudencia allí citada.

26 – En el terreno de la discriminación por razón de la edad, véanse las sentencias de 16 de octubre de 2007, Palacios de la Villa (C-411/05, Rec. p. I-8531), apartado 68, y de 12 de octubre de 2010, Rosenbladt (C-45/09, Rec. p. I-9391), apartado 41.

27 – Véanse las sentencias Palacios de la Villa, citada en la nota 26, apartado 72, y de 12 de enero de 2010, Petersen (C-341/08, Rec. p. I-47), apartado 70.

28 – Véanse al respecto mis conclusiones presentadas en el asunto Andersen, citadas en la nota 24, punto

68, y mis conclusiones presentadas el 2 de octubre de 2012 en el asunto Comisión/Hungría (C-286/12, Rec. p. I-0000), punto 78.

SENTENCIA DEL TRIBUNAL DE JUSTICIA (Gran Sala)

de 17 de julio de 2008 (*)

«Política social – Directiva 2000/78/CE − Igualdad de trato en el empleo y la ocupación − Artículos 1 y 2, apartados 1, 2, letra a), y 3, así como artículo 3, apartado 1, letra c) − Discriminación directa por motivo de discapacidad − Acoso relacionado con la discapacidad − Despido de un trabajador que no es una persona con discapacidad, pero cuyo hijo sí lo es − Inclusión − Carga de la prueba»

En el asunto C-303/06,

que tiene por objeto una petición de decisión prejudicial planteada, con arreglo al artículo 234 CE, por el Employment Tribunal, London South (Reino Unido), mediante resolución de 6 de julio de 2006, recibida en el Tribunal de Justicia el 10 de julio de 2006, en el procedimiento entre

S. Coleman

y

Attridge Law,

Steve Law,

EL TRIBUNAL DE JUSTICIA (Gran Sala),

integrado por el Sr. V. Skouris, Presidente, los Sres. P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts y A. Tizzano, Presidentes de Sala, y los Sres. M. Ilešič, J. Klučka, A. Ó Caoimh (Ponente), T. von Danwitz y A. Arabadjiev, Jueces;

Abogado General: Sr. M. Poiares Maduro;

Secretaria: Sra. L. Hewlett, administradora principal;

habiendo considerado los escritos obrantes en autos y celebrada la vista el 9 de octubre de 2007;

consideradas las observaciones presentadas:

– en nombre de la Sra. Coleman, por los Sres. R. Allen, QC, y P. Michell, Barrister;

– en nombre del Gobierno del Reino Unido, por la Sra. V. Jackson, en calidad de agente, asistida por el Sr. N. Paines, QC;

– en nombre del Gobierno griego, por el Sr. K. Georgiadis y la Sra. Z. Chatzipavlou, en calidad de agentes;

– en nombre de Irlanda, por el Sr. N. Travers, BL;

– en nombre del Gobierno italiano, por el Sr. I.M. Braguglia, en calidad de agente, asistido por la Sra. W. Ferrante, avvocato dello Stato;

– en nombre del Gobierno lituano, por el Sr. D. Kriaučiūnas, en calidad de agente;

– en nombre del Gobierno neerlandés, por las Sras. H.G. Sevenster y C. ten Dam, en calidad de agentes;

– en nombre del Gobierno sueco, por la Sra. A. Falk, en calidad de agente;

– en nombre de la Comisión de las Comunidades Europeas, por el Sr. J. Enegren y la Sra. N. Yerrell, en calidad de agentes;

oídas las conclusiones del Abogado General, presentadas en audiencia pública el 31 de enero de 2008;

dicta la siguiente

Sentencia

1 La petición de decisión prejudicial tiene por objeto la interpretación de la Directiva 2000/78/CE del Consejo, de 27 de noviembre de 2000, relativa al establecimiento de un marco general para la igualdad de trato en el empleo y la ocupación (DO L 303, p. 16).

2 Dicha petición se presentó en el marco de un litigio entre, por un lado, la Sra. Coleman, demandante en el litigio principal, y, por otro lado, Attridge Law, bufete de abogados, y un socio de dicho bufete, el Sr. Steve Law (en lo sucesivo, «antiguo empresario»), que versa sobre el despido encubierto del que la demandante afirma haber sido objeto.

Marco jurídico

Normativa comunitaria

3 La Directiva 2000/78 se adoptó sobre la base del artículo 13 CE. Sus considerandos sexto, undécimo, decimosexto, decimoséptimo, vigésimo, vigésimo séptimo, trigésimo primero y trigésimo séptimo tienen la siguiente redacción:

«6) La Carta comunitaria de los derechos sociales fundamentales de los trabajadores reconoce la importancia de combatir toda forma de discriminación y, especialmente, la necesidad de adoptar medidas adecuadas para la integración social y económica de las personas mayores y de las personas con discapacidad.

[…]

11) La discriminación por motivos de religión o convicciones, discapacidad, edad u orientación sexual puede poner en peligro la consecución de los objetivos del Tratado CE, en particular el logro de un alto nivel de empleo y de protección social, la elevación del nivel y de la calidad de vida, la cohesión económica y social, la solidaridad y la libre circulación de personas.

[…]

16) La adopción de medidas de adaptación a las necesidades de las personas con discapacidad en el lugar de trabajo desempeña un papel importante a la hora de combatir la discriminación por motivos de discapacidad.

17) La presente Directiva no obliga a contratar, ascender, mantener en un puesto de trabajo o facilitar formación a una persona que no sea competente o no esté capacitada o disponible para desempeñar las tareas fundamentales del puesto de que se trate o para seguir una formación dada, sin perjuicio de la obligación de realizar los ajustes razonables para las personas con discapacidad.

[…]

20) Es preciso establecer medidas adecuadas, es decir, medidas eficaces y prácticas para acondicionar el lugar de trabajo en función de la discapacidad, por ejemplo adaptando las instalaciones, equipamientos, pautas de trabajo, asignación de funciones o provisión de medios de formación o encuadre.

[…]

27) El Consejo, en su Recomendación 86/379/CEE, de 24 de julio de 1986, sobre el empleo de los minusválidos en la Comunidad [DO L 225, p. 43], estableció un marco de orientación que enumera ejemplos de acciones positivas para el fomento del empleo y de la formación profesional de los minusválidos, y en su Resolución de 17 de junio de 1999 [DO C 186, p. 3] relativa a la igualdad de oportunidades laborales de las personas con minusvalías afirmó la importancia de prestar una atención específica, en particular, a la contratación, al mantenimiento de los trabajadores en el empleo y a la formación y formación permanente de los minusválidos.

[…]

31) Las normas relativas a la carga de la prueba deben modificarse cuando haya un caso de presunta discriminación y en el caso en que se verifique tal situación a fin de que la carga de la prueba recaiga en la parte demandada. No obstante, no corresponde a la parte demandada probar que la parte demandante pertenece a una determinada religión, posee determinadas convicciones, presenta una determinada discapacidad, es de una determinada edad o tiene una determinada orientación sexual.

[…]

37) De conformidad con el principio de subsidiariedad contemplado en el artículo 5 del Tratado CE, los objetivos de la presente Directiva, en particular el establecimiento en la Comunidad de un marco para la igualdad en el empleo y la ocupación, no pueden alcanzarse de manera suficiente por los Estados miembros. Por consiguiente, pueden lograrse mejor, debido a la dimensión y repercusión de la acción propuesta, en el ámbito comunitario. Conforme al principio de proporcionalidad tal y como se enuncia en el mencionado artículo, la presente Directiva no excede de lo necesario para alcanzar dicho objetivo.»

4 A tenor de su artículo 1, la Directiva 2000/78 «tiene por objeto establecer un marco general para luchar contra la discriminación por motivos de religión o convicciones, de discapacidad, de edad o de orientación sexual en el ámbito del empleo y la ocupación, con el fin de que en los Estados miembros se aplique el principio de igualdad de trato».

5 En los apartados 1 a 4 de su artículo 2, que lleva el epígrafe «Concepto de discriminación», la misma Directiva dispone lo siguiente:

«1. A efectos de la presente Directiva, se entenderá por principio de igualdad de trato la ausencia de toda discriminación directa o indirecta basada en cualquiera de los motivos mencionados en el artículo 1.

2. A efectos de lo dispuesto en el apartado 1:

a) existirá discriminación directa cuando una persona sea, haya sido o pudiera ser tratada de manera menos favorable que otra en situación análoga por alguno de los motivos mencionados en el artículo 1;

b) existirá discriminación indirecta cuando una disposición, criterio o práctica aparentemente neutros pueda ocasionar una desventaja particular a personas con una religión o convicción, con una discapacidad, de una edad, o con una orientación sexual determinadas, respecto de otras personas, salvo que:

i) dicha disposición, criterio o práctica pueda justificarse objetivamente con una finalidad legítima y salvo que los medios para la consecución de esta finalidad sean adecuados y necesarios; o que

ii) respecto de las personas con una discapacidad determinada, el empresario o cualquier persona u organización a la que se aplique lo dispuesto en la presente Directiva, esté obligado, en virtud de la legislación nacional, a adoptar medidas adecuadas de conformidad con los principios contemplados en el artículo 5 para eliminar las desventajas que supone esa disposición, ese criterio o esa práctica.

3. El acoso constituirá discriminación a efectos de lo dispuesto en el apartado 1 cuando se produzca un comportamiento no deseado relacionado con alguno de los motivos indicados en el artículo 1 que tenga como objetivo o consecuencia atentar contra la dignidad de la persona y crear un entorno intimidatorio, hostil, degradante, humillante u ofensivo. A este respecto, podrá definirse el concepto de acoso de conformidad con las normativas y prácticas nacionales de cada Estado miembro.

[…]»

6 A tenor del artículo 3, apartado 1, de la Directiva 2000/78:

«Dentro del límite de las competencias conferidas a la Comunidad, la presente Directiva se aplicará a todas las personas, por lo que respecta tanto al sector público como al privado, incluidos los organismos públicos, en relación con:

[…]

c) las condiciones de empleo y trabajo, incluidas las de despido y remuneración;

[…].»

7 En el artículo 5, cuyo epígrafe es «Ajustes razonables para las personas con discapacidades», la misma Directiva dispone lo siguiente:

«A fin de garantizar la observancia del principio de igualdad de trato en relación con las personas con discapacidades, se realizarán ajustes razonables. Esto significa que los empresarios tomarán las medidas adecuadas, en función de las necesidades de cada situación concreta, para permitir a las personas con discapacidades acceder al empleo, tomar parte en el mismo o progresar profesionalmente, o para que se les ofrezca formación, salvo que esas medidas supongan una carga excesiva para el empresario. […]»

8 El artículo 7 de la misma Directiva, cuyo epígrafe es «Acción positiva y medidas específicas», tiene la siguiente redacción:

«1. Con el fin de garantizar la plena igualdad en la vida profesional, el principio de igualdad de trato no impedirá que un Estado miembro mantenga o adopte medidas específicas destinadas a prevenir o compensar las desventajas ocasionadas por cualquiera de los motivos mencionados en el artículo 1.

2. Por lo que respecta a las personas con discapacidad, el principio de igualdad de trato no constituirá un obstáculo al derecho de los Estados miembros de mantener o adoptar disposiciones relativas a la protección de la salud y la seguridad en el lugar de trabajo, ni para las medidas cuya finalidad sea crear o mantener disposiciones o facilidades con objeto de proteger o fomentar la inserción de dichas personas en el mundo laboral.»

9 El artículo 10 de la Directiva 2000/78, que lleva como epígrafe «Carga de la prueba», dispone lo siguiente:

«1. Los Estados miembros adoptarán con arreglo a su ordenamiento jurídico nacional, las medidas necesarias para garantizar que corresponda a la parte demandada demostrar que no ha habido vulneración del principio de igualdad de trato, cuando una persona que se considere perjudicada por la no aplicación, en lo que a ella se refiere, de dicho principio alegue, ante un tribunal u otro órgano competente, hechos que permitan presumir la existencia de discriminación directa o indirecta.

2. Lo dispuesto en el apartado 1 se entenderá sin perjuicio de que los Estados miembros adopten normas sobre la prueba más favorables a la parte demandante.»

10 Conforme al artículo 18, párrafo primero, de la Directiva 2000/78, los Estados miembros debían adoptar las disposiciones legales, reglamentarias y administrativas necesarias para dar cumplimiento a lo establecido en dicha Directiva a más tardar el 2 de diciembre de 2003. No obstante, a tenor del párrafo segundo del citado artículo:

«A fin de tener en cuenta condiciones particulares, los Estados miembros podrán disponer, cuando sea necesario, de un plazo adicional de tres años a partir del 2 de diciembre de 2003, es decir, de un máximo de 6 años en total, para poner en aplicación las disposiciones de la presente Directiva relativas a la discriminación por motivos de edad y discapacidad. En este caso, lo comunicarán de inmediato a la Comisión. Los Estados miembros que opten por recurrir a este período adicional informarán anualmente a la Comisión sobre las medidas que adopten para luchar contra la discriminación por motivos de edad y discapacidad, y sobre los progresos realizados para la aplicación de la presente Directiva. La Comisión informará anualmente al Consejo.»

11 Dado que el Reino Unido de Gran Bretaña e Irlanda del Norte solicitó tal plazo adicional para adaptar su Derecho interno a la citada Directiva, el referido plazo no expiró hasta el 2 de diciembre de 2006 por lo que se refiere a dicho Estado miembro.

Normativa nacional

12 La Disability Discrimination Act 1995 (Ley de 1995 relativa a la discriminación por motivo de discapacidad) (en lo sucesivo, «DDA»), tiene como finalidad esencial prohibir toda discriminación contra las personas con discapacidad, especialmente en materia de empleo.

13 Con ocasión de la adaptación del ordenamiento jurídico del Reino Unido a la Directiva 2000/78, la segunda parte de la DDA, que regula las cuestiones relacionadas con el empleo, resultó modificada por las Disability Discrimination Act 1995 (Amendment) Regulations 2003 (Reglamento de 2003 por el que se modifica la Ley de 1995 relativa a la discriminación por motivo de discapacidad), que entraron en vigor el 1 de octubre de 2004.

14 Con arreglo al artículo 3 A, apartado 1, de la DDA, en su versión modificada por el citado Reglamento de 2003 (en lo sucesivo, «DDA de 2003»):

«[…] Se considerará que se practica discriminación contra una persona con discapacidad cuando,

a) por un motivo relacionado con la discapacidad que padece la persona con discapacidad, se trate a ésta de un modo menos favorable a como se trata o trataría a otras personas a las que no se aplica el motivo en cuestión, y

b) siempre que no pueda demostrarse que tal trato esté justificado».

15 El artículo 3 A, apartado 4, de la DDA de 2003 precisa, no obstante, que el trato dispensado a una persona con discapacidad en ningún caso podrá justificarse si resulta equiparable a una discriminación directa en el sentido del apartado 5 del mismo artículo, disposición a cuyo tenor:

«Se considerará que se practica discriminación directa contra una persona discapacitada cuando se dispensa a ésta, por motivo de la discapacidad que padece, un trato menos favorable que el que obtiene u obtendría una persona que no tenga esa discapacidad específica y cuyas características pertinentes, incluidas las capacidades, sean las mismas que las de la persona discapacitada o no difieran sensiblemente de ellas».

16 El concepto de acoso se define del siguiente modo en el artículo 3 B de la DDA de 2003:

«1) [...] Se considerará que se somete a acoso a una persona discapacitada cuando, por algún motivo relacionado con la discapacidad que ésta padece, se adopta una conducta no deseada que tenga como objetivo o consecuencia:

a) atentar contra la dignidad de la persona con discapacidad, o

b) crear un entorno intimidatorio, hostil, degradante, humillante u ofensivo.

2) Se entenderá que una conducta tiene la consecuencia que se menciona en el apartado 1, letras a) o b), cuando razonablemente haya de considerarse que tiene tal consecuencia habida cuenta de todas las circunstancias y, en particular, de lo que siente la persona con discapacidad».

17 A tenor del artículo 4, apartado 2, letra d), de la DDA de 2003, se prohíbe que un empresario discrimine a una persona con discapacidad procediendo a su despido o causándole cualquier otro perjuicio.

18 El artículo 4, apartado 3, letras a) y b), de la DDA de 2003 prohíbe también que un empresario, actuando en condición de tal, someta a acoso a una persona con discapacidad que trabaje para él o que le haya solicitado un empleo.

Litigio principal y cuestiones prejudiciales

19 La Sra. Coleman trabajó como secretaria jurídica para su antiguo empresario a partir de enero de 2001.

20 En el año 2002, la Sra. Coleman tuvo un hijo que padece crisis de apnea, así como laringomalacia y broncomalacia congénitas. El estado de su hijo exige cuidados específicos y especializados. La demandante le dispensa la mayor parte de los cuidados que éste necesita.

21 El 4 de marzo de 2005, la Sra. Coleman aceptó dimitir por exceso de plantilla («voluntary redundancy»), lo que puso fin al contrato que la vinculaba a su antiguo empresario.

22 El 30 de agosto de 2005, presentó una demanda ante el Employment Tribunal, London South, en la que sostenía que había sido víctima de un despido encubierto («unfair constructive dismissal») y de un trato menos favorable que el que obtuvieron los restantes empleados, debido al hecho de tener a su cargo un hijo discapacitado. La Sra. Coleman alega que se vio obligada, como consecuencia del trato recibido, a dejar de trabajar para su antiguo empresario.

23 De la resolución de remisión se desprende que aún no se han determinado en su integridad las circunstancias pertinentes del litigio principal, habida cuenta de que las cuestiones prejudiciales se plantearon con carácter preliminar. En efecto, el órgano jurisdiccional remitente suspendió el procedimiento en la parte del recurso relativa al despido de la Sra. Coleman, pero el 17 de febrero de 2006 celebró una vista preliminar dedicada al examen del motivo basado en la discriminación.

24 La cuestión preliminar que se suscitó ante el referido órgano jurisdiccional consiste en determinar si la demandante en el litigio principal puede ampararse en las disposiciones del Derecho nacional –especialmente en aquéllas cuya finalidad es adaptar dicho Derecho a la Directiva 2000/78– para invocar frente a su antiguo empresario la discriminación de la que considera haber sido objeto, en el sentido de que supuestamente fue víctima de un trato desfavorable relacionado con la discapacidad que padece su hijo.

25 De los términos de la resolución de remisión se desprende que, en el supuesto de que la interpretación de la Directiva 2000/78 por el Tribunal de Justicia fuera contraria a la propugnada por la Sra. Coleman, el Derecho nacional se opondría a que prosperara la demanda presentada por esta última ante el órgano jurisdiccional remitente.

26 De la resolución de remisión se desprende asimismo que, con arreglo al Derecho del Reino Unido, cuando se celebra una vista preliminar sobre una cuestión de Derecho, el tribunal que conoce del asunto presume que los hechos se han producido del modo en que los relata la parte demandante. Se presume que los hechos del litigio, en el asunto principal, son los siguientes:

– Al reincorporarse la Sra. Coleman al trabajo tras el permiso de maternidad, su antiguo empresario se opuso a que se reintegrara en el puesto que había ocupado hasta ese momento, en circunstancias en las que sí se habría permitido que padres de hijos no discapacitados recuperaran sus antiguos puestos.

– El empresario también se opuso a concederle la misma flexibilidad horaria y las mismas condiciones de trabajo que a aquellos de sus compañeros de trabajo que son padres de hijos no discapacitados.

– La Sra. Coleman fue calificada de «perezosa» cuando solicitó una reducción de la jornada laboral para cuidar a su hijo, mientras que tales facilidades sí se concedieron a padres de hijos no discapacitados.

– La reclamación oficial que formuló contra el mal trato que padecía no fue objeto de la debida consideración, de manera que la Sra. Coleman se sintió obligada a retirarla.

– Se produjeron comentarios insultantes o fuera de lugar tanto contra ella misma como contra su hijo. No se formuló ningún comentario de esta naturaleza cuando otros empleados se vieron obligados a solicitar una reducción de la jornada laboral o mayor flexibilidad para ocuparse de sus hijos no discapacitados.

– Al haber llegado en ocasiones tarde a la oficina, a causa de problemas en el cuidado de su hijo, se le dijo que sería despedida si volvía a faltar a la puntualidad. No se amenazó de esta manera a otros trabajadores con hijos no discapacitados que llegaban tarde al trabajo por las mismas razones.

27 Al estimar que el litigio del que conoce suscitaba cuestiones de interpretación del Derecho comunitario, el Employment Tribunal, London South, decidió suspender el procedimiento y plantear al Tribunal de Justicia las cuestiones prejudiciales siguientes:

«1) En el contexto de la prohibición de discriminación por motivo de discapacidad, ¿protege la Directiva [2000/78/CE] sólo a las propias personas discapacitadas frente a la discriminación directa y el acoso?

2) En caso de respuesta negativa a la primera cuestión, ¿protege la Directiva [2000/78] a los trabajadores que, aun sin estar ellos mismos discapacitados, reciben un trato menos favorable o sufren acoso por su vinculación a una persona discapacitada?

3) Cuando un empresario trata a un trabajador de forma menos favorable en comparación con la forma en la que trata o trataría a otros trabajadores y consta que el motivo del trato del referido trabajador es el hecho de que tiene un hijo discapacitado a su cuidado, ¿constituye dicho trato una discriminación directa que vulnera el principio de igualdad de trato establecido por la Directiva [2000/78]?

4) Cuando un empresario acosa a un trabajador y consta que el motivo del trato de dicho trabajador es el hecho de que tiene un hijo discapacitado a su cuidado, ¿vulnera ese acoso el principio de igualdad de trato establecido por la Directiva [2000/78]?»

Sobre la admisibilidad

28 Aun considerando que las cuestiones planteadas por el órgano jurisdiccional remitente se suscitaron en un verdadero litigio, el Gobierno neerlandés ha puesto en tela de juicio la admisibilidad de la remisión prejudicial en virtud del hecho de que, al tratarse de cuestiones previas suscitadas con ocasión de una vista preliminar, todavía no se han determinando todas las circunstancias del asunto. El mencionado Gobierno observa que, cuando se celebra una vista preliminar de ese tipo, el juez nacional presume que los hechos se han producido del modo en que los relata la parte demandante.

29 A este respecto, cabe recordar que el artículo 234 CE establece una estrecha cooperación entre los órganos jurisdiccionales nacionales y el Tribunal de Justicia, basada en un reparto de funciones entre ellos. Del párrafo segundo del citado artículo se desprende claramente que incumbe al órgano jurisdiccional nacional decidir en qué fase del procedimiento procede plantear una cuestión prejudicial al Tribunal de Justicia (véanse las sentencias de 10 de marzo de 1981, Irish Creamery Milk Suppliers Association y otros, 36/80 y 71/80, Rec. p. 735, apartado 5, y de 30 de marzo de 2000, JämO, C-236/98, Rec. p. I-2189, apartado 30).

30 Cabe observar que, en el asunto principal, el órgano jurisdiccional remitente consideró que, en el supuesto de que el Tribunal de Justicia no interpretara la Directiva 2000/78 en un sentido correspondiente al propugnado por la Sra. Coleman, no podría prosperar la demanda de ésta en cuanto al fondo. Así pues, el órgano jurisdiccional nacional decidió examinar, como permite la legislación del Reino Unido, la cuestión de si la citada Directiva debe interpretarse en el sentido de que resulta aplicable al despido de un trabajador en una situación como la de la Sra. Coleman, antes de determinar si, de hecho, esta última fue víctima de trato desfavorable o de acoso. Esta es la razón de que las cuestiones prejudiciales se plantearan partiendo de la presunción de que los hechos fueron tal como se resumen en el apartado 26 de la presente sentencia.

31 Dado que se ha sometido al Tribunal de Justicia una petición de interpretación del Derecho comunitario que no está manifiestamente desprovista de relación con la realidad o el objeto del litigio en el procedimiento principal y que este Tribunal dispone de los datos necesarios para responder de un modo útil a las cuestiones que se le han planteado, relativas a la aplicabilidad de la Directiva 2000/78 a dicho litigio, debe responder a la mencionada petición sin tener que pronunciarse acerca de la presunción sobre los hechos en la que se basó el órgano jurisdiccional remitente, presunción cuya validez habrá de comprobar posteriormente este último órgano jurisdiccional si ello resulta necesario (véase, en este sentido, la sentencia de 27 de octubre de 1993, Enderby, C-127/92, Rec. p. I-5535, apartado 12).

32 En tales circunstancias, procede declarar la admisibilidad de la petición de decisión prejudicial.

Sobre las cuestiones prejudiciales

Sobre la primera parte de la primera cuestión prejudicial, así como sobre las cuestiones prejudiciales segunda y tercera

33 Mediante estas cuestiones, que procede examinar conjuntamente, el órgano jurisdiccional remitente pide en lo sustancial que se dilucide si la Directiva 2000/78 y, en particular, sus artículos 1 y 2, apartados 1 y 2, letra a), deben interpretarse en el sentido de que únicamente prohíben la discriminación por motivo de incapacidad cuando el propio trabajador es la persona discapacitada, o si el principio de igualdad de trato y la prohibición de la discriminación directa se aplican también cuando el propio trabajador no es la persona discapacitada, pero sí, como sucede en el asunto principal, la víctima de un trato desfavorable por motivo de la discapacidad que padece un hijo suyo, a quien el trabajador prodiga la mayor parte de los cuidados que su estado requiere.

34 El artículo 1 de la Directiva 2000/78 define como objeto de la misma el de establecer, en el ámbito del empleo y la ocupación, un marco general para luchar contra la discriminación por motivos de religión o convicciones, de discapacidad, de edad o de orientación sexual.

35 El artículo 2, apartado 1, de la misma Directiva define el principio de igualdad de trato como la ausencia de toda discriminación directa o indirecta basada en cualquiera de los motivos mencionados en el artículo 1, con inclusión, pues, de la discapacidad.

36 Con arreglo al apartado 2, letra a), del citado artículo 2, existe discriminación directa cuando una persona sea, haya sido o pudiera ser tratada de manera menos favorable que otra en situación análoga por motivo, entre otros, de discapacidad.

37 En virtud del artículo 3, apartado 1, letra c), la Directiva 2000/78 se aplicará, dentro del límite de las competencias conferidas a la Comunidad, a todas las personas, por lo que respecta tanto al sector público como al privado, incluidos los organismos públicos, en relación con las condiciones de empleo y trabajo, incluidas las de despido y remuneración.

38 Por consiguiente, de las citadas disposiciones de la Directiva 2000/78 no se desprende que el principio de igualdad de trato que ésta pretende garantizar se circunscriba a las personas que padezcan ellas mismas una discapacidad en el sentido de dicha Directiva. Antes al contrario, la Directiva tiene por objeto, en lo que atañe al empleo y al trabajo, combatir todas las formas de discriminación basadas en la discapacidad. En efecto, el principio de igualdad de trato que en esta materia consagra la citada Directiva no se aplica a una categoría determinada de personas, sino en función de los motivos contemplados en el artículo 1 de la misma. Corrobora esta interpretación el tenor literal del artículo 13 CE, disposición que constituye la base jurídica de la Directiva 2000/78 y que atribuye a la Comunidad competencia para adoptar acciones adecuadas para luchar contra la discriminación por motivo, entre otros, de discapacidad.

39 Es verdad que, según se desprende de sus propios términos, la Directiva 2000/78 contiene varias disposiciones aplicables únicamente a las personas con discapacidad. En efecto, el artículo 5 precisa que, a fin de garantizar la observancia del principio de igualdad de trato en relación con las personas con discapacidades, se realizarán ajustes razonables. Esto significa que los empresarios tomarán las medidas adecuadas, en función de las necesidades de cada situación concreta, para permitir a las personas con discapacidades acceder al empleo, tomar parte en el mismo o progresar profesionalmente, o para que se les ofrezca formación, salvo que esas medidas supongan una carga excesiva para el empresario.

40 El artículo 7, apartado 2, de la misma Directiva prevé igualmente que, por lo que respecta a las personas con discapacidad, el principio de igualdad de trato no constituirá un obstáculo al derecho de los Estados miembros de mantener o adoptar disposiciones relativas a la protección de la salud y la seguridad en el lugar de trabajo, ni para las medidas cuya finalidad sea crear o mantener disposiciones o facilidades con objeto de proteger o fomentar la inserción de dichas personas en el mundo laboral.

41 A la luz de las disposiciones mencionadas en los dos apartados precedentes y de los considerandos decimosexto, decimoséptimo y vigésimo séptimo de la Directiva 2000/78, tanto el Gobierno del Reino Unido como los Gobiernos griego, italiano y neerlandés sostienen que la prohibición de discriminación directa prevista en dicha Directiva no puede interpretarse en el sentido de que incluye una situación como la de la demandante en el litigio principal, puesto que esta última no está ella misma discapacitada. Según los mencionados Gobiernos, tan sólo pueden invocar las disposiciones de la citada Directiva aquellas personas que, en una situación análoga a la de otras personas, son tratadas de manera menos favorable o colocadas en una situación desventajosa en razón de características que les son propias.

42 Sin embargo, es preciso señalar a este respecto que el hecho de que las disposiciones mencionadas en los apartados 39 y 40 de la presente sentencia se refieran específicamente a las personas que padecen una discapacidad obedece a la circunstancia de que se trata, bien de disposiciones que establecen medidas de discriminación positiva en favor de la propia persona discapacitada, bien de medidas específicas que quedarían privadas de todo alcance o que podrían resultar desproporcionadas si no se circunscribieran exclusivamente a las personas que padecen alguna discapacidad. Según se desprende de los considerandos decimosexto y vigésimo de la Directiva, se trata de medidas de adaptación a las necesidades de las personas con discapacidad en el lugar de trabajo y para acondicionar el lugar de trabajo en función de la discapacidad de esas personas. Así pues, la finalidad específica de tales medidas es hacer posible y facilitar la inserción de las personas con discapacidad en el mundo del trabajo y, por esta razón, sólo pueden resultar aplicables a las propias personas con discapacidad, así como a las obligaciones que, frente a ellas, tienen los correspondientes empresarios y, en su caso, los Estados miembros.

43 Por consiguiente, el hecho de que la Directiva 2000/78 contenga disposiciones destinadas a tener en cuenta específicamente las necesidades de las personas con discapacidad no permite llegar a la conclusión de que el principio de igualdad de trato que la misma consagra deba interpretarse de manera restrictiva, es decir, en el sentido de que prohíbe únicamente las discriminaciones directas por motivo de discapacidad que afecten exclusivamente a las propias personas con discapacidad. Por lo demás, el sexto considerando de la citada Directiva, al mencionar la Carta comunitaria de los derechos sociales fundamentales de los trabajadores, remite tanto al combate general contra toda forma de discriminación como a la necesidad de adoptar medidas adecuadas para la integración social y económica de las personas con discapacidad.

44 Los Gobiernos italiano, neerlandés y del Reino Unido sostienen también que la sentencia de 11 de julio de 2006, Chacón Navas (C-13/05, Rec. p. I-6467), contiene una interpretación restrictiva del alcance *ratione personae* de la Directiva 2000/78. Según el Gobierno italiano, en aquella sentencia el Tribunal de Justicia asumió una interpretación restrictiva del concepto de discapacidad y de su pertinencia en la relación laboral.

45 En la citada sentencia Chacón Navas, el Tribunal de Justicia definió el concepto de «discapacidad» y, en los apartados 51 y 52 de la misma, consideró que la prohibición, en

materia de despido, de la discriminación por motivo de discapacidad, recogida en los artículos 2, apartado 1, y 3, apartado 1, letra c), de la Directiva 2000/78, se opone a un despido por motivo de discapacidad que, habida cuenta de la obligación de realizar los ajustes razonables para las personas con discapacidad, no se justifique por el hecho de que la persona en cuestión no sea competente o no esté capacitada o disponible para desempeñar las tareas fundamentales del puesto de que se trate. No obstante lo cual, tal interpretación no autoriza a deducir que el principio de igualdad de trato definido en el artículo 2, apartado 1, de esa misma Directiva y la prohibición de discriminación directa prevista en el apartado 2, letra a), del mismo artículo no puedan aplicarse a una situación como la controvertida en el litigio principal cuando el trato desfavorable que un trabajador alega haber sufrido esté motivado por la discapacidad que padece un hijo suyo, a quien prodiga la mayor parte de los cuidados que su estado requiere.

46 En efecto, aunque en el apartado 56 de la sentencia Chacón Navas, antes citada, el Tribunal de Justicia precisó que, a la vista del tenor literal del artículo 13 CE, el ámbito de aplicación de la Directiva 2000/78 no puede ampliarse a otros tipos de discriminación además de las basadas en los motivos enumerados con carácter exhaustivo en el artículo 1 de la propia Directiva –de manera que un trabajador que haya sido despedido por su empresario a causa exclusivamente de enfermedad no está comprendido en el marco general establecido por la Directiva 2000/78–, este Tribunal, sin embargo, no declaró que el principio de igualdad de trato y el alcance *ratione personae* de dicha Directiva deban interpretarse de manera restrictiva en lo que atañe a los motivos de que se trata.

47 En cuanto a los objetivos perseguidos por la Directiva 2000/78, la finalidad de ésta es, tal como se desprende de los apartados 34 y 38 de la presente sentencia, establecer un marco general para luchar, en el ámbito del empleo y la ocupación, contra la discriminación por cualquiera de los motivos enumerados en el artículo 1 de la misma Directiva, entre los que figura específicamente la discapacidad, y ello con el fin de que en los Estados miembros se aplique el principio de igualdad de trato. Del considerando trigésimo séptimo se desprende que otro de los objetivos de la citada Directiva es el establecimiento en la Comunidad de un marco para la igualdad en el empleo y la ocupación.

48 Tal como alegan la Sra. Coleman, los Gobiernos lituano y sueco y la Comisión, tanto los mencionados objetivos como el efecto útil de la Directiva 2000/78 se verían comprometidos si un trabajador que se encuentre en una situación como la de la demandante en el litigio principal no pudiera invocar la prohibición de discriminación directa establecida en el artículo 2, apartado 2, letra a), de la misma Directiva cuando se haya probado que ha recibido un trato menos favorable que el que recibe, ha recibido o podría recibir otro trabajador en situación análoga, a causa de la discapacidad de un hijo suyo, y ello aunque el propio trabajador no sea discapacitado.

49 A este respecto, del undécimo considerando de la misma Directiva se desprende que el legislador comunitario también consideró que la discriminación por motivos de religión o convicciones, discapacidad, edad u orientación sexual puede poner en peligro la consecución de los objetivos del Tratado, en particular por lo que se refiere al empleo.

50 Con todo, si bien es verdad que, en una situación como la controvertida en el litigio principal, la persona objeto de discriminación directa por motivo de discapacidad no es ella misma una persona discapacitada, no es menos cierto que el motivo del trato menos favorable del que la Sra. Coleman alega haber sido víctima lo constituye precisamente la discapacidad. Según consta en el apartado 38 de la presente sentencia, la Directiva 2000/78, que tiene por

objeto, en lo que atañe al empleo y al trabajo, combatir todas las formas de discriminación basadas en la discapacidad, no se aplica a una categoría determinada de personas, sino en función de los motivos contemplados en el artículo 1 de la misma Directiva.

51 Una vez demostrado que un trabajador que se encuentra en una situación análoga a la controvertida en el litigio principal es víctima de discriminación directa por motivo de discapacidad, toda interpretación de la Directiva 2000/78 que circunscriba la aplicación de ésta exclusivamente a aquellas personas que sean ellas mismas personas discapacitadas podría privar a dicha Directiva de una parte considerable de su efecto útil y reducir la protección que pretende garantizar.

52 En cuanto a la carga de la prueba aplicable en una situación como la controvertida en el litigio principal, cabe recordar que, a tenor del artículo 10, apartado 1, de la Directiva 2000/78, los Estados miembros deben adoptar, con arreglo a su ordenamiento jurídico nacional, las medidas necesarias para garantizar que corresponda a la parte demandada demostrar que no ha habido vulneración del principio de igualdad de trato, cuando una persona que se considere perjudicada por la no aplicación, en lo que a ella se refiere, de dicho principio alegue, ante un tribunal u otro órgano competente, hechos que permitan presumir la existencia de discriminación directa o indirecta. A tenor del apartado 2 de dicho artículo, lo dispuesto en el apartado 1 se entenderá sin perjuicio de que los Estados miembros adopten normas sobre la carga de la prueba más favorables a la parte demandante.

53 Así pues, en el asunto principal, incumbe a la Sra. Coleman, en virtud del artículo 10, apartado 1, de la Directiva 2000/78, acreditar ante el órgano jurisdiccional remitente hechos que permitan presumir que existe una discriminación directa por motivo de discapacidad prohibida por dicha Directiva.

54 A tenor de esta última disposición de la Directiva 2000/78 y del considerando trigésimo primero de la misma, las normas relativas a la carga de la prueba deben modificarse cuando haya un caso de presunta discriminación. En el supuesto de que la Sra. Coleman acredite hechos que permitan presumir que existe una discriminación directa, la aplicación efectiva del principio de igualdad de trato exigirá que la carga de la prueba recaiga en los demandados en el litigio principal, quienes habrán de demostrar que no hubo violación de dicho principio.

55 En este contexto, dichos demandados podrían refutar la existencia de tal violación acreditando específicamente, mediante cualquier medio de prueba admisible en Derecho, que el trato del que fue objeto el trabajador estaba justificado por factores objetivos y ajenos a toda discriminación por motivo de discapacidad, así como a toda relación que dicho trabajador pudiera mantener con una persona con discapacidad.

56 Habida cuenta de las consideraciones precedentes, procede responder a la primera parte de la primera cuestión prejudicial y a las cuestiones prejudiciales segunda y tercera que la Directiva 2000/78 y, en particular, sus artículos 1 y 2, apartados 1 y 2, letra a), deben interpretarse en el sentido de que la prohibición de discriminación directa que establecen no se circunscribe exclusivamente a aquellas personas que sean ellas mismas discapacitadas. Cuando un empresario trate a un trabajador que no sea él mismo una persona con discapacidad de manera menos favorable a como trata, ha tratado o podría tratar a otro trabajador en una situación análoga y se acredite que el trato desfavorable del que es víctima dicho trabajador está motivado por la discapacidad que padece un hijo suyo, a quien el trabajador prodiga la mayor parte de los cuidados que su estado requiere, tal trato resulta

contrario a la prohibición de discriminación directa enunciada en el citado artículo 2, apartado 2, letra a).

Sobre la segunda parte de la primera cuestión prejudicial y sobre la cuarta cuestión prejudicial

57 Mediante estas cuestiones, que procede examinar conjuntamente, el órgano jurisdiccional remitente pide en lo sustancial que se dilucide si la Directiva 2000/78 y, en particular, sus artículos 1 y 2, apartados 1 y 3, deben interpretarse en el sentido de que únicamente prohíben el acoso relacionado con una discapacidad cuando la persona con discapacidad sea el propio trabajador, o si, por el contrario, la prohibición de acoso se aplica también cuando, como sucede en el litigio principal, el propio trabajador no es una persona con discapacidad, pero sí víctima de un comportamiento no deseado constitutivo de acoso relacionado con la discapacidad que padece un hijo suyo, a quien el trabajador prodiga la mayor parte de los cuidados que su estado requiere.

58 Teniendo en cuenta que, en virtud del artículo 2, apartado 3, de la Directiva 2000/78, el acoso se considera discriminación a efectos del apartado 1 de ese mismo artículo, procede señalar que, por las mismas razones que las expuestas en los apartados 34 a 51 de la presente sentencia, la citada Directiva y, en particular, sus artículos 1 y 2, apartados 1 y 3, deben interpretarse en el sentido de que no se limitan a prohibir el acoso frente a personas que sean ellas mismas discapacitadas.

59 Cuando se demuestre que el comportamiento no deseado constitutivo del acoso sufrido por un trabajador que no sea él mismo una persona con discapacidad está relacionado con la discapacidad de un hijo suyo, al que el trabajador prodiga la mayor parte de los cuidados que su estado requiere, tal comportamiento resulta contrario al principio de igualdad de trato consagrado por la Directiva 2000/78 y, en particular, a la prohibición del acoso enunciada en el artículo 2, apartado 3, de la misma.

60 No obstante, procede recordar a este respecto que, según los propios términos del artículo 2, apartado 3, de la citada Directiva, el concepto de acoso podrá definirse de conformidad con las normativas y prácticas nacionales de cada Estado miembro.

61 En lo que atañe a la carga de la prueba aplicable a una situación como la controvertida en el litigio principal, procede declarar que, teniendo en cuenta que el acoso se considera discriminación a efectos del artículo 2, apartado 1, de la Directiva 2000/78, se aplican al acoso las mismas normas expuestas en los apartados 52 a 55 de la presente sentencia.

62 Por consiguiente, tal como se desprende del apartado 54 de la presente sentencia, a tenor del artículo 10, apartado 1, de la Directiva 2000/78 y del considerando trigésimo primero de la misma, las normas relativas a la carga de la prueba deben modificarse cuando haya un caso de presunta discriminación. En el supuesto de que la Sra. Coleman acredite hechos que permitan presumir que existe acoso, la aplicación efectiva del principio de igualdad de trato exigirá que la carga de la prueba recaiga en los demandados en el litigio principal, quienes habrán de demostrar que no hubo acoso en las circunstancias del caso concreto.

63 Habida cuenta de las consideraciones precedentes, procede responder a la segunda parte de la primera cuestión prejudicial y a la cuarta cuestión prejudicial que la Directiva 2000/78 y, en particular, sus artículos 1 y 2, apartados 1 y 3, deben interpretarse en el sentido de que la

prohibición de acoso que establecen no se circunscribe exclusivamente a aquellas personas que sean ellas mismas discapacitadas. Cuando se demuestre que el comportamiento no deseado constitutivo del acoso del que es víctima un trabajador que no sea él mismo una persona con discapacidad está relacionado con la discapacidad de un hijo suyo, al que el trabajador prodiga la mayor parte de los cuidados que su estado requiere, tal comportamiento resulta contrario a la prohibición del acoso establecida en el citado artículo 2, apartado 3.

Costas

64 Dado que el procedimiento tiene, para las partes del litigio principal, el carácter de un incidente promovido ante el órgano jurisdiccional nacional, corresponde a éste resolver sobre las costas. Los gastos efectuados por quienes, no siendo partes del litigio principal, han presentado observaciones ante el Tribunal de Justicia no pueden ser objeto de reembolso.

En virtud de todo lo expuesto, el Tribunal de Justicia (Gran Sala) declara:

1) **La Directiva 2000/78/CE del Consejo, de 27 de noviembre de 2000, relativa al establecimiento de un marco general para la igualdad de trato en el empleo y la ocupación, y, en particular, sus artículos 1 y 2, apartados 1 y 2, letra a), deben interpretarse en el sentido de que la prohibición de discriminación directa que establecen no se circunscribe exclusivamente a aquellas personas que sean ellas mismas discapacitadas. Cuando un empresario trate a un trabajador que no sea él mismo una persona con discapacidad de manera menos favorable a como trata, ha tratado o podría tratar a otro trabajador en una situación análoga y se acredite que el trato desfavorable del que es víctima dicho trabajador está motivado por la discapacidad que padece un hijo suyo, a quien el trabajador prodiga la mayor parte de los cuidados que su estado requiere, tal trato resulta contrario a la prohibición de discriminación directa enunciada en el citado artículo 2, apartado 2, letra a).**

2) **La Directiva 2000/78 y, en particular, sus artículos 1 y 2, apartados 1 y 3, deben interpretarse en el sentido de que la prohibición de acoso que establecen no se circunscribe exclusivamente a aquellas personas que sean ellas mismas discapacitadas. Cuando se demuestre que el comportamiento no deseado constitutivo del acoso del que es víctima un trabajador que no sea él mismo una persona con discapacidad está relacionado con la discapacidad de un hijo suyo, al que el trabajador prodiga la mayor parte de los cuidados que su estado requiere, tal comportamiento resulta contrario a la prohibición del acoso establecida en el citado artículo 2, apartado 3.**

Firmas

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* Lengua de procedimiento: inglés.

SENTENCIA DEL TRIBUNAL DE JUSTICIA (Gran Sala)

de 11 de julio de 2006 (*)

«Directiva 2000/78/CE – Igualdad de trato en el empleo y la ocupación – Concepto de discapacidad»

En el asunto C-13/05,

que tiene por objeto una petición de decisión prejudicial planteada, con arreglo al artículo 234 CE, por el Juzgado de lo Social nº 33 de Madrid mediante resolución de 7 de enero de 2005, recibida en el Tribunal de Justicia el 19 de enero de 2005, en el procedimiento entre

Sonia Chacón Navas

y

Eurest Colectividades, S.A.,

EL TRIBUNAL DE JUSTICIA (Gran Sala),

integrado por el Sr. V. Skouris, Presidente, los Sres. P. Jann, C.W.A. Timmermans, A. Rosas, K. Schiemann y J. Makarczyk, Presidentes de Sala, y el Sr. J.-P. Puissochet, la Sra. N. Colneric (Ponente) y los Sres. K. Lenaerts, P. Kūris, E. Juhász, E. Levits y A. Ó Caoimh, Jueces;

Abogado General: Sr. L.A. Geelhoed;

Secretario: Sr. R. Grass;

habiendo considerado los escritos obrantes en autos;

consideradas las observaciones escritas presentadas:

– en nombre de Eurest Colectividades, S.A., por la Sra. R. Sanz García-Muro, abogada;

– en nombre del Gobierno español, por el Sr. E. Braquehais Conesa, en calidad de agente;

– en nombre del Gobierno checo, por el Sr. T. Boček, en calidad de agente;

– en nombre del Gobierno alemán, por el Sr. M. Lumma y la Sra. C. Schulze-Bahr, en calidad de agentes;

– en nombre del Gobierno neerlandés, por la Sra. H.G. Sevenster, en calidad de agente;

– en nombre del Gobierno austriaco, por la Sra. C. Pesendorfer, en calidad de agente;

– en nombre del Gobierno del Reino Unido, por la Sra. C. White, en calidad de agente, asistida por el Sr. T. Ward, Barrister;

– en nombre de la Comisión de las Comunidades Europeas, por la Sra. I. Martínez del Peral Cagigal y el Sr. D. Martin, en calidad de agentes;

oídas las conclusiones del Abogado General, presentadas en audiencia pública el 16 de marzo de 2006;

dicta la siguiente

Sentencia

1 La petición de decisión prejudicial versa sobre la interpretación, en lo que atañe a la discriminación por motivos de discapacidad, de la Directiva 2000/78/CE del Consejo, de 27 de noviembre de 2000, relativa al establecimiento de un marco general para la igualdad de trato en el empleo y la ocupación (DO L 303, p. 16), y, con carácter subsidiario, sobre la eventual prohibición de una discriminación por motivos de enfermedad.

2 Dicha petición se presentó en el marco de un litigio entre la Sra. Chacón Navas y la sociedad Eurest Colectividades, S.A. (en lo sucesivo, «Eurest»), en relación con un despido producido con ocasión de una baja laboral por enfermedad.

Marco jurídico y normativo

Normativa comunitaria

3 El artículo 136 CE, párrafo primero, dispone lo siguiente:

«La Comunidad y los Estados miembros, teniendo presentes derechos sociales fundamentales como los que se indican en la Carta Social Europea, firmada en Turín el 18 de octubre de 1961, y en la Carta comunitaria de los derechos sociales fundamentales de los trabajadores, de 1989, tendrán como objetivo el fomento del empleo, la mejora de las condiciones de vida y de trabajo, a fin de conseguir su equiparación por la vía del progreso, una protección social adecuada, el diálogo social, el desarrollo de los recursos humanos para conseguir un nivel de empleo elevado y duradero y la lucha contra las exclusiones».

4 Para la consecución de los objetivos del artículo 136, los apartados 1 y 2 del artículo 137 CE atribuyen a la Comunidad competencias para apoyar y completar la acción de los Estados miembros, concretamente en los ámbitos de la integración de las personas excluidas del mercado laboral y de la lucha contra la exclusión social.

5 La Directiva 2000/78 fue adoptada sobre la base del artículo 13 CE, en su versión anterior al Tratado de Niza, disposición según la cual:

«Sin perjuicio de las demás disposiciones del presente Tratado y dentro de los límites de las competencias atribuidas a la Comunidad por el mismo, el Consejo, por unanimidad, a propuesta de la Comisión y previa consulta al Parlamento Europeo, podrá adoptar acciones adecuadas para luchar contra la discriminación por motivos de sexo, de origen racial o étnico, religión o convicciones, discapacidad, edad u orientación sexual».

6 El artículo 1 de la Directiva 2000/78 dispone lo siguiente:

«La presente Directiva tiene por objeto establecer un marco general para luchar contra la discriminación por motivos de religión o convicciones, de discapacidad, de edad o de orientación sexual en el ámbito del empleo y la ocupación, con el fin de que en los Estados miembros se aplique el principio de igualdad de trato».

7 Dicha Directiva enuncia en sus considerandos:

«11) La discriminación por motivos de religión o convicciones, discapacidad, edad u orientación sexual puede poner en peligro la consecución de los objetivos del Tratado CE, en particular el logro de un alto nivel de empleo y de protección social, la elevación del nivel y de la calidad de vida, la cohesión económica y social, la solidaridad y la libre circulación de personas.

12) A tal fin, se deberá prohibir en toda la Comunidad cualquier discriminación directa o indirecta por motivos de religión o convicciones, discapacidad, edad u orientación sexual en los ámbitos a que se refiere la presente Directiva. [...]

[…]

16) La adopción de medidas de adaptación a las necesidades de las personas con discapacidad en el lugar de trabajo desempeña un papel importante a la hora de combatir la discriminación por motivos de discapacidad.

17) La presente Directiva no obliga a contratar, ascender, mantener en un puesto de trabajo o facilitar formación a una persona que no sea competente o no esté capacitada o disponible para desempeñar las tareas fundamentales del puesto de que se trate o para seguir una formación dada, sin perjuicio de la obligación de realizar los ajustes razonables para las personas con discapacidad.

[…]

27) El Consejo, en su Recomendación 86/379/CEE, de 24 de julio de 1986, sobre el empleo de los minusválidos en la Comunidad [DO L 225, p. 43], estableció un marco de orientación que enumera ejemplos de acciones positivas para el fomento del empleo y de la formación profesional de los minusválidos, y en su Resolución de 17 de junio de 1999 […] relativa a la igualdad de oportunidades laborales de las personas con minusvalías afirmó la importancia de prestar una atención específica, en particular, a la contratación, al mantenimiento de los trabajadores en el empleo y a la formación y formación permanente de los minusválidos.»

8 El artículo 2, apartados 1 y 2, de la Directiva 2000/78 dispone lo siguiente:

«1. A efectos de la presente Directiva, se entenderá por principio de igualdad de trato la ausencia de toda discriminación directa o indirecta basada en cualquiera de los motivos mencionados en el artículo 1.

2. A efectos de lo dispuesto en el apartado 1:

a) existirá discriminación directa cuando una persona sea, haya sido o pudiera ser tratada de manera menos favorable que otra en situación análoga por alguno de los motivos mencionados en el artículo 1;

b) existirá discriminación indirecta cuando una disposición, criterio o práctica aparentemente neutros pueda ocasionar una desventaja particular a personas con una religión o convicción, con una discapacidad, de una edad, o con una orientación sexual determinadas, respecto de otras personas, salvo que:

i) dicha disposición, criterio o práctica pueda justificarse objetivamente con una finalidad legítima y salvo que los medios para la consecución de esta finalidad sean adecuados y necesarios; o que

ii) respecto de las personas con una discapacidad determinada, el empresario o cualquier persona u organización a la que se aplique lo dispuesto en la presente Directiva, esté obligado, en virtud de la legislación nacional, a adoptar medidas adecuadas de conformidad con los principios contemplados en el artículo 5 para eliminar las desventajas que supone esa disposición, ese criterio o esa práctica.»

9 A tenor del artículo 3 de la misma Directiva:

«1. Dentro del límite de las competencias conferidas a la Comunidad, la presente Directiva se aplicará a todas las personas, por lo que respecta tanto al sector público como al privado, incluidos los organismos públicos, en relación con:

[…]

c) las condiciones de empleo y trabajo, incluidas las de despido y remuneración;

[…]»

10 El artículo 5 de dicha Directiva dispone:

«A fin de garantizar la observancia del principio de igualdad de trato en relación con las personas con discapacidades, se realizarán ajustes razonables. Esto significa que los empresarios tomarán las medidas adecuadas, en función de las necesidades de cada situación concreta, para permitir a las personas con discapacidades acceder al empleo, tomar parte en el mismo o progresar profesionalmente, o para que se les ofrezca formación, salvo que esas medidas supongan una carga excesiva para el empresario. La carga no se considerará excesiva cuando sea paliada en grado suficiente mediante medidas existentes en la política del Estado miembro sobre discapacidades».

11 La Carta comunitaria de los derechos sociales fundamentales de los trabajadores, adoptada con ocasión de la reunión del Consejo Europeo celebrada el 9 de diciembre de 1989, a la que hace referencia el artículo 136 CE, apartado 1, enuncia en su apartado 26:

«Todo minusválido, cualesquiera que sean el origen y la naturaleza de su minusvalía, debe poder beneficiarse de medidas adicionales concretas encaminadas a favorecer su integración profesional y social.

Estas medidas de mejora deben referirse, en particular, según las capacidades de los interesados, a la formación profesional, la ergonomía, la accesibilidad, la movilidad, los medios de transporte y la vivienda.»

Normativa nacional

12 A tenor del artículo 14 de la Constitución Española:

«Los españoles son iguales ante la ley, sin que pueda prevalecer discriminación alguna por razón de nacimiento, raza, sexo, religión, opinión o cualquier otra condición o circunstancia personal o social.»

13 El Real Decreto Legislativo 1/1995, de 24 de marzo, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (BOE nº 75, de 29 de marzo de 1995, p. 9654; en lo sucesivo, «Estatuto de los Trabajadores»), establece una distinción entre el despido improcedente y el despido nulo.

14 Los apartados 5 y 6 del artículo 55 del Estatuto de los Trabajadores disponen lo siguiente:

«5. Será nulo el despido que tenga por móvil alguna de las causas de discriminación prohibidas en la Constitución o en la Ley, o bien se produzca con violación de derechos fundamentales y libertades públicas del trabajador.

6. El despido nulo tendrá el efecto de la readmisión inmediata del trabajador, con abono de los salarios dejados de percibir.»

15 Del artículo 56, apartados 1 y 2, del Estatuto de los trabajadores se desprende que, en caso de despido improcedente, y a no ser que el empresario opte por readmitir al trabajador, éste perderá su trabajo y se le abonará una indemnización.

16 En lo que atañe a la prohibición de discriminación en las relaciones laborales, el artículo 17 del Estatuto de los Trabajadores, en su versión modificada por la Ley 62/2003, de 30 de diciembre, de medidas fiscales, administrativas y del orden social (BOE nº 313, de 31 de diciembre de 2003, p. 46874), que tiene por objeto adaptar el Derecho español a la Directiva 2000/78, dispone lo siguiente:

«1. Se entenderán nulos y sin efecto los preceptos reglamentarios, las cláusulas de los convenios colectivos, los pactos individuales y las decisiones unilaterales del empresario que contengan discriminaciones directas o indirectas desfavorables por razón de edad o discapacidad o favorables o adversas en el empleo, así como en materia de retribuciones, jornada y demás condiciones de trabajo por circunstancias de sexo, origen, incluido el racial o étnico, estado civil, condición social, religión o convicciones, ideas políticas, orientación sexual, adhesión o no a sindicatos y a sus acuerdos, vínculos de parentesco con otros trabajadores en la empresa y lengua dentro del Estado español.

[…]»

Litigio principal y cuestiones prejudiciales

17 La Sra. Chacón Navas trabajaba en la empresa Eurest, sociedad especializada en el sector de la restauración colectiva. El 14 de octubre de 2003 fue declarada en baja laboral por enfermedad y, según los servicios públicos de salud que se ocuparon de su caso, no estaba en condiciones de reanudar su actividad a corto plazo. El órgano jurisdiccional remitente no aporta indicación alguna sobre la enfermedad que padece la Sra. Chacón Navas.

18 El 28 de mayo de 2004, Eurest notificó a la Sra. Chacón Navas que quedaba despedida, sin especificar motivo alguno, reconociendo al mismo tiempo el carácter improcedente del despido y ofreciéndole una indemnización.

19 El 29 de junio de 2004, la Sra. Chacón Navas presentó una demanda contra Eurest, alegando que su despido era nulo debido a la desigualdad de trato y a la discriminación de las que había sido objeto, las cuales resultaban de la situación de baja laboral en la que se encontraba desde hacía ocho meses. Solicitó que se condenara a Eurest a readmitirla en su puesto de trabajo.

20 El órgano jurisdiccional remitente señala que, al no figurar en los autos ninguna alegación ni elemento probatorio, aplicando las reglas sobre inversión de la carga de la prueba debe considerarse que la Sra. Chacón Navas fue despedida por el único motivo de encontrarse en baja laboral por enfermedad.

21 El órgano jurisdiccional remitente observa que, en la jurisprudencia española existen precedentes según los cuales este tipo de despido se califica de improcedente, y no de nulo, puesto que en el Derecho español la enfermedad no figura expresamente entre los motivos de discriminación prohibidos en las relaciones entre personas privadas.

22 No obstante, el órgano jurisdiccional remitente pone de relieve que existe una relación de causalidad entre enfermedad y discapacidad. Para definir el término «discapacidad», procede, a su juicio, acudir a la Clasificación Internacional del Funcionamiento, de la Discapacidad y de la Salud («CIF») de la Organización Mundial de la Salud. De ella resulta, según el órgano jurisdiccional remitente, que la «discapacidad» es un término genérico que incluye las deficiencias y los factores que limitan la actividad y la participación en la vida social. La enfermedad, precisa, puede producir deficiencias que discapaciten al individuo.

23 Teniendo en cuenta que frecuentemente la enfermedad puede dar lugar a una discapacidad irreversible, el órgano jurisdiccional remitente estima que los trabajadores deben estar protegidos en el momento oportuno en virtud de la prohibición de discriminación por motivos de discapacidad. Lo contrario podría, según él, vaciar de contenido la protección pretendida por el legislador y fomentar prácticas discriminatorias incontroladas.

24 Para el supuesto de que se estime que la discapacidad y la enfermedad son dos conceptos diferentes y que la normativa comunitaria no es directamente aplicable a esta última, el órgano jurisdiccional remitente sugiere que se considere que la enfermedad constituye una seña identitaria no específicamente citada que debe añadirse a aquellas en relación con las cuales la Directiva 2000/78 prohíbe toda discriminación. Esta consideración se deduce, según él, de la interpretación conjunta de los artículos 13 CE, 136 CE y 137 CE, así como de las disposiciones del artículo II-21 del proyecto de Tratado por el que se establece una Constitución para Europa.

25 En tales circunstancias, el Juzgado de lo Social nº 33 de Madrid decidió suspender el procedimiento y plantear al Tribunal de Justicia las siguientes cuestiones prejudiciales:

«1) ¿La Directiva 2000/78, en tanto que en su artículo 1 establece un marco general para luchar contra la discriminación por motivos de discapacidad, incluye dentro de su ámbito protector a una trabajadora que ha sido despedida de su empresa exclusivamente por razón de encontrarse enferma?

2) Subsidiariamente y para el supuesto de que se considerara que las situaciones de enfermedad no encajan dentro del marco protector que la Directiva 2000/78 dispensa contra la discriminación por motivos de discapacidad y la primera pregunta fuera respondida negativamente:

¿se puede considerar a la enfermedad como una seña identitaria adicional frente a las que proscribe discriminación la Directiva 2000/78?»

Sobre la admisibilidad de la remisión prejudicial

26 La Comisión pone en tela de juicio la admisibilidad de las cuestiones planteadas, alegando que los hechos descritos en el auto de remisión adolecen de falta de precisión.

27 A este respecto, procede señalar que, a pesar de no existir indicación alguna acerca de la naturaleza y eventual evolución de la enfermedad de la Sra. Chacón Navas, este Tribunal de Justicia dispone de datos suficientes que le permiten responder útilmente a las cuestiones planteadas.

28 En efecto, del auto de remisión se desprende que la Sra. Chacón Navas, que había sido declarada en baja laboral por enfermedad y que no estaba en condiciones de reanudar su actividad profesional a corto plazo, fue despedida, según el órgano jurisdiccional remitente, por el único motivo de encontrarse en baja laboral por enfermedad. Del referido auto se desprende asimismo que el órgano jurisdiccional remitente estima que existe una relación de causalidad entre la enfermedad y la discapacidad y que un trabajador en la situación de la Sra. Chacón Navas debe ser protegido en virtud de la prohibición de las discriminaciones por motivos de discapacidad.

29 La cuestión planteada con carácter principal versa específicamente sobre la interpretación del concepto de «discapacidad» a efectos de la Directiva 2000/78. La interpretación que el Tribunal de Justicia haga del referido concepto tiene por objeto permitir que el órgano jurisdiccional remitente examine si, debido a su enfermedad, la Sra. Chacón Navas era en el momento del despido una persona discapacitada en el sentido de la mencionada Directiva, beneficiándose por ello de la protección prevista en el artículo 3, apartado 1, letra c), de la misma Directiva.

30 Por su parte, la cuestión planteada con carácter subsidiario versa sobre la enfermedad como «seña identitaria» y se refiere, por tanto, a todo tipo de enfermedad.

31 Eurest estima que la remisión prejudicial no es admisible porque los tribunales españoles, concretamente el Tribunal Supremo, ya decidieron en el pasado, teniendo en cuenta la normativa comunitaria, que el despido de un trabajador en situación de baja laboral por enfermedad no constituye en cuanto tal una discriminación. No obstante, el hecho de que un órgano jurisdiccional nacional haya interpretado ya una normativa comunitaria no implica la inadmisibilidad de una remisión prejudicial.

32 En lo que atañe a la alegación de Eurest según la cual dicha empresa despidió a la Sra. Chacón Navas porque, con independencia de que ésta se encontrara en baja laboral por enfermedad, sus servicios ya no eran indispensables en aquel momento, es preciso recordar que, en el marco de un procedimiento con arreglo al artículo 234 CE, basado en una clara separación de las funciones entre los órganos jurisdiccionales nacionales y el Tribunal de Justicia, toda apreciación de los hechos del asunto es competencia del juez nacional.

Asimismo corresponde exclusivamente al órgano jurisdiccional nacional, que conoce del litigio y que debe asumir la responsabilidad de la decisión jurisdiccional que debe adoptarse, apreciar, a la luz de las particularidades del asunto, tanto la necesidad de una decisión prejudicial para poder dictar sentencia, como la pertinencia de las cuestiones que plantea al Tribunal de Justicia. Por consiguiente, cuando las cuestiones planteadas se refieran a la interpretación del Derecho comunitario, el Tribunal de Justicia está, en principio, obligado a pronunciarse (véanse, en particular, las sentencias de 25 de febrero de 2003, IKA, C-326/00, Rec. p. I-1703, apartado 27, y de 12 de abril de 2005, Keller, C-145/03, Rec. p. I-2529, apartado 33).

33 Sin embargo, el Tribunal de Justicia también ha indicado que, en supuestos excepcionales, le corresponde examinar las circunstancias en las que el juez nacional se dirige a él, con objeto de verificar su propia competencia (véase, en este sentido, la sentencia de 16 de diciembre de 1981, Foglia, 244/80, Rec. p. 3045, apartado 21). La negativa a pronunciarse sobre una cuestión prejudicial planteada por un órgano jurisdiccional nacional sólo es posible cuando resulta evidente que la interpretación del Derecho comunitario solicitada no tiene relación alguna con la realidad o con el objeto del litigio principal, cuando el problema es de naturaleza hipotética o cuando el Tribunal de Justicia no dispone de los elementos de hecho o de Derecho necesarios para responder de manera útil a las cuestiones planteadas (véanse, en particular, las sentencias de 13 de marzo de 2001, PreussenElektra, C-379/98, Rec. p. I-2099, apartado 39, y de 19 de febrero de 2002, Arduino, C-35/99, Rec. p. I-1529, apartado 25).

34 En el caso presente, al no concurrir ninguno de los mencionados requisitos, procede declarar la admisibilidad de la petición de decisión prejudicial.

Sobre las cuestiones prejudiciales

Sobre la primera cuestión prejudicial

35 Mediante su primera cuestión, el órgano jurisdiccional remitente pide en lo sustancial que se dilucide si el marco general establecido por la Directiva 2000/78 para luchar contra la discriminación por motivos de discapacidad incluye dentro de su ámbito protector a una persona que ha sido despedida por su empresario exclusivamente a causa de una enfermedad.

36 A tenor del artículo 3, apartado 1, letra c), de la Directiva 2000/78, dentro del límite de las competencias conferidas a la Comunidad, dicha Directiva se aplicará a todas las personas en relación con las condiciones de despido.

37 Por consiguiente, dentro de los referidos límites, el marco general establecido por la Directiva 2000/78 para luchar contra la discriminación por motivos de discapacidad se aplica en materia de despido.

38 Para responder a la cuestión planteada, procede, en primer lugar, interpretar el concepto de «discapacidad» a efectos de la Directiva 2000/78 y, en segundo lugar, examinar en qué medida protege dicha Directiva a las personas discapacitadas en lo que atañe al despido.

Sobre el concepto de «discapacidad»

39 El concepto de «discapacidad» no viene definido en la propia Directiva 2000/78, la cual tampoco remite al Derecho de los Estados miembros a efectos de la definición de dicho concepto.

40 Pues bien, de las exigencias tanto de la aplicación uniforme del Derecho comunitario como del principio de igualdad se desprende que el tenor de una disposición de Derecho comunitario que no contenga una remisión expresa al Derecho de los Estados miembros para determinar su sentido y su alcance normalmente debe ser objeto de una interpretación autónoma y uniforme en toda la Comunidad que debe buscarse teniendo en cuenta el contexto de la disposición y el objetivo que la normativa de que se trate pretende alcanzar (véanse, entre otras, las sentencias de 18 de enero de 1984, Ekro, 327/82, Rec. p. 107, apartado 11, y de 9 de marzo de 2006, Comisión/España, C-323/03, Rec. p. I-0000, apartado 32).

41 A tenor de su artículo 1, la Directiva 2000/78 tiene por objeto establecer un marco general para luchar, en el ámbito del empleo y la ocupación, contra la discriminación por cualquiera de los motivos mencionados en dicho artículo, entre los que figura la discapacidad.

42 Habida cuenta del mencionado objetivo, el concepto de «discapacidad» a efectos de la Directiva 2000/78 debe ser objeto, de conformidad con los criterios recordados en el apartado 40 anterior, de una interpretación autónoma y uniforme.

43 La finalidad de la Directiva 2000/78 es combatir determinados tipos de discriminación en el ámbito del empleo y de la ocupación. En este contexto, debe entenderse que el concepto de «discapacidad» se refiere a una limitación derivada de dolencias físicas, mentales o psíquicas y que suponga un obstáculo para que la persona de que se trate participe en la vida profesional.

44 Ahora bien, al utilizar en el artículo 1 de la mencionada Directiva el concepto de «discapacidad», el legislador escogió deliberadamente un término que difiere del de «enfermedad». Así pues, es preciso excluir la equiparación pura y simple de ambos conceptos.

45 El decimosexto considerando de la Directiva 2000/78 establece que «la adopción de medidas de adaptación a las necesidades de las personas con discapacidad en el lugar de trabajo desempeña un papel importante a la hora de combatir la discriminación por motivos de discapacidad». La importancia que el legislador comunitario atribuye a las medidas destinadas a adaptar el puesto de trabajo en función de la discapacidad demuestra que tuvo en mente supuestos en los que la participación en la vida profesional se ve obstaculizado durante un largo período. Por lo tanto, para que la limitación de que se trate pueda incluirse en el concepto de «discapacidad», se requiere la probabilidad de que tal limitación sea de larga duración.

46 La Directiva 2000/78 no contiene indicación alguna que sugiera que los trabajadores se encuentran protegidos en virtud de la prohibición de discriminación por motivos de discapacidad tan pronto como aparezca cualquier enfermedad.

47 De las consideraciones anteriores resulta que una persona que ha sido despedida por su empresario exclusivamente a causa de una enfermedad no está incluida en el marco general establecido por la Directiva 2000/78 para luchar contra la discriminación por motivos de discapacidad.

Sobre la protección de las personas discapacitadas en materia de despido

48 Un trato desfavorable por motivos de discapacidad sólo choca con la protección que pretende la Directiva 2000/78 en la medida en que constituya una discriminación con arreglo al artículo 2, apartado 1, de la misma Directiva.

49 Según su decimoséptimo considerando, la Directiva 2000/78 no obliga a contratar, ascender o mantener en un puesto de trabajo a una persona que no sea competente o no esté capacitada o disponible para desempeñar las tareas fundamentales del puesto de que se trate, sin perjuicio de la obligación de realizar los ajustes razonables para las personas con discapacidad.

50 Con arreglo al artículo 5 de la Directiva 2000/78, se realizarán ajustes razonables a fin de garantizar la observancia del principio de igualdad de trato en relación con las personas con discapacidades. Dicha disposición precisa que lo anterior significa que los empresarios tomarán las medidas adecuadas, en función de las necesidades de cada situación concreta, para permitir a las personas con discapacidades acceder al empleo, tomar parte en el mismo o progresar profesionalmente, salvo que esas medidas supongan una carga excesiva para el empresario.

51 La prohibición, en materia de despido, de la discriminación por motivos de discapacidad, recogida en los artículos 2, apartado 1, y 3, apartado 1, letra c), de la Directiva 2000/78, se opone a un despido por motivos de discapacidad que, habida cuenta de la obligación de realizar los ajustes razonables para las personas con discapacidad, no se justifique por el hecho de que la persona en cuestión no sea competente o no esté capacitada o disponible para desempeñar las tareas fundamentales del puesto de que se trate.

52 Del conjunto de las consideraciones anteriores se desprende que procede responder a la primera cuestión prejudicial de la siguiente manera:

– Una persona que haya sido despedida por su empresario exclusivamente a causa de una enfermedad no está incluida en el marco general establecido por la Directiva 2000/78 para luchar contra la discriminación por motivos de discapacidad.

– La prohibición, en materia de despido, de la discriminación por motivos de discapacidad, recogida en los artículos 2, apartado 1, y 3, apartado 1, letra c), de la Directiva 2000/78, se opone a un despido por motivos de discapacidad que, habida cuenta de la obligación de realizar los ajustes razonables para las personas con discapacidad, no se justifique por el hecho de que la persona en cuestión no sea competente o no esté capacitada o disponible para desempeñar las tareas fundamentales del puesto de que se trate.

Sobre la segunda cuestión prejudicial

53 Mediante su segunda cuestión, el órgano jurisdiccional remitente pide que se dilucide si cabe considerar la enfermedad como un motivo que venga a añadirse a aquellos otros motivos en relación con los cuales la Directiva 2000/78 prohíbe toda discriminación.

54 A este respecto, procede declarar que ninguna disposición del Tratado CE contiene una prohibición de la discriminación por motivos de enfermedad en cuanto tal.

55 En lo que atañe al artículo 13 CE y al artículo 137 CE, en relación con el artículo 136 CE, no contienen sino una regulación de las competencias de la Comunidad. Por otra parte, el artículo 13 CE, que menciona la discriminación por motivos de discapacidad, no

contempla además la discriminación por motivos de enfermedad en cuanto tal y, por consiguiente, ni siquiera puede constituir el fundamento jurídico de medidas del Consejo destinadas a combatir ese tipo de discriminación.

56 Es verdad que entre los derechos fundamentales que forman parte de los principios generales del Derecho comunitario figura el principio general de no discriminación. Por lo tanto, este último principio vincula a los Estados miembros cuando la situación nacional sobre la que versa el litigio principal está incluida en el ámbito de aplicación del Derecho comunitario (en este sentido, véanse las sentencias de 12 de diciembre de 2002, Rodríguez Caballero, C-442/00, Rec. p. I-11915, apartados 30 y 32, y de 12 de junio de 2003, Schmidberger, C-112/00, Rec. p. I-5659, apartado 75, y jurisprudencia allí citada). Pero de ello no cabe deducir que el ámbito de aplicación de la Directiva 2000/78 deba ampliarse por analogía a otros tipos de discriminación además de las basadas en los motivos enumerados con carácter exhaustivo en el artículo 1 de la propia Directiva.

57 Procede, pues, responder a la segunda cuestión prejudicial que la enfermedad en cuanto tal no puede considerarse un motivo que venga a añadirse a aquellos otros motivos en relación con los cuales la Directiva 2000/78 prohíbe toda discriminación.

Costas

58 Dado que el procedimiento tiene, para las partes del litigio principal, el carácter de un incidente promovido ante el órgano jurisdiccional nacional, corresponde a éste resolver sobre las costas. Los gastos efectuados por quienes, no siendo partes del litigio principal, han presentado observaciones ante el Tribunal de Justicia no pueden ser objeto de reembolso.

En virtud de todo lo expuesto, el Tribunal de Justicia (Gran Sala) declara:

1) **Una persona que haya sido despedida por su empresario exclusivamente a causa de una enfermedad no está incluida en el marco general establecido por la Directiva 2000/78/CE del Consejo, de 27 de noviembre de 2000, relativa al establecimiento de un marco general para la igualdad de trato en el empleo y la ocupación, para luchar contra la discriminación por motivos de discapacidad.**

2) **La prohibición, en materia de despido, de la discriminación por motivos de discapacidad, recogida en los artículos 2, apartado 1, y 3, apartado 1, letra c), de la Directiva 2000/78, se opone a un despido por motivos de discapacidad que, habida cuenta de la obligación de realizar los ajustes razonables para las personas con discapacidad, no se justifique por el hecho de que la persona en cuestión no sea competente o no esté capacitada o disponible para desempeñar las tareas fundamentales del puesto de que se trate.**

3) **La enfermedad en cuanto tal no puede considerarse un motivo que venga a añadirse a aquellos otros motivos en relación con los cuales la Directiva 2000/78 prohíbe toda discriminación.**

Firmas

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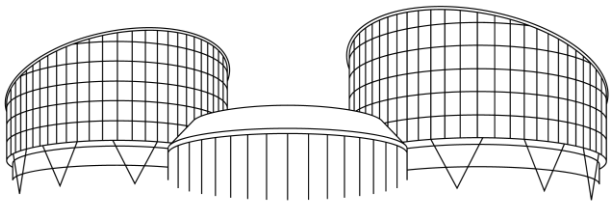
* Lengua de procedimiento: español.



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;

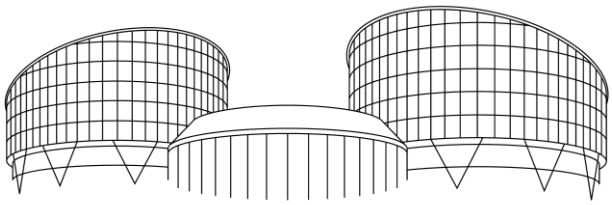
5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 20,000 twenty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to 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;

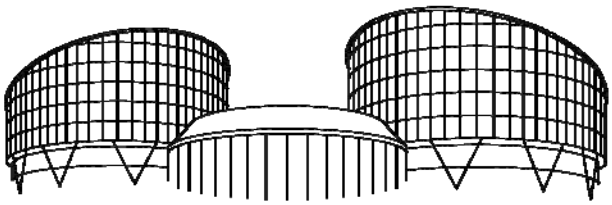
5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, 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
Registrar

Dean Spielmann
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;

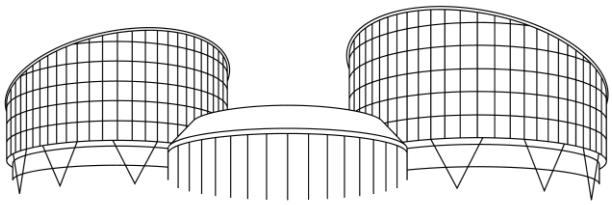
(iii) any tax that may be chargeable on the above amounts;

(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 Jurisconsult	Nicolas Bratza 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).

COMISIÓN DE LAS COMUNIDADES EUROPEAS

Bruselas, 2.7.2008
COM(2008) 426 final

2008/0140 (CNS)

Propuesta de

DIRECTIVA DEL CONSEJO

por la que se aplica el principio de igualdad de trato entre las personas independientemente de su religión o convicciones, discapacidad, edad u orientación sexual

{SEC(2008) 2180}
{SEC(2008) 2181}

(presentadas por la Comisión)

EXPOSICIÓN DE MOTIVOS

1. CONTEXTO DE LA PROPUESTA

Motivación y objetivos de la propuesta

La presente propuesta tiene por objeto aplicar el principio de igualdad de trato entre las personas independientemente de su religión o convicciones, discapacidad, edad u orientación sexual fuera del contexto laboral. La propuesta crea un marco para la prohibición de la discriminación por estos motivos y establece un nivel mínimo homogéneo de protección en la Unión Europea para las personas que han sufrido una discriminación de este tipo.

Asimismo, complementa el marco jurídico comunitario actual, en el que la prohibición de discriminación por los motivos de religión o convicciones, discapacidad, edad u orientación sexual se circunscribe al empleo, la ocupación y la formación profesional[1].

Contexto general

En su programa de legislativo y de trabajo, adoptado el 23 de octubre de 2007[2], la Comisión anunció la presentación de nuevas iniciativas destinadas a completar el marco jurídico de la UE en materia de no discriminación.

La propuesta actual se inscribe en el marco de la «Agenda Social Renovada: Oportunidades, acceso y solidaridad en la Europa del siglo XXI»[3], que acompaña a la Comunicación «No discriminación e igualdad de oportunidades: un compromiso renovado»[4].

Los Estados miembros y la Comunidad Europea han firmado la Convención de las Naciones Unidas sobre los Derechos de las Personas con Discapacidad. Esta Convención se basa en los principios de no discriminación, participación e inclusión social, igualdad de oportunidades y accesibilidad. Se ha presentado el Consejo una propuesta para la celebración de la Convención por la Comunidad Europea[5].

Disposiciones vigentes en el ámbito de la propuesta

La propuesta se suma a las Directivas 2000/43/CE, 2000/78/CE y 2004/113/CE[6], en las que se prohíbe la discriminación por motivos de sexo, origen racial o étnico, religión o convicciones, discapacidad, edad u orientación sexual[7]. La discriminación por raza u origen étnico está

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1 Directiva 2000/43/CE, de 29 de junio de 2000, relativa a la aplicación del principio de igualdad de trato de las personas independientemente de su origen racial o étnico (DO L 180 de 19.7.2000, p. 22) y Directiva 2000/78/CE del Consejo, de 27 de noviembre de 2000, relativa al establecimiento de un marco general para la igualdad de trato en el empleo y la ocupación (DO L 303 de 2.12.2000, p. 16).

2 COM(2007) 640.

3 COM(2008) 412.

4 COM(2008) 420.

5 [COM(2008) XXX].

6 Directiva 2004/113/CE, de 13 de diciembre de 2004, por la que se aplica el principio de igualdad de trato entre hombres y mujeres al acceso a bienes y servicios y su suministro (DO L 373 de 21.12.2004, p. 37).

7 Directiva 2000/43/CE, de 29 de junio de 2000, relativa a la aplicación del principio de igualdad de trato de las personas independientemente de su origen racial o étnico (DO L 180 de 19.7.2000, p. 22) y Directiva 2000/78/CE del Consejo, de 27 de noviembre de 2000, relativa al establecimiento de un marco general para la igualdad de trato en el empleo y la ocupación (DO L 303 de 2.12.2000, p. 16).

prohibida en el empleo, la ocupación y la formación profesional, así como en ámbitos distintos de la actividad laboral como la protección social, la asistencia sanitaria, la educación y el acceso a bienes y servicios, incluida la vivienda, a disposición de la población. La discriminación por sexo se prohíbe en los mismos ámbitos a excepción de la educación, los medios de comunicación y la publicidad. Pero la discriminación por motivos de religión o convicciones, discapacidad, edad u orientación sexual solo se prohíbe en el empleo, la ocupación y la formación profesional.

Las Directivas 2000/43/CE y 2000/78/CE debían estar incorporadas a las legislaciones nacionales, a más tardar, en 2003, a excepción de las disposiciones relativas a la discriminación por edad y discapacidad, para las que era posible acogerse a un plazo adicional de tres años. La Comisión adoptó en 2006 un informe sobre la aplicación de la Directiva 2000/43/CE[8] y el 19 de junio de 2008, un informe sobre la aplicación de la Directiva 2000/78/CE[9]. Todos los Estados miembros salvo uno han transpuesto estas Directivas. La Directiva 2004/113/CE debía estar incorporada a las legislaciones nacionales a finales de 2007, a más tardar.

Los conceptos y las normas previstos en la presente propuesta se engarzan, en la medida de lo posible, con las disposiciones de las Directivas actuales basadas en el artículo 13 CE.

Coherencia con otras políticas y objetivos de la Unión

La presente propuesta se basa en la estrategia desarrollada desde el Tratado de Amsterdam para luchar contra la discriminación y es coherente con los objetivos horizontales de la Unión Europea y, en particular, con la Estrategia de Lisboa para el crecimiento y el empleo y los objetivos del Proceso de la UE sobre protección e inclusión sociales. Asimismo, contribuirá a promover los derechos fundamentales de los ciudadanos, en consonancia con la Carta de los Derechos Fundamentales de la Unión Europea.

2. CONSULTA DE LAS PARTES INTERESADAS Y EVALUACIÓN DE IMPACTO

Consultas

Al preparar esta iniciativa, la Comisión ha tratado de asociar a todas las partes que pudieran estar interesadas y se ha procurado dar el tiempo y ofrecer la posibilidad de responder a todos los que quisieran hacer un comentario al respecto. El Año Europeo de la Igualdad de Oportunidades para Todos ha ofrecido una ocasión única de poner de relieve estas cuestiones y fomentar la participación en el debate.

Cabe mencionar, en particular, una consulta pública en línea[10], una encuesta en el sector empresarial[11] y una consulta por escrito a los interlocutores sociales y las ONG europeas dedicadas a la lucha contra la discriminación, acompañada de reuniones[12]. El resultado de la consulta pública y la de las ONG fue un llamamiento al establecimiento de legislación de la UE para mejorar el nivel de protección contra la discriminación, si bien algunos se

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8 COM(2006) 643 final.

9 COM(2008) 225.

10 Los resultados de la consulta pública están disponibles en: 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

manifestaron más favorables a directivas específicas por motivo de discriminación en el caso de la discapacidad y del sexo. La encuesta del Grupo de Consulta de las Empresas Europeas puso de manifiesto que sería de utilidad para las empresas disponer del mismo nivel de protección contra la discriminación en toda la UE. Los interlocutores sociales en representación de las empresas se manifestaron, en principio, contrarios a una nueva legislación, que consideran una carga administrativa y económica, mientras que los sindicatos se mostraron favorables.

Las respuestas a la consulta pusieron de relieve ciertas inquietudes sobre la manera en que una nueva directiva podría abordar una serie de áreas sensibles y también revelaron malentendidos sobre los límites y el alcance de las competencias comunitarias. La Directiva propuesta aborda estas consideraciones y delimita explícitamente las competencias comunitarias en la materia. Sin rebasar estos límites, la Comunidad tiene el poder de actuar (artículo 13 del Tratado CE) y considera que una actuación de la UE es la mejor vía de procedimiento.

Las respuestas subrayaron asimismo la naturaleza específica de la discriminación ligada a la discapacidad y las medidas necesarias para luchar contra ella. Estas se abordan en un artículo determinado.

También se planteó si una nueva directiva incrementaría los costes para las empresas, pero cabe insistir en que esta propuesta se basa en gran medida en conceptos utilizados en las otras Directivas en vigor, que ya conocen los operadores económicos. Por lo que se refiere a las medidas encaminadas a tratar la discriminación por discapacidad, las empresas ya conocen el concepto de «ajustes razonables» establecido en la Directiva 2000/78/CE. La propuesta de la Comisión especifica los factores que deben tenerse en cuenta a la hora de valorar lo que puede calificarse de «razonable».

Se señaló además que, en contraposición a las otras dos Directivas, la Directiva 2000/78/CE no exige a los Estados miembros que creen organismos de promoción de la igualdad de trato. También se hizo hincapié en la necesidad de abordar la discriminación múltiple, por ejemplo, ofreciendo una definición de este tipo de discriminación y facilitando soluciones efectivas. Estas cuestiones sobrepasan el ámbito de la presente Directiva, pero nada impide que los Estados miembros intervengan en tales ámbitos.

Por último, se mencionó que el alcance de la protección contra la discriminación por sexo en el marco de la Directiva 2004/113/CE no es tan amplio como el de la Directiva 2000/43/CE, cuestión que debería subsanarse en la nueva legislación. La Comisión no ha recogido esta sugerencia de momento, ya que acaba de expirar la fecha para la transposición de la Directiva 2004/113/CE. No obstante, la Comisión informará en 2010 sobre la aplicación de la Directiva y podrá proponer modificaciones, si procede.

Obtención y utilización de asesoramiento técnico

Un estudio[13] realizado en 2006 mostró que, por una parte, la mayoría de los países ofrecen alguna modalidad de protección jurídica superior a los requisitos comunitarios actuales en la mayor parte de los ámbitos examinados y que, por otra, existe una gran variedad entre los países por lo que se refiere al grado y la naturaleza de esta protección. También se puso de relieve que muy pocos países han realizado evaluaciones de impacto previas respecto a la

[13] http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/stud/mapstrand1_en.pdf

legislación en materia de no discriminación. Otro estudio[14] analizó el tipo y la difusión de la discriminación fuera del empleo en la UE, y los gastos potenciales (directos e indirectos) que ello puede acarrear a las personas y a la sociedad.

Además, la Comisión ha utilizado los informes de la Red Europea de Expertos Independientes en el ámbito de la no discriminación, en particular, su estudio «El desarrollo en Europa de una legislación contra la discriminación»[15] y otro titulado «Abordar la discriminación múltiple: prácticas, políticas y leyes»[16].

También cabe mencionar los resultados de una encuesta especial del Eurobarómetro[17] y de una encuesta flash Eurobarómetro efectuada en febrero de 2008[18].

Evaluación de impacto

El informe de evaluación de impacto[19] estudió las pruebas de discriminación fuera del mercado de trabajo. En el informe, se descubrió que si bien la no discriminación está reconocida como uno de los valores fundamentales de la UE, en la práctica, el nivel de protección jurídica para garantizar estos valores difiere en función de los Estados miembros y del motivo de discriminación de que se trate. En consecuencia, las personas con riesgo de ser discriminadas se encuentran, a menudo, menos capacitadas para participar plenamente en la sociedad y en la economía, lo que repercute negativamente en el individuo y la sociedad en su conjunto.

El informe definió tres objetivos que debería cumplir cualquier iniciativa:

- mejorar la protección contra la discriminación;
- garantizar la seguridad jurídica para los operadores económicos y las víctimas potenciales en todos los Estados miembros;
- reforzar la inclusión social y promover la plena participación de todos los colectivos en la sociedad y en la economía.

De entre las diversas medidas identificadas para poder alcanzar los objetivos, se seleccionaron seis opciones para ser analizadas con mayor detalle, que comprenden propuestas de tipo: ninguna intervención a escala de la UE, autorregulación, recomendaciones y la adopción de una o más directivas que prohíban la discriminación fuera del ámbito laboral.

En cualquier caso, los Estados miembros deberán aplicar la Convención de las Naciones Unidas sobre los Derechos de las Personas con Discapacidad, en la que se define la denegación de un ajuste razonable como discriminación. Una medida jurídicamente vinculante que prohíba la discriminación por discapacidad implica costes financieros por las

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14 Podrá consultarse en la dirección siguiente: 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 Encuesta especial del Eurobarómetro nº 296 sobre la discriminación en la UE: http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm y http://ec.europa.eu/public_opinion/archives/eb_special_en.htm

18 Flash Eurobarómetro nº 232: http://ec.europa.eu/public_opinion/flash/fl_232_en.pdf.

19 Podrá consultarse en la dirección siguiente: http://ec.europa.eu/employment_social/fundamental_rights/org/imass_en.htm

adaptaciones que requiere, pero también resulta positiva por la mayor inclusión económica y social de grupos que se enfrentan actualmente a la discriminación.

El informe concluye que una directiva que abarque varios motivos constituye la respuesta más adecuada, en el respeto de los principios de subsidiariedad y proporcionalidad. Un número reducido de Estados miembros ya dispone de una legislación bastante completa en este campo, pero la mayoría ofrece una protección menos amplia. Por tanto, varía el grado de adaptación legislativa que supondría una nueva normativa comunitaria.

La Comisión ha recibido muchas quejas relativas a la discriminación en las aseguradoras y la banca. La aplicación de criterios de edad o discapacidad en estos sectores para valorar el perfil de riesgo de sus clientes no siempre representa una discriminación: depende del producto. La Comisión tiene previsto entablar un diálogo con los sectores bancario y de seguros junto con otras partes interesadas pertinentes a fin de facilitar la comprensión común de los ámbitos en los que la edad o la discapacidad constituyen factores importantes para el diseño y la tarifación de los productos que ofrecen.

3. ASPECTOS JURÍDICOS

Base jurídica

La propuesta se basa en el artículo 13, apartado 1, del Tratado CE.

Subsidiariedad y proporcionalidad

El principio de subsidiariedad se aplica en la medida en que el ámbito de la propuesta no es competencia exclusiva de la Comunidad. Dado que los objetivos de la acción pretendida no pueden ser alcanzados de manera suficiente mediante una actuación aislada de los Estados miembros, solo una medida a nivel comunitario puede velar por un nivel mínimo común de protección contra cualquier discriminación por motivos de religión o convicciones, discapacidad, edad u orientación sexual en todos los Estados miembros. Un acto jurídico comunitario ofrece seguridad jurídica respecto a los derechos y obligaciones de los operadores económicos y los ciudadanos, incluidos aquellos que se desplazan entre los Estados miembros. La experiencia adquirida con las Directivas anteriores basadas en el artículo 13, apartado 1, del Tratado CE pone de manifiesto su efecto positivo en el logro de una mejor protección contra la discriminación. De acuerdo con el principio de proporcionalidad, la Directiva propuesta no excede de lo necesario para alcanzar los objetivos perseguidos.

Además, las tradiciones y los enfoques nacionales en ámbitos como la asistencia sanitaria, la protección social y la educación tienden a ser más variados que en campos relacionados con el empleo. Estas áreas se caracterizan por opciones legítimas de una sociedad en ámbitos de competencia nacional.

La diversidad de las sociedades europeas constituye uno de los puntos fuertes de Europa, y debe respetarse en consonancia con el principio de subsidiariedad. Cuestiones como la organización y el contenido de la educación, el reconocimiento del estado civil o la situación familiar, la adopción, los derechos reproductivos y otras cuestiones similares se deciden más adecuadamente a escala nacional. Por tanto, la Directiva no requiere que ningún Estado miembro modifique sus leyes o prácticas actuales en relación con estas cuestiones. No afecta tampoco a sus disposiciones nacionales por las que se rigen las actividades de las confesiones

o de otras organizaciones religiosas o su relación con el Estado. De este modo, por ejemplo, los Estados miembros mantendrán sus competencias en la toma de decisiones sobre temas como permitir una admisión selectiva en las escuelas, prohibir o permitir que se lleven o muestren símbolos religiosos en las escuelas, reconocer los matrimonios entre personas del mismo sexo y el tipo de relación entre las confesiones religiosas legalmente inscritas y el Estado.

Instrumentos elegidos

Una directiva constituye el instrumento más adecuado para garantizar un nivel mínimo coherente de protección contra la discriminación en toda la UE sin impedimento alguno para los Estados miembros que deseen ofrecer una protección mayor. También les permite elegir el medio más adecuado de aplicación y las sanciones por incumplimiento. Las experiencias pasadas en el terreno de la no discriminación avalan a la directiva como el instrumento más idóneo.

Tabla de correspondencias

Los Estados miembros deben comunicar a la Comisión el texto de las disposiciones nacionales que transponen la presente Directiva, así como una tabla de correspondencias entre dichas disposiciones y la Directiva.

Espacio Económico Europeo

Este texto es pertinente a efectos del Espacio Económico Europeo, y la Directiva será también aplicable a los países miembros del Espacio Económico Europeo no pertenecientes a la UE, previa decisión del Comité Mixto.

4. REPERCUSIONES PRESUPUESTARIAS

La propuesta no tiene ninguna incidencia en el presupuesto comunitario.

5. EXPLICACIÓN DETALLADA DE LAS DISPOSICIONES ESPECÍFICAS

Artículo 1: objeto

El principal objetivo de la Directiva es luchar contra la discriminación por motivo de religión o convicciones, discapacidad, edad u orientación sexual, y poner en práctica el principio de igualdad de trato fuera del contexto laboral. La Directiva no prohíbe las diferencias de trato por motivo del sexo que amparan los artículos 13 y 141 del Tratado CE y la legislación secundaria vinculada.

Artículo 2: concepto de discriminación

La definición del principio de igualdad de trato se basa en la que recogen las Directivas anteriores adoptadas con arreglo al artículo 13, apartado 1, del Tratado CE (así como en la jurisprudencia pertinente del Tribunal de Justicia de las Comunidades Europeas).

La discriminación directa consiste en tratar a una persona de manera diferente únicamente por su edad, discapacidad, religión o convicciones u orientación sexual. La discriminación indirecta es un fenómeno más complejo en el que una norma o un uso aparentemente neutros

tienen una repercusión particularmente negativa en una persona o un grupo de personas con una característica determinada. Es posible que quien haya establecido esta norma o uso no sea consciente de sus consecuencias prácticas, y en tal caso, por tanto, la intención de discriminar no es lo esencial. Al igual que en las Directivas 2000/43/CE, 2000/78/CE y 2002/73/CE[20], es posible justificar la discriminación indirecta (si dicha disposición, criterio o práctica puede justificarse objetivamente con una finalidad legítima y los medios para alcanzar dicha finalidad son adecuados y necesarios).

El acoso es una forma de discriminación. Esta conducta indeseable puede adoptar distintas modalidades, desde comentarios verbales o escritos hasta gestos o un comportamiento determinado, pero debe ser lo suficientemente grave como para crear un entorno intimidatorio, humillante u ofensivo. La definición de este fenómeno es idéntica a las que incluyen las demás Directivas del artículo 13.

La denegación de un ajuste razonable se considera una forma de discriminación, en consonancia con la Convención de las Naciones Unidas sobre los Derechos de las Personas con Discapacidad y con la Directiva 2000/78/CE. Algunas diferencias de trato por edad pueden ser lícitas si se justifican con un fin legítimo y los medios para la consecución de tal fin son apropiados y necesarios (prueba de proporcionalidad).

En las Directivas actuales del artículo 13 CE, se admiten excepciones a la prohibición de discriminación directa en el caso de «requisitos profesionales esenciales y determinantes», de diferencias de trato basadas en la edad y, en el contexto de discriminación por sexo, para el acceso a bienes y servicios. Si bien la propuesta actual no cubre el empleo, se permitirán diferencias de trato en los ámbitos mencionados en el artículo 3. No obstante, puesto que las excepciones al principio general de igualdad deben delimitarse con mucho rigor, se requiere la doble prueba de una finalidad justificada y de la manera proporcionada de conseguirla (es decir, del modo menos discriminatorio posible).

Se añade una disposición especial en relación con los servicios de seguros y de la banca, reconociéndose el hecho de que la edad y la discapacidad pueden constituir elementos esenciales para la valoración del riesgo de ciertos productos y, por tanto, del precio. Si las aseguradoras no pudieran tener en cuenta en absoluto la edad y la discapacidad, los costes adicionales que de ello se derivarían correrían a cargo del resto de los asegurados, lo que redundaría en unos gastos generales mayores y en una menor disponibilidad de cobertura para los consumidores. La utilización de la edad y la discapacidad en la evaluación del riesgo deberá, no obstante, basarse en datos precisos y en estadísticas.

La Directiva no afectará a las medidas nacionales encaminadas a velar por la seguridad pública, la defensa del orden y la prevención de infracciones penales, la protección de la salud y la salvaguardia de los derechos y libertades de los ciudadanos.

Artículo 3: ámbito de aplicación

La discriminación por motivos de religión o convicciones, discapacidad, edad u orientación sexual se prohíbe en los sectores público y privado en los ámbitos siguientes:

- la protección social, incluida la seguridad social y la asistencia sanitaria;
- los beneficios sociales;

[20] DO L 269 de 5.10.2002.

- la educación;

- el acceso y suministro de bienes y servicios a disposición de la población, incluida la vivienda.

Por lo que se refiere al acceso a bienes y servicios, solo se amparan las actividades profesionales o comerciales. Dicho de otro modo, no se abarcan las transacciones entre particulares de índole privada: no es necesario considerar el alquiler de una habitación en una vivienda privada como el alquiler de habitaciones en un hotel. Estos ámbitos solo se amparan hasta los límites que marcan las competencias comunitarias. Así, por ejemplo, la organización del sistema escolar, las actividades y el contenido de los planes de estudios, incluida la manera de organizar la educación para personas con discapacidad, es competencia de los Estados miembros, que pueden establecer diferencias de trato para el acceso a centros educativos religiosos. Por ejemplo, una escuela puede organizar una presentación especial para niños de una determinada edad y un centro confesional puede organizar excursiones escolares en torno a un tema religioso.

El texto establece también claramente que los asuntos relacionados con el estado civil y la situación familiar, sin excluir la adopción, quedan fuera del ámbito de la Directiva. Esto incluye los derechos reproductivos. Los Estados miembros conservan la libertad de decidir si instituyen de alguna manera o el reconocimiento que dan a las parejas de hecho registradas. Sin embargo, si una legislación nacional equipara los derechos de las parejas de hecho a los de los matrimonios, se aplica el principio de igualdad de trato[21].

El artículo 3 especifica que la Directiva no cubre las disposiciones nacionales relativas al carácter laico del Estado y sus instituciones, ni al estatus de las organizaciones religiosas. Por tanto, los Estados miembros pueden prohibir o permitir que se lleven o muestren símbolos religiosos en las escuelas. Tampoco regula las diferencias de trato por nacionalidad.

Artículo 4: igualdad de trato para las personas con discapacidad

Se establece por adelantado un acceso efectivo de las personas con discapacidad a la protección social, los beneficios sociales, la asistencia sanitaria, la educación y el acceso a bienes y servicios y su suministro, incluida la vivienda, a disposición de la población. Esta obligación no obsta que, en caso de suponer tal disposición una carga desproporcionada o requerir cambios de gran envergadura en el producto o servicio, no se exija su cumplimiento.

En algunos casos, podrán requerirse unos ajustes razonables determinados para garantizar un acceso efectivo a una persona con discapacidad concreta. Al igual que anteriormente, este podría ser solo el caso si no supone una carga desproporcionada. Se facilita una lista no exhaustiva de factores que podrían tenerse en cuenta para valorar si una carga es desproporcionada, de manera que pueda tenerse en cuenta la situación concreta de una pequeña o mediana empresa o bien una microempresa.

El concepto de ajuste razonable ya existe en el ámbito laboral con la Directiva 2000/78/CE, de modo que los Estados miembros y las empresas tienen experiencia en su puesta en práctica. Lo que es aplicable a una empresa grande o a un organismo público puede no serlo para una PYME. El requisito de los ajustes razonables no se refiere únicamente a cambios físicos, sino que puede incluir medios alternativos de ofrecer un servicio.

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[21] Sentencia de 1 de abril de 2008 en el asunto C-267/06, Tadao Maruko.

Artículo 5: acción positiva

Esta disposición figura en todas las Directivas del artículo 13. Está claro que, en muchos casos, la igualdad formal no conlleva una igualdad en la práctica. Puede ser necesario aplicar medidas específicas para prevenir y corregir situaciones de desigualdad. Los Estados miembros tienen tradiciones y prácticas distintas respecto a las acciones positivas, de manera que este artículo les permite emprender acciones positivas sin estar obligados a ello.

Artículo 6: requisitos mínimos

Esta disposición, que figura en todas las Directivas del artículo 13, permite a los Estados miembros proporcionar un nivel de protección mayor que el garantizado por la Directiva y confirma que la aplicación de la Directiva no supondrá regresión alguna del nivel de protección contra la discriminación ya garantizado por los Estados miembros.

Artículo 7: defensa de los derechos

Esta disposición figura en todas las Directivas del artículo 13. Los ciudadanos deben poder hacer valer su derecho a no ser discriminados. Por tanto, este artículo establece que aquellos que se consideren víctimas de discriminación puedan recurrir a procedimientos administrativos o judiciales, aun cuando haya finalizado la relación en la que aleguen haber sido objeto de discriminación, conforme a la sentencia del TJCE en el asunto Coote[22].

Se refuerza el derecho a una protección jurídica efectiva al permitirse a las organizaciones con un interés legítimo en la lucha contra la discriminación que ayuden a las víctimas de discriminación en procedimientos judiciales o administrativos. Este artículo no afecta a las disposiciones nacionales relativas a los plazos de recurso.

Artículo 8: carga de la prueba

Esta disposición figura en todas las Directivas del artículo 13. En los procedimientos judiciales, la norma general es que el demandante demuestre el motivo de su demanda. No obstante, en los casos de discriminación, resulta, a menudo, muy difícil obtener las pruebas necesarias para demostrar el caso, que suelen obrar en poder del demandado. El TJCE[23] y el legislador comunitario mediante la Directiva 97/80/CE[24] han reconocido este problema.

La reversión en la carga de la prueba se aplica a todos los casos en que se alegue un incumplimiento del principio de igualdad de trato, incluidos aquellos en los que participen asociaciones u organizaciones de conformidad con el artículo 7, apartado 2. Al igual que en las Directivas anteriores, esta reversión en la carga de prueba no es aplicable a situaciones en las que se aplique el Derecho penal para juzgar alegaciones de discriminación.

Artículo 9: represalias

Esta disposición figura en todas las Directivas del artículo 13. Una protección legal efectiva debe incluir la protección contra las represalias. Las víctimas pueden desistir de ejercer sus derechos debido al riesgo de ser penalizadas por ello; por tanto, es necesario proteger a las personas contra un trato desfavorable por haber ejercido los derechos que les confiere la presente Directiva. Este artículo es el mismo que en las Directivas 2000/43/CE y 2000/78/CE.

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22 Asunto C-185/97, Rec. 1998, p. I-5199.

23 Asunto 109/88, Danfoss, Rec. 1989, p. 03199.

24 DO L 14 de 20.1.1998.

Artículo 10: divulgación de la información

Esta disposición figura en todas las Directivas del artículo 13. La experiencia y las encuestas ponen de relieve que la mayor parte de las personas desconoce o posee escasa información sobre sus derechos. A mayor efectividad del sistema de información y prevención públicas, menor necesidad hay de buscar soluciones individuales. Este artículo reproduce disposiciones similares de las Directivas 2000/43/CE, 2000/78/CE y 2002/113/CE.

Artículo 11: diálogo con las partes interesadas

Esta disposición, que figura en todas las Directivas del artículo 13, tiene por objeto promover el diálogo entre las autoridades públicas pertinentes y los órganos como las organizaciones no gubernamentales con un interés legítimo en contribuir a la lucha contra la discriminación por razones de religión o convicciones, discapacidad, edad u orientación sexual. En las Directivas anteriores contra la discriminación figura una disposición similar.

Artículo 12: organismos de promoción de la igualdad de trato

Esta disposición, que figura en dos Directivas del artículo 13, exige a los Estados miembros que dispongan como mínimo de un organismo («organismo de promoción de la igualdad de trato») a escala nacional que fomente la igualdad de trato a todas las personas sin discriminación por motivos de religión o convicciones, discapacidad, edad u orientación sexual.

Este artículo reproduce las disposiciones de la Directiva 2000/43/CE en lo que respecta al acceso y al suministro de bienes y servicios y se basa en disposiciones equivalentes de las Directivas 2002/73/CE[25] y 2004/113/CE. Asimismo, establece las competencias mínimas que deben poseer esos organismos nacionales, que han de actuar de forma independiente para promover el principio de igualdad de trato. Los Estados miembros podrán decidir si se trata de los mismos organismos que crearon previamente en el marco de las Directivas anteriores.

Para los ciudadanos que consideren haber sido objeto de discriminación, es complicado y caro presentar una demanda. Por tanto, un papel fundamental de estos organismos será ofrecer ayuda independiente a las víctimas de discriminación. Asimismo, deberán realizar encuestas independientes sobre discriminación y publicar informes y recomendaciones sobre cuestiones de este ámbito.

Artículo 13: cumplimiento

Esta disposición figura en todas las Directivas del artículo 13. La igualdad de trato implica la eliminación de las discriminaciones que se deriven de cualquier ley, reglamento o disposición administrativa y, por lo tanto, la Directiva exige que los Estados miembros deroguen dichas disposiciones. Al igual que con los actos jurídicos anteriores, la Directiva requiere también que se declare nula y sin efecto, o se modifique, cualquier disposición contraria al principio de igualdad de trato, o que sea posible hacerlo si así se reclama.

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[25] Directiva 2002/73/CE, que modifica la Directiva 76/207/CEE del Consejo relativa a la aplicación del principio de igualdad de trato entre hombres y mujeres en lo que se refiere al acceso al empleo, a la formación y a la promoción profesionales, y a las condiciones de trabajo (DO L 269 de 5.10.2002, p. 15).

Artículo 14: sanciones

Esta disposición figura en todas las Directivas del artículo 13. De conformidad con la jurisprudencia del TJCE[26], el texto prohíbe la fijación de un tope máximo en las indemnizaciones abonables en casos de incumplimiento del principio de igualdad de trato. Esta disposición no establece que deban introducirse sanciones penales.

Artículo 15: aplicación

Esta disposición, que figura en todas las Directivas del artículo 13, establece un plazo de dos años para que los Estados miembros incorporen la Directiva a sus legislaciones nacionales y comuniquen a la Comisión los textos de su legislación nacional. Los Estados miembros podrán determinar que la obligación de facilitar un acceso efectivo a las personas con discapacidad se aplique transcurridos cuatro años después de la adopción de la Directiva.

Artículo 16: informe

Esta disposición, que figura en todas las Directivas del artículo 13, exige a la Comisión que elabore un informe sobre la aplicación de la Directiva dirigido al Parlamento Europeo y al Consejo, basado en datos facilitados por los Estados miembros. El informe tomará en consideración las opiniones de los interlocutores sociales, las ONG pertinentes y la Agencia de los Derechos Fundamentales de la Unión Europea.

Artículo 17: entrada en vigor

Esta disposición figura en todas las Directivas del artículo 13. La Directiva entrará en vigor el día de su publicación en el Diario Oficial.

Artículo 18: destinatarios

Esta disposición, que figura en todas las Directivas del artículo 13, indica que la Directiva está destinada a los Estados miembros.

[26] Asuntos C-180/95, Draehmpaehl, Rec. 1997, p. I-2195, y C-271/91, Marshall, Rec. 1993, p. I-4367.

2008/0140 (CNS)

Propuesta de

DIRECTIVA DEL CONSEJO

por la que se aplica el principio de igualdad de trato entre las personas independientemente de su religión o convicciones, discapacidad, edad u orientación sexual

EL CONSEJO DE LA UNIÓN EUROPEA,

Visto el Tratado constitutivo de la Comunidad Europea, y en particular su artículo 13, apartado 1,

Vista la propuesta de la Comisión[27],

Visto el dictamen del Parlamento Europeo[28],

Visto el dictamen del Comité Económico y Social Europeo[29],

Visto el dictamen del Comité de las Regiones[30],

Considerando lo siguiente:

(1) De conformidad con el artículo 6 del Tratado de la Unión Europea, la Unión Europea se basa en los principios de libertad, democracia, respeto de los derechos humanos y de las libertades fundamentales y del Estado de Derecho, principios que son comunes a todos los Estados miembros, y respeta los derechos fundamentales tal y como se garantizan en el Convenio Europeo para la Protección de los Derechos Humanos y de las Libertades Fundamentales y tal como resultan de las tradiciones constitucionales comunes a los Estados miembros, como principios generales del Derecho comunitario.

(2) El derecho de toda persona a la igualdad ante la ley y a estar protegida contra la discriminación constituye un derecho universal reconocido en la Declaración Universal de los Derechos Humanos, la Convención de las Naciones Unidas sobre la Eliminación de todas las Formas de Discriminación contra la Mujer, la Convención Internacional sobre la Eliminación de todas las Formas de Discriminación Racial y los Pactos de las Naciones Unidas de Derechos Civiles y Políticos y de Derechos Económicos, Sociales y Culturales, la Convención de las Naciones Unidas sobre los Derechos de las Personas con Discapacidad, el Convenio Europeo para la Protección de los Derechos Humanos y de las Libertades Fundamentales, así como en la Carta Social Europea, de la que son signatarios [todos] los Estados miembros. En particular,

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27 DO C […] de […], p. […].
28 DO C […] de […], p. […].
29 DO C […] de […], p. […].
30 DO C […] de […], p. […].

la Convención de las Naciones Unidas sobre los Derechos de las Personas con Discapacidad incluye en su definición de discriminación la denegación de ajustes razonables.

(3) La Directiva respeta los derechos fundamentales y observa los principios fundamentales reconocidos, en particular, por la Carta de los Derechos Fundamentales de la Unión Europea. El artículo 10 de la Carta reconoce el derecho a la libertad de pensamiento, de conciencia y de religión. El artículo 21, que prohíbe cualquier discriminación, incluye los motivos de religión o convicciones, discapacidad, edad u orientación sexual, y el artículo 26 reconoce el derecho de las personas con discapacidad a beneficiarse de medidas que garanticen su autonomía.

(4) Los Años Europeos de las Personas con Discapacidad (2003), de la Igualdad de Oportunidades para Todos (2007) y del Diálogo Intercultural (2008) han puesto de relieve la persistencia de la discriminación, pero también los beneficios de la diversidad.

(5) El Consejo Europeo de 14 de diciembre de 2007, celebrado en Bruselas, instó a los Estados miembros a redoblar sus esfuerzos para prevenir y combatir la discriminación dentro y fuera del mercado de trabajo[31].

(6) El Parlamento Europeo ha abogado por un incremento de la protección contra la discriminación en la legislación de la Unión Europea[32].

(7) La Comisión Europea ha afirmado en su Comunicación «Agenda Social Renovada: Oportunidades, acceso y solidaridad en la Europa del siglo XXI»[33] que en sociedades en las que se considera que todas las personas tienen el mismo valor, no deberían existir obstáculos que releguen a nadie.

(8) La Comunidad ha adoptado tres actos jurídicos[34] basados en el artículo 13, apartado 1, del Tratado CE, para prevenir y combatir la discriminación por razones de sexo, raza u origen étnico, religión o convicciones, discapacidad, edad u orientación sexual. Estos instrumentos han demostrado que las medidas legislativas son útiles para luchar contra la discriminación. En particular, la Directiva 2000/78/CE establece un marco general para la igualdad de trato en el empleo y la ocupación sin atender a religión o convicciones, discapacidad, edad u orientación sexual. No obstante, persisten diferencias entre los Estados miembros respecto al grado y la modalidad de protección contra la discriminación por estos motivos fuera del ámbito laboral.

(9) Por consiguiente, la legislación debe prohibir la discriminación por los motivos de religión o convicciones, discapacidad, edad u orientación sexual en una serie de campos distintos del mercado de trabajo, que cubran la protección social, la educación y el acceso y suministro de bienes y servicios, incluida la vivienda. Debe asimismo ofrecer medidas para garantizar la igualdad de acceso de las personas con discapacidad a los ámbitos amparados.

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31 Conclusiones de la Presidencia del Consejo Europeo de Bruselas de 14 de diciembre de 2007, punto 50.
32 Resolución de 20 de mayo de 2008 [P6_TA-PROV(2008) 0212].
33 COM(2008) 412.
34 Directivas 2000/43/CE, 2000/78/CE y 2004/113/CE.

(10) La Directiva 2000/78/CE prohíbe la discriminación en el acceso a la formación profesional; es necesario completar esta protección ampliando la prohibición de discriminación a la parte de la educación que no se considera formación profesional.

(11) La Directiva debe entenderse sin perjuicio de las competencias de los Estados miembros en los campos de la educación, la seguridad social y la asistencia sanitaria. También debe entenderse sin perjuicio del papel fundamental y la amplia discrecionalidad de los Estados miembros para el suministro, la adjudicación y la organización de servicios de interés económico general.

(12) Se entiende que la discriminación incluye la discriminación directa e indirecta, el acoso, las instrucciones para discriminar y la denegación de ajustes razonables.

(13) En la aplicación del principio de igualdad de trato con independencia de la religión o convicciones, la discapacidad, la edad o la orientación sexual, la Comunidad, en virtud del artículo 3, apartado 2, del Tratado CE, debe proponerse la eliminación de las desigualdades y el fomento de la igualdad entre hombres y mujeres, máxime considerando que, a menudo, las mujeres son víctimas de discriminación múltiple.

(14) La apreciación de los hechos de los que pueda resultar la presunción de haberse producido una discriminación directa o indirecta debe seguir a cargo de los órganos jurisdiccionales u otros órganos competentes nacionales, con arreglo a las legislaciones o prácticas de los Estados miembros. Estas normas pueden disponer que la discriminación indirecta se establezca por cualquier medio, incluso a partir de pruebas estadísticas.

(15) En la prestación de servicios bancarios, de seguros y otros servicios financieros, se recurre a factores actuariales y de riesgo ligados a la discapacidad y la edad. Estos no deben contemplarse como actos discriminatorios si los factores se consideran elementos clave para la evaluación del riesgo.

(16) Todas las personas gozan de libertad para celebrar contratos, incluida la libertad de elegir a la otra parte contratante para efectuar una transacción determinada. La presente Directiva no debe aplicarse a transacciones económicas entre particulares para los cuales dichas transacciones no constituyen su actividad profesional o comercial.

(17) Al tiempo que se prohíbe la discriminación, es importante que se respeten otros derechos y libertades fundamentales como la protección de la intimidad y la vida familiar, así como las transacciones que se lleven a cabo en dicho contexto, la libertad religiosa y la libertad de asociación. Lo dispuesto en la presente Directiva se entiende sin perjuicio de la legislación nacional sobre el estado civil, la situación familiar y los derechos reproductivos. También se entiende sin perjuicio del carácter laico del Estado, las instituciones u organismos públicos o la educación.

(18) La organización y el contenido de los sistemas educativos son competencia de los Estados miembros. La Comunicación de la Comisión titulada «Mejorar las competencias en el siglo XXI: agenda para la cooperación europea en las escuelas» incide en la necesidad de que se preste una atención especial a los niños desfavorecidos y a aquellos con necesidades educativas especiales. En particular, la legislación nacional puede permitir diferencias de acceso a los centros educativos

confesionales o basados en ciertas convicciones. Asimismo, los Estados miembros pueden prohibir o permitir que se lleven o muestren símbolos religiosos en las escuelas.

(19) La Unión Europea, en su Declaración nº 11 sobre el estatuto de las iglesias y de las organizaciones no confesionales, adjunta al Acta final del Tratado de Amsterdam, ha reconocido explícitamente que respeta y no prejuzga el estatuto reconocido, en virtud del Derecho nacional, a las iglesias y las asociaciones o comunidades religiosas en los Estados miembros, y que respeta asimismo el estatuto de las organizaciones filosóficas y no confesionales. Las medidas destinadas a que las personas con discapacidad tengan un acceso no discriminatorio efectivo a los ámbitos amparados por la presente Directiva desempeña un papel importante a la hora de garantizar una plena igualdad en la práctica. Además, pueden requerirse, en algunos casos, determinadas medidas de ajustes razonables para velar por un acceso tal. En ningún caso se exigen medidas que impongan una carga desproporcionada. Para valorar si una carga es desproporcionada, debe tenerse en cuenta un cierto número de factores que incluyen el tamaño, los recursos y el tipo de entidad de que se trate. El principio de los ajustes razonables y de la carga desproporcionada está establecido en la Directiva 2000/78/CE y en la Convención de las Naciones Unidas sobre los Derechos de las Personas con Discapacidad.

(20) En algunos campos, se han dispuesto exigencias legales[35] y normas sobre accesibilidad a escala europea, y el artículo 16 del Reglamento (CE) nº 1083/2006 del Consejo, de 11 de julio de 2006, por el que se establecen las disposiciones generales relativas al Fondo Europeo de Desarrollo Regional, al Fondo Social Europeo y al Fondo de Cohesión y se deroga el Reglamento (CE) nº 1260/1999[36] establece que la accesibilidad para las personas discapacitadas constituye uno de los criterios que deben observarse al decidir operaciones cofinanciadas por los Fondos. El Consejo ha destacado asimismo la necesidad de que se establezcan medidas para garantizar la accesibilidad de las personas con discapacidad a la infraestructura y las actividades culturales[37].

(21) La prohibición de la discriminación debe entenderse sin perjuicio de que los Estados miembros mantengan o adopten medidas destinadas a evitar o compensar situaciones de desventaja sufridas por un grupo de personas de una cierta religión o convicciones, con discapacidad, o bien con una edad u orientación sexual determinadas. Estas medidas pueden permitir la existencia de organizaciones de personas de una determinada religión o convicciones, o bien con una cierta discapacidad, edad u orientación sexual, cuando su finalidad principal sea promover las necesidades específicas de estas personas.

(22) La presente Directiva establece requisitos mínimos, de manera que reconoce a los Estados miembros la facultad de adoptar o mantener disposiciones más favorables. La aplicación de la presente Directiva no podrá justificar un retroceso en relación con la situación existente en cada Estado miembro.

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35 Reglamento (CE) nº 1107/2006 y Reglamento (CE) nº 1371/2007.

36 DO L 210 de 31.7.2006, p. 25. Reglamento modificado en último lugar por el Reglamento (CE) nº 1989/2006 (DO L 411 de 30.12.2006, p. 6).

37 DO C 134 de 7.6.2003, p. 7.

(23) Las personas que hayan sido objeto de discriminación basada en la religión o convicciones, la discapacidad, la edad o la orientación sexual deben disponer de medios de protección jurídica adecuados. A fin de asegurar un nivel de protección más efectivo, también debe permitirse que asociaciones, organizaciones o personas jurídicas estén facultadas para iniciar procedimientos, en nombre de cualquier víctima o en su apoyo, sin perjuicio de las disposiciones nacionales de procedimiento en cuanto a la representación y defensa ante los tribunales.

(24) Las normas relativas a la carga de la prueba deben modificarse cuando haya un caso de presunta discriminación y, para que el principio de igualdad de trato se aplique efectivamente, cuando se verifique tal situación, la carga de la prueba debe recaer en la parte demandada. No obstante, no corresponde a la parte demandada probar que la parte demandante pertenece a una determinada religión, posee determinadas convicciones, presenta una determinada discapacidad, es de una determinada edad o tiene una determinada orientación sexual.

(25) La aplicación efectiva del principio de igualdad de trato exige una protección judicial adecuada contra las represalias.

(26) En su Resolución relativa a las actividades consecutivas al Año Europeo de la Igualdad de Oportunidades para Todos (2007), el Consejo instó a hacer participar plenamente a la sociedad civil, incluidas las organizaciones que representan a las personas con riesgo de ser discriminadas, los interlocutores sociales y los interesados en la elaboración de políticas y programas destinados a evitar la discriminación y promover la igualdad y la igualdad de oportunidades, tanto a escala europea como nacional.

(27) La experiencia adquirida con la aplicación de las Directivas 2000/43/CE y 2004/113/CE pone de manifiesto que la protección contra la discriminación por los motivos amparados por la presente Directiva se vería reforzada con la existencia de uno o más organismos independientes en cada Estado miembro, con competencias para analizar los problemas existentes, estudiar las soluciones posibles y proporcionar asistencia específica a las víctimas.

(28) Al ejercer sus poderes y cumplir sus responsabilidades en el marco de la presente Directiva, estos organismos deben funcionar en consonancia con los denominados Principios de París de las Naciones Unidas, Principios relativos al Estatuto de las Instituciones Nacionales de Promoción y Protección de los Derechos Humanos.

(29) Los Estados miembros deben establecer sanciones efectivas, proporcionadas y disuasorias en caso de incumplimiento de las obligaciones derivadas de la presente Directiva.

(30) De conformidad con el principio de subsidiariedad y el principio de proporcionalidad contemplados en el artículo 5 del Tratado CE, la finalidad de la presente Directiva, consistente en garantizar un nivel común de protección contra la discriminación en todos los Estados miembros, no puede ser alcanzada de manera suficiente por los Estados miembros y, por tanto, puede lograrse mejor, debido a la dimensión y repercusión de la acción propuesta, en el ámbito comunitario. La presente Directiva se limita a lo estrictamente necesario para alcanzar dichos objetivos y no excede de lo necesario para ese propósito.

(31) De conformidad con el punto 34 del Acuerdo interinstitucional «Legislar mejor», se exhorta a los Estados miembros a establecer, en su propio interés y en el de la Comunidad, sus propias tablas, que muestren, en la medida de lo posible, la concordancia entre la presente Directiva y las medidas de incorporación al Derecho interno, y a hacerlas públicos.

HA ADOPTADO LA PRESENTE DIRECTIVA:

Capítulo 1
DISPOSICIONES GENERALES

Artículo 1
Objeto

La presente Directiva tiene por objeto establecer un marco general para luchar contra la discriminación por motivos de religión o convicciones, discapacidad, edad u orientación sexual, con el fin de que en los Estados miembros se aplique el principio de igualdad de trato en ámbitos distintos del empleo y la ocupación.

Artículo 2
Concepto de discriminación

1. A efectos de la presente Directiva, se entenderá por «principio de igualdad de trato» la ausencia de toda discriminación directa o indirecta por cualquiera de los motivos contemplados en el artículo 1.

2. A efectos de lo dispuesto en el apartado 1,

a) existirá discriminación directa cuando una persona sea, haya sido o pudiera ser tratada de manera menos favorable que otra en situación análoga por alguno de los motivos contemplados en el artículo 1;

b) existirá discriminación indirecta cuando una disposición, criterio o práctica aparentemente neutros sitúen a personas de una determinada religión, determinadas convicciones, una determinada discapacidad, una determinada edad o una determinada orientación sexual en desventaja particular con respecto a otras personas, salvo que dicha disposición, criterio o práctica puedan justificarse objetivamente con una finalidad legítima y salvo que los medios para la consecución de esta finalidad sean adecuados y necesarios.

3. El acoso constituirá discriminación a tenor de lo dispuesto en el apartado 1 cuando se produzca un comportamiento indeseable relacionado con alguno de los motivos contemplados en el artículo 1 que tenga como objetivo o consecuencia atentar contra la dignidad de la persona y crear un entorno intimidatorio, hostil, degradante, humillante u ofensivo.

4. Toda orden de discriminar a personas por alguno de los motivos contemplados en el artículo 1 se considerará discriminación a tenor de lo dispuesto en el apartado 1.

5. La denegación de ajustes razonables en un caso particular conforme a lo dispuesto en el artículo 4, apartado 1, letra b), de la presente Directiva respecto a las personas con discapacidad se considerará discriminación a tenor del apartado 1.

6. No obstante lo dispuesto en el apartado 2, los Estados miembros podrán disponer que las diferencias de trato por motivos de edad no constituirán discriminación si están justificadas por una finalidad legítima en el marco del Derecho nacional, y si los medios para lograr este objetivo son adecuados y necesarios. En particular, la presente Directiva no será obstáculo para la fijación de una edad determinada para el acceso a las prestaciones sociales, la educación y a determinados bienes o servicios.

7. No obstante lo dispuesto en el apartado 2, por lo que se refiere a la prestación de servicios financieros, los Estados miembros podrán decidir autorizar diferencias de trato ajustadas en caso de que, para el producto en cuestión, la consideración de la edad o la discapacidad constituya un factor determinante de la evaluación del riesgo a partir de datos actuariales y estadísticos pertinentes y exactos.

8. La presente Directiva se entenderá sin perjuicio de las medidas generales establecidas en la legislación nacional que, en una sociedad democrática, son necesarias para la seguridad pública, la defensa del orden y la prevención de infracciones penales, la protección de la salud y la salvaguardia de los derechos y libertades de los ciudadanos.

Artículo 3
Ámbito de aplicación

1. Dentro de los límites de las competencias atribuidas a la Comunidad, la prohibición de discriminación se aplicará a todas las personas, por lo que respecta tanto al sector público como al privado, incluidos los organismos públicos, en relación con:

a) la protección social, incluida la seguridad social y la asistencia sanitaria;

b) los beneficios sociales;

c) la educación;

d) el acceso y el suministro de bienes y otros servicios a disposición de la población, incluida la vivienda.

La letra d) se aplicará a los particulares únicamente cuando estén ejerciendo una actividad profesional o comercial.

2. Lo dispuesto en la presente Directiva se entiende sin perjuicio de la legislación nacional sobre el estado civil, el concepto de familia y los derechos reproductivos.

3. Se entenderá la presente Directiva sin perjuicio de la responsabilidades de los Estados miembros en cuanto a los contenidos de la enseñanza, las actividades y la organización de los sistemas educativos, incluida la enseñanza para las personas con necesidades especiales. Los Estados miembros podrán permitir las diferencias de trato en la admisión a centros educativos confesionales o basados en ciertas convicciones.

4. Se entenderá la presente Directiva sin perjuicio de la legislación nacional que vele por el carácter laico del Estado, las instituciones u organismos estatales, la educación, o por lo que se refiere al estatus y las actividades de las confesiones y de otras organizaciones religiosas o basadas en ciertas convicciones. Se entenderá asimismo sin perjuicio de legislación nacional que promueve la igualdad entre hombres y mujeres.

5. La presente Directiva no afectará a la diferencia de trato por motivos de nacionalidad y se entenderá sin perjuicio de las disposiciones y condiciones por las que se regulan la entrada y residencia de nacionales de terceros países y de apátridas en el territorio de los Estados miembros y del trato que se derive de la situación jurídica de los nacionales de terceros países y de los apátridas.

Artículo 4
Igualdad de trato para las personas con discapacidad

1. A fin de garantizar la observancia del principio de igualdad de trato en relación con las personas con discapacidad:

a) Se facilitarán por adelantado las medidas necesarias para un acceso no discriminatorio efectivo de las personas con discapacidad a la protección social, los beneficios sociales, la asistencia sanitaria, la educación y el acceso y suministro de bienes y servicios, incluidos la vivienda y el transporte, a disposición de la población, si es necesario mediante las modificaciones o los ajustes oportunos. Estas medidas no deben suponer una carga desproporcionada ni requerir un cambio esencial en la protección social, los beneficios sociales, la asistencia sanitaria, la educación o en los bienes y servicios en cuestión, ni exigir que se proporcionen alternativas a los mismos.

b) No obstante la obligación de velar por un acceso no discriminatorio efectivo y cuando se requiera en un caso determinado, se proporcionarán ajustes razonables siempre cuando ello no suponga una carga desproporcionada.

2. A efectos de valorar si las medidas necesarias para cumplir con el apartado 1 pueden suponer una carga desproporcionada, se tomarán en consideración, en particular, el tamaño y los recursos de la entidad de que se trate, su naturaleza, los gastos estimados, el ciclo de vida de los bienes y servicios, y los posibles beneficios que un mejor acceso reportaría a las personas con discapacidad. La carga no se considerará excesiva cuando sea paliada en grado suficiente mediante medidas existentes en la política del Estado miembro en materia de igualdad de trato.

3. La Directiva se entenderá sin perjuicio de las disposiciones del Derecho comunitario o de las normativas nacionales referentes a la accesibilidad de determinados bienes y servicios.

Artículo 5
Acción positiva

Con el fin de garantizar la plena igualdad en la práctica, el principio de igualdad de trato no impedirá que un Estado miembro mantenga o adopte medidas específicas para prevenir o compensar las desventajas que afecten a personas por motivo de su religión o convicciones, discapacidad, edad u orientación sexual.

Artículo 6
Requisitos mínimos

1. Los Estados miembros podrán adoptar o mantener disposiciones más favorables para la protección del principio de igualdad de trato que las establecidas en la presente Directiva.

2. La aplicación de la presente Directiva no constituirá en ningún caso motivo para reducir el nivel de protección contra la discriminación ya garantizado por los Estados miembros en los ámbitos amparados por la Directiva.

CAPÍTULO II
RECURSOS Y APLICACIÓN

Artículo 7
Defensa de los derechos

1. Los Estados miembros velarán por que haya procedimientos judiciales o administrativos, e incluso, cuando lo consideren oportuno, procedimientos de conciliación, para exigir el cumplimiento de las obligaciones establecidas mediante la presente Directiva, a disposición de todas las personas que se consideren perjudicadas por la ausencia de aplicación, en lo que a ellas se refiere, del principio de igualdad de trato, incluso tras la conclusión de la relación en la que supuestamente se ha producido la discriminación.

2. Los Estados miembros velarán por que las asociaciones, organizaciones u otras personas jurídicas que tengan un interés legítimo en procurar el cumplimiento de lo dispuesto en la presente Directiva, puedan iniciar, en nombre del demandante o en su apoyo, y con su autorización, cualquier procedimiento judicial o administrativo previsto para exigir el cumplimiento de las obligaciones de la presente Directiva.

3. Los apartados 1 y 2 se entenderán sin perjuicio de las normas nacionales en materia de plazos de interposición de recursos en relación con el principio de igualdad de trato.

Artículo 8
Carga de la prueba

1. Con arreglo a sus sistemas judiciales nacionales, los Estados miembros adoptarán las medidas necesarias para que, cuando una persona que se considere perjudicada por la ausencia de aplicación, en lo que a ella se refiere, del principio de igualdad de trato, presente hechos que permitan presumir la existencia de discriminación directa o indirecta ante un órgano jurisdiccional u otro órgano competente, corresponda a la parte demandada demostrar que no ha habido vulneración de la prohibición de discriminación.

2. El apartado 1 se entenderá sin perjuicio del derecho de los Estados miembros a imponer un régimen probatorio más favorable a la parte demandante.

3. Lo dispuesto en el apartado 1 no se aplicará a los procedimientos penales.

4. Los Estados miembros no estarán obligados a aplicar lo dispuesto en el apartado 1 a los procedimientos en los que la instrucción de los hechos relativos al caso corresponda a los órganos jurisdiccionales o a otro órgano competente.

5. Lo dispuesto en los apartados 1, 2, 3 y 4 se aplicará asimismo a toda acción judicial emprendida de conformidad con el artículo 7, apartado 2.

Artículo 9
Represalias

Los Estados miembros adoptarán en sus ordenamientos jurídicos las medidas que resulten necesarias para proteger a las personas contra cualquier trato adverso o consecuencia negativa que pueda producirse como reacción ante una reclamación o ante un procedimiento destinado a exigir el cumplimiento del principio de igualdad de trato.

Artículo 10
Divulgación de la información

Los Estados miembros velarán por que las disposiciones adoptadas en virtud de la presente Directiva, junto con otras disposiciones vigentes ya adoptadas en este ámbito, sean puestas en conocimiento de las personas interesadas por todos los medios adecuados y en el conjunto de su territorio.

Artículo 11
Diálogo con las partes interesadas

A fin de promover el principio de igualdad de trato, los Estados miembros fomentarán el diálogo con las partes interesadas correspondientes y, en particular, con las organizaciones no gubernamentales que tengan, con arreglo a su legislación y práctica nacionales, un interés legítimo en contribuir a la lucha contra la discriminación por los motivos amparados por la presente Directiva.

Artículo 12
Organismos de promoción de la igualdad de trato

1. Los Estados miembros designarán un organismo u organismos de promoción de la igualdad de trato para todas las personas independientemente de su religión o convicciones, discapacidad, edad u orientación sexual. Dichos organismos podrán formar parte de los órganos encargados a nivel nacional de la defensa de los derechos humanos o de la salvaguardia de los derechos de las personas, incluidos los derechos amparados bajo otros actos jurídicos comunitarios, como es el caso de las Directivas 2000/43/CE y 2004/113/CE.

2. Los Estados miembros velarán por que entre las competencias de estos organismos figuren las siguientes:

– sin perjuicio del derecho de víctimas y asociaciones, organizaciones u otras personas jurídicas contemplado en el artículo 7, apartado 2, prestar asistencia independiente a las víctimas de discriminación a la hora de tramitar sus reclamaciones por discriminación;

– realizar estudios independientes sobre la discriminación;

– publicar informes independientes y formular recomendaciones sobre cualquier cuestión relacionada con esta discriminación.

CAPÍTULO III
DISPOSICIONES FINALES

Artículo 13
Cumplimiento

Los Estados miembros adoptarán las medidas necesarias para que se respete el principio de igualdad de trato y a fin de que, en particular:

a) se supriman las disposiciones legales, reglamentarias o administrativas contrarias al principio de igualdad de trato;

b) se declaren o puedan declararse nulas y sin efecto, o se modifiquen, todas las disposiciones contractuales, las normas de los reglamentos internos de las empresas, así como las reglas que rijan las asociaciones con o sin ánimo de lucro, contrarias al principio de igualdad de trato.

Artículo 14
Sanciones

Los Estados miembros establecerán el régimen de sanciones aplicable en caso de incumplimiento de las disposiciones nacionales adoptadas de conformidad con la presente Directiva, y adoptarán todas las medidas necesarias para garantizar su aplicación. Dichas sanciones podrán incluir el pago de una indemnización, que no podrá estar sujeta a la fijación de un límite máximo predeterminado, y deberán ser efectivas, proporcionadas y disuasorias.

Artículo 15
Aplicación

1. Los Estados miembros adoptarán las disposiciones legales, reglamentarias y administrativas necesarias para dar cumplimiento a lo establecido en la presente Directiva a más tardar … [dos años después de la adopción]. Comunicarán inmediatamente a la Comisión el texto de dichas disposiciones, así como una tabla de correspondencias entre las mismas y la presente Directiva.

Cuando los Estados miembros adopten dichas disposiciones, estas harán referencia a la presente Directiva o irán acompañadas de dicha referencia en su publicación oficial. Los Estados miembros establecerán las modalidades de la mencionada referencia.

2. A fin de tener en cuenta condiciones particulares, los Estados miembros podrán determinar, en su caso, que la obligación de facilitar un acceso efectivo contemplada en el artículo 4 deberá cumplirse a más tardar el … [cuatro años después de la adopción].

Los Estados miembros que prevean acogerse a este plazo adicional, informarán de ello a la Comisión, a más tardar, en la fecha fijada en el apartado 1, precisando los motivos de su decisión.

Artículo 16
Informe

1. Los Estados miembros y los organismos de promoción de la igualdad de trato comunicarán a la Comisión, a más tardar el … y, posteriormente, cada cinco años, toda la información necesaria para que la Comisión elabore un informe dirigido al Parlamento Europeo y al Consejo sobre la aplicación de la presente Directiva.

2. El informe de la Comisión tendrá en cuenta, cuando proceda, los puntos de vista de los interlocutores sociales y de las organizaciones no gubernamentales correspondientes, así como los de la Agencia de los Derechos Fundamentales de la Unión Europea. Con arreglo al principio de igualdad de oportunidades entre el hombre y la mujer, dicho informe facilitará una evaluación de la incidencia de las medidas tomadas en las mujeres y los hombres. En función de la información recibida, el informe incluirá, en su caso, propuestas de revisión y actualización de la presente Directiva.

Artículo 17
Entrada en vigor

La presente Directiva entrará en vigor el día de su publicación en el *Diario Oficial de la Unión Europea.*

Artículo 18
Destinatarios

Los destinatarios de la presente Directiva serán los Estados miembros.

Hecho en Bruselas,

Por el Consejo

El Presidente

7.1.9.

CÓDIGO DE CONDUCTA PARA EL EMPLEO DE LAS PERSONAS CON DISCAPACIDAD

DECISIÓN DE LA MESA

DE 22 DE JUNIO DE 2005

LA MESA del Parlamento Europeo,

- Visto el Tratado constitutivo de la Comunidad Europea, y, en particular, su artículo 13,

- Visto el artículo 1 quinquies del Estatuto,

- Vista la Directiva 2000/78/CE del Consejo, de 27 de noviembre de 2000, relativa al establecimiento de un marco general para la igualdad de trato en el empleo y la ocupación[1],

- Visto el Código de Buenas Prácticas para el empleo de personas con discapacidad, adoptado por la Mesa del Parlamento Europeo en enero de 2000[2],

- Vista la Decisión de la Comisión de 25 de noviembre de 2003 relativa a la revisión del Código de Conducta en materia de empleo de personas con discapacidad,

Considerando que :

(1) el *Documento consultivo de la Comisión sobre las condiciones de trabajo y las perspectivas de carrera ofrecidas a las personas con discapacidad*[3] establece "que debe adoptarse un enfoque más activo para la aplicación, la evaluación y el control del Código de Conducta, con una mayor participación de las personas con discapacidad",

(2) las Orientaciones para el empleo 2000 adoptadas por el Consejo Europeo en Helsinki los días 10 y 11 de diciembre de 1999 hacen hincapié en la necesidad de favorecer un mercado de trabajo favorable a la integración social formulando un conjunto coherente de políticas destinadas a combatir la discriminación hacia grupos como las personas con discapacidad,

(3) la Directiva del Consejo relativa al establecimiento de un marco general para la igualdad de trato en el empleo y la ocupación y las Orientaciones para el empleo 2000 no se aplicaban a las instituciones comunitarias y la Comisión ha declarado en la reforma que ofrecería a su personal al menos las mismas oportunidades y niveles de protección aplicado en los Estados miembros",

(4) la Resolución del Parlamento Europeo del 9 de marzo de 2005 sobre las orientaciones presupuestarias y sobre el anteproyecto de estado de previsiones del Parlamento Europeo

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[1] 2000/78/CE

[2] PE 282.903/BUR

[3] SEC(2000)2084/4

para el procedimiento presupuestario 2006[4] insta a las Instituciones a que, a más tardar para el 1 de septiembre de 2005, presenten un resumen de las medidas adoptadas para superar los obstáculos a la igualdad de trato definidos en el artículo 13 del Tratado CE, tomando en consideración las posibilidades que ofrece el nuevo Estatuto de los Funcionarios;

ADOPTA EL SIGUIENTE CÓDIGO DE CONDUCTA:

Artículo 1 - Introducción

Las instituciones europeas tienen empeño en garantizar la igualdad de acceso al empleo en la función pública europea. Una función pública que refleje la diversidad de la comunidad a la que sirve estará en mejores condiciones de prestar servicios de calidad a los ciudadanos europeos. Con independencia de los méritos objetivos de la igualdad, cualquier organización que pretenda ser progresista y tener una perspectiva de futuro ha de procurar optimizar la contribución potencial de toda su base de reclutamiento, garantizando la igualdad de acceso.

Las estadísticas europeas revelan que el número de personas con discapacidad que ocupan un empleo es excesivamente reducido en comparación con el número de personas con discapacidad en edad de trabajar. Forma parte de la política de las instituciones europeas promover una mano de obra diversificada y cualificada, mejorar el acceso al empleo y la participación de las personas con discapacidad, erradicar la discriminación en el lugar de trabajo y promover una cultura laboral basada en prácticas y comportamientos equitativos en el lugar de trabajo.

Para llevar a cabo esta política conviene tener debidamente en cuenta la Comunicación de la Comisión titulada «Hacia una Europa sin barreras para las personas con discapacidad»[5]. Asimismo debe aplicarse el principio de «diseño para todos», un planteamiento relativamente nuevo que pasa por el diseño, el desarrollo y la comercialización de productos, servicios, sistemas y entornos corrientes que sean accesibles a la gama más amplia posible de usuarios. Sólo aplicando este principio y tomando en consideración las necesidades de las personas a la hora de planificar, diseñar y adaptar los entornos podrá evitarse que muchas de ellas se vean abocadas innecesariamente a una situación de dependencia y de exclusión social.

El propósito del presente CÓDIGO DE CONDUCTA es articular una declaración clara de la política de las instituciones europeas por lo que respecta al empleo de las personas con discapacidad y garantizar que todo su personal cumple sus obligaciones jurídicas y estatutarias en relación con la lucha contra la discriminación y ejerce sus funciones con arreglo a buenas prácticas en materia de igualdad de oportunidades. A tal fin, todas las direcciones generales y todos los servicios asignarán, siempre que sea necesario, los recursos adecuados para garantizar la efectiva puesta en práctica del presente Código de Conducta.

DECLARACIÓN GENERAL[6]

Las instituciones europeas se comprometen a promover la igualdad de trato, sin distinción por razones de sexo, raza, color de piel, origen étnico o social, características genéticas, lengua,

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[4] A6-0043/2005, ap. 9.

5 COM(200) 284 final, de 12.5.2000.

6 Los "motivos de discriminación" que se recogen en la presente declaración general son los mismos propuestos para su inclusión en el proyecto de Estatuto de los funcionarios revisado, que debería adoptarse el 1 de mayo de 2004.

religión o creencias, convicciones políticas o de otra índole, pertenencia a una minoría nacional, fortuna, nacimiento, edad, discapacidad u orientación sexual, para lo cual adoptarán normas, políticas, prácticas y conductas relativos al lugar de trabajo que valoren y respeten a todos los trabajadores, ofreciéndoles la oportunidad de desarrollar plenamente su potencial y de proseguir la carrera que escojan. Los trabajadores tienen derecho a un entorno de trabajo en el que no sean víctimas de acoso ni de discriminación y en el que se identifiquen y supriman las barreras a la participación. Estos principios contribuyen a que las instituciones europeas puedan atraer a las personas más cualificadas para prestar un servicio de elevada calidad a los ciudadanos europeos y asegurar su mantenimiento en servicio.

Con vistas a la consecución de estos objetivos, en el Estatuto de los funcionarios de las Comunidades Europeas revisado[7] se incluirán las nuevas disposiciones relativas al empleo de las personas con discapacidad siguientes:

"… se considerarán discapacitadas aquellas personas que presenten una deficiencia física o psíquica que sea o pueda ser permanente. Esta deficiencia se determinará con arreglo al procedimiento previsto en el artículo 33.

Se considerará que una persona discapacitada cumple las condiciones establecidas en la letra e) del artículo 28 si, una vez realizadas adaptaciones razonables, puede desempeñar las funciones esenciales del puesto de trabajo.

Por "adaptaciones razonables" en relación con las funciones esenciales de un puesto de trabajo, se entenderá el suministro o la modificación de instrumentos, servicios o lugares de trabajo, o la modificación de ciertas prácticas o procedimientos, con vistas a ayudar a una persona discapacitada a ejercer eficazmente sus funciones, sin que ello constituya una carga excesiva para la autoridad facultada para proceder a los nombramientos.

Artículo 2 - Ámbitos de aplicación del Código

Las personas con discapacidad no son sólo aquéllas cuya discapacidad es inmediatamente manifiesta. Numerosas discapacidades no manifiestas también requieren ciertas adaptaciones. Es sabido que una misma discapacidad puede presentar diversos grados de gravedad y afectar a un individuo de diferentes maneras y en distintos momentos y que una discapacidad puede ser de carácter temporal.

El presente Código se aplicará a las personas que sufran una discapacidad durante el proceso de reclutamiento, a las que presenten una discapacidad en el momento del primer nombramiento y a las que desarrollen una discapacidad en el transcurso de su carrera. Las instituciones europeas procurarán adaptarse a cualquier nueva circunstancia haciendo gala de un espíritu abierto y positivo.

El ámbito de aplicación del Código no abarca cuestiones como el subsidio médico especial para personas con discapacidad o la asignación especial para los hijos de funcionarios que presenten una discapacidad y las ayudas escolares relacionadas.

7 Véase el artículo 1 quáter del Estatuto de los funcionarios: "Toda referencia contenida en el presesnte Estatuto a personas de sexo masculino se entenderá hecha igualmente a personas de sexo femenino, y a la inversa, salvo que el contexto indique claramente lo contrario". Por consiguiente, el Código ha sido redactado en términos neutros desde el punto de vista del género, pero no así los extractos de textos jurídicos.

Artículo 3 - Adaptaciones relacionadas con el empleo

Forma parte de la política de las instituciones europeas introducir adaptaciones razonables en el empleo para satisfacer las necesidades de las personas con discapacidad y de las instituciones. A efectos del presente Código, incumbe a la institución demostrar que la realización de adaptaciones necesarias supone una carga excesiva.

La mayoría de las personas con discapacidad no requiere ninguna forma de ayuda especial o de adaptación para desempeñar su trabajo. Sin embargo, las personas pueden efectuar el mismo trabajo de formas diferentes para alcanzar el mismo resultado. El hecho de permitir a un miembro del personal desempeñar eficazmente sus funciones introduciendo adaptaciones relacionadas con el trabajo está, por tanto, perfectamente en consonancia con el principio del mérito. A fin de asegurar y facilitar la realización de adaptaciones accesibles, las instituciones deberán anticipar algunas necesidades fundamentales bien conocidas, con arreglo a los principios de «diseño para todos», especialmente cuando se diseñen nuevas infraestructuras.

La Directiva 2000/78/CE, relativa al establecimiento de un marco general para la igualdad de trato en el empleo y la ocupación, impone a los empresarios la obligación de adoptar las medidas adecuadas, en función de las necesidades de cada situación concreta, para permitir a las personas con discapacidades acceder al empleo, tomar parte en el mismo o progresar profesionalmente, o para que se les ofrezca formación, salvo que esas medidas supongan una carga excesiva para el empresario. Ésta es también la base de la política de las instituciones europeas en materia de adaptaciones relacionadas con el trabajo.

La adaptación se aplica a todos los ámbitos de la actividad profesional, incluidos:

- el reclutamiento, la selección y el nombramiento,
- el desarrollo de la carrera,
- la formación,
- la promoción, los traslados o cualquier otro beneficio relacionado con el empleo,
- las relaciones sociales dentro de las instituciones.

La adaptación es una forma de transformar el lugar de trabajo y puede comprender:

- la redefinición de las funciones,
- la adquisición o la modificación de equipos,
- una organización flexible del trabajo.

Las adaptaciones necesarias se determinarán atendiendo a las necesidades específicas del interesado y serán, en principio, aceptadas. En caso de que la realización de las adaptaciones necesarias les suponga una carga desproporcionada, las instituciones europeas podrán rechazar ofrecer un empleo a una persona con discapacidad. La evaluación de lo que constituye una carga desproporcionada para las instituciones europeas deberá hacerse aplicando normas estrictas, que deberán definirse en su momento, y ello sin perjuicio del derecho al recurso administrativo.

Artículo 4 - Reclutamiento

Las instituciones europeas siguen una política de igualdad de oportunidades y de selección basada en el mérito a través de concursos públicos y equitativos. Los procedimientos de reclutamiento y selección estarán adaptados de manera que no resulten perjudicados los candidatos con discapacidad. Otros medios para animar a las personas con discapacidad a que presenten sus candidaturas son las referencias explícitas a la política de igualdad de oportunidades que figuran en los anuncios de vacantes y la difusión de los anuncios de concursos en publicaciones especializadas y en organizaciones tales como el Foro Europeo de la Discapacidad, que representa a los grupos de personas con discapacidad constituidos en ONG en los Estados miembros, y la Agencia Europea para el Desarrollo de la Educación Especial. Asimismo deberían seguirse adoptado medidas positivas en el ámbito de la contratación de personal administrativo en prácticas, así como en el contexto de los contratos interinos o temporales.

Los procedimientos de reclutamiento deberán incluir, por tanto, los siguientes aspectos:

- **La publicidad en prensa** relativa a los concursos incluirá una declaración en la que se proclame el compromiso de las instituciones en favor de la igualdad de oportunidades para todos los candidatos.

- **La guía del candidato** que se publica en el Diario Oficial junto con el anuncio de concurso contendrá un párrafo dirigido específicamente a los candidatos con discapacidad en el que se hará referencia al presente CÓDIGO DE CONDUCTA.

- En los **formularios de candidatura** se invitará a los candidatos con discapacidad a que indiquen las adaptaciones que estimen necesarias para poder participar en las pruebas en pie de igualdad con los demás candidatos y se hará todo lo posible por satisfacer todas las solicitudes razonables.

- Cuando una persona con discapacidad participe en un **concurso** o en una **entrevista**, el secretario del tribunal, bajo la autoridad del presidente, será responsable de asegurar que se tomen las medidas necesarias para facilitar su acogida y para prestarle toda la ayuda que pudiera necesitar (p. ej. acceso a los edificios, equipos especiales, tiempo adicional durante las pruebas, etc.).

- **La formación** impartida a los miembros de los tribunales incluirá un módulo de sensibilización sobre la discapacidad y sobre el contenido del presente CÓDIGO DE CONDUCTA. Este módulo estará abierto al personal de todas las instituciones.

- Se creará un **sitio web** conforme a las normas de accesibilidad más actualizadas a fin de permitir el acceso a un público lo más amplio posible.

Artículo 5 - Carreras

Los candidatos que figuren en una lista de reserva podrán recurrir al asesoramiento de especialistas para obtener un puesto. La DG Personal y Administración y la EPSO (Oficina Europea de Selección de Personal) efectuarán una auditoría permanente para determinar el número de candidatos con discapacidad que participan en los concursos, que los superan y que son finalmente reclutados.

Una vez reclutados, los funcionarios con discapacidad tienen derecho a desarrollar plenamente su potencial. Durante todas las etapas de su carrera se procurará evitar imponerles exigencias profesionales que, de forma intencional o no, no guarden relación con las funciones que deban desempeñar y resulten, por tanto, discriminatorias contra las personas con discapacidad.

- **Primer nombramiento y periodo de prácticas**: la autoridad facultada para proceder a los nombramientos hará todo lo posible, en cooperación con los servicios médicos y/o la Unidad «No discriminación e igualdad de oportunidades» de la DG Personal y Administración, para garantizar que se ofrezcan puestos apropiados a los candidatos con discapacidad inscritos en una lista de reserva. De conformidad con el Estatuto de los funcionarios, la aptitud de todos los candidatos aceptados en un concurso para ejercer sus funciones está garantizada por el examen médico al que deben someterse antes de su nombramiento. En el momento del nombramiento de una persona con discapacidad o de la determinación de su aptitud para continuar en el ejercicio de sus funciones, se procurará evitar cualquier forma de discriminación basada en la discapacidad. Se trata así de garantizar que la persona en cuestión posee las cualificaciones necesarias para el empleo y de verificar que está en condiciones de desempeñar las funciones esenciales del puesto, sin perjuicio de la obligación de realizar adaptaciones razonables y de tener en cuenta el tipo de discapacidad. Si, durante el periodo de prácticas, se constata que el puesto asignado a un candidato aceptado es incompatible con su discapacidad, debería considerarse la posibilidad de asignarlo a otro puesto.

- **Orientación profesional**: tanto el Servicio central de orientación profesional (SCOP) como los responsables locales de orientación profesional están llamados a desempeñar un papel destacado asesorando al personal con discapacidad en lo tocante al desarrollo de su carrera y pueden recibir una formación apropiada. En el caso del SCOP, el mejor planteamiento sería contratar a un asesor especializado en orientación profesional y rehabilitación, que serviría de contacto, si fuese necesario, con otros servicios pertinentes.

- **Desarrollo de la carrera**: no se escatimarán esfuerzos para asegurar que los miembros del personal discapacitados tengan las mismas posibilidades de enriquecer su experiencia y desarrollar su carrera que los demás, gracias a la movilidad dentro de las instituciones. El desarrollo de la carrera puede requerir la adaptación de otros puestos, de modo que los miembros del personal discapacitados puedan ocupar puestos diferentes o de mayor rango para desarrollar nuevas capacidades.

- **Formación**: los miembros del personal discapacitados tienen los mismo derechos en materia de formación que los demás. La adquisición de cualificaciones y conocimientos nuevos es un requisito previo importante para el desarrollo de la carrera de todos los funcionarios. No se escatimarán esfuerzos para permitir que los miembros del personal discapacitados puedan participar en cursos y programas de formación organizados por la institución. Siempre que no se imparta formación interna o que ésta sea inadecuada, podrán adoptarse medidas razonables para asegurar una formación externa.

- **Evaluación del personal y promoción**: la discapacidad no constituye un motivo para justificar que los evaluadores y los comités de promoción se aparten de los criterios objetivos habitualmente utilizados para evaluar los méritos de los funcionarios.

- **Mantenimiento en servicio del personal**: si un miembro del personal desarrolla una discapacidad o si se agrava una discapacidad existente, las instituciones europeas adoptarán medidas destinadas a asegurar el mantenimiento en servicio del interesado. Se considerará, en consulta con el interesado, la posibilidad de introducir adaptaciones para facilitar su mantenimiento en servicio, incluidas la reestructuración de su puesto, una formación de

reconversión profesional o la reasignación a un puesto adecuado. Estas disposiciones podrán ser revisadas siempre que sea necesario. En caso de que se decida que no es posible realizar adaptaciones que permitan la permanencia del funcionario en sus funciones o cuando no esté disponible otro puesto apropiado, se emprenderá un procedimiento de jubilación por razones de salud, en estrecha cooperación con el interesado.

Artículo 6 - Entorno de trabajo

Las instituciones velarán por que se adopten medidas razonables para suprimir cualquier barrera física o técnica en el entorno de trabajo que pueda causar dificultades a los miembros del personal discapacitados:

- **Inmuebles**: todos los nuevos inmuebles destinados a ser ocupados por miembros del personal de las instituciones deberán ser conformes con la legislación nacional aplicable en materia de acceso y utilización de los edificios públicos por las personas con discapacidad, a fin de asegurar una movilidad sin barreras. Los inmuebles que no sean convenientemente accesibles o que no cumplan un nivel razonable al respecto serán objeto progresivamente de obras de mejora, en función de las disponibilidades presupuestarias, o serán abandonados. En tanto las instituciones no adopten criterios revisados que rijan la adaptación de sus edificios, se aplicarán los principios contenidos en la última edición del documento de la Comisión titulado «Inmueble tipo». Las instituciones están adoptando todas las medidas razonables para asegurar que los funcionarios con discapacidad dispongan de oficinas con instalaciones compatibles con sus necesidades específicas y cuenten, en su caso, con espacio de aparcamiento reservado. Las instalaciones y los dispositivos de emergencia deberán ser adecuados para todos los funcionarios con discapacidad. La DG Personal y Administración seguirá verificando regularmente el estado de los inmuebles para determinar las mejoras que deberían llevarse a cabo.

- **Equipos de oficina**: se hará todo lo posible por que los equipos de oficina estén adaptados a las personas con necesidades específicas. La Comisión designará un especialista que efectuará una evaluación ergonómica del entorno de oficina antes de la entrada en servicio de los miembros del personal discapacitados y cada vez que cambien de oficina.

Dicho especialista inspeccionará periódicamente las oficinas de todos los miembros del personal discapacitados; recomendará, en su caso, la realización de transformaciones adecuadas y comunicará regularmente a la Dirección General de Personal y Administración, así como al Grupo interservicios sobre discapacidad, las informaciones pertinentes.

Para asegurar la existencia de adaptaciones razonables es preciso adoptar medidas técnicas específicas, que constituyen una condición previa para garantizar un entorno accesible. Es esencial que las herramientas de la tecnología de la información, incluidas las intranets, las aplicaciones y las bases de datos, se desarrollen siguiendo los principios de «diseño para todos» y las directrices en materia de accesibilidad. Los datos y la información electrónicos deberán estar disponibles en formatos accesibles. En este sentido, son elementos esenciales la adquisición de herramientas apropiadas y la formación del personal.

Se consultará a los funcionarios con discapacidad acerca de los equipos o del mobiliario especial que podrían mejorar su rendimiento y su eficacia en el ejercicio de sus funciones. Las instituciones aceptarán todas las peticiones de material que consideren razonables.

- **Reuniones, etc**.: se adoptarán todas las medidas necesarias para asegurar que las personas con discapacidad puedan participar plenamente en las reuniones u otros tipos de foros, evitando el uso inadecuado de soportes de presentación o de otros medios de comunicación y asegurando que el material pertinente esté disponible en formatos accesibles.

- **Trabajo flexible**: se aplicarán, en la medida de lo posible, condiciones de trabajo flexibles a fin de responder tanto a las exigencias de trabajo de la institución como a las necesidades específicas de los funcionarios con discapacidad. Citemos, a título de ejemplo, las siguientes posibilidades:

- *horario de entrada y salida flexibles, de modo que se tengan en cuenta las dificultades que experimentan algunas personas con discapacidad a la hora de desplazarse entre el lugar de trabajo y su domicilio utilizando los transportes públicos;*

- *breves pausas regulares para ayudar a las personas que necesitan descansar o tomar medicamentos regularmente;*

- *trabajo a tiempo parcial y teletrabajo, debiendo suministrar el empleador soportes tecnológicos adecuados.*

Artículo 7 - Información y sensibilización

Las unidades de recursos humanos de las direcciones generales darán a conocer el presente CÓDIGO DE CONDUCTA entre todo el personal. El Código está disponible en todas las lenguas de la UE en el sitio web EUROPA, en las intranets de las instituciones y en sus oficinas y agencias y se distribuye a todo el personal encargado de la gestión de recursos humanos y a los cuadros superiores e intermedios. Siempre que sea posible, las instituciones procurarán garantizar la accesibilidad de los servicios de información y documentación por parte de los diferentes grupos de personas con discapacidad, teniendo en cuenta sus necesidades lingüísticas y culturales.

Los cursos de formación que aborden de forma pormenorizada cuestiones de discapacidad estarán dirigidos a las personas particularmente afectadas, por ejemplo el personal encargado de los recursos humanos, los responsables locales de orientación profesional, los jefes de unidad implicados y los miembros de los tribunales de los concursos.

Artículo 8 - Seguimiento

Uno de los elementos esenciales para la puesta en práctica del presente CÓDIGO DE CONDUCTA es el seguimiento continuo de sus resultados, asegurando así que se introduzcan a todos los niveles procedimientos perfeccionados para mejorar su aplicación, incluido el proceso de reclutamiento y a lo largo de toda la carrera. En caso de que se presenten denuncias, incumbirá a las direcciones generales demostrar que cumplen los requisitos en materia de discapacidad. La Comisión y el Grupo interservicios sobre discapacidad discutirán y fijarán objetivos para lograr condiciones libres de barreras.

Se llevará a cabo regularmente una auditoría sobre la discapacidad, en cuyo marco las direcciones generales encuestarán a los miembros de su personal acerca de si estiman padecer una discapacidad. Los resultados de estas encuestas se comunicarán a la DG Personal y Administración. La recopilación de esta información permitirá:

- garantizar que se consulta debidamente a todo el personal pertinente;

- eliminar la discriminación y las barreras a la igualdad de oportunidades a las que debe hacer frente el personal con discapacidad;

- determinar las adaptaciones que podrían ser necesarias a la hora de entrevistar o reclutar a una persona con discapacidad;

- aprovechar al máximo el potencial de todo el personal y garantizar la igualdad de oportunidades en el desarrollo de la carrera.

Los datos recopilados se utilizarán para elaborar informes estadísticos anónimos, gracias a los cuales las instituciones podrán evaluar la eficacia de la política de lucha contra la discriminación y del presente Código, así como su contribución de cara a nuevas iniciativas. En consonancia con lo dispuesto en el Reglamento relativo a la protección de los datos por lo que respecta al tratamiento de datos personales por parte de las instituciones comunitarias[8], la información recopilada en la auditoría no se utilizará para ningún otro fin. Las estadísticas relativas al número de miembros de personal que padecen una discapacidad se harán públicas.

El **Grupo interservicios sobre discapacidad de la Comisión** transmitirá igualmente a la DG Personal y Administración las contribuciones directas realizadas en las direcciones generales por miembros del personal discapacitados sobre las cuestiones relativas a las condiciones de trabajo, la accesibilidad, el reclutamiento y el desarrollo de la carrera.
Además, las personas que deseen presentar reclamaciones sobre la puesta en práctica del presente Código en la Comisión Europea podrán dirigirse a la Unidad «No discriminación e igualdad de oportunidades» de la DG Personal y Administración, que tratará las cuestiones con discreción, respetando en todo momento el nivel de confidencialidad requerido.

8 Reglamento (CE) nº 45/2001 del Parlamento Europeo y del Consejo de 18 de diciembre de 2000 relativo a la protección de las personas físicas en lo que respecta al tratamiento de datos personales por las instituciones y los organismos comunitarios y a la libre circulación de estos datos (DO L 8 de 12.01.2001, p. 1.).

I

(Actos legislativos)

REGLAMENTOS

REGLAMENTO (UE) Nº 181/2011 DEL PARLAMENTO EUROPEO Y DEL CONSEJO

de 16 de febrero de 2011

sobre los derechos de los viajeros de autobús y autocar y por el que se modifica el Reglamento (CE) nº 2006/2004

(Texto pertinente a efectos del EEE)

EL PARLAMENTO EUROPEO Y EL CONSEJO DE LA UNIÓN EUROPEA,

Visto el Tratado de Funcionamiento de la Unión Europea y, en particular, su artículo 91, apartado 1,

Vista la propuesta de la Comisión Europea,

Visto el dictamen del Comité Económico y Social Europeo [1],

Previa consulta al Comité de las Regiones,

De conformidad con el procedimiento legislativo ordinario, a la vista del texto conjunto aprobado por el Comité de Conciliación el 24 de enero de 2011 [2],

Considerando lo siguiente:

(1) Las medidas de la Unión en el ámbito del transporte en autobús y autocar deben perseguir, entre otras cosas, que se garantice un elevado nivel de protección de los viajeros, comparable al de otros modos de transporte, independientemente del lugar al que viajen. Asimismo, deben tenerse plenamente en cuenta las exigencias en materia de protección de los consumidores en general.

(2) Dado que los viajeros de autobús y autocar constituyen la parte más débil del contrato de transporte, se debe conceder a todos ellos un nivel mínimo de protección.

(3) Las medidas de la Unión para mejorar los derechos de los viajeros en el sector del transporte en autobús y autocar deben tener en cuenta las características específicas de este sector, formado en gran parte de pequeñas y medianas empresas.

(4) Los viajeros y, como mínimo, las personas con las que los viajeros tuvieran o hubieran tenido en el futuro una obligación de alimentos deben gozar de protección en caso de accidente resultante del uso del autobús o autocar, teniendo en cuenta la Directiva 2009/103/CE del Parlamento Europeo y del Consejo, de 16 de septiembre de 2009, relativa al seguro de la responsabilidad civil que resulta de la circulación de vehículos automóviles, así como al control de la obligación de asegurar esta responsabilidad [3].

(5) Al determinar el Derecho nacional aplicable a la indemnización por fallecimiento, que comprenderá unos gastos funerarios razonables, o lesiones personales, así como por pérdida o daños sufridos por el equipaje debido a accidentes resultantes del uso del autobús o autocar, se deben tener en cuenta el Reglamento (CE) nº 864/2007 del Parlamento Europeo y del Consejo, de 11 de julio de 2007, relativo a la ley aplicable a las obligaciones extracontractuales («Roma II») [4], y el Reglamento (CE) nº 593/2008 del Parlamento Europeo y del Consejo, de 17 de junio de 2008, sobre la ley aplicable a las obligaciones contractuales (Roma I) [5].

(6) Además de una indemnización de conformidad con el Derecho nacional en caso de fallecimiento o lesiones personales, o pérdida o daños sufridos por el equipaje debido a accidentes resultantes del uso del autobús o autocar, los viajeros deben tener derecho a una asistencia para las necesidades prácticas inmediatas tras un accidente. Esta asistencia debe incluir, cuando resulte necesario, primeros auxilios, alojamiento, comida, ropa y transporte.

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[1] DO C 317 de 23.12.2009, p. 99.

[2] Posición del Parlamento Europeo de 23 de abril de 2009 (DO C 184 E de 8.7.2010, p. 312), Posición del Consejo en primera lectura de 11 de marzo de 2010 (DO C 122 E de 11.5.2010, p. 1), Posición del Parlamento Europeo de 6 de julio de 2010 (no publicada aún en el Diario Oficial), Decisión del Consejo de 31 de enero de 2011, y Resolución legislativa del Parlamento Europeo de 15 de febrero de 2011 (no publicada aún en el Diario Oficial).

[3] DO L 263 de 7.10.2009, p. 11.

[4] DO L 199 de 31.7.2007, p. 40.

[5] DO L 177 de 4.7.2008, p. 6.

(7) Los servicios de autobús y autocar deben estar disponibles para los ciudadanos en general. Por consiguiente, las personas con discapacidad y las personas con movilidad reducida por razones de discapacidad, edad o cualquier otro factor deben disponer, al viajar en autobús o autocar, de oportunidades equivalentes a las de los demás ciudadanos. Las personas con discapacidad y las personas con movilidad reducida tienen los mismos derechos que todos los demás ciudadanos en lo que respecta a la libertad de movimiento, la libertad de elección y la no discriminación.

(8) A la luz del artículo 9 de la Convención de las Naciones Unidas sobre los Derechos de las Personas con Discapacidad y a fin de dar a las personas con discapacidad o con movilidad reducida oportunidades para viajar en autobús y autocar equiparables a las de otros ciudadanos, deben establecerse normas antidiscriminatorias y en materia de asistencia durante sus viajes. Por tanto, dichas personas deben poder acceder a este medio de transporte sin ser rechazadas por razón de su discapacidad o de su movilidad reducida, salvo cuando existan motivos justificados por razones de seguridad o del diseño de los vehículos o de la infraestructura. En el marco de la legislación pertinente en materia de protección de los trabajadores, las personas con discapacidad y las personas con movilidad reducida deben tener derecho a asistencia en las estaciones y a bordo de los vehículos. El objetivo de inclusión social exige que esta asistencia sea gratuita. Los transportistas deben establecer condiciones de acceso, utilizando preferentemente el sistema europeo de normalización.

(9) Al diseñar nuevas estaciones o en caso de renovaciones importantes, las entidades gestoras de las estaciones deben tratar de tener en cuenta las necesidades de las personas con discapacidad o con movilidad reducida, de conformidad con los requisitos del «diseño para todos». En todo caso, las entidades gestoras de las estaciones deben establecer puntos donde dichas personas puedan notificar su llegada y sus necesidades de asistencia.

(10) De manera similar, y sin perjuicio de lo dispuesto en la legislación vigente o futura sobre requisitos técnicos para autobuses y autocares, los transportistas, en la medida de lo posible, deben tomar en consideración dichas necesidades a la hora de equipar los vehículos nuevos y nuevamente acondicionados.

(11) Cuando resulte necesario, los Estados miembros deben mejorar las infraestructuras existentes para que los transportistas puedan garantizar el acceso de las personas con discapacidad y con movilidad reducida, así como facilitar la asistencia adecuada.

(12) Para responder a las necesidades de las personas con discapacidad y de las personas con movilidad reducida, el personal debe recibir la formación adecuada. Con objeto de facilitar el reconocimiento mutuo de las cualificaciones nacionales de los conductores, podría prestarse una formación que incluya la toma de conciencia sobre la discapacidad como parte de la cualificación inicial o de la formación periódica según se establece en la Directiva 2003/59/CE del Parlamento Europeo y del Consejo, de 15 de julio de 2003, relativa a la cualificación inicial y la formación continua de los conductores de determinados vehículos destinados al transporte de mercancías o de viajeros por carretera [1]. Para garantizar la coherencia entre la introducción de los requisitos de formación y los plazos establecidos en dicha Directiva, debe contemplarse la posibilidad de una exención por un período limitado.

(13) Las organizaciones representativas de las personas con discapacidad o con movilidad reducida deben ser consultadas o integradas en la preparación del contenido de la formación en materia de discapacidades.

(14) Entre los derechos de los viajeros de autobús y autocar debe incluirse el de ser informados sobre el servicio antes del viaje y durante el mismo. Toda la información esencial proporcionada a los viajeros de autobús o autocar debe también proporcionarse, cuando estos lo soliciten, en formatos alternativos, accesibles a las personas con discapacidad o con movilidad reducida, por ejemplo en grandes caracteres, lenguaje sencillo, braille, comunicaciones electrónicas accesibles mediante tecnología adaptativa, y cintas de audio.

(15) El presente Reglamento no debe limitar los derechos de los transportistas a reclamar indemnizaciones a cualquier persona, incluso a terceros, de conformidad con el Derecho nacional aplicable.

(16) Deben reducirse los inconvenientes que sufren los viajeros debido a cancelaciones o a retrasos significativos en sus viajes y, a tal fin, los viajeros que parten de una estación deben ser adecuadamente atendidos e informados de un modo accesible para todos los viajeros. Los viajeros deben también poder anular su viaje y recibir el reembolso de sus billetes o continuar su viaje u obtener un recorrido alternativo en condiciones satisfactorias. En caso de que los transportistas incumplan su obligación de prestar a los viajeros la asistencia necesaria, estos deben tener derecho a una compensación económica.

(17) Los transportistas —con la participación de las partes interesadas, las asociaciones profesionales y las asociaciones de consumidores, viajeros, personas con discapacidad y personas con movilidad reducida— deben cooperar a fin de adoptar disposiciones a escala nacional o europea. Dichas disposiciones deben tener por objetivo mejorar el cuidado y la asistencia a los viajeros cuyo viaje se haya visto interrumpido, especialmente en caso de grave retraso o cancelación del viaje, con una especial atención a los viajeros con necesidades especiales debido a su discapacidad, movilidad reducida, enfermedad, edad avanzada o embarazo, incluidos los viajeros que los acompañen y los que viajen con niños pequeños. Se ha de informar sobre estas medidas a los organismos nacionales de ejecución.

[1] DO L 226 de 10.9.2003, p. 4.

(18) El presente Reglamento no debe afectar a los derechos de los viajeros establecidos por la Directiva 90/314/CEE del Consejo, de 13 de junio de 1990, relativa a los viajes combinados, las vacaciones combinadas y los circuitos combinados ([1]). El presente Reglamento no debe aplicarse en los casos de cancelación de un circuito combinado por razones distintas de la cancelación del servicio de transporte en autobús o autocar.

(19) Los viajeros deben ser informados plenamente de los derechos que les confiere el presente Reglamento, de modo que puedan ejercerlos de forma efectiva.

(20) Los viajeros deben poder ejercer sus derechos mediante procedimientos de reclamación adecuados, aplicados por los transportistas o, en su caso, presentando una reclamación ante el organismo o los organismos designados a tal fin por el Estado miembro pertinente.

(21) Los Estados miembros deben garantizar el cumplimiento del presente Reglamento y designar al organismo u organismos competentes para llevar a cabo la supervisión y la aplicación del mismo. Ello no afecta a los derechos de los viajeros a obtener indemnizaciones por vía judicial con arreglo al Derecho nacional.

(22) Teniendo en cuenta los procedimientos establecidos por un Estado miembro para la presentación de reclamaciones, toda reclamación referente a la asistencia debe dirigirse preferentemente al organismo o los organismos competentes designados para velar por la aplicación del presente Reglamento en el Estado miembro donde esté situado el punto de embarque o de desembarque.

(23) Los Estados miembros deben fomentar el uso del transporte público y el uso de información integrada y de billetes integrados con el fin de optimizar el uso y la interoperabilidad de los distintos medios y operadores de transporte.

(24) Los Estados miembros deben establecer las sanciones aplicables a las infracciones del presente Reglamento y asegurarse de que dichas sanciones sean aplicadas. Esas sanciones deben ser eficaces, proporcionadas y disuasorias.

(25) Dado que el objetivo del presente Reglamento, a saber, garantizar un nivel equivalente de protección y asistencia a los viajeros en el trasporte en autobús o autocar en todos los Estados miembros, no puede ser alcanzado de manera suficiente por los Estados miembros y, por consiguiente, debido a las dimensiones y los efectos de la acción, pueden lograrse mejor a nivel de la Unión, esta puede adoptar medidas, de acuerdo con el principio de subsidiariedad consagrado en el artículo 5 del Tratado de la Unión Europea. De conformidad con el principio de proporcionalidad enunciado en dicho artículo, el presente Reglamento no excede de lo necesario para alcanzar ese objetivo.

([1]) DO L 158 de 23.6.1990, p. 59.

(26) El presente Reglamento debe entenderse sin perjuicio de la Directiva 95/46/CE del Parlamento Europeo y del Consejo, de 24 de octubre de 1995, relativa a la protección de las personas físicas en lo que respecta al tratamiento de datos personales y a la libre circulación de estos datos ([2]).

(27) La aplicación del presente Reglamento debe basarse en el Reglamento (CE) nº 2006/2004 del Parlamento Europeo y del Consejo, de 27 de octubre de 2004, sobre la cooperación entre las autoridades nacionales encargadas de la aplicación de la legislación de protección de los consumidores (Reglamento sobre la cooperación en materia de protección de los consumidores) ([3]). Por tanto, debe modificarse en consecuencia el citado Reglamento.

(28) El presente Reglamento respeta los derechos fundamentales y observa los principios reconocidos en particular en la Carta de los Derechos Fundamentales de la Unión Europea, mencionados en el artículo 6 del Tratado de la Unión Europea, teniendo en cuenta también la Directiva 2000/43/CE del Consejo, de 29 de junio de 2000, relativa a la aplicación del principio de igualdad de trato de las personas independientemente de su origen racial o étnico ([4]), y la Directiva 2004/113/CE del Consejo, de 13 de diciembre de 2004, por la que se aplica el principio de igualdad de trato entre hombres y mujeres al acceso a bienes y servicios y su suministro ([5]).

HAN ADOPTADO EL PRESENTE REGLAMENTO:

CAPÍTULO I

DISPOSICIONES GENERALES

Artículo 1

Objeto

El presente Reglamento establece normas para el transporte en autobús y autocar, aplicables a:

a) la no discriminación entre los viajeros en las condiciones de transporte ofrecidas por los transportistas;

b) los derechos de los viajeros en caso de accidente resultante del uso del autobús o del autocar con resultado de fallecimiento o lesiones personales, o pérdida o daños sufridos por el equipaje;

c) la no discriminación y la asistencia obligatoria a las personas con discapacidad o con movilidad reducida;

d) los derechos de los viajeros en caso de cancelación o retraso;

e) la información mínima que debe darse a los viajeros;

f) la tramitación de las reclamaciones;

g) las normas generales de aplicación.

([2]) DO L 281 de 23.11.1995, p. 31.
([3]) DO L 364 de 9.12.2004, p. 1.
([4]) DO L 180 de 19.7.2000, p. 22.
([5]) DO L 373 de 21.12.2004, p. 37.

Artículo 2

Ámbito de aplicación

1. El presente Reglamento se aplicará a los viajeros que utilicen servicios regulares para viajeros de categoría indeterminada cuyo punto de embarque o desembarque esté situado en el territorio de un Estado miembro y cuya distancia programada sea igual o superior a 250 kilómetros.

2. En lo relativo a los servicios a que se refiere el apartado 1, pero cuya distancia programada sea inferior a 250 kilómetros, se aplicarán el artículo 4, apartado 2; el artículo 9; el artículo 10, apartado 1; el artículo 16, apartado 1, letra b), y apartado 2; el artículo 17, apartados 1 y 2, y los artículos 24 a 28.

3. El presente Reglamento se aplicará además, a excepción de los artículos 9 a 16, del artículo 17, apartado 3, y de los capítulos IV, V y VI, a los servicios discrecionales cuando el punto de embarque inicial o el punto de desembarque final del viajero esté situado en el territorio de un Estado miembro.

4. A excepción del artículo 4, apartado 2; del artículo 9; del artículo 10, apartado 1; del artículo 16, apartado 1, letra b), y apartado 2; del artículo 17, apartados 1 y 2, y de los artículos 24 a 28, los Estados miembros podrán eximir, de manera transparente y no discriminatoria, de la aplicación del presente Reglamento los servicios regulares nacionales. Tales exenciones podrán concederse a partir de la fecha de aplicación del presente Reglamento por un período no superior a cuatro años, que podrá renovarse una sola vez.

5. Los Estados miembros podrán eximir, de manera transparente y no discriminatoria, de la aplicación de del presente Reglamento, por un período máximo de cuatro años a partir de la fecha de aplicación del presente Reglamento, determinados servicios regulares, por realizarse una parte significativa de dichos servicios, incluida por lo menos una parada programada, fuera de la Unión. Tales exenciones podrán renovarse una sola vez.

6. Los Estados miembros informarán a la Comisión de las exenciones de los distintos tipos de servicios concedidas de conformidad con los apartados 4 y 5. La Comisión tomará las medidas apropiadas si se considerase que dichas exenciones no se ajustan a las disposiciones del presente artículo. A más tardar el 2 de marzo de 2018, la Comisión presentará al Parlamento Europeo y al Consejo un informe sobre las exenciones concedidas de conformidad con los apartados 4 y 5.

7. Ninguna disposición del presente Reglamento se entenderá contraria a la legislación vigente sobre requisitos técnicos, ni introductoria de requisitos adicionales a los que dispone dicha legislación, para autobuses o autocares o infraestructura o equipo en las paradas o estaciones de autobús.

8. El presente Reglamento no afecta a los derechos que la Directiva 90/314/CEE atribuye a los viajeros, y no se aplicará en los casos en que un circuito combinado mencionado en dicha directiva se cancele por alguna razón que no sea la cancelación de un servicio regular.

Artículo 3

Definiciones

A los efectos del presente Reglamento se entenderá por:

a) «servicios regulares»: servicios que efectúan el transporte de viajeros en autobús o autocar con una frecuencia y un itinerario determinados, recogiendo y depositando viajeros en paradas previamente fijadas;

b) «servicios discrecionales»: los servicios no incluidos en la definición de servicios regulares y cuya principal característica es el transporte en autobús o autocar de grupos de viajeros formados por encargo del cliente o a iniciativa del propio transportista;

c) «contrato de transporte»: contrato de transporte entre un transportista y un viajero para la prestación de uno o más servicios regulares o discrecionales;

d) «billete»: documento válido u otra prueba de un contrato de transporte;

e) «transportista»: persona física o jurídica, distinta de un operador turístico, una agencia de viajes o un proveedor de billetes, que ofrezca transporte mediante servicios regulares o discrecionales al público en general;

f) «transportista ejecutor»: persona física o jurídica distinta del transportista y que efectúa, de hecho, la totalidad o parte del transporte;

g) «proveedor de billetes»: cualquier intermediario que celebre contratos de transporte por cuenta de un transportista;

h) «agencia de viajes»: cualquier intermediario que actúe en nombre de un viajero para la celebración de contratos de transporte;

i) «operador turístico»: organizador o detallista, distinto del transportista, según las definiciones del artículo 2, apartados 2 y 3, de la Directiva 90/314/CEE;

j) «persona con discapacidad» o «persona con movilidad reducida»: persona cuya movilidad al utilizar el transporte se vea reducida debido a una discapacidad física (sensorial o locomotriz, permanente o temporal), a una discapacidad o deficiencia intelectual, o a cualquier otra causa de discapacidad, o debido a la edad, y cuya situación requiera una atención adecuada y una adaptación a sus necesidades particulares de los servicios ofrecidos a todos los viajeros;

k) «condiciones de acceso»: normas, directrices e información pertinentes sobre la accesibilidad de los autobuses o de estaciones determinadas, incluidas sus instalaciones, para personas con discapacidad o personas con movilidad reducida;

l) «reserva»: toda reserva de un asiento a bordo de un autobús o autocar para un servicio regular a una hora de salida específica;

m) «estación»: una estación dotada de personal donde, según la ruta determinada, está programada la parada de un servicio regular para el embarque o desembarque de viajeros, y equipada con instalaciones como las destinadas a la facturación, salas de espera o ventanillas para la venta de billetes;

n) «parada»: cualquier punto, distinto de una estación, donde, según la ruta determinada, está programada la parada de un servicio regular para el embarque o desembarque de viajeros;

o) «gestor de la estación»: entidad organizativa de un Estado miembro responsable de gestionar una estación determinada;

p) «cancelación»: la no realización de un servicio regular previamente programado;

q) «retraso»: diferencia entre la hora programada para la salida de un servicio regular según el horario publicado y la hora de salida real.

Artículo 4

Billetes y condiciones contractuales no discriminatorias

1. Los transportistas emitirán un billete al viajero, a menos que otros documentos concedan el derecho al transporte. Los billetes podrán emitirse en formato electrónico.

2. Sin perjuicio de las tarifas sociales, las condiciones contractuales y las tarifas aplicadas por los transportistas se ofrecerán al público en general sin discriminación directa ni indirecta por razones de nacionalidad del cliente final o del lugar de establecimiento de los transportistas o de los proveedores de billetes en la Unión.

Artículo 5

Otras partes ejecutantes

1. Si el cumplimiento de las obligaciones que se derivan del presente Reglamento ha sido confiado a un transportista ejecutor, proveedor de billetes o a cualquier otra persona, el transportista, la agencia de viajes, el operador turístico o el gestor de la estación que haya delegado tales obligaciones serán, no obstante, responsables de las acciones y omisiones de dicha parte ejecutante.

2. Además, la parte a la que el transportista, la agencia de viajes, el operador turístico o el gestor de la estación hayan encomendado el cumplimiento de una obligación estará sujeta a lo dispuesto en el presente Reglamento en lo que se refiere a la obligación encomendada.

Artículo 6

Inadmisibilidad de las exenciones

1. Las obligaciones respecto de los viajeros derivadas del presente Reglamento no podrán ser objeto de limitación o exención mediante, en particular, la introducción de excepciones o cláusulas restrictivas en el contrato de transporte.

2. Los transportistas podrán ofrecer condiciones contractuales más favorables para los viajeros que las establecidas en el presente Reglamento.

CAPÍTULO II

INDEMNIZACIÓN Y ASISTENCIA EN CASO DE ACCIDENTES

Artículo 7

Fallecimiento o lesiones personales de los viajeros y pérdida o daño del equipaje

1. Los viajeros, de conformidad con el Derecho nacional vigente, tendrán derecho a una indemnización por fallecimiento, que comprenderá unos gastos funerarios razonables, o lesiones personales, así como por la pérdida o daño del equipaje, debidos a accidentes resultantes del uso del autobús o autocar. En caso de fallecimiento de un viajero, este derecho se aplicará como mínimo a las personas con las que este tuviera o hubiera tenido en el futuro una obligación de alimentos.

2. El importe de la indemnización se calculará de conformidad con el Derecho nacional vigente. El límite máximo establecido por el Derecho nacional a la indemnización por fallecimiento o lesiones personales o por la pérdida o daño del equipaje para cada ocasión no será inferior a:

a) 220 000 EUR por viajero;

b) 1 200 EUR por pieza de equipaje. En caso de daños a una silla de ruedas, demás equipo de movilidad o dispositivos de asistencia, el importe de la indemnización equivaldrá siempre al coste de la sustitución o reparación del equipo perdido o dañado.

Artículo 8

Necesidades prácticas inmediatas de los viajeros

En caso de accidente resultante del uso del autobús o autocar, el transportista proporcionará una asistencia adecuada y proporcionada a los viajeros para sus necesidades prácticas inmediatas tras el accidente. Esta asistencia incluirá, cuando resulte necesario, alojamiento, comida, ropa, transporte y prestación de primeros auxilios. La asistencia prestada no constituirá reconocimiento de responsabilidad.

El transportista podrá limitar el coste total del alojamiento a 80 EUR por noche y por viajero, por un máximo de dos noches.

CAPÍTULO III

DERECHOS DE LAS PERSONAS CON DISCAPACIDAD Y LAS PERSONAS CON MOVILIDAD REDUCIDA

Artículo 9

Derecho al transporte

1. Los transportistas, las agencias de viajes y los operadores turísticos no podrán negarse a aceptar una reserva de una persona, a emitir o a proporcionarle de otro modo un billete, o a embarcarla, por su discapacidad o movilidad reducida.

2. Las reservas y los billetes se ofrecerán a las personas con discapacidad o con movilidad reducida sin coste adicional alguno.

Artículo 10

Excepciones y condiciones especiales

1. No obstante lo dispuesto en el artículo 9, apartado 1, los transportistas, las agencias de viajes y los operadores turísticos podrán negarse a aceptar una reserva de una persona, a emitir o a proporcionarle de otro modo un billete, o a embarcarla, por su discapacidad o movilidad reducida:

a) a fin de dar cumplimiento a los requisitos de seguridad establecidos por el Derecho internacional, de la Unión o nacional, o para dar cumplimiento a los requisitos de salud y seguridad establecidos por las autoridades competentes;

b) cuando el diseño del vehículo o la infraestructura, incluidas las paradas y las estaciones de autobús, haga físicamente imposible el embarque, el desembarque o el traslado de la persona con discapacidad o movilidad reducida de manera segura y operativamente viable.

2. En caso de negarse a aceptar una reserva o a emitir o proporcionar de otro modo un billete por los motivos mencionados en el apartado 1, los transportistas, las agencias de viajes y los operadores turísticos deberán informar a la persona en cuestión sobre todo servicio alternativo aceptable operado por el transportista.

3. Cuando a una persona con discapacidad o movilidad reducida que tenga una reserva o esté en posesión de un billete y cumpla los requisitos establecidos en el artículo 14, apartado 1, letra a), le sea, no obstante, denegado el embarque debido a su discapacidad o movilidad reducida, deberá ofrecérseles a la persona en cuestión y a cualquier persona acompañante con arreglo al apartado 4 del presente artículo la elección entre:

a) el derecho al reembolso y, cuando proceda, un servicio de ida y vuelta gratuito al primer punto de salida, según se establezca en el contrato de transporte, en la primera ocasión que se presente, y

b) excepto cuando no sea viable, la continuación del viaje o un recorrido alternativo utilizando servicios de transporte alternativos razonables para llegar al destino mencionado en el contrato de transporte.

La falta de notificación de conformidad con el artículo 14, apartado 1, letra a), no afectará al derecho a reembolso del importe abonado por el billete.

4. Si un transportista, una agencia de viajes o un operador turístico se niegan a aceptar una reserva de una persona por razón de su discapacidad o su movilidad reducida, a emitir o proporcionar de otro modo un billete a dicha persona o a embarcarla, debido a los motivos contemplados en el apartado 1, dicha persona podrá solicitar ir acompañada por otra persona de su elección capaz de prestarle la asistencia requerida por la persona con discapacidad o con movilidad reducida para que dejen de aplicarse los motivos mencionados en el apartado 1.

Esta persona acompañante será transportada gratuitamente y, de ser viable, se la sentará al lado de la persona con discapacidad o con movilidad reducida.

5. Cuando un transportista, una agencia de viajes o un operador turístico apliquen el apartado 1, informarán inmediatamente a la persona con discapacidad o movilidad reducida de las razones correspondientes y, si así lo solicitase la persona en cuestión, le informarán por escrito en el plazo de cinco días hábiles tras dicha solicitud.

Artículo 11

Accesibilidad e información

1. En cooperación con las organizaciones representativas de las personas con discapacidad o de las personas con movilidad reducida, los transportistas y los gestores de las estaciones, en su caso a través de sus organizaciones, establecerán o dispondrán condiciones de acceso no discriminatorio aplicables al transporte de personas con discapacidad y personas con movilidad reducida.

2. Los transportistas y los gestores de las estaciones harán públicas las condiciones de acceso previstas en el apartado 1, incluido el texto de la legislación internacional, de la Unión o nacional en materia de requisitos de seguridad, sobre la que se basen las condiciones de acceso no discriminatorio, en soporte material o a través de internet, en formatos accesibles si así se solicita, en las mismas lenguas en que la información suele ponerse a disposición de todos los viajeros. Al facilitar esta información se prestará especial atención a las necesidades de las personas con discapacidad y de las personas con movilidad reducida.

3. Los operadores turísticos pondrán a disposición las condiciones de acceso previstas en el apartado 1 que sean aplicables a los viajes incluidos en los viajes combinados, las vacaciones combinadas y los circuitos combinados que organizan, venden u ofrecen para la venta.

4. La información sobre las condiciones de acceso mencionadas en los apartados 2 y 3 se distribuirá en soporte material a petición del viajero.

5. Los transportistas, las agencias de viajes y los operadores turísticos garantizarán que toda la información general pertinente relativa al viaje y a las condiciones de transporte esté disponible en formatos adecuados y accesibles para las personas con discapacidad o con movilidad reducida, incluyendo, en su caso, las reservas y la información en línea. A petición del viajero la información se distribuirá en soporte material.

Artículo 12

Designación de las estaciones

Los Estados miembros designarán las estaciones de autobuses y autocares donde debe proporcionarse asistencia a las personas con discapacidad o con movilidad reducida. Los Estados miembros informarán a la Comisión al respecto. La Comisión pondrá a disposición en internet una lista de las estaciones de autobús y autocar designadas.

Artículo 13

Derecho de asistencia en las estaciones designadas y en los autobuses y autocares

1. Con sujeción a las condiciones de acceso establecidas en el artículo 11, apartado 1, y en sus respectivos ámbitos de competencia, los transportistas y los gestores de las estaciones prestarán, en las estaciones designadas por los Estados miembros, asistencia gratuita a las personas con discapacidad y a las personas con movilidad reducida, al menos del nivel especificado en el anexo I, parte a).

2. Con sujeción a las condiciones de acceso establecidas en el artículo 11, apartado 1, los transportistas prestarán, en los autobuses y los autocares, asistencia gratuita a las personas con discapacidad y a las personas con movilidad reducida, al menos del nivel especificado en el anexo I, parte b).

Artículo 14

Condiciones para la prestación de asistencia

1. Los transportistas y los gestores de las estaciones cooperarán para prestar asistencia a las personas con discapacidad o con movilidad reducida a condición de que:

a) la necesidad de dicha asistencia se notifique a los transportistas, los gestores de estaciones, las agencias de viajes y los operadores turísticos con una antelación mínima de 36 horas, y

b) las personas de que se trate se presenten en el punto designado:

   i) a una hora fijada previamente por el transportista, que no será anterior a la hora de salida publicada en más de 60 minutos, a no ser que el transportista y el pasajero acuerden un plazo menor, o

   ii) si no se ha fijado hora alguna, como mínimo 30 minutos antes de la hora de salida publicada.

2. Además de lo establecido en el apartado 1, las personas con discapacidad o las personas con movilidad reducida notificarán al transportista, a la agencia de viajes o al operador turístico en el momento de la reserva o de la compra anticipada del billete sus necesidades específicas en relación con los asientos, siempre que en ese momento la necesidad sea conocida.

3. Los transportistas, los gestores de estaciones, las agencias de viajes y los operadores turísticos adoptarán las medidas necesarias para facilitar la recepción de las notificaciones de necesidad de asistencia hechas por las personas con discapacidad o con movilidad reducida. Esta obligación se aplicará a todas las estaciones designadas y a sus puntos de venta, incluidas la venta telefónica y la venta por internet.

4. Si no se efectuara la correspondiente notificación de acuerdo con la letra a) del apartado 1 y con el apartado 2, los transportistas, los gestores de las estaciones, las agencias de viajes y los operadores turísticos harán todos los esfuerzos razonables para garantizar la prestación de asistencia de forma que las personas con discapacidad o con movilidad reducida puedan embarcar en los servicios de transporte de salida, hacer los transbordos necesarios y desembarcar de los servicios de transporte de llegada para los que han adquirido billete.

5. Los gestores de las estaciones designarán un punto dentro o fuera de la estación donde las personas con discapacidad o con movilidad reducida puedan comunicar su llegada y solicitar asistencia. El punto estará claramente señalizado y ofrecerá en formatos accesibles información básica sobre la estación y la asistencia disponible.

Artículo 15

Transmisión de la información a terceros

Si los agentes de viajes u operadores turísticos reciben una notificación en el sentido que se menciona en el artículo 14, apartado 1, letra a), transmitirán lo antes posible, dentro de sus horas habituales de oficina, la información a los transportistas o al gestor de la estación.

Artículo 16

Formación

1. Los transportistas y, cuando proceda, los gestores de las estaciones, establecerán procedimientos de formación en materia de discapacidades, con inclusión de instrucciones, y garantizarán que:

a) el personal, excluidos los conductores pero incluidos los empleados de cualquiera otra parte ejecutora, que preste asistencia directa a las personas con discapacidad o con movilidad reducida, reciba formación o instrucciones según se indica en el anexo II, partes a) y b), y

b) el personal, incluidos los conductores, que tenga trato directo con los viajeros o con cuestiones relacionadas con ellos, reciba formación o instrucciones según se indica en el anexo II, parte a).

2. Los Estados miembros podrán conceder una exención por un período máximo de cinco años a partir del 1 de marzo de 2013 respecto de la aplicación del apartado 1, letra b), por lo que se refiere a la formación de los conductores.

Artículo 17

Indemnizaciones relacionadas con las sillas de ruedas y otros equipos de movilidad

1. Los transportistas y los gestores de las estaciones serán responsables de las pérdidas de sillas de ruedas, otros equipos de ayuda a la movilidad o dispositivos de asistencia y de los daños causados a ellos. Indemnizará las pérdidas o daños el transportista o el gestor de la estación responsable de ellos.

2. La indemnización a que se refiere el apartado 1 será igual al coste de sustitución o reparación del equipo u objetos perdidos o dañados.

3. En caso necesario, se harán los esfuerzos necesarios para poner temporalmente a disposición de los interesados equipos o dispositivos sustitutivos. Las sillas de ruedas, los demás equipos de ayuda a la movilidad o dispositivos de asistencia tendrán, en la medida de lo posible, características técnicas y funcionales similares a los perdidos o dañados.

Artículo 18

Exenciones

1. Sin perjuicio del artículo 2, apartado 2, los Estados miembros podrán eximir los servicios regulares nacionales de la aplicación de algunas o todas las disposiciones del presente capítulo, siempre y cuando garanticen que el nivel de protección de las personas con discapacidad y de las personas con movilidad reducida que ofrece su Derecho nacional es al menos el mismo que el que ofrece el presente Reglamento.

2. Los Estados miembros informarán a la Comisión de las exenciones concedidas al amparo del apartado 1. La Comisión tomará las medidas apropiadas si se considerase que dichas exenciones no se ajustan a las disposiciones del presente artículo. A más tardar el 2 de marzo de 2018, la Comisión presentará al Parlamento Europeo y al Consejo un informe sobre las exenciones concedidas en virtud del apartado 1.

CAPÍTULO IV

DERECHOS DE LOS VIAJEROS EN CASO DE CANCELACIÓN O RETRASO

Artículo 19

Continuación, recorrido alternativo y reembolso

1. Cuando un transportista tenga razones para suponer que un servicio regular vaya a cancelarse o a tener un retraso de más de 120 minutos en su salida desde una estación, así como en caso de sobrerreserva, le ofrecerá de inmediato al viajero elegir entre:

a) continuación o recorrido alternativo hasta el destino final sin coste adicional y en la primera ocasión posible, en condiciones comparables a las estipuladas en el contrato de transporte;

b) reembolso del precio del billete y, si procede, un servicio de vuelta gratuito en autobús o autocar en la primera ocasión posible, al primer punto de partida mencionado en el contrato de transporte.

2. Si el transportista no ofrece al viajero la posibilidad de elegir a que se refiere el apartado 1, este tendrá derecho a percibir una indemnización que ascenderá al 50 % del precio del billete, además del reembolso estipulado en el apartado 1, letra b). El transportista abonará dicha cantidad en el plazo de un mes a partir de la presentación de la solicitud de indemnización.

3. En caso de avería del autobús o autocar durante el viaje, el transportista facilitará bien la continuación del servicio con otro vehículo desde el punto en que se encuentre el vehículo averiado, o bien transporte desde el punto en que se encuentre el vehículo averiado hasta un punto de espera o una estación adecuados desde donde sea posible la continuación del viaje.

4. Cuando un servicio regular se cancele o se retrase más de 120 minutos en su salida desde una parada de autobús, el viajero tendrá derecho a que el transportista se haga cargo de la continuación, el recorrido alternativo o el reembolso a los que se hace referencia en el apartado 1.

5. El pago del reembolso establecido en el apartado 1, letra b), y en el apartado 4 se efectuará en los 14 días siguientes al ofrecimiento o a la recepción de la solicitud. El pago cubrirá el coste total del billete, al precio que se haya pagado, de la parte o partes del viaje que no se hayan hecho y de la parte o partes ya hechas si el viaje no sirve ya a los fines del plan de viaje original del viajero. Para los viajeros que estén en posesión de pases de viaje o de abonos de temporada, el pago será equivalente a la parte proporcional del coste completo del pase o abono. El reembolso se pagará en dinero, a no ser que el viajero acepte otra forma de reembolso.

Artículo 20

Información

1. En caso de cancelación o retraso en la salida de un servicio regular, el transportista o, según proceda, el gestor de la estación informarán de la situación a los viajeros que salgan de las estaciones, lo antes posible y en cualquier caso a más tardar 30 minutos después de la hora de salida programada, así como de la hora estimada de salida en cuanto se disponga de esa información.

2. En caso de que los viajeros pierdan una conexión, prevista en el horario, debido a una cancelación o retraso, el transportista o, según proceda, el gestor de la estación, harán esfuerzos razonables para informarles sobre las conexiones alternativas.

3. El transportista o, según proceda, el gestor de la estación, velarán por que las personas con discapacidad o con movilidad reducida reciban en formato accesible la información exigida en los apartados 1 y 2.

4. Cuando sea posible, la información exigida en los apartados 1 y 2 será facilitada por medios electrónicos a todos los viajeros, incluidos los que no partan de las estaciones, dentro de los plazos señalados en el apartado 1, si el viajero así lo solicita y ha facilitado al transportista los datos de contacto necesarios.

Artículo 21

Asistencia en caso de cancelación o retraso en la salida

Para un viaje de una duración prevista de más de tres horas, el transportista, en caso de cancelación o retraso en la salida de la estación de más de 90 minutos, ofrecerá al viajero gratuitamente:

a) aperitivos, comidas o refrigerios en proporción razonable al tiempo de espera o retraso, siempre que se disponga de ellos en el autobús o la estación o puedan razonablemente proveerse;

b) una habitación de hotel u otro tipo de alojamiento, así como asistencia para organizar el traslado entre la estación y el lugar de alojamiento cuando sea necesaria una estancia de una o más noches. El transportista podrá limitar a 80 EUR por noche y por viajero, por un máximo de dos noches, el coste total del alojamiento, limitación que no incluirá el transporte de ida y vuelta entre la estación y el lugar de alojamiento.

Al aplicar el presente artículo, el transportista prestará atención especial a las necesidades de las personas con discapacidad y las personas con movilidad reducida y de toda persona acompañante.

Artículo 22

Otras reclamaciones

Ninguna disposición contenida en el presente capítulo impedirá a los viajeros solicitar ante los órganos jurisdiccionales nacionales indemnizaciones, de conformidad con el Derecho nacional, por los daños y perjuicios resultantes de la cancelación o el retraso de los servicios regulares.

Artículo 23

Exenciones

1. Los artículos 19 y 21 no serán aplicables a los viajeros con billetes abiertos mientras no se especifique la hora de salida, salvo si se trata de pasajeros titulares de un pase de viaje o abono de temporada.

2. El artículo 21, letra b), no será aplicable cuando el transportista demuestre que la cancelación o el retraso se debe a condiciones meteorológicas extremas o a grandes catástrofes naturales que hacen peligrosa la seguridad del servicio de autobús o autocar.

CAPÍTULO V

NORMAS GENERALES SOBRE INFORMACIÓN Y RECLAMACIONES

Artículo 24

Derecho a información sobre el viaje

Los transportistas y los gestores de las estaciones, dentro de sus respectivos ámbitos de competencia, suministrarán a los viajeros información adecuada a lo largo de su viaje. Siempre que sea posible, la información se proporcionará en formatos accesibles previa petición.

Artículo 25

Información sobre los derechos de los viajeros

1. Los transportistas y los gestores de las estaciones, dentro de sus respectivos ámbitos de competencia, velarán por que los viajeros reciban información adecuada y exhaustiva sobre los derechos que les otorga el presente Reglamento a más tardar en el momento de la salida. La información se suministrará en las estaciones y, cuando sea posible, en internet. La información se facilitará, siempre que sea posible, en formato accesible cuando así lo soliciten las personas con discapacidad o con movilidad reducida. La información incluirá los datos de contacto necesarios para dirigirse al organismo u organismos de aplicación designados por los Estados miembros con arreglo al artículo 28, apartado 1.

2. Con objeto de cumplir con el requisito de información contemplado en el apartado 1, los transportistas y los gestores de las estaciones podrán usar un resumen de las disposiciones del presente Reglamento elaborado por la Comisión en todas las lenguas oficiales de las instituciones de la Unión Europea y puesto a su disposición.

Artículo 26

Reclamaciones

Los transportistas crearán o dispondrán de un mecanismo de tramitación de las reclamaciones relativas a los derechos y obligaciones establecidos en el presente Reglamento.

Artículo 27

Presentación de reclamaciones

Sin perjuicio de las demandas de indemnización según lo dispuesto en el artículo 7, si el viajero cubierto por el presente Reglamento desea presentar una reclamación contra el transportista, la presentará en los tres meses siguientes a la fecha en que se haya prestado o se hubiera debido prestar un servicio regular. En el mes siguiente a la recepción de la reclamación, el transportista notificará al viajero que su reclamación se ha admitido, se ha desestimado o todavía se está examinando. El plazo para proporcionar la respuesta definitiva no será superior a tres meses a partir de la fecha de recepción de la reclamación.

CAPÍTULO VI

APLICACIÓN Y ORGANISMOS DE APLICACIÓN NACIONALES

Artículo 28

Organismos de aplicación nacionales

1. Cada Estado miembro deberá designar uno o varios organismos, nuevos o existentes, responsables de la aplicación del presente Reglamento, por lo que se refiere a los servicios regulares desde puntos situados en su territorio y los servicios regulares desde un tercer país a esos puntos. Cada organismo adoptará las medidas necesarias para garantizar el cumplimiento del presente Reglamento.

Dichos organismos serán independientes de los transportistas, de los operadores turísticos y de los gestores de las terminales en lo relativo a su organización, sus decisiones de financiación, su estructura jurídica y su proceso de toma de decisiones.

2. Los Estados miembros notificarán a la Comisión el organismo u organismos de aplicación que designen conforme al presente artículo.

3. En caso de supuesta infracción del presente Reglamento, todo viajero podrá presentar una reclamación, de conformidad con el Derecho nacional, ante el organismo correspondiente designado con arreglo al apartado 1 o ante cualquier organismo competente designado por el Estado miembro.

Todo Estado miembro podrá decidir que el viajero, como primera medida, presente al transportista una reclamación, en cuyo caso el organismo de aplicación nacional o cualquier otro organismo competente designado por el Estado miembro actuará como organismo de apelación en relación con las reclamaciones no resueltas de conformidad con el artículo 27.

Artículo 29

Informe sobre la aplicación

A más tardar el 2 de marzo de 2015, y posteriormente cada dos años, los organismos de aplicación designados con arreglo al artículo 28, apartado 1, publicarán un informe sobre su actividad en los dos años naturales anteriores, que contendrá, en particular, una descripción de las medidas adoptadas para aplicar las disposiciones del presente Reglamento y estadísticas sobre las reclamaciones y las sanciones aplicadas.

Artículo 30

Cooperación entre los organismos de aplicación

Los organismos de aplicación nacionales a que se refiere el artículo 28, apartado 1, intercambiarán, cuando proceda, información sobre sus actividades y sus principios y prácticas en materia de toma de decisiones. Para esa tarea, contarán con la asistencia de la Comisión.

Artículo 31

Sanciones

Los Estados miembros establecerán normas sobre las sanciones aplicables a las infracciones de las disposiciones del presente Reglamento y adoptarán todas las medidas necesarias para garantizar su aplicación. Las sanciones establecidas deberán ser efectivas, proporcionadas y disuasorias. A más tardar el 1 de marzo de 2013, los Estados miembros notificarán a la Comisión dichas normas y medidas y le notificarán sin demora toda modificación posterior que las afecte.

CAPÍTULO VII

DISPOSICIONES FINALES

Artículo 32

Informe

A más tardar el 2 de marzo de 2016, la Comisión informará al Parlamento Europeo y al Consejo sobre el funcionamiento y los efectos del presente Reglamento. En caso necesario, se adjuntarán al informe las propuestas legislativas que apliquen con más detalle las disposiciones del presente Reglamento o las modifiquen.

Artículo 33

Modificación del Reglamento (CE) nº 2006/2004

En el anexo del Reglamento (CE) nº 2006/2004 se añade el punto siguiente:

«19. Reglamento (UE) nº 181/2011 del Parlamento Europeo y del Consejo, de 16 de febrero de 2011, sobre los derechos de los viajeros de autobús y autocar (*).

(*) DO L 55 de 28.2.2011, p. 1».

Artículo 34

Entrada en vigor

El presente Reglamento entrará en vigor a los veinte días de su publicación en el *Diario Oficial de la Unión Europea*.

El presente Reglamento será aplicable a partir del 1 de marzo de 2013.

El presente Reglamento será obligatorio en todos sus elementos y directamente aplicable en cada Estado miembro.

Hecho en Estrasburgo, el 16 de febrero de 2011.

Por el Parlamento Europeo
El Presidente
J. BUZEK

Por el Consejo
El Presidente
MARTONYI J.

ANEXO I

PRESTACIÓN DE ASISTENCIA A LAS PERSONAS CON DISCAPACIDAD O CON MOVILIDAD REDUCIDA

a) **Asistencia en las estaciones designadas**

Asistencia y disposiciones necesarias para permitir a las personas con discapacidad y a las personas con movilidad reducida:

— comunicar su llegada a la estación y presentar su solicitud de asistencia en los puntos designados,

— desplazarse desde el punto designado al mostrador de facturación, la sala de espera y la zona de embarque,

— subir al vehículo mediante la utilización de ascensores, sillas de ruedas o asistencia de otro tipo en caso necesario,

— cargar su equipaje,

— recuperar su equipaje,

— apearse del vehículo,

— llevar un perro de asistencia en los autobuses o autocares,

— acceder a los asientos.

b) **Asistencia a bordo**

Asistencia y disposiciones necesarias para permitir a las personas con discapacidad y a las personas con movilidad reducida:

— recibir la información esencial sobre el viaje en formatos accesibles previa petición del viajero,

— embarcar/desembarcar durante los descansos del viaje si, aparte del conductor, hay personal a bordo.

ANEXO II

FORMACIÓN EN MATERIA DE DISCAPACIDADES

a) **Sensibilización sobre la problemática de la discapacidad**

La formación del personal que tenga trato directo con los viajeros incluirá:

— la sensibilización y el trato adecuado para con los viajeros con discapacidades físicas, sensoriales (auditivas y visuales), ocultas o de aprendizaje, que incluye la capacidad de distinguir entre las distintas capacidades de las personas cuya movilidad, orientación o comunicación pueda ser reducida,

— las barreras a que se enfrentan las personas con discapacidad o con movilidad reducida, incluidas las barreras mentales, las ambientales y físicas, y las organizativas,

— perros de asistencia reconocidos, incluidos su papel y sus necesidades,

— los métodos para abordar situaciones inesperadas,

— las técnicas de trato interpersonal y los métodos de comunicación con personas sordas o con discapacidad auditiva, con discapacidad visual, con dificultades de locución o con dificultades de aprendizaje,

— la manipulación cuidadosa de las sillas de ruedas y otros equipos de movilidad con objeto de evitar dañarlos (para todo el personal responsable de la manipulación de equipajes, si existiese).

b) **Formación sobre asistencia a personas con discapacidad**

La formación del personal que asista directamente a las personas con discapacidad o con movilidad reducida incluirá:

— la forma de ayudar a los usuarios de sillas de ruedas a sentarse o levantarse de las mismas,

— métodos de asistencia a las personas con discapacidad o con movilidad reducida que viajen con perros de asistencia reconocidos, incluidos el papel y las necesidades de estos,

— técnicas de acompañamiento de viajeros con discapacidades visuales y para el manejo y el transporte de perros de asistencia reconocidos,

— conocimientos de los tipos de equipos de asistencia a las personas con discapacidad o con movilidad reducida y sobre su utilización,

— el uso de los equipos de asistencia utilizados en el embarque y desembarque, y conocimientos de los procedimientos de asistencia adecuados para embarcar y desembarcar salvaguardando la seguridad y la dignidad de las personas con discapacidad o con movilidad reducida,

— comprensión de la necesidad de asistencia fiable y profesional; sensibilización sobre la posibilidad de que determinados viajeros con discapacidad experimenten sentimientos de vulnerabilidad durante el viaje debido a su dependencia de la asistencia prestada,

— conocimientos de primeros auxilios.

I

(Actos legislativos)

REGLAMENTOS

REGLAMENTO (UE) Nº 1177/2010 DEL PARLAMENTO EUROPEO Y DEL CONSEJO

de 24 de noviembre de 2010

sobre los derechos de los pasajeros que viajan por mar y por vías navegables y por el que se modifica el Reglamento (CE) nº 2006/2004

(Texto pertinente a efectos del EEE)

EL PARLAMENTO EUROPEO Y EL CONSEJO DE LA UNIÓN EUROPEA,

Visto el Tratado de Funcionamiento de la Unión Europea y, en particular, su artículo 91, apartado 1, y su artículo 100, apartado 2,

Vista la propuesta de la Comisión Europea,

Visto el dictamen del Comité Económico y Social Europeo [1],

Previa consulta al Comité de las Regiones,

De conformidad con el procedimiento legislativo ordinario [2],

Considerando lo siguiente:

(1) La Unión debe orientar su intervención en el sector del transporte por mar y por vías navegables a garantizar, entre otros objetivos, un alto nivel de protección de los pasajeros comparable al de otros modos de transporte. Además, han de tenerse plenamente en cuenta las exigencias de la protección de los consumidores en general.

(2) Habida cuenta de que los pasajeros que viajan por mar y por vías navegables son la parte más débil en el contrato de transporte, es necesario proporcionar a todos esos pasajeros un nivel mínimo de protección. Nada debe impedir que los transportistas ofrezcan a los pasajeros condiciones contractuales más favorables que las establecidas en el presente Reglamento. Al mismo tiempo, el presente Reglamento no pretende interferir en las relaciones comerciales entre empresas relativas al transporte de mercancías. En particular, los acuerdos entre camioneros y transportistas no deben considerarse contratos de transporte a los efectos del presente Reglamento y, por lo tanto, no deben otorgar ni al camionero ni a sus empleados ningún derecho a indemnización en virtud del presente Reglamento en caso de retrasos.

(3) La protección de los pasajeros debe cubrir no solo los servicios de pasaje entre puertos situados en el territorio de los Estados miembros, sino también entre esos puertos y los situados fuera de su territorio, teniendo en cuenta el riesgo de distorsión de la competencia en el mercado del transporte de pasajeros. Por consiguiente, a los efectos del presente Reglamento, el término «transportista de la Unión» debe interpretarse en el sentido más amplio posible, aunque sin afectar a otros actos jurídicos de la Unión, como el Reglamento (CEE) nº 4056/86 del Consejo, de 22 de diciembre de 1986, por el que se determinan las modalidades de aplicación de los artículos 85 y 86 del Tratado a los transportes marítimos [3], y el Reglamento (CEE) nº 3577/92 del Consejo, de 7 de diciembre de 1992, por el que se aplica el principio de libre prestación de servicios a los transportes marítimos dentro de los Estados miembros (cabotaje marítimo) [4].

[1] DO C 317 de 23.12.2009, p. 89.

[2] Posición del Parlamento Europeo de 23 de abril de 2009 (DO C 184 E de 8.7.2010, p. 293), Posición del Consejo en primera lectura de 11 de marzo de 2010 (DO C 122 E de 11.5.2010, p. 19), Posición del Parlamento Europeo de 6 de julio de 2010 (no publicada aún en el Diario Oficial) y Decisión del Consejo de 11 de octubre de 2010.

[3] DO L 378 de 31.12.1986, p. 4.

[4] DO L 364 de 12.12.1992, p. 7.

(4) El mercado interior de servicios de pasaje por mar y por vías navegables debe beneficiar al conjunto de los ciudadanos. Por consiguiente, las personas con discapacidad y las personas con movilidad reducida por motivo de incapacidad funcional, de edad o de cualquier otro factor deben tener oportunidades comparables a las de otros ciudadanos para utilizar los servicios de pasaje y los cruceros. Las personas con discapacidad y las personas con movilidad reducida tienen los mismos derechos que todos los demás ciudadanos por lo que respecta a la libertad de circulación, la libertad de elección y la no discriminación.

(5) Los Estados miembros deben promover el uso del transporte público y de los billetes integrados a fin de optimizar la utilización e interoperabilidad de los distintos modos y operadores de transporte.

(6) De conformidad con el artículo 9 de la Convención de las Naciones Unidas sobre los Derechos de las Personas con Discapacidad, y a fin de asegurar que las personas con discapacidad y las personas con movilidad reducida disfruten de unas oportunidades de viajar por mar y por vías navegables comparables a las de los demás ciudadanos, es preciso establecer normas que impidan su discriminación y les garanticen asistencia durante esos viajes. Por tanto, se debe aceptar el transporte de esas personas, pudiendo solo denegárselo cuando existan motivos justificados por razones de seguridad y establecidos por las autoridades competentes. Dichas personas deben disponer de asistencia en los puertos y a bordo de los buques de pasaje. Los objetivos de inclusión social exigen que esa asistencia sea gratuita. Los transportistas deben determinar las condiciones de acceso, preferentemente mediante el sistema de normalización europeo.

(7) A la hora de decidir el diseño de los nuevos puertos y terminales o cuando se efectúen reformas importantes, los organismos responsables de esas instalaciones deben tener en cuenta las necesidades de las personas con discapacidad y de las personas con movilidad reducida, en particular en lo relativo a la accesibilidad, prestando especial atención a las obligaciones derivadas del «diseño para todos». Los transportistas deben tener en cuenta esas necesidades a la hora de diseñar nuevos buques de pasaje y de reformar los existentes de conformidad con la Directiva 2006/87/CE del Parlamento Europeo y del Consejo, de 12 de diciembre de 2006, por la que se establecen las prescripciones técnicas de las embarcaciones de la navegación interior [1], y con la Directiva 2009/45/CE del Parlamento Europeo y del Consejo, de 6 de mayo de 2009, sobre las reglas y normas de seguridad aplicables a los buques de pasaje [2].

(8) La asistencia dispensada en los puertos situados en el territorio de un Estado miembro debe permitir, entre otras cosas, el desplazamiento de las personas con discapacidad y de las personas con movilidad reducida desde un punto designado de llegada a un puerto hasta el buque de pasaje, y desde el buque de pasaje hasta un punto designado de salida de un puerto, incluido el embarque y el desembarque.

(9) Al organizar la prestación de asistencia a las personas con discapacidad y a las personas con movilidad reducida, y la formación del personal asistente, los transportistas deben cooperar con las organizaciones representativas de las personas con discapacidad o con movilidad reducida. En esta labor han de tener en cuenta asimismo las disposiciones pertinentes del Convenio Internacional y del Código sobre Normas de Formación, Titulación y Guardia para la Gente de Mar, así como la Recomendación de la Organización Marítima Internacional (OMI) sobre el proyecto y las operaciones de los buques de pasaje para atender a las personas de edad avanzada o con discapacidad.

(10) Las disposiciones relativas al embarque de personas con discapacidad o con movilidad reducida se entienden sin perjuicio de las normas generales aplicables al embarque de pasajeros establecidas en virtud de la normativa internacional, de la Unión o nacional en vigor.

(11) Los actos jurídicos de la Unión en materia de derechos de los pasajeros deben tener en cuenta las necesidades de estos, en particular de las personas con discapacidad o con movilidad reducida, para el uso de diferentes modos de transporte y para el transbordo fluido entre diferentes modos, con arreglo a la normativa de seguridad aplicable a la navegación de buques.

(12) Los pasajeros deben ser informados adecuadamente en caso de cancelación o retraso de algún servicio de pasaje o de un crucero. Esa información debe permitir a los pasajeros tomar las medidas oportunas y, en caso necesario, obtener información sobre las conexiones alternativas.

(13) Es preciso reducir las molestias sufridas por los pasajeros como consecuencia de la cancelación o el grave retraso de su viaje. Con ese fin, es necesario atender adecuadamente a los pasajeros, quienes deben poder cancelar su viaje y obtener el reembolso de los billetes o un transporte alternativo en condiciones satisfactorias. Un alojamiento adecuado para los pasajeros no tiene por qué consistir en una habitación de hotel, sino que puede también ser cualquier otro alojamiento disponible, dependiendo en particular de las circunstancias que rodeen a cualquier situación específica, de los vehículos de los pasajeros y de las características del buque. En este sentido, en los casos debidamente justificados de circunstancias urgentes y extraordinarias, el transportista debe poder aprovechar plenamente las instalaciones pertinentes disponibles, en colaboración con las autoridades civiles.

[1] DO L 389 de 30.12.2006, p. 1.
[2] DO L 163 de 25.6.2009, p. 1.

(14) En caso de cancelación o retraso de algún servicio de pasaje, los transportistas deben proporcionar a los pasajeros el pago de indemnizaciones basadas en un porcentaje del precio del billete, salvo cuando la cancelación o el retraso se deban a condiciones meteorológicas que pongan en peligro la seguridad de la navegación del buque o a circunstancias extraordinarias imposibles de evitar aun cuando se hubiesen adoptado todas las medidas oportunas.

(15) Conforme a los principios generalmente aceptados debe incumbir a los transportistas la carga de la prueba de que la cancelación o el retraso fueron consecuencia de tales condiciones meteorológicas o circunstancias extraordinarias.

(16) Entre las condiciones meteorológicas que ponen en peligro la seguridad de la navegación del buque cabe señalar, de manera no exhaustiva, vientos fuertes, mar agitado, corriente fuerte, condiciones difíciles debido a la presencia de hielo, niveles de agua extremadamente altos o bajos, huracanes, tornados e inundaciones.

(17) Entre las circunstancias extraordinarias cabe señalar, de manera no exhaustiva, catástrofes naturales (como incendios y terremotos), atentados terroristas, guerras y conflictos armados militares o civiles, insurrecciones, confiscaciones militares o ilegales, conflictos laborales, desembarco de personas enfermas, heridas o fallecidas, operaciones de búsqueda y rescate en el mar o vías navegables, medidas necesarias para proteger el medio ambiente, decisiones adoptadas por los organismos encargados del tráfico o por las autoridades portuarias, o decisiones adoptadas por las autoridades competentes en lo que se refiere al orden público y la seguridad, así como la cobertura de las necesidades de transporte urgente.

(18) Los transportistas —con la participación de las partes interesadas, las asociaciones profesionales y las asociaciones de defensa de los consumidores, los pasajeros, las personas con discapacidad y las personas con movilidad reducida— deben cooperar a fin de adoptar medidas a nivel nacional o europeo que mejoren la asistencia a los pasajeros cuyo viaje se haya visto interrumpido, especialmente en caso de grave retraso o cancelación del viaje. Se ha de informar sobre estas medidas a los organismos nacionales de ejecución.

(19) El Tribunal de Justicia de la Unión Europea ya ha declarado que los problemas causantes de cancelaciones o retrasos solamente pueden quedar cubiertos por el concepto de circunstancias extraordinarias en la medida en que se deriven de circunstancias que no sean inherentes al ejercicio normal de la actividad del transportista de que se trate y escapen al control efectivo de dicho transportista. Es preciso señalar que las condiciones meteorológicas que hacen peligrosa la navegación del buque son perfectamente ajenas al control efectivo del transportista.

(20) El presente Reglamento debe entenderse sin perjuicio de los derechos de los pasajeros establecidos por la Directiva 90/314/CEE del Consejo, de 13 de junio de 1990, relativa a los viajes combinados, las vacaciones combinadas y los circuitos combinados [1]. El presente Reglamento no debe aplicarse en caso de que un circuito combinado se cancele por motivos ajenos a la cancelación del servicio de pasaje o del crucero.

(21) Los pasajeros deben ser plenamente informados, en un formato accesible para todos, de los derechos que les confiere el presente Reglamento, a fin de poder ejercitarlos efectivamente. Los derechos de los pasajeros deben incluir la recepción de información sobre el servicio de pasaje o crucero antes del viaje y durante su transcurso. Toda la información esencial que se facilite a los pasajeros debe presentarse también en formatos accesibles para las personas con discapacidad o con movilidad reducida, y dichos formatos accesibles deben permitir a los pasajeros acceder a la misma información utilizando texto, braille, y formatos de audio, vídeo o electrónicos.

(22) Los pasajeros deben poder ejercitar sus derechos mediante procedimientos de reclamación adecuados y accesibles habilitados por los transportistas y los operadores de terminal en sus respectivos ámbitos de competencia, o, en su caso, mediante la presentación de reclamaciones al organismo u organismos designados a tal fin por el Estado miembro de que se trate. Los transportistas y los operadores de terminal deben responder dentro de un plazo previamente definido a las reclamaciones de los pasajeros, teniendo presente que la pasividad ante una reclamación podría esgrimirse contra ellos.

(23) Teniendo en cuenta los procedimientos establecidos por los Estados miembros para la presentación de reclamaciones, una reclamación relativa a la asistencia en un puerto o a bordo de un buque debe presentarse preferentemente ante el organismo o los organismos designados para la aplicación del presente Reglamento en el Estado miembro en el que esté situado el puerto de embarque y, para los transportes de pasajeros de un tercer país, en el Estado miembro en el que esté situado el puerto de desembarque.

(24) Los Estados miembros deben asegurar el cumplimiento del presente Reglamento y designar al organismo u organismos competentes para llevar a cabo la supervisión y la aplicación del mismo. Ello no afecta al derecho de los pasajeros a recurrir a los tribunales a fin de obtener reparación con arreglo al Derecho nacional.

(25) El organismo o los organismos designados para la ejecución del presente Reglamento deben ser independientes de todo interés comercial. Cada Estado miembro debe designar al menos un organismo que, cuando proceda, esté

[1] DO L 158 de 23.6.1990, p. 59.

autorizado y tenga la capacidad de examinar reclamaciones individuales y de facilitar la solución de litigios. Los pasajeros deben tener derecho a recibir, dentro de un plazo razonable, una respuesta documentada del organismo designado. Dada la importancia que para la aplicación del presente Reglamento reviste una estadística fiable, en particular para garantizar una aplicación coherente en toda la Unión, los informes elaborados por estos organismos deben, en la medida de lo posible, incluir estadísticas sobre las reclamaciones y su desenlace.

(26) Los Estados miembros deben establecer las sanciones aplicables a las infracciones del presente Reglamento y asegurar la aplicación de esas sanciones. Estas sanciones deben ser efectivas, proporcionadas y disuasorias.

(27) Dado que los objetivos del presente Reglamento, a saber, garantizar a los pasajeros un alto nivel de protección y asistencia en todos los Estados miembros y asegurar que los agentes económicos operen en condiciones armonizadas en el mercado interior, no pueden ser alcanzados de manera suficiente por los Estados miembros y, por consiguiente, debido a las dimensiones y los efectos de la acción, pueden lograrse mejor a escala de la Unión, esta puede adoptar medidas, de acuerdo con el principio de subsidiariedad consagrado en el artículo 5 del Tratado de la Unión Europea. De conformidad con el principio de proporcionalidad enunciado en ese mismo artículo, el presente Reglamento no excede de lo necesario para alcanzar esos objetivos.

(28) La aplicación del presente Reglamento debe basarse en el Reglamento (CE) nº 2006/2004 del Parlamento Europeo y del Consejo, de 27 de octubre de 2004, sobre la cooperación entre las autoridades nacionales encargadas de la aplicación de la legislación de protección de los consumidores («Reglamento sobre la cooperación en materia de protección de los consumidores») [1]. Procede, por lo tanto, modificar dicho Reglamento en consecuencia.

(29) La Directiva 95/46/CE del Parlamento Europeo y del Consejo, de 24 de octubre de 1995, relativa a la protección de las personas físicas en lo que respecta al tratamiento de datos personales y a la libre circulación de estos datos [2], debe respetarse y aplicarse estrictamente a fin de garantizar que se respeta la privacidad de las personas físicas y jurídicas, y que tanto la información como los informes requeridos se destinan exclusivamente a cumplir las obligaciones establecidas en el presente Reglamento y no se utilizan en contra de dichas personas.

(30) El presente Reglamento respeta los derechos fundamentales y observa los principios reconocidos, en particular, en la Carta de los Derechos Fundamentales de la Unión Europea, tal como menciona el artículo 6 del Tratado de la Unión Europea.

HAN ADOPTADO EL PRESENTE REGLAMENTO:

[1] DO L 364 de 9.12.2004, p. 1.
[2] DO L 281 de 23.11.1995, p. 31.

CAPÍTULO I

DISPOSICIONES GENERALES

Artículo 1

Objeto

El presente Reglamento establece normas aplicables al transporte por mar y por vías navegables en lo que respecta a:

a) la no discriminación entre pasajeros en cuanto a las condiciones de transporte ofrecidas por los transportistas;

b) la no discriminación de las personas con discapacidad y las personas con movilidad reducida y la prestación de asistencia a esas personas;

c) los derechos de los pasajeros en caso de cancelación o retraso;

d) la información mínima que debe facilitarse a los pasajeros;

e) la tramitación de reclamaciones;

f) normas generales en materia de ejecución.

Artículo 2

Ámbito de aplicación

1. El presente Reglamento se aplicará a los pasajeros que utilicen:

a) servicios de pasaje cuyo puerto de embarque esté situado en el territorio de un Estado miembro;

b) servicios de pasaje cuyo puerto de embarque esté situado fuera del territorio de un Estado miembro y cuyo puerto de desembarque esté situado en el territorio de un Estado miembro, siempre que el operador del servicio sea un transportista de la Unión con arreglo a lo definido en el artículo 3, letra e);

c) un crucero cuyo puerto de embarque esté situado en el territorio de un Estado miembro. No obstante, no se aplicarán a estos pasajeros el artículo 16, apartado 2, los artículos 18 y 19 y el artículo 20, apartados 1 y 4.

2. El presente Reglamento no se aplicará a los pasajeros que viajen:

a) en buques autorizados a transportar hasta 12 pasajeros;

b) en buques en los que la tripulación responsable del funcionamiento del buque esté compuesta por tres personas como máximo o cuyo servicio de pasaje en su totalidad cubra una distancia inferior a 500 metros, en un solo sentido;

c) en circuitos de excursión y turísticos, excepto los cruceros, o

d) en buques no propulsados por medios mecánicos, así como en buques originales y reproducciones singulares de buques de pasaje históricos proyectados antes de 1965 y construidos predominantemente con los materiales de origen, autorizados a transportar hasta 36 pasajeros.

3. Durante un período de dos años a partir del 18 de diciembre de 2012, los Estados miembros podrán excluir de la aplicación del presente Reglamento a los buques marítimos de menos de 300 toneladas de registro bruto dedicados al transporte nacional, siempre que los derechos de los pasajeros a los que se aplica el presente Reglamento estén debidamente garantizados en el Derecho nacional.

4. Los Estados miembros podrán excluir de la aplicación del presente Reglamento a los servicios de pasaje cubiertos por obligaciones de servicio público, contratos de servicio público o servicios integrados, siempre que los derechos de los pasajeros a los que se aplica el presente Reglamento estén garantizados de forma similar en el Derecho nacional.

5. Sin perjuicio de lo dispuesto en la Directiva 2006/87/CE y en la Directiva 2009/45/CE, ninguna disposición del presente Reglamento se entenderá en el sentido de que constituye un requisito técnico que imponga a los transportistas, operadores de terminales u otras entidades, obligación alguna de modificar o sustituir sus buques, infraestructuras, puertos o terminales portuarias.

Artículo 3

Definiciones

A los efectos del presente Reglamento se entenderá por:

a) «persona con discapacidad» o «persona con movilidad reducida»: cualquier persona cuya movilidad para utilizar el transporte se halla reducida por motivos de discapacidad física (sensorial o locomotriz, permanente o temporal), discapacidad o deficiencia intelectual o cualquier otra causa de discapacidad, o por la edad, y cuya situación requiere una atención adecuada y la adaptación a sus necesidades particulares del servicio puesto a disposición de los demás pasajeros;

b) «territorio de un Estado miembro»: territorio al que se aplica el Tratado de Funcionamiento de la Unión Europea tal como se indica en su artículo 355, en las condiciones que en él se fijan;

c) «condiciones de acceso»: normas, orientaciones e información pertinentes relativas a la accesibilidad de las terminales portuarias y de los buques, incluidas sus instalaciones para las personas con discapacidad o con movilidad reducida;

d) «transportista»: persona física o jurídica (distinta de un operador turístico, una agencia de viajes o un proveedor de billetes) que ofrece transporte al público en general mediante servicios de pasaje o cruceros;

e) «transportista de la Unión»: todo transportista establecido en el territorio de un Estado miembro o que ofrece transporte mediante servicios de pasaje con destino al territorio de un Estado miembro o a partir del mismo;

f) «servicio de pasaje»: servicio comercial de transporte de pasajeros por mar o por vías navegables realizado conforme a un horario hecho público;

g) «servicios integrados»: servicios de transporte interconectados dentro de un área geográfica determinada que cuentan con un único servicio de información, de expedición de billetes y un solo horario;

h) «transportista ejecutor»: persona distinta del transportista y que efectúa de hecho, total o parcialmente, el transporte;

i) «vías navegables»: masa, o sistema de masas interconectadas, de aguas interiores navegables, de carácter natural o artificial, que se utilizan para transporte, como lagos, ríos o canales o cualquier combinación de estos;

j) «puerto»: lugar o zona geográfica que se ha habilitado y dotado de instalaciones para permitir la recepción de buques en los que los pasajeros pueden embarcar, o de los que pueden desembarcar, de forma regular;

k) «terminal portuaria»: terminal, dotada como personal de un transportista o un operador de terminal, de un puerto que cuenta con instalaciones, como mostradores de facturación, taquillas de venta de billetes o salas de espera, y con personal para el embarque y el desembarque de pasajeros que viajan en servicios de pasaje o en un crucero;

l) «buque»: nave utilizada para la navegación por mar o por vías navegables;

m) «contrato de transporte»: contrato de transporte entre un transportista y un pasajero para la prestación de uno o varios servicios de pasaje o cruceros;

n) «billete»: documento válido u otra prueba de un contrato de transporte;

o) «proveedor de billetes»: cualquier detallista que celebre contratos de transporte por cuenta de un transportista;

p) «agencia de viajes»: cualquier detallista que actúe en nombre de un pasajero o de un operador turístico para celebrar contratos de transporte;

q) «operador turístico»: organizador o detallista, distinto de los transportistas, conforme a las definiciones del artículo 2, apartados 2 y 3, de la Directiva 90/314/CEE;

r) «reserva»: reserva de una salida específica de un servicio de pasaje o de un crucero;

s) «operador de terminal»: organismo público o privado ubicado en el territorio de un Estado miembro que sea responsable de la administración y la gestión de una terminal portuaria;

t) «crucero»: servicio de transporte por mar o por vías navegables realizado exclusivamente con fines de placer o recreativos, completado con alojamiento y otros servicios, con estancia a bordo superior a dos noches;

u) «suceso relacionado con la navegación»: naufragio, zozobra, abordaje o varada del buque, explosión o incendio en él, o deficiencia del mismo.

Artículo 4

Billetes y condiciones contractuales no discriminatorias

1. Los transportistas expedirán un billete al pasajero, a menos que, según el Derecho nacional, otros documentos den derecho al transporte. El billete podrá ser expedido en formato electrónico.

2. Sin perjuicio de las tarifas sociales, las condiciones contractuales y las tarifas aplicadas por los transportistas u otros proveedores de billetes se ofrecerán al público en general sin discriminación alguna, directa o indirecta, basada en la nacionalidad del cliente final o en el lugar de establecimiento de los transportistas o proveedores de billetes en la Unión.

Artículo 5

Otras partes ejecutantes

1. Si el cumplimiento de las obligaciones que se derivan del presente Reglamento ha sido confiado al transportista ejecutor, al proveedor de billetes o a cualquier otra persona, el transportista, la agencia de viajes, el operador turístico o el operador de terminal que haya delegado tales obligaciones serán, no obstante, responsables de las acciones y omisiones de dicha parte ejecutante, en el marco de sus funciones.

2. Además de lo dispuesto en el apartado 1, la parte a la que el transportista, la agencia de viajes, el operador turístico o el operador de terminal hayan encomendado el cumplimiento de una obligación estará sujeta a lo dispuesto en el presente Reglamento, incluidas las disposiciones sobre responsabilidades y excepciones, en lo que se refiere a la obligación encomendada.

Artículo 6

Inadmisibilidad de las exenciones

Los derechos y las obligaciones derivados del presente Reglamento no podrán ser objeto de exención o limitación, en particular mediante la introducción de cláusulas de exención o de cláusulas restrictivas en el contrato de transporte.

CAPÍTULO II

DERECHOS DE LAS PERSONAS CON DISCAPACIDAD Y DE LAS PERSONAS CON MOVILIDAD REDUCIDA

Artículo 7

Derecho al transporte

1. Los transportistas, agencias de viaje y operadores turísticos no podrán negarse a aceptar una reserva, a expedir o facilitar de otro modo un billete ni a embarcar a personas alegando como motivo la discapacidad o la movilidad reducida del pasajero como tales.

2. Las reservas y los billetes se ofrecerán a las personas con discapacidad y a las personas con movilidad reducida sin costes adicionales en las mismas condiciones que al resto de los pasajeros.

Artículo 8

Excepciones y condiciones especiales

1. No obstante lo dispuesto en el artículo 7, apartado 1, los transportistas, agencias de viajes y operadores turísticos podrán negarse a aceptar una reserva de una persona con discapacidad o con movilidad reducida, a expedirle o facilitarle de otro modo un billete, o denegarle el embarque:

a) a fin de dar cumplimiento a los requisitos de seguridad establecidos por el Derecho internacional, de la Unión o nacional, o para dar cumplimiento a los requisitos de seguridad establecidos por las autoridades competentes;

b) si el diseño del buque de pasaje o las infraestructuras y equipos portuarios, incluidas las terminales portuarias, imposibilitan que se lleve a cabo de forma segura u operativamente viable el embarque, el desembarque o el transporte de la persona en cuestión.

2. En caso de denegarse la aceptación de una reserva o la expedición o cualquier otra facilitación de un billete por los motivos mencionados en el apartado 1, los transportistas, agencias de viajes y operadores turísticos deberán adoptar todas las medidas a su alcance para proponer a la persona de que se trate un transporte alternativo aceptable en un servicio de pasaje o en un crucero operado por el transportista.

3. Cuando a una persona con discapacidad o con movilidad reducida, que tenga una reserva o posea un billete y haya cumplido los requisitos contemplados en el artículo 11, apartado 2, se le deniegue, no obstante, el embarque sobre la base de lo dispuesto en el presente Reglamento, se dará a dicha persona y a toda persona que la acompañe según se menciona en el apartado 4 del presente artículo la posibilidad de elegir entre el derecho al reembolso y el transporte alternativo contemplados en el anexo I. El derecho a optar por un viaje de vuelta o un transporte alternativo estará condicionado a que se cumplan todos los requisitos en materia de seguridad.

4. Si resultase estrictamente necesario y en virtud de las condiciones establecidas en el apartado 1, los transportistas, agencias de viajes y operadores turísticos podrán exigir que una persona con discapacidad o con movilidad reducida vaya acompañada por otra persona capaz de facilitarle la asistencia requerida. Por lo que se refiere a los servicios de pasaje, el transporte de esta persona acompañante será gratuito.

5. Cuando los transportistas, agencias de viajes y operadores turísticos se acojan a lo dispuesto en los apartados 1 a 4, deberán informar inmediatamente de los motivos específicos de su actuación a la persona con discapacidad o con movilidad reducida. Previa solicitud, dichos motivos se notificarán por escrito a la persona con discapacidad o con movilidad reducida a más tardar cinco días hábiles después de la solicitud. En caso de denegación, de conformidad con lo dispuesto en el apartado 1, letra a), se hará referencia a los requisitos aplicables en materia de seguridad.

Artículo 9

Accesibilidad e información

1. En colaboración con las organizaciones que representan a las personas con discapacidad o a las personas con movilidad reducida, los transportistas y los operadores de terminal establecerán o mantendrán, cuando proceda a través de sus organizaciones, unas condiciones de acceso no discriminatorias aplicables al transporte de dichas personas y de sus acompañantes. Las condiciones de acceso se comunicarán, si así se solicita, a los organismos nacionales de ejecución.

2. Los transportistas y los operadores de terminal pondrán a disposición del público, materialmente o en Internet, en formatos accesibles si así se solicita, las condiciones de acceso indicadas en el apartado 1 en las mismas lenguas en las que se ponga generalmente la información a disposición de todos los pasajeros. Se prestará especial atención a las necesidades de las personas con discapacidad y de las personas con movilidad reducida.

3. Los operadores turísticos pondrán a disposición del público las condiciones de acceso indicadas en el apartado 1 que apliquen a los trayectos incluidos en los viajes combinados, las vacaciones combinadas y los circuitos combinados que organicen, vendan o pongan a la venta.

4. Los transportistas, agencias de viajes y operadores turísticos se asegurarán de que toda la información pertinente sobre las condiciones del transporte, el viaje y las condiciones de acceso, incluidos los servicios de reserva e información en línea, se halle disponible en formatos apropiados y accesibles para las personas con discapacidad y para las personas con movilidad reducida. Aquellas personas que precisen asistencia deberán recibir confirmación por cualquier medio disponible, incluyendo los electrónicos o el servicio de mensajes cortos (SMS).

Artículo 10

Derecho de asistencia en los puertos y a bordo de los buques

Sin perjuicio de las condiciones de acceso establecidas en el artículo 9, apartado 1, los transportistas y los operadores de terminal, dentro de sus ámbitos de competencia respectivos, prestarán asistencia gratuita a las personas con discapacidad y a las personas con movilidad reducida, según se especifica en los anexos II y III, en los puertos, incluido el embarque y desembarque, y a bordo de los buques. La asistencia se adaptará, en la medida de lo posible, a las necesidades individuales de la persona con discapacidad o con movilidad reducida.

Artículo 11

Condiciones en las que se prestará asistencia

1. Los transportistas y los operadores de terminal, en sus ámbitos de competencia respectivos, prestarán asistencia a las personas con discapacidad y a las personas con movilidad reducida, tal como se establece en el artículo 10, siempre que:

a) se notifique al transportista o al operador de terminal, por cualquier medio disponible, incluidos los electrónicos o el SMS, la necesidad de asistencia a dichas personas, a más tardar 48 horas antes de que se requiera esa asistencia, a no ser que se haya acordado un plazo más breve entre el pasajero y el transportista o el operador de terminal, y

b) la persona con discapacidad o la persona con movilidad reducida se presente en el puerto o en el punto designado a que se refiere el artículo 12, apartado 3:

   i) a la hora determinada por escrito por el transportista, no más de 60 minutos antes de la hora de embarque anunciada, o

   ii) si no se ha determinado hora de embarque alguna, como mínimo 60 minutos antes de la hora de salida anunciada, a no ser que se haya acordado un plazo más breve entre el pasajero y el transportista o el operador de terminal.

2. Además de lo dispuesto en el apartado 1, las personas con discapacidad o las personas con movilidad reducida deberán notificar al transportista, en el momento de efectuar la reserva o antes de la compra del billete, sus necesidades específicas de alojamiento, asiento o los servicios requeridos o sus necesidades de llevar un equipo médico, siempre que dichas necesidades se conozcan en tal momento.

3. Las notificaciones hechas con arreglo al apartado 1, letra a), y al apartado 2 podrán remitirse siempre a la agencia de viajes o al operador turístico al que se haya comprado el billete. Cuando el billete permita realizar varios viajes, bastará con una sola notificación, siempre que se facilite información adecuada acerca de los horarios de los sucesivos viajes. El pasajero recibirá una confirmación en la que se declarará que se han notificado debidamente las necesidades de asistencia de acuerdo con el apartado 1, letra a), y el apartado 2.

4. Cuando no se efectúe notificación alguna con arreglo al apartado 1, letra a), y al apartado 2, los transportistas y los operadores de terminal deberán adoptar, no obstante, cuantas medidas estén a su alcance para asegurar que se presta la asistencia que permita a la persona con discapacidad o con movilidad reducida embarcar, desembarcar y viajar en el buque.

5. Cuando una persona con discapacidad o una persona con movilidad reducida vaya acompañada por un perro de asistencia reconocido, este será alojado junto con dicha persona, siempre que el transportista, agencia de viajes u operador turístico haya sido notificado al respecto de conformidad con las disposiciones nacionales aplicables al transporte de perros de asistencia reconocidos a bordo de los buques de pasaje, si existen tales disposiciones.

Artículo 12

Recepción de notificaciones y designación de puntos de encuentro

1. Los transportistas, operadores de terminal, agencias de viajes y operadores turísticos tomarán las medidas necesarias para facilitar que la solicitud de las notificaciones y la recepción de las notificaciones se hagan de conformidad con el artículo 11, apartado 1, letra a), y apartado 2. Esa obligación será exigible en todos sus puntos de venta, incluida la venta por teléfono y por Internet.

2. Si las agencias de viajes o los operadores turísticos reciben la notificación a que se refiere el apartado 1, remitirán la información sin demora, en las horas normales de oficina, al transportista o al operador de terminal.

3. Los transportistas y los operadores de terminal designarán un punto dentro o fuera de las terminales portuarias en los que las personas con discapacidad y las personas con movilidad reducida puedan anunciar su llegada y solicitar asistencia. En ese punto, que estará claramente señalizado, se ofrecerá información básica en formatos accesibles relativa a la terminal portuaria y la asistencia prestada.

Artículo 13

Normas de calidad de la asistencia

1. Los operadores de terminal y los transportistas que operen en terminales portuarias o presten servicios de pasaje y que tengan un tráfico comercial total superior a los 100 000 pasajeros durante el año civil precedente fijarán, dentro de sus ámbitos de competencia respectivos, normas de calidad aplicables a la asistencia indicada en los anexos II y III, y determinarán, en su caso a través de sus organizaciones, los recursos necesarios para su cumplimiento, en cooperación con las organizaciones representativas de las personas con discapacidad y de las personas con movilidad reducida.

2. Al establecer normas de calidad se tendrán plenamente en cuenta las políticas y los códigos de conducta internacionalmente reconocidos para la facilitación del transporte de personas con discapacidad o con movilidad reducida y, en particular, la Recomendación de la OMI sobre el proyecto y las operaciones de los buques de pasaje para atender a las personas de edad avanzada o con discapacidad.

3. Los operadores de terminal y los transportistas pondrán a disposición del público, materialmente o en Internet, las normas de calidad indicadas en el apartado 1 en formatos accesibles y en las mismas lenguas en las que se ponga generalmente la información a disposición de todos los pasajeros.

Artículo 14

Formación e instrucciones

No obstante lo dispuesto en el Convenio Internacional y en el Código sobre Normas de Formación, Titulación y Guardia para la Gente de Mar y en los reglamentos adoptados en virtud del Convenio revisado relativo a la navegación del Rin y el Convenio relativo al régimen de navegación en el Danubio, los transportistas y, si procede, los operadores de terminales establecerán procedimientos de formación en materia de discapacidad, incluidas instrucciones, y garantizarán que:

a) su personal, incluido el empleado por cualquier otra parte ejecutante, que preste asistencia directa a las personas con discapacidad o con movilidad reducida haya recibido la formación o las instrucciones adecuadas descritas en el anexo IV, partes A y B;

b) su personal que sea por lo demás responsable de la reserva y venta de los billetes o del embarque y desembarque, incluido el personal empleado por cualquier otra parte ejecutante, haya recibido la formación o las instrucciones adecuadas descritas en el anexo IV, parte A, y

c) las categorías de personal a que se refieren las letras a) y b) mantengan sus competencias, por ejemplo mediante instrucciones o cursillos de actualización cuando proceda.

Artículo 15

Indemnización correspondiente al equipo de movilidad u otro equipo específico

1. Los transportistas y los operadores de terminal serán responsables de las pérdidas originadas por el extravío o los daños sufridos por el equipo de movilidad u otro equipo específico utilizado por una persona con discapacidad o una persona con movilidad reducida, siempre que el suceso que haya originado las pérdidas sea imputable a una falta o negligencia del transportista o del operador de terminal. Se presumirá la culpa o negligencia del transportista cuando las pérdidas hayan sido resultado de un suceso relacionado con la navegación.

2. La indemnización a que se refiere el apartado 1 equivaldrá al valor de sustitución del equipo correspondiente o, cuando proceda, al coste de la reparación.

3. Los apartados 1 y 2 no se aplicarán cuando se aplique el artículo 4 del Reglamento (CE) nº 392/2009 del Parlamento Europeo y del Consejo, de 23 de abril de 2009, sobre la responsabilidad de los transportistas de pasajeros por mar en caso de accidente [1].

4. Además, se tomarán las medidas necesarias para proporcionar rápidamente el equipo de sustitución temporal que constituya una alternativa adecuada.

[1] DO L 131 de 28.5.2009, p. 24.

CAPÍTULO III

OBLIGACIONES DE LOS TRANSPORTISTAS Y DE LOS OPERADORES DE LAS TERMINALES EN CASO DE INTERRUPCIÓN DEL VIAJE

Artículo 16

Información en caso de cancelación o retraso de salidas

1. En los supuestos de cancelación o de retraso de la salida de un servicio de pasaje o de un crucero, el transportista o, en su caso, el operador de terminal, informarán de la situación lo antes posible, y en cualquier caso a más tardar 30 minutos después de la hora de salida programada, a los pasajeros que partan de las terminales portuarias o si es posible a los pasajeros que partan de los puertos, y les informarán también de la hora estimada de salida y de llegada tan pronto como dispongan de esta información.

2. En caso de que los pasajeros pierdan un servicio de conexión de transporte debido a una cancelación o a un retraso, el transportista o, en su caso, el operador de terminal, adoptarán cuantas medidas estén a su alcance para informarles sobre las conexiones alternativas.

3. El transportista o, en su caso, el operador de terminal, velarán por que las personas con discapacidad o las personas con movilidad reducida reciban en formatos accesibles la información exigida en virtud de los apartados 1 y 2.

Artículo 17

Asistencia en caso de cancelación o retraso de salidas

1. Cuando un transportista prevea que la salida de un servicio de pasaje o de un crucero vaya a cancelarse o a retrasarse más de 90 minutos con respecto a su hora de salida programada, ofrecerá a los pasajeros que partan de las terminales portuarias aperitivos, comida y refrescos gratuitos suficientes en función del tiempo que sea necesario esperar, siempre que estén disponibles o si pueden suministrarse razonablemente.

2. En el supuesto de cancelación o de retraso en la salida que requiera una estancia de una o varias noches o una estancia suplementaria a la prevista por el pasajero, el transportista, siempre y cuando sea materialmente posible, ofrecerá de forma gratuita un alojamiento adecuado, a bordo o en tierra, a los pasajeros que partan de las terminales portuarias, así como el transporte de ida y vuelta entre la terminal portuaria y el lugar de alojamiento, además de los aperitivos, las comidas o los refrigerios indicados en el apartado 1. El transportista podrá limitar a 80 EUR por noche y por pasajero, para un máximo de tres noches, el coste total del alojamiento en tierra, limitación que no incluirá el transporte de ida y vuelta entre la terminal portuaria y el lugar de alojamiento.

3. Al aplicar lo dispuesto en los apartados 1 y 2, el transportista prestará especial atención a las necesidades de las personas con discapacidad, las personas con movilidad reducida y, en su caso, los acompañantes.

Artículo 18

Transporte alternativo y reembolso en caso de cancelación o retraso de salidas

1. Cuando un transportista prevea que un servicio de pasaje vaya a ser cancelado o a retrasarse más de 90 minutos con respecto a su hora de salida programada a partir de una terminal portuaria, se ofrecerá inmediatamente a los pasajeros la posibilidad de escoger entre:

a) la conducción hasta el destino final, en condiciones de transporte comparables, con arreglo al contrato de transporte, en la primera ocasión que se presente y sin coste adicional;

b) el reembolso del precio del billete y, si procede, un servicio de vuelta gratuita al primer punto de partida, con arreglo al contrato de transporte, en la primera ocasión que se presente.

2. Cuando un servicio de pasaje sea cancelado o sufra un retraso superior a 90 minutos en su salida de un puerto, los pasajeros tendrán derecho a dicha conducción o al reembolso por el transportista del precio del billete.

3. El pago del reembolso previsto en el apartado 1, letra b), y el apartado 2 se efectuará en un plazo de siete días, en metálico, por transferencia bancaria electrónica, transferencia bancaria o cheque por el valor del coste íntegro del billete —al precio al que se compró— correspondiente a la parte o partes del viaje no efectuadas y a la parte o partes del viaje efectuadas, si el viaje ha perdido razón de ser en relación con el plan de viaje inicial del pasajero. Con el acuerdo del pasajero, el reembolso total del billete podrá efectuarse mediante vales u otros servicios por un importe equivalente a la tarifa a la que se compró, siempre que las condiciones sean flexibles, en particular con respecto al período de validez y al destino.

Artículo 19

Indemnización por el precio del billete en caso de retraso en la llegada

1. Sin renunciar a su derecho al transporte, los pasajeros podrán solicitar al transportista una indemnización cuando la llegada a su destino, con arreglo al contrato de transporte, pueda verse demorada. El nivel mínimo de la indemnización será el 25 % del precio del billete para los retrasos de como mínimo:

a) una hora en el caso de viajes programados de duración igual o inferior a cuatro horas;

b) dos horas en el caso de viajes programados de duración superior a cuatro horas, pero igual o inferior a ocho horas;

c) tres horas en el caso de viajes programados de duración superior a ocho horas, pero igual o inferior a 24 horas, o

d) seis horas en el caso de viajes programados de duración superior a 24 horas.

Si el retraso es superior al doble del tiempo indicado en las letras a) a d), la indemnización corresponderá al 50 % del precio del billete.

2. Los pasajeros titulares de un pase de transporte o abono de temporada que sufran repetidamente retrasos a la llegada durante su período de validez podrán reclamar una indemnización adecuada de conformidad con las disposiciones del transportista en materia de indemnización. Estas disposiciones fijarán los criterios aplicables a los retrasos a la llegada y al cálculo de las indemnizaciones.

3. La indemnización se calculará en relación con el precio que el viajero abonó realmente por el servicio de pasaje que ha sufrido el retraso.

4. Si el contrato de transporte se refiere a un viaje de ida y vuelta, la indemnización por retraso a la llegada, ya sea en el trayecto de ida o en el de vuelta, se calculará en relación con el 50 % del precio abonado por el transporte en dicho servicio de pasaje.

5. La indemnización se abonará en el plazo de un mes a partir de la presentación de la solicitud correspondiente. La indemnización podrá abonarse en forma de vales u otros servicios, siempre y cuando las condiciones del contrato sean flexibles, especialmente en lo que se refiere al período de validez y al destino. La indemnización se abonará en efectivo a petición del pasajero.

6. No se deducirán de la indemnización por el precio del billete costes de transacción como tasas, gastos telefónicos o sellos. Los transportistas podrán establecer un umbral mínimo por debajo del cual no se abonará indemnización alguna. Ese umbral no podrá ser superior a 6 EUR.

Artículo 20

Exenciones

1. Los artículos 17, 18 y 19 no serán aplicables a los pasajeros con billetes abiertos mientras no se especifique la hora de salida, salvo si se trata de pasajeros titulares de un pase de transporte o abono de temporada.

2. Los artículos 17 y 19 no serán aplicables a aquellos pasajeros que hayan sido informados de la cancelación o del retraso antes de efectuar la compra del billete o cuando la cancelación o el retraso se deban a causas imputables al pasajero.

3. El artículo 17, apartado 2, no será aplicable cuando el transportista demuestre que la cancelación o el retraso se deben a condiciones meteorológicas que hacen peligrosa la navegación.

4. El artículo 19 no será aplicable cuando el transportista demuestre que la cancelación o el retraso se debe a condiciones meteorológicas que hacen peligrosa la navegación del buque, o a circunstancias extraordinarias que entorpecen la ejecución del servicio de pasaje y que no hubieran podido evitarse incluso tras la adopción de todas las medidas oportunas.

Artículo 21

Otras reclamaciones

Ninguna disposición del presente Reglamento impedirá a los pasajeros solicitar ante los tribunales nacionales, con arreglo al Derecho nacional, indemnizaciones por los daños y perjuicios resultantes de la cancelación o el retraso de servicios de transporte, incluso en virtud de la Directiva 90/314/CEE.

CAPÍTULO IV

NORMAS GENERALES SOBRE LA INFORMACIÓN Y LAS RECLAMACIONES

Artículo 22

Derecho a información sobre el viaje

Los transportistas y los operadores de terminal, dentro de sus ámbitos de competencia respectivos, suministrarán a los pasajeros información adecuada durante todo su viaje en formatos accesibles para todos y en las mismas lenguas en las que se ponga generalmente la información a disposición de todos los pasajeros. Se prestará especial atención a las necesidades de las personas con discapacidad y de las personas con movilidad reducida.

Artículo 23

Información sobre los derechos de los pasajeros

1. Los transportistas, los operadores de terminal y, cuando proceda, las autoridades portuarias, dentro de sus ámbitos de competencia respectivos, velarán por que la información sobre los derechos que amparan a los pasajeros en virtud del presente Reglamento esté disponible a bordo de los buques, en los puertos si es posible y en las terminales portuarias. La información se proporcionará en la medida de lo posible en formatos accesibles y en las mismas lenguas en las que se ponga generalmente la información a disposición de todos los pasajeros. Al facilitar esta información, se prestará especial atención a las necesidades de las personas con discapacidad y de las personas con movilidad reducida.

2. Con objeto de cumplir con el requisito de información a que se refiere el apartado 1, los transportistas, los operadores de terminal y, cuando proceda, las autoridades portuarias podrán usar un resumen de las disposiciones del presente Reglamento preparado por la Comisión en todas las lenguas oficiales de la Unión Europea y puesto a disposición de aquellos.

3. Los transportistas, los operadores de terminal y, cuando proceda, las autoridades portuarias informarán adecuadamente a los pasajeros a bordo de los buques, en los puertos si es posible, y en las terminales portuarias, de los datos necesarios para entrar en contacto con el organismo de ejecución designado por el Estado miembro de que se trate con arreglo al artículo 25, apartado 1.

Artículo 24

Reclamaciones

1. Los transportistas y los operadores de terminal crearán o dispondrán de un mecanismo accesible de tramitación de las reclamaciones relativas a los derechos y obligaciones contemplados en el presente Reglamento.

2. Si un pasajero cubierto por el presente Reglamento desea hacer una reclamación al transportista o al operador de terminal, la presentará en el plazo de dos meses a partir de la fecha en que se prestó o hubiera debido prestarse un determinado servicio. En el plazo de un mes a partir de la recepción de la reclamación, el transportista o el operador de terminal notificarán al pasajero que su reclamación ha sido atendida o desestimada o es todavía objeto de estudio. El plazo de respuesta definitiva no deberá superar dos meses a partir de la recepción de una reclamación.

CAPÍTULO V

EJECUCIÓN Y ORGANISMOS NACIONALES DE EJECUCIÓN

Artículo 25

Organismos nacionales de ejecución

1. Cada Estado miembro designará un nuevo organismo o un organismo ya existente responsable de la ejecución del presente Reglamento en lo que se refiere a los servicios de pasaje y cruceros a partir de puertos situados en su territorio y a los servicios de pasaje hacia dichos puertos a partir de un tercer país. Cada organismo adoptará las medidas necesarias para garantizar el cumplimiento del presente Reglamento.

Cada organismo será independiente de cualquier interés comercial en lo relativo a su organización, sus decisiones de financiación, su estructura jurídica y su proceso de toma de decisiones.

2. Los Estados miembros notificarán a la Comisión el organismo u organismos que designen conforme al presente artículo.

3. Cualquier pasajero podrá presentar una reclamación, con arreglo al Derecho nacional, ante el organismo competente designado en virtud del apartado 1, o ante cualquier otro organismo competente designado por el Estado miembro correspondiente, por presunta infracción del presente Reglamento. El organismo competente dará a los pasajeros, dentro de un plazo razonable, una respuesta motivada a su reclamación.

El Estado miembro podrá decidir:

a) que el pasajero, en un primer momento, presente al transportista o al operador de terminal la reclamación contemplada en el presente Reglamento, y/o

b) que el organismo nacional de ejecución o cualquier otro organismo competente designado por el Estado miembro, actúe como instancia de apelación para las reclamaciones no resueltas con arreglo al artículo 24.

4. Los Estados miembros que hayan optado por excluir determinados servicios en virtud del artículo 2, apartado 4, garantizarán la existencia de un mecanismo similar para la aplicación de los derechos de los pasajeros.

Artículo 26

Informe de ejecución

A más tardar el 1 de junio de 2015 y a continuación cada dos años, los organismos de ejecución designados con arreglo al artículo 25 publicarán un informe sobre su actividad durante los dos años civiles anteriores, que contendrá, en particular, una descripción de las medidas adoptadas para aplicar las disposiciones del presente Reglamento, información detallada sobre las sanciones aplicadas y una estadística relativa a las reclamaciones y a las sanciones impuestas.

Artículo 27

Cooperación entre los organismos de ejecución

Los organismos nacionales de ejecución a que se refiere el artículo 25, apartado 1, intercambiarán información sobre sus actividades y sus principios y prácticas en materia de adopción de decisiones en la medida necesaria para una aplicación coherente del presente Reglamento. Para esa tarea, contarán con la asistencia de la Comisión.

Artículo 28

Sanciones

Los Estados miembros determinarán el régimen de sanciones aplicable a las infracciones de lo dispuesto en el presente Reglamento y adoptarán cuantas medidas sean necesarias para garantizar su aplicación. Las sanciones previstas serán efectivas, proporcionadas y disuasorias. Los Estados miembros notificarán esas normas y medidas a la Comisión antes del 18 de diciembre de 2012, y le comunicarán sin demora alguna cualquier modificación posterior de las mismas.

CAPÍTULO VI

DISPOSICIONES FINALES

Artículo 29

Informe

La Comisión presentará al Parlamento Europeo y al Consejo un informe sobre la aplicación y los efectos del presente Reglamento a más tardar el 19 de diciembre de 2015. En caso necesario, se adjuntarán a dicho informe las propuestas legislativas pertinentes que desarrollen lo dispuesto en el presente Reglamento o lo modifiquen.

Artículo 30

Modificación del Reglamento (CE) nº 2006/2004

En el anexo del Reglamento (UE) nº 2006/2004 se añade el punto siguiente:

«18. Reglamento (UE) nº 1177/2010 del Parlamento Europeo y del Consejo, de 24 de noviembre de 2010, relativo a los derechos de los pasajeros que viajan por mar y por vías navegables (*).

(*) DO L 334 de 17.12.2010, p. 1.»

Artículo 31

Entrada en vigor

El presente Reglamento entrará en vigor a los veinte días de su publicación en el *Diario Oficial de la Unión Europea*.

Será aplicable a partir del 18 de diciembre de 2012.

El presente Reglamento será obligatorio en todos sus elementos y directamente aplicable en cada Estado miembro.

Hecho en Estrasburgo, el 24 de noviembre de 2010.

Por el Parlamento Europeo
El Presidente
J. BUZEK

Por el Consejo
El Presidente
O. CHASTEL

ANEXO I

DERECHO DE LAS PERSONAS CON DISCAPACIDAD O CON MOVILIDAD REDUCIDA A REEMBOLSO O A TRANSPORTE ALTERNATIVO CONFORME AL ARTÍCULO 8

1. Cuando se haga referencia al presente anexo, las personas con discapacidad y las personas con movilidad reducida podrán optar entre:

   a) — el reembolso, en un plazo de siete días, en metálico, por transferencia bancaria electrónica, transferencia bancaria o cheque por el valor del coste íntegro del billete — al precio al que se compró— correspondiente a la parte o partes del viaje no efectuadas y a la parte o partes del viaje efectuadas, si el viaje ha perdido razón de ser en relación con el plan de viaje inicial del pasajero, junto con, cuando proceda:

   — un servicio de vuelta al primer punto de partida, lo antes posible, o

   b) la conducción hasta el destino final, en condiciones de transporte comparables, con arreglo al contrato de transporte, en la primera ocasión que se presente y sin coste adicional, o

   c) la conducción hasta el destino final, con arreglo al contrato de transporte, en condiciones comparables, en una fecha posterior que convenga al pasajero, en función de los billetes disponibles.

2. Lo dispuesto en el apartado 1, letra a), se aplicará también a los pasajeros cuyos viajes formen parte de un circuito combinado, excepto en lo que respecta al derecho a reembolso cuando ese derecho se derive de la Directiva 90/314/CEE.

3. En el caso de las ciudades o regiones donde existan varios puertos, el transportista que ofrezca a un pasajero un viaje a un puerto distinto de aquel para el que se efectuó la reserva deberá correr con los gastos de transporte del pasajero desde ese segundo puerto, bien hasta el puerto para el que se efectuó la reserva, bien hasta otro destino cercano convenido con el pasajero.

ANEXO II

ASISTENCIA EN PUERTOS, INCLUIDOS EL EMBARQUE Y DESEMBARQUE, A QUE SE REFIEREN LOS ARTÍCULOS 10 Y 13

1. Asistencia y disposiciones necesarias para permitir a las personas con discapacidad y a las personas con movilidad reducida:

   — comunicar su llegada a una terminal portuaria o si es posible a un puerto, y su solicitud de asistencia,

   — desplazarse desde un punto de entrada hasta el mostrador de facturación (cuando exista) o hasta el buque,

   — proceder a la comprobación de su billete y a la facturación de su equipaje, en caso necesario,

   — desplazarse desde el mostrador de facturación, cuando exista, al buque, a través de los controles de emigración y seguridad,

   — embarcar en el buque, para lo que deberán preverse elevadores, sillas de ruedas o cualquier otro tipo de asistencia que proceda,

   — desplazarse desde la puerta del buque a sus asientos o zonas,

   — guardar y recuperar su equipaje dentro del buque,

   — desplazarse desde sus asientos a la puerta del buque,

   — desembarcar del buque, para lo que deberán preverse elevadores, sillas de ruedas o cualquier otro tipo de asistencia que proceda,

   — recuperar su equipaje, en caso necesario, y pasar a través de los controles de inmigración y aduanas,

   — desplazarse desde la sala de recogida de equipajes o el punto de desembarque a un punto de salida designado,

   — si es preciso, desplazarse a los aseos (si existen).

2. Cuando una persona con discapacidad o una persona con movilidad reducida reciba la ayuda de un acompañante, este deberá poder prestar, cuando así se le solicite, la asistencia necesaria en el puerto y durante el embarque y desembarque.

3. Manipulación de todo el equipo de movilidad necesario, incluido el equipo como las sillas de ruedas eléctricas.

4. Sustitución temporal del equipo de movilidad extraviado o averiado por un equipo que constituya una alternativa adecuada.

5. Asistencia en tierra a los perros de asistencia reconocidos, cuando así proceda.

6. Comunicación en formatos accesibles de la información necesaria para embarcar y desembarcar.

ANEXO III

ASISTENCIA A BORDO DE BUQUES A QUE SE REFIEREN LOS ARTÍCULOS 10 Y 13

1. Transporte de los perros de asistencia reconocidos, con arreglo a la normativa nacional.

2. Transporte del equipo médico y del equipo de movilidad necesarios para la persona con discapacidad o la persona con movilidad reducida, sillas de ruedas eléctricas incluidas.

3. Comunicación de la información esencial sobre la ruta en formatos accesibles.

4. Despliegue de todos los esfuerzos razonables para disponer los asientos conforme a las necesidades de las personas con discapacidad o las personas con movilidad reducida que así lo soliciten, siempre que los requisitos de seguridad lo permitan y en función de las disponibilidades.

5. Si es preciso, ayuda para desplazarse a los aseos (si existen).

6. Cuando una persona con discapacidad o una persona con movilidad reducida reciba la ayuda de un acompañante, el transportista hará todo cuanto esté a su alcance para ofrecer al acompañante un asiento o un camarote junto a la persona con discapacidad o a la persona con movilidad reducida.

ANEXO IV

FORMACIÓN EN MATERIA DE DISCAPACIDAD, INCLUIDAS LAS INSTRUCCIONES, A QUE SE REFIERE EL ARTÍCULO 14

A. Formación en materia de sensibilización ante las discapacidades, incluidas las instrucciones

La formación en materia de sensibilización ante las discapacidades, incluidas las instrucciones, incluye:

— la sensibilización y el trato adecuado para con los viajeros con discapacidades físicas, sensoriales (auditivas y visuales), ocultas o de aprendizaje, que incluye la capacidad de distinguir entre las distintas capacidades de las personas cuya movilidad, orientación o capacidad de comunicación pueda estar reducida,

— las barreras a que se enfrentan las personas con discapacidad o con movilidad reducida, incluidas las barreras mentales, ambientales o físicas, y las organizativas,

— los perros de asistencia reconocidos, incluyendo su función y sus necesidades,

— los métodos para abordar situaciones inesperadas,

— las técnicas de trato interpersonal y los métodos de comunicación con personas con discapacidad auditiva, visual, locutiva o en el aprendizaje,

— el conocimiento general de las directrices de la OMI incluidas en su Recomendación sobre el proyecto y las operaciones de los buques de pasajeros para atender a las necesidades de las personas de edad avanzada o con discapacidad.

B. Formación en materia de asistencia a las personas con discapacidad, incluidas las instrucciones

La formación en materia de asistencia a las personas con discapacidad, incluidas las instrucciones, incluye:

— la forma de ayudar a los usuarios de sillas de ruedas a sentarse en ellas o a levantarse de ellas,

— métodos de asistencia a las personas con discapacidad o con movilidad reducida que viajen con perros de asistencia reconocidos, incluyendo la función y las necesidades de estos animales,

— técnicas de acompañamiento de viajeros con discapacidad visual, y de manipulación y transporte de perros de asistencia reconocidos,

— conocimientos sobre los diversos tipos de equipos de asistencia a las personas con discapacidad o con movilidad reducida y sobre la forma de manejar cuidadosamente dichos equipos,

— la utilización de los equipos de asistencia utilizados en el embarque y desembarque, y el conocimiento de los procedimientos de asistencia adecuados para el embarque y el desembarque de las personas con discapacidad y las personas con movilidad reducida, salvaguardando su seguridad y su dignidad,

— la comprensión de la necesidad de asistencia fiable y profesional. Asimismo, sensibilización ante la posibilidad de que determinadas personas con discapacidad y personas con movilidad reducida experimenten sentimientos de vulnerabilidad durante el viaje debido a su dependencia de la asistencia prestada,

— conocimientos de primeros auxilios.

REGLAMENTO (CE) Nº 1371/2007 DEL PARLAMENTO EUROPEO Y DEL CONSEJO

de 23 de octubre de 2007

sobre los derechos y las obligaciones de los viajeros de ferrocarril

EL PARLAMENTO EUROPEO Y EL CONSEJO DE LA UNIÓN EUROPEA,

Visto el Tratado constitutivo de la Comunidad Europea y, en particular, su artículo 71, apartado 1,

Vista la propuesta de la Comisión,

Visto el dictamen del Comité Económico y Social Europeo [1],

Visto el dictamen del Comité de las Regiones [2],

De conformidad con el procedimiento establecido en el artículo 251 del Tratado, a la vista del texto conjunto aprobado el 31 de julio de 2007 por el Comité de conciliación [3],

Considerando lo siguiente:

(1) En el contexto de la política común de transportes, es importante garantizar los derechos de los viajeros de ferrocarril, además de aumentar la calidad y la eficacia de los servicios de transporte de viajeros por ferrocarril con el fin de incrementar la cuota correspondiente al transporte ferroviario en relación con los demás medios de transporte.

(2) La Comunicación de la Comisión «Estrategia en materia de política de los consumidores 2002-2006» [4] establece el objetivo de conseguir un elevado nivel de protección de los consumidores en el sector de los transportes de conformidad con el artículo 153, apartado 2, del Tratado.

(3) El viajero de ferrocarril es la parte más débil del contrato de transporte, motivo por el que deben defenderse sus derechos en ese contexto.

(4) Los derechos de los usuarios de servicios de ferrocarril incluyen la obtención de información sobre el servicio, antes y durante el viaje. Siempre que sea factible las empresas ferroviarias y los proveedores de billetes deben facilitar esta información con antelación y lo antes posible.

(5) Se establecerán disposiciones más detalladas para la oferta de información sobre el viaje en las especificaciones técnicas de interoperabilidad (ETI) a que se refiere el capítulo II de la Directiva 2001/16/CE del Parlamento Europeo y del Consejo, de 19 de marzo de 2001, relativa a la interoperabilidad del sistema ferroviario convencional [5].

(6) La mejora de los derechos de los viajeros de ferrocarril debe basarse en el sistema existente de Derecho internacional sobre esta cuestión que figura en el apéndice A, «Reglas uniformes relativas al contrato de transporte internacional de viajeros y equipajes por ferrocarril (CIV)» del Convenio relativo a los Transportes Internacionales por Ferrocarril (COTIF), de 9 de mayo de 1980, modificado por el Protocolo de 3 de junio de 1999 por el que se modifica el Convenio relativo a los Transportes Internacionales por Ferrocarril (Protocolo de 1999). Sin embargo, conviene ampliar el ámbito de aplicación del presente Reglamento y proteger no solo a los viajeros internacionales sino también a los viajeros nacionales.

(7) Las empresas ferroviarias deben cooperar para facilitar la transferencia de los viajeros de ferrocarril de un operador a otro ofreciendo, cuando sea posible, billetes directos.

(8) El suministro de la información y de billetes a los viajeros de ferrocarril debe facilitarse adaptando los sistemas informáticos a una especificación común.

(9) La implantación de los sistemas de información y reserva de viajes debe realizarse de acuerdo con las ETI.

(10) Los servicios de transporte de viajeros por ferrocarril deben beneficiar a toda la ciudadanía. Por consiguiente, las personas con discapacidad y las personas de movilidad reducida provocada por la discapacidad, la edad o cualquier otro factor deben disponer al viajar por ferrocarril de oportunidades equivalentes a las de los demás ciudadanos. Las personas con discapacidad y las personas de movilidad reducida tienen el mismo derecho que todos los demás ciudadanos a la libertad de movimiento, a la libertad de elección y a la no discriminación. Entre otras cosas, debe prestarse especial atención a que se dé a las personas con discapacidad y las personas de movilidad reducida información sobre las posibilidades de acceso de los servicios ferroviarios, las condiciones de acceso al material rodante y las instalaciones a bordo del tren. Con el fin de informar lo mejor posible sobre los retrasos a los viajeros con discapacidad sensorial, deben utilizarse sistemas visuales y auditivos al efecto. Las personas con discapacidad y las personas de movilidad reducida deben poder comprar los billetes a bordo del tren sin recargo.

([1]) DO C 221 de 8.9.2005, p. 8.

([2]) DO C 71 de 22.3.2005, p. 26.

([3]) Dictamen del Parlamento Europeo de 28 de septiembre de 2005 (DO C 227 E de 21.9.2006, p. 490), Posición Común del Consejo de 24 de julio de 2006 (DO C 289 E de 28.11.2006, p. 1), Posición del Parlamento Europeo de 18 de enero de 2007 (no publicada aún en el Diario Oficial), Resolución legislativa del Parlamento Europeo de 25 de septiembre de 2007 y Decisión del Consejo de 26 de septiembre de 2007.

([4]) DO C 137 de 8.6.2002, p. 2.

([5]) DO L 110 de 20.4.2001, p. 1. Directiva modificada en último lugar por la Directiva 2007/32/CE (DO L 141 de 2.6.2007, p. 63).

(11) Las empresas ferroviarias y los administradores de estaciones deben tener en cuenta las necesidades de las personas con discapacidad y de las personas de movilidad reducida, mediante el cumplimiento de las ETI para las personas de movilidad reducida, con el fin de garantizar que, cuando se realizan adquisiciones de nuevo material o se llevan a cabo nuevas construcciones o renovaciones importantes, respetando la normativa comunitaria vigente en materia de contratación pública, todos los edificios y todo el material rodante es accesible gracias a la eliminación progresiva de los obstáculos físicos y funcionales.

(12) Las empresas ferroviarias deben tener la obligación de suscribir un seguro o contar con un sistema equivalente de cobertura de su responsabilidad respecto de los viajeros de ferrocarril en caso de accidente. El importe mínimo del seguro por empresa ferroviaria debe ser revisado sucesivamente.

(13) Unos mayores derechos de indemnización y asistencia en caso de retraso, pérdida de enlaces y supresión de un servicio deben aportar incentivos al mercado de los servicios de transporte de viajeros por ferrocarril, en beneficio de los propios usuarios.

(14) Es conveniente que el presente Reglamento instaure un sistema de indemnización para los viajeros en caso de retraso relacionado con la responsabilidad de la empresa ferroviaria, sobre la misma base que el sistema internacional creado por el COTIF y en particular su apéndice CIV sobre los derechos de los viajeros.

(15) Cuando un Estado miembro conceda a las empresas ferroviarias una exención respecto de lo dispuesto en el presente Reglamento, debe alentarlas a que, en consulta con las organizaciones representantes de los viajeros, establezcan regímenes de indemnización y asistencia en caso de perturbación grave del servicio de transporte de viajeros por ferrocarril.

(16) Procede liberar de inquietudes económicas a corto plazo, en el período inmediato al accidente, a las víctimas de los accidentes y a las personas de ellas dependientes.

(17) Para los viajeros de ferrocarril es importante que, de acuerdo con las autoridades públicas, se adopten las medidas adecuadas para garantizar su seguridad personal tanto en las estaciones como a bordo de los trenes.

(18) Los viajeros de ferrocarril deben poder presentar, a la empresa ferroviaria que proceda, reclamación sobre los derechos y obligaciones que el presente Reglamento determina y deben recibir respuesta en un período de tiempo razonable.

(19) Las empresas ferroviarias deben definir, gestionar y controlar las normas de calidad del servicio de transporte de viajeros por ferrocarril.

(20) El contenido del presente Reglamento debe revisarse para adaptar los importes a la inflación y adecuar los requisitos de calidad de la información y de los servicios a la evolución del mercado, así como a las consecuencias del presente Reglamento sobre la calidad del servicio.

(21) El presente Reglamento debe entenderse sin perjuicio de la Directiva 95/46/CE del Parlamento Europeo y del Consejo, de 24 de octubre de 1995, relativa a la protección de las personas físicas en lo que respecta al tratamiento de datos personales y a la libre circulación de estos datos [1].

(22) Los Estados miembros deben establecer las sanciones aplicables a las infracciones del presente Reglamento y asegurarse de que las sanciones se apliquen. Las sanciones, que pueden incluir el pago de indemnizaciones a los interesados, deben ser eficaces, proporcionadas y disuasorias.

(23) Dado que los objetivos del presente Reglamento, a saber, el desarrollo de los ferrocarriles de la Comunidad y la introducción de derechos de los viajeros, no pueden ser alcanzados de manera suficiente por los Estados miembros y, por consiguiente, pueden lograrse mejor a nivel comunitario, la Comunidad puede adoptar medidas, de acuerdo con el principio de subsidiariedad consagrado en el artículo 5 del Tratado. De conformidad con el principio de proporcionalidad enunciado en dicho artículo, el presente Reglamento no excede de lo necesario para alcanzar dichos objetivos.

(24) El presente Reglamento pretende mejorar los servicios de transporte de viajeros por ferrocarril dentro de la Comunidad. Para ello, los Estados miembros deben poder conceder exenciones temporales para servicios ofrecidos en regiones en las que una parte significativa de los mismos se explota fuera de la Comunidad.

(25) Es posible que a las empresas ferroviarias de algunos Estados miembros les resulte difícil aplicar todas las disposiciones del presente Reglamento en su fecha de entrada en vigor. Por consiguiente, los Estados miembros deben poder conceder exenciones temporales respecto de la aplicación de lo dispuesto en el presente Reglamento a los servicios nacionales de transporte ferroviario de viajeros de largo recorrido. No obstante, las exenciones temporales no deben afectar a las disposiciones del presente Reglamento que conceden a las personas con discapacidad y a las personas de movilidad reducida acceso a los viajes en tren, ni al derecho de toda persona a adquirir sin dificultades indebidas un billete para viajar en tren, ni a las disposiciones relativas a la responsabilidad de las empresas ferroviarias para con los viajeros y su equipaje, al requisito de que las empresas cuenten con un seguro adecuado ni al requisito de que estas tomen las medidas adecuadas para garantizar la seguridad personal de los viajeros en las estaciones de tren y en los trenes y para gestionar los riesgos.

[1] DO L 281 de 23.11.1995, p. 31. Directiva modificada por el Reglamento (CE) nº 1882/2003 (DO L 284 de 31.10.2003, p. 1).

(26) La naturaleza de los servicios de transporte de viajeros por ferrocarril urbano, suburbano y regional es distinta de la de los servicios de largo recorrido. Por consiguiente, y con la salvedad de ciertas disposiciones que deban aplicarse a todos los servicios de transporte de viajeros por ferrocarril en la Comunidad, los Estados miembros deben poder conceder exenciones respecto de la aplicación de lo dispuesto en el presente Reglamento a los servicios de transporte de viajeros por ferrocarril urbano, suburbano y regional.

(27) Procede aprobar las medidas necesarias para la ejecución del presente Reglamento con arreglo a la Decisión 1999/468/CE del Consejo, de 28 de junio de 1999, por la que se establecen los procedimientos para el ejercicio de las competencias de ejecución atribuidas a la Comisión [1].

(28) Conviene, en particular, conferir competencias a la Comisión para que adopte medidas de ejecución. Dado que estas medidas son de alcance general, y están destinadas a modificar elementos no esenciales del presente Reglamento o a completarlo añadiendo nuevos elementos no esenciales, deben adoptarse con arreglo al procedimiento de reglamentación con control previsto en el artículo 5 *bis* de la Decisión 1999/468/CE.

HAN ADOPTADO EL PRESENTE REGLAMENTO:

CAPÍTULO I

DISPOSICIONES GENERALES

Artículo 1

Objeto

El presente Reglamento establece normas aplicables:

a) a la información que deben facilitar las empresas ferroviarias, a la celebración de contratos de transporte, a la expedición de billetes y a la instauración de un sistema informatizado de datos y reservas para el transporte ferroviario;

b) a la responsabilidad de las empresas ferroviarias y a sus obligaciones en materia de seguros para los viajeros y sus equipajes;

c) a las obligaciones de las empresas ferroviarias para con los viajeros en caso de retraso;

d) a la protección y asistencia que debe ofrecerse a las personas con discapacidad y las personas de movilidad reducida que viajen en tren;

e) a la definición y control de normas de calidad del servicio, la gestión del riesgo para la seguridad personal de los viajeros y la tramitación de las reclamaciones, y

f) a normas generales en materia de ejecución.

[1] DO L 184 de 17.7.1999, p. 23. Decisión modificada por la Decisión 2006/512/CE (DO L 200 de 22.7.2006, p. 11).

Artículo 2

Ámbito de aplicación

1. El presente Reglamento se aplicará a todos los viajes y servicios de ferrocarril en toda la Comunidad prestados por una o varias empresas ferroviarias que dispongan de una licencia de conformidad con la Directiva 95/18/CE del Consejo, de 19 de junio de 1995, sobre licencias de empresas ferroviarias [2].

2. El presente Reglamento no se aplicará a las empresas ferroviarias y a los servicios de transporte que no dispongan de una licencia de conformidad con la Directiva 95/18/CE.

3. A partir de la entrada en vigor del presente Reglamento, los artículos 9, 11, 12, 19, el artículo 20, apartado 1, y el artículo 26 se aplicarán a todos los servicios de transporte de viajeros por ferrocarril en toda la Comunidad.

4. Salvo en lo que concierne a las disposiciones establecidas en el apartado 3, un Estado miembro podrá conceder, sobre la base de la transparencia y la no discriminación, una exención por un período máximo de cinco años, que podrá renovarse dos veces por sendos períodos máximos de cinco años, respecto de la aplicación de las disposiciones del presente Reglamento a los servicios nacionales de transporte de viajeros por ferrocarril.

5. Salvo en lo que concierne a las disposiciones establecidas en el apartado 3 del presente artículo, un Estado miembro podrá conceder una exención respecto de la aplicación de las disposiciones del presente Reglamento a los servicios de transporte de viajeros por ferrocarril suburbano, urbano y regional. Para distinguir entre los servicios de transporte de viajeros por ferrocarril suburbano, urbano y regional, los Estados miembros utilizarán las definiciones que figuran en la Directiva 91/440/CEE del Consejo, de 29 julio de 1991, sobre el desarrollo de los ferrocarriles comunitarios [3]. Al aplicar estas definiciones, los Estados miembros tendrán en cuenta los siguientes criterios: distancia, frecuencia de los servicios, número de paradas previstas, material rodante utilizado, sistemas de expedición de billetes, variaciones del número de viajeros entre los servicios en horas punta y en horas de baja frecuentación, códigos de trenes y horarios.

6. Durante un período máximo de cinco años, todo Estado miembro podrá conceder, con transparencia y carácter no discriminatorio, una exención prorrogable respecto de la aplicación de las disposiciones del presente Reglamento para servicios o trayectos específicos por efectuarse fuera de la Comunidad una parte significativa del servicio ferroviario de transporte de viajeros, que incluya al menos una parada programada en una estación.

7. Los Estados miembros informarán a la Comisión de las exenciones concedidas de conformidad con los apartados 4, 5, y 6. La Comisión adoptará las medidas adecuadas cuando dicha exención no se considere conforme a lo dispuesto en el presente artículo. A más tardar el 3 de diciembre de 2014, la Comisión presentará al Parlamento Europeo y al Consejo un informe sobre las exenciones concedidas de conformidad con los apartados 4, 5 y 6.

[2] DO L 143 de 27.6.1995, p. 70. Directiva modificada en último lugar por la Directiva 2004/49/CE del Parlamento Europeo y del Consejo (DO L 164 de 30.4.2004, p. 44).

[3] DO L 237 de 24.8.1991, p. 25. Directiva modificada en último lugar por la Directiva 2006/103/CE (DO L 363 de 20.12.2006, p. 344).

Artículo 3

Definiciones

A efectos del presente Reglamento, se entenderá por:

1) «empresa ferroviaria»: toda empresa ferroviaria tal como se define en el artículo 2 de la Directiva 2001/14/CE [1] y cualquier empresa privada o pública cuya actividad consista en prestar servicios de transporte de mercancías y/o viajeros por ferrocarril, debiendo ser dicha empresa quien aporte la tracción; esta definición incluye asimismo las empresas que solo proporcionen la tracción;

2) «transportista»: la empresa ferroviaria contractual con quien el viajero ha celebrado el contrato de transporte, o una serie de empresas ferroviarias consecutivas que sean responsables sobre la base de dicho contrato;

3) «transportista sustituto»: una empresa ferroviaria que no ha celebrado un contrato de transporte con el viajero, pero a quien la empresa ferroviaria parte en el contrato ha confiado total o parcialmente la ejecución del transporte por ferrocarril;

4) «administrador de infraestructuras»: todo organismo o empresa encargado principalmente de la instalación y mantenimiento de infraestructuras ferroviarias, o de parte de las mismas, con arreglo a la definición del artículo 3 de la Directiva 91/440/CEE, lo que también podrá incluir la gestión de los sistemas de control y de seguridad de la infraestructura. Las funciones del administrador de infraestructuras de una red o de parte de una red podrán encomendarse a diferentes organismos o empresas;

5) «administrador de estaciones»: entidad organizativa a quien, en cada Estado miembro, se confía la responsabilidad de la gestión de las estaciones de ferrocarril y que puede ser el administrador de infraestructuras;

6) «operador turístico»: organizador o detallista, distinto de las empresas ferroviarias, según las definiciones de los puntos 2 y 3 del artículo 2 de la Directiva 90/314/CEE [2];

7) «proveedor de billetes»: cualquier detallista de servicios de transporte ferroviario que celebre contratos de transporte y venda billetes por cuenta de una empresa ferroviaria o por cuenta propia;

8) «contrato de transporte»: contrato de transporte, a título oneroso o gratuito, entre una empresa ferroviaria o un proveedor de billetes y un viajero, para la prestación de uno o más servicios de transporte;

9) «reserva»: autorización, en papel o en forma electrónica, que da derecho al transporte, siempre que se haya confirmado previamente el plan personalizado de transporte;

10) «billete directo»: billete o billetes que constituyen un contrato para servicios de transporte ferroviario sucesivos explotados por una o varias empresas ferroviarias;

11) «servicio nacional de transporte de viajeros por ferrocarril»: servicio de transporte de viajeros por ferrocarril que no cruza la frontera de ningún Estado miembro;

12) «retraso»: tiempo transcurrido entre la hora programada de llegada del viajero según el horario publicado y la hora real o prevista de llegada;

13) «contrato de transporte» o «abono de temporada»: billete para un número ilimitado de viajes que permite al titular autorizado viajar en tren en un trayecto o red determinados durante un período de tiempo especificado;

14) «sistema informatizado de datos y reservas para el transporte ferroviario (SIDRTF)»: sistema informatizado que contiene información sobre los servicios de ferrocarril ofrecidos por las empresas ferroviarias; la información sobre los servicios de viajeros archivada en el SIDRTF deberá incluir datos sobre:

   a) programas y horarios de los servicios de viajeros;

   b) disponibilidad de asientos en los servicios de viajeros;

   c) tarifas y condiciones especiales;

   d) accesibilidad de los trenes para las personas con discapacidad y las personas de movilidad reducida;

   e) dispositivos que permiten la realización de reservas o la expedición de billetes o billetes directos, en la medida en que algunos de esos dispositivos o todos ellos se pongan a disposición de los usuarios;

15) «persona con discapacidad» o «persona de movilidad reducida»: toda persona cuya movilidad a la hora de utilizar el transporte se halle reducida por motivos de discapacidad física (sensorial o locomotriz, permanente o temporal), discapacidad o deficiencia intelectual, o cualquier otra causa de discapacidad, o por la edad, y cuya situación requiera una atención adecuada y la adaptación a sus necesidades particulares del servicio puesto a disposición de los demás pasajeros;

16) «condiciones generales de transporte»: las condiciones del transportista, expresadas en forma de condiciones generales o de tarifas legalmente vigentes en cada Estado miembro y que se han convertido, mediante la celebración del contrato de transporte, en parte integrante de este;

17) «vehículo»: un vehículo automóvil o un remolque transportados con motivo de un transporte de viajeros.

[1] Directiva 2001/14/CE del Parlamento Europeo y del Consejo, de 26 de febrero de 2001, relativa a la adjudicación de la capacidad de infraestructura ferroviaria, aplicación de cánones por su utilización (DO L 75 de 15.3.2001, p. 29). Directiva modificada en último lugar por la Directiva 2004/49/CE.

[2] Directiva 90/314/CEE del Consejo, de 13 de junio de 1990, relativa a los viajes combinados, las vacaciones combinadas y los circuitos combinados (DO L 158 de 23.6.1990, p. 59).

CAPÍTULO II

CONTRATO DE TRANSPORTE, INFORMACIÓN Y BILLETES

Artículo 4

Contrato de transporte

Sin perjuicio de lo dispuesto en el presente capítulo, la celebración y ejecución de un contrato de transporte y el suministro de información y billetes se regirán por las disposiciones de los títulos II y III del anexo I.

Artículo 5

Bicicletas

Las empresas ferroviarias posibilitarán que los viajeros lleven a bordo bicicletas, en su caso previo pago, siempre que sean fácilmente manejables, que ello no afecte de manera adversa al servicio ferroviario en cuestión y que el material rodante lo permita.

Artículo 6

Prohibición de renuncias y estipulaciones de límites

1. Las obligaciones para con los viajeros derivadas del presente Reglamento no podrán ser objeto de limitación o renuncia, en particular mediante la introducción de excepciones o cláusulas restrictivas en el contrato de transporte.

2. Las empresas ferroviarias podrán ofrecer a los viajeros condiciones contractuales más favorables que las establecidas en el presente Reglamento.

Artículo 7

Obligación de informar sobre la interrupción de los servicios

Las empresas ferroviarias o, en su caso, las autoridades competentes encargadas de los contratos ferroviarios de servicio público, deberán hacer pública por los medios apropiados toda decisión de interrumpir un servicio antes de llevarla a cabo.

Artículo 8

Información sobre el viaje

1. Sin perjuicio de lo dispuesto en el artículo 10, las empresas ferroviarias y los proveedores de billetes que ofrezcan contratos de transporte por cuenta de una o varias empresas ferroviarias deberán facilitar al viajero que lo solicite, como mínimo, la información indicada en el anexo II, parte I, relativa a los viajes para los cuales la empresa ferroviaria de que se trate ofrece un contrato de transporte. Los proveedores de billetes que ofrezcan contratos de transporte por cuenta propia y los operadores turísticos ofrecerán esta información si está disponible.

2. Las empresas ferroviarias facilitarán a los viajeros durante el viaje, como mínimo, la información que se indica en el anexo II, parte II.

3. La información mencionada en los apartados 1 y 2 se facilitará en el formato más apropiado. Se prestará especial atención en este sentido a las necesidades de las personas con discapacidad auditiva o visual.

Artículo 9

Disponibilidad de billetes, billetes directos y reservas

1. Las empresas ferroviarias y los proveedores de billetes deberán ofrecer, en caso de disponibilidad, billetes, billetes directos y reservas.

2. Sin perjuicio del apartado 4, las empresas ferroviarias deberán expedir billetes a los viajeros a través de al menos uno de los siguientes puntos de venta:

a) taquillas o taquillas automáticas;

b) teléfono, Internet o cualquier otra tecnología de la información de uso generalizado;

c) a bordo de los trenes.

3. Sin perjuicio de los apartados 4 y 5, las empresas ferroviarias deberán expedir billetes para servicios prestados con arreglo a contratos de servicio público a través de al menos uno de los siguientes puntos de venta:

a) taquillas o taquillas automáticas;

b) a bordo de los trenes.

4. Las empresas ferroviarias deberán ofrecer la posibilidad de adquirir a bordo del tren billetes para el correspondiente servicio, a menos que esta opción esté limitada o prohibida por razones de seguridad, por medidas de lucha contra el fraude, por la obligación de reservar plaza o por otros motivos comerciales razonables.

5. Si no existe taquilla o taquilla automática en la estación de ferrocarril de salida, deberá informarse a los pasajeros en la estación:

a) de la posibilidad de comprar un billete por teléfono o por Internet o a bordo del tren, así como del procedimiento que se ha de seguir;

b) de la estación de ferrocarril o del lugar más próximos en que se disponga de taquillas o taquillas automáticas.

Artículo 10

Sistemas de información sobre viajes y de reserva

1. A fin de facilitar la información y de expedir los billetes a que se refiere el presente Reglamento, las empresas ferroviarias y los proveedores de billetes utilizarán el SIDRTF que se establecerá aplicando los procedimientos contemplados en el presente artículo.

2. A los efectos del presente Reglamento, serán de aplicación las especificaciones técnicas de interoperabilidad (ETI) a que se refiere la Directiva 2001/16/CE.

3. La Comisión, sobre la base de una propuesta que le presentará la Agencia Ferroviaria Europea, adoptará las ETI de las aplicaciones telemáticas destinadas a servicios de viajeros a más tardar el 3 de diciembre de 2010. Las ETI deberán permitir el suministro de la información indicada en el anexo II y la expedición de billetes, a tenor de las disposiciones del presente Reglamento.

4. Las empresas ferroviarias adecuarán sus SIDRTF a los requisitos estipulados en las ETI de conformidad con el plan de instalación indicado en las ETI.

5. Sin perjuicio de lo dispuesto en la Directiva 95/46/CE, ni la empresa ferroviaria ni el proveedor de billetes revelarán a otras empresas ferroviarias o proveedores de billetes información personal sobre reservas individuales.

CAPÍTULO III

RESPONSABILIDAD DE LAS EMPRESAS FERROVIARIAS RESPECTO DE LOS VIAJEROS Y DE SUS EQUIPAJES

Artículo 11

Responsabilidad respecto de los viajeros y de sus equipajes

Sin perjuicio de las disposiciones del presente capítulo y de la legislación nacional aplicable que conceda al viajero una indemnización suplementaria en concepto de daños, la responsabilidad de las empresas ferroviarias respecto de los viajeros y de sus equipajes se regirá por lo dispuesto en los capítulos I, III y IV del título IV y en los títulos VI y VII del anexo I.

Artículo 12

Seguros

1. La obligación establecida en el artículo 9 de la Directiva 95/18/CE, en lo que respecta a la responsabilidad respecto de los viajeros, se entenderá como la obligación de que las empresas ferroviarias estén convenientemente aseguradas o tomen disposiciones equivalentes para la cobertura de sus responsabilidades en virtud del presente Reglamento.

2. La Comisión presentará al Parlamento Europeo y al Consejo un informe sobre la fijación de un importe mínimo para el seguro de las empresas ferroviarias a más tardar el 3 de diciembre de 2010. El informe irá acompañado cuando proceda de las propuestas o recomendaciones pertinentes al respecto.

Artículo 13

Anticipos

1. En caso de que un viajero muera o resulte herido, la empresa ferroviaria, contemplada en el artículo 26, apartado 5, del anexo I, abonará sin demora, y en cualquier caso a más tardar 15 días después de que se haya identificado a la persona con derecho a indemnización, los anticipos necesarios para atender a las necesidades económicas inmediatas, de forma proporcional a los daños sufridos.

2. Sin perjuicio de lo dispuesto en el apartado 1, el anticipo no será inferior a 21 000 EUR por viajero en caso de muerte.

3. El anticipo no constituirá reconocimiento de responsabilidad y podrá deducirse de cualquier suma que se abone posteriormente sobre la base del presente Reglamento, pero no dará lugar a reembolso, salvo en caso de que el daño sufrido haya sido causado por negligencia o falta del viajero o de que la persona que haya recibido el anticipo no sea la persona con derecho a indemnización.

Artículo 14

Contestación de la responsabilidad

Incluso en el caso de que la empresa ferroviaria conteste su responsabilidad en cuanto a los daños corporales causados a un viajero que haya transportado, hará todos los esfuerzos razonables para asistir al viajero que exija una indemnización por daños de terceros.

CAPÍTULO IV

RETRASOS, PÉRDIDA DE ENLACES Y CANCELACIONES

Artículo 15

Responsabilidad por retrasos, pérdida de enlaces y cancelaciones

Sin perjuicio de lo dispuesto en el presente capítulo, la responsabilidad de la empresa ferroviaria respecto de los retrasos, pérdida de enlaces y cancelaciones se regirá por las disposiciones del capítulo II del título IV del anexo I.

Artículo 16

Reintegro y conducción por una vía alternativa

En caso de que sea razonable prever que la llegada al destino final previsto en el contrato de transporte sufra un retraso superior a 60 minutos, el viajero tendrá de inmediato la opción entre:

a) el reintegro del importe total del billete —en las condiciones en que este haya sido abonado— correspondiente a la parte o partes del viaje no efectuadas y a la parte o partes ya efectuadas si el viaje ha perdido razón de ser dentro del plan de viaje original del viajero, y, cuando así proceda, un servicio de regreso lo antes posible al punto de partida. El reintegro del importe correspondiente se realizará en las mismas condiciones que el pago de la indemnización contemplada en el artículo 17;

b) la continuación del viaje o la conducción por una vía alternativa al punto de destino final, en condiciones de transporte comparables y lo antes posible;

c) la continuación del viaje o la conducción por una vía alternativa al punto de destino final, en condiciones de transporte comparables, en la fecha posterior que convenga al viajero.

Artículo 17

Indemnización por el precio del billete

1. El viajero que vaya a sufrir un retraso entre los lugares de partida y de destino especificados en el billete por el cual no se le haya reintegrado el importe del billete con arreglo a lo dispuesto en el artículo 16 podrá solicitar a la empresa ferroviaria una indemnización por retraso sin por ello renunciar a su derecho al transporte. Las indemnizaciones mínimas por causa de retraso serán las siguientes:

a) 25 % del precio del billete en caso de retraso de entre 60 y 119 minutos;

b) 50 % del precio del billete en caso de retraso igual o superior a 120 minutos.

Los pasajeros titulares de un contrato de transporte o abono de temporada que sufran repetidamente retrasos o cancelaciones durante su período de validez podrán reclamar una indemnización adecuada de conformidad con las disposiciones de las empresas ferroviarias en materia de indemnización. Estas disposiciones fijarán los criterios aplicables a los retrasos y al cálculo de las indemnizaciones.

La indemnización por retrasos se calculará en relación con el precio que el viajero abonó realmente por el servicio que ha sufrido el retraso.

Si el contrato de transporte se refiere a un viaje de ida y vuelta, la indemnización por retraso ya sea en el trayecto de ida o en el de vuelta se calculará en relación con el 50 % del precio pagado por el billete. En el mismo sentido, la indemnización en caso de retraso de un servicio contemplado en cualquier otro tipo de contrato de transporte que permita recorrer varios trayectos sucesivos se calculará en proporción al precio total del billete.

En el cálculo de la duración del retraso no se contabilizará ningún retraso sobre el que la empresa ferroviaria pueda demostrar que ha ocurrido fuera de los territorios en los que se aplica el Tratado constitutivo de la Comunidad Europea.

2. La indemnización por el precio del billete se abonará en el plazo de un mes a partir de la presentación de la solicitud correspondiente. La indemnización podrá pagarse en forma de vales u otros servicios, o de ambas cosas, si las condiciones del contrato son flexibles (en particular en términos de período de validez y destino). La indemnización se abonará en efectivo a petición del viajero.

3. No se deducirán de la indemnización por el precio del billete costes de transacción como tasas, gastos telefónicos o sellos. Las empresas ferroviarias podrán establecer un umbral mínimo por debajo del cual no se abonará indemnización alguna. Ese umbral no podrá ser superior a 4 EUR.

4. El viajero no tendrá derecho a indemnización si se le informa del retraso antes de que compre el billete o si el retraso debido a la continuación del viaje en otro servicio o a la conducción por una vía alternativa es inferior a 60 minutos.

Artículo 18

Asistencia

1. En caso de retraso de la salida o de la llegada, la empresa ferroviaria o el administrador de estación mantendrán informados a los viajeros de la situación y de la hora estimada de salida y de llegada en cuanto esa información esté disponible.

2. En caso de que el retraso a que se refiere el apartado 1 sea superior a 60 minutos, se ofrecerá además gratuitamente a los viajeros:

a) comidas y refrigerios, en una medida adecuada al tiempo de espera, si están disponibles en el tren o en la estación o si pueden razonablemente suministrarse;

b) alojamiento en un hotel u otro lugar, y transporte entre la estación de ferrocarril y el lugar de alojamiento, en los casos que requieran una estancia de una o más noches o una estancia adicional, siempre y cuando sea físicamente posible;

c) si el tren se encuentra bloqueado en la vía, transporte del tren a la estación de ferrocarril, al lugar de partida alternativo o al destino final del servicio, siempre y cuando sea físicamente posible.

3. Si resulta imposible continuar el servicio ferroviario, las empresas ferroviarias organizarán lo antes posible servicios alternativos de transporte para los viajeros.

4. A petición de los viajeros, las empresas ferroviarias certificarán en el billete que el servicio ferroviario ha sufrido un retraso o un retraso que ha ocasionado la pérdida de un enlace o ha sido cancelado, según corresponda.

5. A la hora de aplicar lo dispuesto en los apartados 1, 2 y 3, la empresa ferroviaria correspondiente prestará una especial atención a las necesidades de las personas con discapacidad y las personas de movilidad reducida y sus acompañantes.

CAPÍTULO V

PERSONAS CON DISCAPACIDAD Y PERSONAS DE MOVILIDAD REDUCIDA

Artículo 19

Derecho al transporte

1. Las empresas ferroviarias y los administradores de estaciones establecerán o poseerán, con la participación activa de las organizaciones que representan a las personas con discapacidad y a las personas de movilidad reducida, unas normas de acceso no discriminatorias aplicables al transporte de personas con discapacidad y personas de movilidad reducida.

2. Las reservas y los billetes se ofrecerán a las personas con discapacidad y a las personas de movilidad reducida sin coste adicional. La empresa ferroviaria, el proveedor de billetes o el operador turístico no podrán negarse a aceptar una reserva de una persona con discapacidad o de una persona de movilidad reducida o a expedirle un billete, ni podrán pedirle que viaje acompañada por otra persona, a menos que sea estrictamente necesario para cumplir las normas de acceso a que se refiere el apartado 1.

Artículo 20

Información a las personas con discapacidad y a las personas de movilidad reducida

1. Las empresas ferroviarias, los proveedores de billetes o los operadores turísticos facilitarán a las personas con discapacidad y a las personas de movilidad reducida, previa solicitud, información acerca de la accesibilidad de los servicios ferroviarios y de las condiciones de acceso al material rodante, conforme a las normas de acceso a que se refiere el artículo 19, apartado 1, así como acerca de las instalaciones a bordo del tren.

2. Las empresas ferroviarias, los proveedores de billetes o los operadores turísticos que se acojan a la excepción prevista en el artículo 19, apartado 2, deberán, previa solicitud, informar por escrito a la persona con discapacidad o persona de movilidad reducida afectada de los motivos de tal decisión en un plazo de cinco días hábiles a partir de la fecha en la que se haya denegado la reserva o el billete o se haya exigido que la persona viaje acompañada.

Artículo 21

Accesibilidad

1. Las empresas ferroviarias y los administradores de estaciones garantizarán, mediante el respeto de las ETI referidas a las personas de movilidad reducida, que las estaciones, los andenes, el material rodante y otras instalaciones sean accesibles para las personas con discapacidad y personas de movilidad reducida

2. Cuando no haya personal de acompañamiento a bordo del tren o no haya personal en la estación, las empresas ferroviarias y los administradores de estaciones harán todos los esfuerzos razonables para que las personas con discapacidad y las personas de movilidad reducida puedan tener acceso a viajar en tren.

Artículo 22

Asistencia en las estaciones de ferrocarril

1. A la salida de la persona con discapacidad o persona de movilidad reducida de una estación de ferrocarril dotada de personal, durante su tránsito por la misma o a su llegada a ella, el administrador de la estación ofrecerá asistencia gratuita de modo que dicha persona pueda embarcar en el tren saliente o desembarcar del tren entrante para el que haya adquirido un billete, sin perjuicio de las normas de acceso a as que se refiere el artículo 19, apartado 1.

2. Los Estados miembros podrán prever excepciones a lo dispuesto en el apartado 1 en lo que respecta a las personas que viajen en servicios que hayan sido objeto de un contrato de servicio público adjudicado de conformidad con la legislación comunitaria vigente, a condición de que la autoridad competente haya establecido facilidades o disposiciones alternativas que garanticen unas posibilidades de acceso a los servicios de transporte equivalentes o mayores.

3. En el caso de una estación no dotada de personal, la empresa ferroviaria y el administrador de la estación garantizarán que una información fácilmente disponible se exponga y se ofrezca de conformidad con las normas de acceso mencionadas en el artículo 19, apartado 1, en lo que respecta a las estaciones más cercanas dotadas de personal y la asistencia directamente disponible para las personas con discapacidad y para las personas con movilidad reducida.

Artículo 23

Asistencia a bordo del tren

Sin perjuicio de las normas de acceso a que se refiere el artículo 19, apartado 1, las empresas ferroviarias prestarán gratuitamente a las personas con discapacidad y a las personas de movilidad reducida asistencia a bordo del tren y en el momento de embarcar en un tren y desembarcar de él.

A los efectos del presente artículo, se entenderá por asistencia a bordo del tren cualquier esfuerzo razonable para ofrecer asistencia a la persona con discapacidad y a la persona de movilidad reducida a fin de que estas puedan acceder en el tren a los mismos servicios que los demás viajeros en caso de que sus problemas de movilidad no les permitan acceder a ellos de forma independiente y segura.

Artículo 24

Condiciones en las que se prestará asistencia

Las empresas ferroviarias, los administradores de estaciones, los proveedores de billetes y los operadores turísticos cooperarán para ofrecer asistencia a las personas con discapacidad y a las personas de movilidad reducida con arreglo a los artículos 22 y 23 de conformidad con lo dispuesto en las letras siguientes:

a) la prestación de asistencia estará supeditada a la condición de que se notifique la necesidad de tal asistencia a la empresa ferroviaria, al administrador de la estación, al proveedor de billetes o al operador turístico al que se haya comprado el billete como mínimo 48 horas antes del momento en que se precise la asistencia. En caso de que el billete permita realizar varios viajes, bastará con una sola notificación siempre que se facilite suficiente información sobre los horarios en que se realizarán los sucesivos viajes;

b) las empresas ferroviarias, los administradores de estaciones, los proveedores de billetes y los operadores turísticos adoptarán todas las medidas necesarias para poder recibir las notificaciones;

c) si no se efectúa ninguna notificación de conformidad con la letra a), la empresa ferroviaria y el administrador de estación harán cuanto razonablemente esté en su mano para prestar la asistencia necesaria, de modo que la persona con discapacidad o la persona de movilidad reducida pueda realizar su viaje;

d) sin perjuicio de las competencias de otras entidades en lo que respecta a las zonas situadas fuera de la propia estación de ferrocarril, el administrador de la estación o cualquier otra persona autorizada designará los lugares, dentro o fuera de la estación, en los que las personas con discapacidad y las personas de movilidad reducida puedan anunciar su llegada a la estación y, en caso necesario, solicitar asistencia;

e) se facilitará asistencia a condición de que la persona con discapacidad o la persona de movilidad reducida se presente en el lugar designado a la hora estipulada por la empresa ferroviaria o por el administrador de la estación que prestan la asistencia. La hora estipulada no podrá anteceder en más de 60 minutos a la hora de salida publicada, o a la hora a la que se pide a todos los pasajeros que embarquen. Si no se ha estipulado ninguna hora límite a la que deba presentarse la persona con discapacidad o la persona de movilidad reducida, dicha persona se presentará en el lugar designado al menos 30 minutos antes de la hora de salida publicada o de la hora a que se pide a todos los pasajeros que embarquen.

Artículo 25

Indemnización en relación con el equipo de movilidad y otro material específico

Si la empresa ferroviaria es responsable del extravío de la totalidad o de una parte del equipo de movilidad u otro material específico utilizado por personas con discapacidad o personas de movilidad reducida, o de los daños sufridos por este, no se aplicará ninguna limitación económica.

CAPÍTULO VI

SEGURIDAD, RECLAMACIONES Y CALIDAD DEL SERVICIO

Artículo 26

Seguridad personal de los viajeros

Con el acuerdo de las autoridades públicas, las empresas ferroviarias, los administradores de infraestructuras y los administradores de estaciones adoptarán las medidas adecuadas en sus respectivos ámbitos de competencia, adaptándolas al nivel de seguridad que determinen las autoridades públicas, para garantizar la seguridad personal de los viajeros en las estaciones de ferrocarril y en los trenes y para gestionar los riesgos. Cooperarán entre sí e intercambiarán información sobre las prácticas idóneas en materia de prevención de actos que puedan deteriorar el nivel de seguridad.

Artículo 27

Reclamaciones

1. Las empresas ferroviarias establecerán un sistema de tramitación de reclamaciones relativas a los derechos y obligaciones contemplados en el presente Reglamento. La empresa ferroviaria ofrecerá a los viajeros amplia información sobre la forma de ponerse en contacto con la empresa ferroviaria y sobre su lengua o lenguas de trabajo.

2. Los viajeros podrán dirigir su reclamación a cualquiera de las empresas ferroviarias pertinentes. En un plazo de un mes, el destinatario de la reclamación dará una respuesta motivada o, cuando el caso lo justifique, informará al viajero de la fecha para la cual cabe esperar una respuesta, sin que pueda superarse un plazo de tres meses desde la fecha de presentación de la reclamación.

3. La empresa ferroviaria publicará, en el informe anual a que se refiere el artículo 28, el número y tipo de las reclamaciones recibidas y de las reclamaciones tramitadas, el tiempo de respuesta y las eventuales medidas de mejora adoptadas.

Artículo 28

Normas de calidad del servicio

1. Las empresas ferroviarias definirán normas de calidad del servicio e implantarán un sistema de gestión de la calidad para el mantenimiento de la calidad del servicio. Las normas de calidad del servicio cubrirán, como mínimo, los aspectos indicados en el anexo III.

2. Las empresas ferroviarias controlarán sus propios resultados en materia de calidad según las normas de calidad del servicio. Además, publicarán cada año, junto con su informe anual, un informe sobre sus resultados en materia de calidad del servicio. Los informes sobre sus resultados en materia de calidad del servicio se publicarán en la página de Internet de las empresas ferroviarias. Además, estos informes estarán disponibles en la página de Internet de la Agencia Ferroviaria Europea.

CAPÍTULO VII

INFORMACIÓN Y EJECUCIÓN

Artículo 29

Información de los viajeros sobre sus derechos

1. Las empresas ferroviarias, los administradores de estaciones y los operadores turísticos, cuando vendan billetes de transporte ferroviario, informarán a los viajeros sobre los derechos y las obligaciones que les incumben en virtud del presente Reglamento. Con objeto de cumplir con este requisito de información, las empresas ferroviarias, los administradores de estaciones y los operadores turísticos podrán usar un resumen de las disposiciones del presente Reglamento preparado por la Comisión en todas las lenguas oficiales de las instituciones de la Unión Europea y puesto a disposición de las empresas ferroviarias, los administradores de empresas y los operadores turísticos.

2. Las empresas ferroviarias y los administradores de estaciones informarán adecuadamente a los viajeros, en la estación y en el tren, sobre los datos para ponerse en contacto con el organismo designado por los Estados miembros conforme al artículo 30.

Artículo 30

Ejecución

1. Cada Estado miembro deberá designar uno o varios organismos responsables de la ejecución del presente Reglamento. Cada organismo adoptará las medidas necesarias para garantizar el respeto de los derechos de los viajeros.

En lo que respecta a su organización, decisiones de financiación, estructura jurídica y procedimiento de adopción de decisiones, el organismo será independiente de los administradores de la infraestructura, organismos de tarifación, organismos adjudicadores y empresas ferroviarias.

Los Estados miembros notificarán a la Comisión el organismo u organismos que designen conforme al presente apartado y le comunicarán sus responsabilidades o, si son varios, sus responsabilidades respectivas.

2. Todo viajero podrá presentar reclamaciones relacionadas con supuestas infracciones del presente Reglamento al organismo pertinente designado con arreglo al apartado 1, o a cualquier otro organismo pertinente designado por el Estado miembro correspondiente.

Artículo 31

Cooperación entre los organismos de ejecución

Los organismos de ejecución mencionados en el artículo 30 deberán intercambiar información sobre su actividad, sus principios de adopción de decisiones y sus prácticas en la materia con el fin de coordinar dichos principios en toda la Comunidad. Para esa tarea, contarán con la asistencia de la Comisión.

CAPÍTULO VIII

DISPOSICIONES FINALES

Artículo 32

Sanciones

Los Estados miembros establecerán el régimen de sanciones aplicable en caso de infracción de las disposiciones del presente Reglamento y adoptarán cuantas medidas sean necesarias para garantizar su ejecución. Las sanciones deberán ser eficaces, proporcionales y disuasorias. Los Estados miembros notificarán esas disposiciones a la Comisión a más tardar el 3 de junio de 2010 y le comunicarán sin demora toda modificación posterior de las mismas.

Artículo 33

Anexos

Las medidas destinadas a modificar elementos no esenciales del presente Reglamento, adaptando los anexos de mismo, con excepción del anexo I, se adoptarán con arreglo al procedimiento de reglamentación con control contemplado en el artículo 35, apartado 2.

Artículo 34

Disposiciones modificadoras

1. Las medidas destinadas a modificar elementos no esenciales del presente Reglamento, completándolo, necesarias para la aplicación de los artículos 2, 10 y 12 se adoptarán con arreglo al procedimiento de reglamentación con control contemplado en el artículo 35, apartado 2.

2. Las medidas destinadas a modificar elementos no esenciales del presente Reglamento, ajustando los importes indicados en el presente Reglamento, con excepción del anexo I, para tener en cuenta la inflación, se adoptarán con arreglo al procedimiento de reglamentación con control contemplado en el artículo 35, apartado 2.

Artículo 35

Procedimiento de comité

1. La Comisión estará asistida por el Comité establecido por el artículo 11 *bis* de la Directiva 91/440/CEE.

2. En los casos en que se haga referencia al presente apartado, serán de aplicación el artículo 5 *bis*, apartados 1 a 4, y el artículo 7 de la Decisión 1999/468/CE, observando lo dispuesto en su artículo 8.

Artículo 36

Informe

La Comisión presentará al Parlamento Europeo y al Consejo un informe sobre la aplicación y los resultados del presente Reglamento a más tardar el 3 de diciembre de 2012, en particular en lo que se refiere a los normas de calidad del servicio.

El informe se basará en la información que ha de facilitarse en virtud del presente Reglamento y del artículo 10 *ter* de la Directiva 91/440/CEE. En caso necesario, el informe irá acompañado de las oportunas propuestas.

Artículo 37

Entrada en vigor

El presente Reglamento entrará en vigor a los veinticuatro meses de su publicación en el *Diario Oficial de la Unión Europea*.

El presente Reglamento será obligatorio en todos sus elementos y directamente aplicable en cada Estado miembro.

Hecho en Estrasburgo, el 23 de octubre de 2007.

Por el Parlamento Europeo
El Presidente
H.-G. PÖTTERING

Por el Consejo
El Presidente
M. LOBO ANTUNES

ANEXO I

Extracto de las reglas uniformes relativas al contrato de transporte internacional de viajeros y equipajes por ferrocarril (CIV)

Apéndice A

del Convenio relativo a los Transportes Internacionales por Ferrocarril (COTIF), de 9 de mayo de 1980, modificado por el Protocolo por el que se modifica el Convenio relativo a los Transportes Internacionales por Ferrocarril de 3 de junio de 1999

TÍTULO II

CONCLUSIÓN Y EJECUCIÓN DEL CONTRATO DE TRANSPORTE

Artículo 6

Contrato de transporte

1. Por medio del contrato de transporte, el transportista se compromete a transportar al viajero, así como, en su caso, equipajes y vehículos, al lugar de destino y a entregar los equipajes y vehículos en el lugar de destino.

2. El contrato de transporte deberá hacerse constar por medio de uno o varios títulos de transporte entregados al viajero. No obstante, sin perjuicio de lo establecido en el artículo 9, la falta, la irregularidad o la pérdida del título de transporte no afectarán ni a la existencia ni a la validez del contrato, que quedará sometido a las presentes Reglas uniformes.

3. El título de transporte hará fe, salvo prueba en contrario, de la conclusión y del contenido del contrato de transporte.

Artículo 7

Título de transporte

1. Las condiciones generales de transporte determinan la forma y el contenido de los títulos de transporte, así como la lengua y los caracteres en que deberán estar impresos y ser cumplimentados.

2. Deberá indicarse, como mínimo, en el título de transporte:

a) el transportista o los transportistas;

b) la observación de que el transporte queda sometido, pese a cualquier cláusula en contrario, a las presentes Reglas uniformes; ello podrá hacerse mediante la sigla CIV;

c) cualquier otra indicación necesaria para probar la conclusión y el contenido del contrato de transporte y que permita al viajero hacer valer los derechos que puedan resultar de este contrato.

3. El viajero deberá asegurarse, cuando reciba el título de transporte, de que este ha sido cumplimentado siguiendo sus indicaciones.

4. El título de transporte es transferible si no es nominativo y el viaje no ha comenzado.

5. El título de transporte podrá emitirse en forma de registro electrónico de datos, que puedan transformarse en signos de escritura legibles. Los procedimientos empleados para el registro y el tratamiento de datos deberán ser equivalentes desde el punto de vista funcional, en particular en lo que se refiere a la fuerza probatoria del título de transporte representado por dichos datos.

Artículo 8

Pago y reembolso del precio del transporte

1. Salvo convenio en contrario entre el viajero y el transportista, el precio del transporte será pagadero por adelantado.

2. Las condiciones generales de transporte determinarán las condiciones en que tendrá lugar un reembolso del precio del transporte.

Artículo 9

Derecho al transporte. Exclusión del transporte

1. Desde el comienzo del viaje, el viajero deberá ir provisto de un título válido de transporte y deberá presentarlo en el momento del control de los títulos de transporte. Las condiciones generales de transporte podrán prever:

a) que un viajero que no presente un título válido de transporte deba pagar, además del precio del transporte, una sobretasa;

b) que un viajero que se niegue al pago inmediato del precio del transporte o de la sobretasa pueda ser excluido del transporte;

c) cuándo y en qué condiciones podrá tener lugar un reembolso de la sobretasa.

2. Las condiciones generales de transporte podrán prever que queden excluidos del transporte o que puedan ser excluidos del transporte durante el viaje, los viajeros que:

a) representen un peligro para la seguridad y el buen funcionamiento de la explotación o para la seguridad de los demás viajeros;

b) que incomoden de manera intolerable a los demás viajeros,

y que dichas personas no tendrán derecho al reembolso ni del precio del transporte ni del precio que hubieran pagado por el transporte de sus equipajes.

Artículo 10

Cumplimiento de las formalidades administrativas

El viajero deberá atenerse a las formalidades requeridas por las aduanas o por otras autoridades administrativas.

Artículo 11

Supresión y retraso de un tren. Enlaces perdidos

El transportista deberá certificar, cuando proceda, en el título de transporte, que el tren ha sido suprimido o el enlace perdido.

TÍTULO III

TRANSPORTE DE BULTOS DE MANO, ANIMALES, EQUIPAJE FACTURADO Y VEHÍCULOS

Capítulo I

Disposiciones comunes

Artículo 12

Objetos y animales admitidos

1. El viajero podrá llevar consigo objetos fáciles de portar (bultos de mano), así como animales vivos, conforme a las condiciones generales de transporte. Por otra parte, el viajero podrá llevar consigo objetos voluminosos conforme a las disposiciones particulares contenidas en las condiciones generales de transporte. No podrán transportarse como bultos de mano los objetos o animales que puedan molestar o incomodar a los viajeros o que puedan causar un daño.

2. El viajero podrá expedir objetos y animales como equipaje facturado, conforme a las condiciones generales de transporte.

3. El transportista podrá admitir el transporte de vehículos cuando se efectúe un transporte de viajeros, conforme a las disposiciones particulares contenidas en las condiciones generales de transporte.

4. El transporte de mercancías peligrosas en bultos de mano, equipaje facturado, así como dentro o sobre vehículos que, conforme a este título, se transporten por ferrocarril, deberá ajustarse a lo dispuesto en el Reglamento relativo al Transporte Internacional de Mercancías Peligrosas por Ferrocarril (RID).

Artículo 13

Comprobación

1. El transportista tendrá el derecho a comprobar, en caso de presunción grave de inobservancia de las condiciones del transporte, si los objetos (bultos de mano, equipaje facturado, vehículos, incluida su carga) y animales transportados responden a las condiciones de transporte, cuando no lo prohíban las leyes y reglamentos del Estado en que la comprobación deba tener lugar. El viajero deberá ser invitado a asistir a la comprobación. Si no se presenta o no puede ser esperado, el transportista deberá llamar a dos testigos independientes.

2. Cuando se compruebe que no han sido respetadas las condiciones de transporte, el transportista podrá exigir del viajero el pago de los gastos ocasionados por la comprobación.

Artículo 14

Cumplimiento de las formalidades administrativas

El viajero deberá atenerse a las disposiciones requeridas por las aduanas o por otras autoridades administrativas en materia de transporte cuando lleve objetos (bultos de mano, equipaje facturado, vehículos, incluida su carga) y animales. Deberá asistir a la inspección de dichos objetos, salvo excepción prevista por las leyes y reglamentos de cada Estado.

Capítulo II

Bultos de mano y animales

Artículo 15

Vigilancia

La vigilancia de los bultos de mano y animales que lleve consigo incumbirá al viajero.

Capítulo III

Equipaje facturado

Artículo 16

Expedición de equipaje facturado

1. Las obligaciones contractuales relativas al despacho de equipaje facturado deberán hacerse constar mediante un talón de equipajes entregado al viajero.

2. Sin perjuicio de lo establecido en el artículo 22, la falta, la irregularidad o la pérdida del talón de equipajes no afectarán ni a la existencia ni a la validez de los convenios relativos al despacho de equipaje facturado, que quedan sometidos a las presentes Reglas uniformes.

3. El talón de equipajes hará fe, salvo prueba en contrario, de la facturación de equipajes y de las condiciones de su transporte.

4. Salvo prueba en contrario, existe la presunción de que en el momento de hacerse cargo el transportista de los equipajes, estos se encontraban en buen estado aparente y el número y el peso de los bultos correspondía a las indicaciones efectuadas en el talón de equipajes.

Artículo 17

Talón de equipajes

1. Las Condiciones generales de transporte determinarán la forma y el contenido del talón de equipajes, así como la lengua y los caracteres en que deberá estar impreso y ser cumplimentado. Se aplicará el artículo 7, apartado 5, por analogía.

2. Deberá indicarse, como mínimo, en el talón de equipajes:

a) el transportista o los transportistas;

b) la observación de que el transporte queda sometido, pese a cualquier cláusula en contrario, a las presentes Reglas uniformes; ello podrá hacerse mediante la sigla CIV;

c) cualquier otra indicación necesaria para la prueba de las obligaciones contractuales relativas al despacho de equipaje facturado y que permitan al viajero hacer valer los derechos que puedan resultar del contrato de transporte.

3. El viajero deberá asegurarse, cuando reciba el talón de equipajes, de que este ha sido cumplimentado siguiendo sus indicaciones.

Artículo 18

Facturación y transporte

1. Salvo excepción prevista en las condiciones generales de transporte, la facturación de equipajes solo se hará previa presentación de un título válido de transporte hasta el lugar de destino de los equipajes. Por lo demás, la facturación se efectuará según las disposiciones vigentes en el lugar de expedición.

2. Cuando en las condiciones generales de transporte esté previsto que puedan admitirse al transporte equipajes sin presentación de un título de transporte, las disposiciones de las presentes Reglas uniformes por las que se establecen los derechos y obligaciones del viajero relativos a sus equipajes facturados se aplicarán por analogía al expedidor de equipajes facturados.

3. El transportista podrá despachar los equipajes facturados en otro tren u otro medio de transporte y por otro itinerario distintos de los utilizados por el viajero.

Artículo 19

Pago del precio por el transporte de equipaje facturado

Salvo convenio en contrario entre el viajero y el transportista, el precio por el transporte de equipaje facturado será pagadero al efectuarse la facturación.

Artículo 20

Rotulación de equipajes

El viajero deberá indicar en cada bulto, en un lugar bien visible y de un modo suficientemente estable y claro:

a) su nombre y dirección;

b) el lugar de destino.

Artículo 21

Derecho a disponer del equipaje facturado

1. Cuando las circunstancias lo permitan y las disposiciones aduaneras o de otras autoridades administrativas no se opongan a ello, el viajero podrá solicitar la restitución de los equipajes al lugar de expedición, contra entrega del talón de equipajes y, cuando ello esté previsto en las condiciones generales de transporte, mediante la presentación del título de transporte.

2. Las condiciones generales de transporte podrán prever otras disposiciones relativas al derecho a disponer del equipaje facturado, en particular modificaciones acerca del lugar de destino y las posibles consecuencias económicas que deberá soportar el viajero.

Artículo 22

Entrega

1. La entrega de equipajes facturados tendrá lugar contra entrega del talón de equipajes y, en su caso, contra el pago de los gastos que graven el envío.

El transportista tendrá derecho a comprobar, sin estar obligado a ello, si el portador del talón está facultado para hacerse cargo de la entrega.

2. Se asimilan a la entrega al portador del talón de equipajes, cuando se efectúen conforme a las disposiciones vigentes en el lugar de destino:

a) la entrega de equipajes a autoridades aduaneras o tributarias en sus locales de expedición o en sus almacenes, cuando aquellos no se encuentren bajo custodia del transportista;

b) el hecho de confiar animales vivos a un tercero.

3. El portador de un talón de equipajes podrá solicitar la entrega de equipajes en el lugar de destino tan pronto haya transcurrido el tiempo convenido, así como en su caso, el tiempo necesario para las operaciones efectuadas por las aduanas o por otras autoridades administrativas.

4. En caso de falta de entrega del talón de equipajes, el transportista no estará obligado a entregar los equipajes más que a quien justifique su derecho; si dicha justificación no parece suficiente, el transportista podrá exigir una fianza.

5. Los equipajes serán entregados en el lugar de destino para el que hayan sido facturados.

6. El portador del talón de equipajes al que no se entreguen los equipajes podrá exigir que se deje constancia, en el talón de equipajes, del día y la hora en que haya pedido la entrega conforme al apartado 3.

7. El derechohabiente podrá negarse a recibir los equipajes si el transportista no atiende a su petición de que se proceda a la comprobación de los equipajes con el fin de dejar constancia de un daño alegado.

8. Por lo demás, la entrega de equipajes se efectuará conforme a las disposiciones vigentes en el lugar de destino.

Capítulo IV

Vehículos

Artículo 23

Condiciones de transporte

Las disposiciones particulares para el transporte de vehículos, contenidas en las condiciones generales de transporte, determinarán en especial las condiciones de admisión al transporte, facturación, carga y transporte, descarga y entrega, así como las obligaciones del viajero.

Artículo 24

Talón de transporte

1. Las obligaciones contractuales relativas al transporte de vehículos deberán hacerse constar mediante un talón de transporte remitido al viajero. El talón de transporte podrá estar integrado en el título de transporte del viajero.

2. Las disposiciones particulares para el transporte de vehículos contenidas en las condiciones generales de transporte determinarán la forma y el contenido del talón de transporte, así como la lengua y los caracteres en que deberá estar impreso y ser cumplimentado. El artículo 7, apartado 5, se aplicará por analogía.

3. Deberá indicarse, como mínimo, en el talón de transporte:

a) el transportista o los transportistas;

b) la observación de que el transporte queda sometido, pese a cualquier cláusula en contrario, a las presentes Reglas uniformes; ello podrá hacerse mediante la sigla CIV;

c) cualquier otra indicación necesaria para probar las obligaciones contractuales relativas a los transportes de vehículos y que permitan al viajero hacer valer los derechos que puedan resultar del contrato de transporte.

4. El viajero deberá asegurarse, cuando reciba el talón de transporte, de que este ha sido cumplimentado siguiendo sus indicaciones.

Artículo 25

Derecho aplicable

Con sujeción a lo dispuesto en el presente capítulo, las disposiciones del capítulo III relativas al transporte de equipajes se aplicarán a los vehículos.

TÍTULO IV

RESPONSABILIDAD DEL TRANSPORTISTA

Capítulo I

Responsabilidad en caso de muerte y lesiones de los viajeros

Artículo 26

Fundamento de la responsabilidad

1. El transportista será responsable del daño resultante de la muerte, de las lesiones o de cualquier otro daño a la integridad física o mental del viajero, causado por un accidente en relación con la explotación ferroviaria ocurrido durante la estancia del viajero en los coches ferroviarios, su entrada o salida de ellos, cualquiera que fuere la infraestructura ferroviaria utilizada.

2. El transportista quedará exento de esta responsabilidad:

a) si el accidente hubiera sido causado por circunstancias ajenas a la explotación ferroviaria que el transportista, a pesar de la diligencia requerida por las particularidades del caso, no haya podido evitar y cuyas consecuencias no haya podido obviar;

b) en la medida en que el accidente haya sido debido a culpa del viajero;

c) si el accidente se hubiera producido a causa del comportamiento de terceros que el transportista, a pesar de la diligencia requerida por las particularidades del caso, no haya podido evitar y cuyas consecuencias no haya podido obviar; otra empresa que utilice la misma infraestructura ferroviaria no será considerada como tercero; el derecho de repetición no se verá afectado.

3. Si el accidente se hubiera producido a causa del comportamiento de terceros y, a pesar de ello, el transportista no estuviera totalmente exento de responsabilidad conforme al apartado 2, letra c), el transportista responderá por la totalidad de los daños dentro de los límites establecidos en las presentes Reglas uniformes y sin perjuicio de su eventual derecho a repetir contra terceros.

4. Las presentes Reglas uniformes no afectarán a la responsabilidad que pueda incumbir al transportista en los casos no previstos en el apartado 1.

5. Cuando un transporte, objeto de un contrato de transporte único, sea efectuado por transportistas subsiguientes, será responsable, en caso de muerte y lesiones de los viajeros, el transportista a quien incumbiera, según el contrato de transporte, la prestación del servicio de transporte en cuyo transcurso el accidente se hubiera producido. Cuando esta prestación no hubiere sido efectuada por el transportista, sino por un transportista sustituto, ambos transportistas serán responsables solidariamente, conforme a las presentes Reglas uniformes.

Artículo 27

Daños y perjuicios en caso de muerte

1. En caso de muerte del viajero, los daños y perjuicios comprenderán:

a) los gastos necesarios a consecuencia del fallecimiento, especialmente los de transporte del cadáver y los de las exequias;

b) si la muerte no hubiere sido instantánea, los daños y perjuicios previstos en el artículo 28.

2. Si, por muerte del viajero, personas con las que este tuviera o hubiera tenido en el futuro una obligación de alimentos en virtud de la ley, se vieran privadas de su sustento, también habrá lugar a indemnizarlas de dicha pérdida. La acción por daños y perjuicios de las personas cuyo mantenimiento corra a cargo del viajero sin estar obligado a ello por ley quedará sometida al Derecho nacional.

Artículo 28

Daños y perjuicios en caso de lesiones

En caso de lesiones o de cualquier otro daño a la integridad física o mental del viajero, los daños y perjuicios comprenderán:

a) los gastos necesarios, especialmente los de tratamiento y los de transporte;

b) la reparación del perjuicio económico causado, bien por la incapacidad total o parcial para el trabajo, bien por el aumento de las necesidades.

Artículo 29

Reparación de otros daños corporales

El Derecho nacional determinará cuándo y en qué medida el transportista deberá abonar daños y perjuicios por daños corporales distintos de los previstos en los artículos 27 y 28.

Artículo 30

Forma y limitación de los daños y perjuicios en caso de muerte y de lesiones

1. Los daños y perjuicios previstos en el artículo 27, apartado 2, y en el artículo 28, letra b), deberán satisfacerse en forma de capital. No obstante, si el Derecho nacional permite la asignación de una renta, se satisfarán de esta forma cuando el viajero perjudicado o los derechohabientes mencionados en el artículo 27, apartado 2, lo soliciten.

2. El importe que deba satisfacerse por daños y perjuicios en virtud del apartado 1 se determinará con arreglo al Derecho nacional. No obstante, para la aplicación de las presentes Reglas uniformes, se fijará un limite máximo de 175 000 unidades de cuenta en capital o en renta anual correspondiente a dicho capital por cada viajero, cuando el Derecho nacional prevea un límite máximo por un importe inferior.

Artículo 31

Otros medios de transporte

1. Con sujeción a lo dispuesto en el apartado 2, las disposiciones relativas a la responsabilidad en caso de muerte y de lesiones de viajeros no se aplicarán a los daños acaecidos durante el transporte que, conforme al contrato de transporte, no fuera un transporte ferroviario.

2. No obstante, cuando los vehículos ferroviarios se transporten por transbordador (*ferry*), las disposiciones relativas a la responsabilidad en caso de muerte y de lesiones de los viajeros se aplicarán a los daños contemplados en el artículo 26, apartado 1, y en el artículo 33, apartado 1, causados por un accidente en relación con la explotación ferroviaria, acaecido durante la estancia del viajero en el mencionado vehículo o a su entrada o salida del mismo.

3. Cuando, por circunstancias excepcionales, la explotación ferroviaria se vea provisionalmente interrumpida y los viajeros sean transportados por otro medio de transporte, el transportista será responsable en virtud de las presentes Reglas uniformes.

Capítulo II

Responsabilidad en caso de incumplimiento del horario

Artículo 32

Responsabilidad en caso de supresión, retraso o enlaces perdidos

1. El transportista será responsable frente al viajero del daño resultante del hecho de que a causa de la supresión, del retraso o de un enlace perdido, el viaje no pueda continuar el mismo día, o que su continuación no sea razonablemente exigible el mismo día a causa de las circunstancias. Los daños y perjuicios comprenderán los gastos razonables de alojamiento, así como los gastos razonables en que pueda incurrirse para avisar a las personas que esperan al viajero.

2. El transportista quedará exento de dicha responsabilidad, cuando la supresión, el retraso o el enlace perdido sean imputables a una de las causas siguientes:

a) circunstancias ajenas a la explotación ferroviaria que el transportista, a pesar de la diligencia requerida por las particularidades del caso, no haya podido evitar y cuyas consecuencias no haya podido obviar;

b) culpa del viajero, o

c) el comportamiento de terceros que el transportista, a pesar de la diligencia requerida por las particularidades del caso, no haya podido evitar y cuyas consecuencias no haya podido obviar; otra empresa que utilice la misma infraestructura ferroviaria no será considerada como tercero; el derecho a repetir no se verá afectado.

3. El Derecho nacional determinará cuándo y en qué medida el transportista deberá abonar daños y perjuicios por daños distintos de los previstos en el apartado 1. Esta disposición no afectará a lo dispuesto en el artículo 44.

Capítulo III

Responsabilidad por bultos de mano, animales, equipajes facturados y vehículos

SECCIÓN 1

Bultos de mano y animales

Artículo 33

Responsabilidad

1. En caso de muerte y de lesiones de viajeros, el transportista será responsable, además, del daño resultante de la pérdida total o parcial, o de la avería, de los objetos que el viajero llevara sobre sí o consigo como bultos de mano; lo mismo sucederá con respecto a los animales que el viajero lleve consigo. El artículo 26 se aplicará por analogía.

2. Por lo demás, el transportista solo será responsable del daño resultante de la pérdida total o parcial o de la avería o daños que pudieran sufrir los objetos, bultos de mano o animales cuya vigilancia incumba al viajero, conforme al artículo 15, cuando dicho daño haya sido causado por culpa del transportista. Los demás artículos del título IV, a excepción del artículo 51, y el título VI, no serán aplicables en este caso.

Artículo 34

Limitaciones de los daños y perjuicios en caso de pérdida o de avería de objetos

Cuando el transportista sea responsable en virtud del artículo 33, apartado 1, deberá reparar el daño hasta un límite de 1 400 unidades de cuenta por cada viajero.

Artículo 35

Exención de responsabilidad

El transportista no será responsable frente al viajero del daño resultante del hecho de que el viajero no se atenga a las disposiciones de las aduanas o de otras autoridades administrativas.

SECCIÓN 2

Equipaje facturado

Artículo 36

Fundamento de la responsabilidad

1. El transportista será responsable del daño resultante de la pérdida total o parcial y de la avería de los equipajes facturados que se produzcan desde el momento en que el transportista se hace cargo de los mismos hasta su entrega, así como del retraso en la entrega.

2. El transportista quedará exento de esta responsabilidad en la medida en que la pérdida, la avería o el retraso en la entrega hubiera tenido como causa una falta del viajero, una orden dada por este que no sea resultado de una falta del transportista, un vicio propio de los equipajes facturados o circunstancias que el transportista no haya podido evitar y cuyas consecuencias no haya podido obviar.

3. El transportista quedará exento de esta responsabilidad en la medida en que la pérdida o la avería resulten de riesgos particulares inherentes a uno o varios de los siguientes hechos:

a) falta o defecto de embalaje;

b) naturaleza especial de los equipajes;

c) expedición como equipajes de objetos excluidos del transporte.

Artículo 37

Carga de la prueba

1. La prueba de que la pérdida, la avería o el retraso en la entrega hubieren sido motivados por uno de los hechos previstos en el artículo 36, apartado 2, incumbirá al transportista.

2. Cuando el transportista, teniendo en cuenta las circunstancias del caso, establezca que la pérdida o la avería haya podido resultar de uno o varios de los riesgos particulares previstos en el artículo 36, apartado 3, existirá la presunción de que se ha producido por dichas causas. No obstante, el derechohabiente seguirá teniendo derecho a probar que el daño no ha sido motivado, total o parcialmente, por uno de dichos riesgos.

Artículo 38

Transportistas subsiguientes

Cuando un transporte, objeto de un contrato de transporte único, sea efectuado por varios transportistas subsiguientes, cada transportista que tome a cargo los equipajes con el talón de equipajes o el vehículo con el talón de transporte, participará, en lo que respecta al despacho de equipajes o el transporte de vehículos, en el contrato de transporte conforme a las estipulaciones del talón de equipajes o del talón de transporte y asumirá las obligaciones que se deriven de los mismos. En este caso, cada transportista responderá de la ejecución del transporte por el trayecto total hasta la entrega.

Artículo 39

Transportista sustituto

1. El transportista que haya confiado, total o parcialmente, la ejecución de un transporte a un transportista sustituto, bien sea o no en el ejercicio de una facultad que le sea reconocida en el contrato de transporte, no dejará por ello de ser responsable de la totalidad del transporte.

2. Todas las disposiciones de las presentes Reglas uniformes que rigen la responsabilidad del transportista se aplicarán igualmente a la responsabilidad del transportista sustituto en lo que respecta al transporte efectuado por este último. Los artículos 48 y 52 se aplicarán cuando se entable una acción contra los agentes y cualesquiera otras personas a cuyos servicios recurra el transportista sustituto para la ejecución del transporte.

3. Cualquier convenio particular mediante el cual el transportista asuma obligaciones que no le incumban en virtud de las presentes Reglas uniformes, o renuncie a derechos que le sean conferidos por dichas Reglas uniformes, quedará sin efecto con respecto al transportista sustituto que no lo haya aceptado expresamente y por escrito. Con independencia de que el transportista sustituto haya aceptado o no dicho convenio, el transportista seguirá, no obstante, estando vinculado por las obligaciones o las renuncias que resulten del mencionado convenio particular.

4. En el caso y en la medida en que el transportista y el transportista sustituto sean responsables, su responsabilidad será solidaria.

5. El importe total de la indemnización debida por el transportista, el transportista sustituto y sus agentes, así como las demás personas a cuyos servicios recurran para la ejecución del transporte, no excederá de los límites previstos en las presentes Reglas uniformes.

6. El presente artículo no afectará a los derechos de repetición que puedan existir entre el transportista y el transportista sustituto.

Artículo 40

Presunción de pérdida

1. El derechohabiente podrá considerar perdido un bulto, sin tener que presentar otras pruebas, cuando no haya sido entregado o puesto a su disposición dentro de los catorce días siguientes a su petición de entrega, presentada conforme al artículo 22, apartado 3.

2. Si un bulto que se haya considerado perdido se hallase dentro del año siguiente a la petición de entrega, el transportista estará obligado a notificárselo al derechohabiente, cuando su domicilio sea conocido o pueda averiguarse.

3. Dentro de los 30 días siguientes a la recepción de la notificación a que se refiere el apartado 2, el derechohabiente podrá exigir que el bulto le sea entregado. En este caso, deberá pagar los gastos relacionados con el transporte del bulto desde el lugar de expedición hasta aquel en que deba tener lugar la entrega y restituir la indemnización recibida, una vez deducidos los gastos que, en su caso, hubieran sido comprendidos en dicha indemnización. No obstante, conservará sus derechos a la indemnización por retraso en la entrega previstos en el artículo 43.

4. Si el bulto encontrado no ha sido reclamado en el plazo previsto en el apartado 3, o si el bulto ha sido hallado transcurrido más de un año desde la petición de entrega, el transportista dispondrá del mismo conforme a las leyes y reglamentos vigentes en el lugar donde se encuentre el bulto.

Artículo 41

Indemnización en caso de pérdida

1. En caso de pérdida total o parcial de los equipajes facturados, el transportista deberá pagar, con exclusión de los demás daños y perjuicios:

a) si se ha probado el importe del daño, una indemnización igual a dicho importe, sin que exceda, no obstante, de 80 unidades de cuenta por kilogramo de peso bruto que falte o de 1 200 unidades de cuenta por bulto;

b) si no se ha probado el importe del daño, una indemnización calculada a tanto alzado de 20 unidades de cuenta por kilogramo de peso bruto que falte o de 300 unidades de cuenta por bulto.

La modalidad de la indemnización, por kilogramo que falte o por bulto, quedará determinada por las condiciones generales de transporte.

2. El transportista deberá reembolsar, además, el precio pagado por el transporte de los equipajes y las restantes cantidades desembolsadas con ocasión del transporte del bulto perdido, así como los derechos de aduana e impuestos sobre consumos específicos que ya se hubieran abonado.

Artículo 42

Indemnización en caso de avería

1. En caso de avería de equipaje facturado, el transportista deberá pagar, con exclusión de los demás daños y perjuicios, una indemnización equivalente a la depreciación sufrida por el equipaje.

2. La indemnización no podrá exceder de:

a) la cantidad a que habría ascendido en caso de pérdida total si la totalidad de los equipajes resultase depreciada por la avería;

b) la cantidad a que habría ascendido en caso de pérdida de la parte depreciada si solamente una parte de los equipajes resultase depreciada por la avería.

Artículo 43

Indemnización por retraso en la entrega

1. En caso de retraso en la entrega de los equipajes facturados, el transportista deberá pagar, por cada período indivisible de 24 horas a partir de la petición de entrega y hasta un máximo de catorce días:

a) si el derechohabiente prueba que se ha producido un perjuicio, comprendida una avería, una indemnización igual al importe del perjuicio hasta un máximo de 0,80 unidades de cuenta por kilogramo de peso bruto de los equipajes o de 14 unidades de cuenta por bulto, entregados con retraso;

b) si el derechohabiente no prueba que por ello se ha producido un perjuicio, una indemnización a tanto alzado de 0,14 unidades de cuenta por kilogramo de peso bruto de los equipajes o de 2,80 unidades de cuenta por bulto, entregados con retraso.

La modalidad de indemnización, por kilogramo o por bulto, quedará determinará por las condiciones generales de transporte.

2. En caso de pérdida total de los equipajes, la indemnización prevista en el apartado 1 no podrá acumularse a la del artículo 41.

3. En caso de pérdida parcial de los equipajes, la indemnización prevista en el apartado 1 será abonada por la parte no perdida.

4. En caso de avería de los equipajes no debida al retraso en la entrega, la indemnización prevista en el apartado 1 se acumulará, si ha lugar, a la del artículo 42.

5. En ningún caso la acumulación de la indemnización prevista en el apartado 1 a las previstas en los artículos 41 y 42 podrá dar lugar al pago de una indemnización superior a la que correspondería en caso de pérdida total de los equipajes.

SECCIÓN 3

Vehículos

Artículo 44

Indemnización en caso de retraso

1. En caso de retraso en la carga por causa imputable al transportista o de retraso en la entrega de un vehículo, el transportista deberá pagar, cuando el derechohabiente pruebe que de ello ha resultado un perjuicio, una indemnización cuyo importe no podrá exceder del precio del transporte.

2. Si el derechohabiente renuncia al contrato de transporte, en caso de retraso en la carga por causa imputable al transportista, el precio del transporte será reembolsado al derechohabiente. Además, este podrá reclamar, si prueba que ha resultado un perjuicio de ese retraso, una indemnización cuyo importe no podrá exceder del precio del transporte.

Artículo 45

Indemnización en caso de pérdida

En caso de pérdida total o parcial de un vehículo, la indemnización que deberá pagarse al derechohabiente por el daño probado será calculada de acuerdo con el valor usual del vehículo y no podrá exceder de 8 000 unidades de cuenta. Un remolque, con o sin carga, será considerado como un vehículo independiente.

Artículo 46

Responsabilidad en lo que se refiere a otros objetos

1. En lo referente a los objetos dejados en el vehículo, o que se hallen en cofres (por ejemplo, cofres portaequipajes o para esquíes), sólidamente fijados al vehículo, el transportista solo será responsable del daño causado por su culpa. La indemnización total a pagar no podrá exceder de 1 400 unidades de cuenta.

2. En lo que se refiere a los objetos fijados en el exterior del vehículo, comprendidos los cofres mencionados en el apartado 1, el transportista solo será responsable en el caso de que se pruebe que el daño está motivado por un acto u por una omisión cometidos por el transportista, bien con intención de provocarlo o de modo temerario y sabiendo que de ello podría resultar dicho daño.

Artículo 47

Derecho aplicable

Con sujeción a lo dispuesto en la presente sección, las disposiciones de la sección 2 relativas a la responsabilidad respecto a los equipajes serán igualmente aplicables a los vehículos.

Capítulo IV

Disposiciones comunes

Artículo 48

Inaplicabilidad del derecho a invocar los límites de responsabilidad

Los límites de responsabilidad previstos en las presentes Reglas uniformes, así como las disposiciones del Derecho nacional que limiten las indemnizaciones a una cantidad determinada, no se aplicarán cuando se pruebe que el daño es resultado de un acto o de una omisión cometidos por el transportista, bien con intención de provocarlo, o de modo temerario y sabiendo que de ello podría resultar dicho daño.

Artículo 49

Conversión e intereses

1. Cuando el cálculo de la indemnización implique la conversión de cantidades expresadas en unidades monetarias extranjeras, la conversión se hará con arreglo al tipo de cambio del día y del lugar de pago de la indemnización.

2. El derechohabiente podrá pedir intereses sobre la indemnización, calculados a razón del 5 % anual, a partir del día de la reclamación prevista en el artículo 55 o, de no existir reclamación, desde la fecha de presentación de la demanda judicial.

3. No obstante, las indemnizaciones establecidas en virtud de los artículos 27 y 28 solo devengarán intereses a contar desde el día en que se produjeron los hechos que sirvieron de base para la determinación de su importe, si ese día fuese posterior al de la reclamación o al de presentación de la demanda judicial.

4. En lo que se refiere a los equipajes, solo se abonarán intereses si la indemnización excede de 16 unidades de cuenta por talón de equipajes.

5. En lo que se refiere a los equipajes, si el derechohabiente no entrega al transportista, dentro del plazo razonable que le haya sido fijado, los documentos justificativos necesarios para la liquidación definitiva de la reclamación, no se devengarán intereses entre la expiración del plazo fijado y la entrega efectiva de los documentos.

Artículo 50

Responsabilidad en caso de accidente nuclear

El transportista quedará liberado de la responsabilidad que le incumbe en virtud de las presentes Reglas uniformes cuando el daño haya sido causado por un accidente nuclear y cuando, en aplicación de las leyes y reglamentos de un Estado que regulen la responsabilidad en el ámbito de la energía nuclear, sea responsable de ese daño quien explote una instalación nuclear u otra persona que le sustituya.

Artículo 51

Personas de las que responde el transportista

El transportista será responsable de sus agentes y de las demás personas a cuyos servicios recurra para la ejecución del transporte, cuando dichos agentes o personas actúen en el ejercicio de sus funciones. Los gestores de la infraestructura ferroviaria en que se efectúe el transporte serán considerados como personas a cuyos servicios recurre el transportista para la ejecución del transporte.

Artículo 52

Otras acciones

1. En todos los casos en que sean aplicadas las presentes Reglas uniformes no se podrá ejercer contra el transportista ninguna acción de responsabilidad, por cualquier causa que sea, si no es bajo las condiciones y límites establecidos en estas Reglas uniformes.

2. Lo mismo sucederá con cualquier acción que se ejerza contra los agentes y demás personas de las que responda el transportista en virtud del artículo 51.

TÍTULO V

RESPONSABILIDAD DEL VIAJERO

Artículo 53

Principios particulares de responsabilidad

El viajero será responsable frente al transportista por cualquier daño o perjuicio:

a) resultante del incumplimiento por el viajero de las obligaciones que le incumben en virtud:

   1) de los artículos 10, 14 y 20;

   2) de las disposiciones particulares para el transporte de vehículos, contenidas en las condiciones generales de transporte, o

   3) del Reglamento relativo al Transporte Internacional de Mercancías Peligrosas por Ferrocarril (RID), o

b) causado por los objetos o animales que lleve consigo el viajero,

a no ser que este pruebe que el daño o perjuicio ha sido motivado por circunstancias que no haya podido evitar y cuyas consecuencias no haya podido obviar, a pesar de haber actuado con la diligencia requerida de un viajero cuidadoso. Esta disposición no afectará a la responsabilidad que pueda incumbir al transportista en virtud del artículo 26 y del artículo 33, apartado 1.

TÍTULO VI

EJERCICIO DE LOS DERECHOS

Artículo 54

Comprobación de la pérdida parcial o de la avería

1. Cuando el transportista descubra o presuma la existencia de una pérdida parcial o de una avería de un objeto transportado bajo su custodia (equipajes, vehículos), o el derechohabiente alegue su existencia, el transportista estará obligado a levantar sin demora, y a ser posible, en presencia del derechohabiente, un acta en la que se haga constar, según la naturaleza del daño, el estado del objeto y, en lo posible, la cuantía del daño, su causa y el momento en que se produjo.

2. Deberá entregarse gratuitamente una copia del acta al derechohabiente.

3. Si el derechohabiente no aceptase lo indicado en el acta, podrá pedir que el estado de los equipajes o del vehículo, así como la causa y el importe del daño sean comprobados por un perito designado por las partes en el contrato de transporte o por vía judicial. El procedimiento quedará sometido a las leyes y reglamentos del Estado en que tenga lugar la comprobación.

Artículo 55

Reclamaciones

1. Las reclamaciones relativas a la responsabilidad del transportista en caso de muerte o de lesiones de viajeros deberán dirigirse por escrito al transportista contra quien pueda ejercerse la acción judicial. En el caso de un transporte objeto de un contrato único y efectuado por transportistas subsiguientes, las reclamaciones podrán igualmente dirigirse al primero o al último transportista, así como al transportista que tenga su sede principal o la sucursal o el establecimiento que haya concluido el contrato de transporte en el Estado del domicilio o de residencia habitual del viajero.

2. Las demás reclamaciones relativas al contrato de transporte deberán dirigirse por escrito al transportista designado en el artículo 56, apartados 2 y 3.

3. Los documentos que el derechohabiente desee adjuntar a la reclamación por considerarlos de utilidad deberán ser presentados, bien en el original, bien en copia, debidamente legalizada si el transportista así lo solicita. Al producirse el pago de la reclamación, el transportista podrá exigir la restitución del título de transporte, el talón de equipajes y el talón de transporte.

Artículo 56

Transportistas que pueden ser demandados

1. La acción judicial fundada en la responsabilidad del transportista en caso de muerte y de lesiones de los viajeros solo podrá ejercerse contra un transportista responsable en el sentido del artículo 26, apartado 5.

2. A reserva de lo dispuesto en el apartado 4, las demás acciones judiciales de los viajeros fundadas en el contrato de transporte podrán ejercerse únicamente contra el primero o el último transportista o contra aquel que hubiera efectuado la parte del transporte durante la cual se hubiera producido el hecho generador de la acción.

3. Cuando, en el caso de transportes efectuados por transportistas subsiguientes, el transportista que deba hacer entrega del equipaje o del vehículo esté designado con su consentimiento en el talón de equipajes o en el talón de transporte, podrá entablarse una acción contra él conforme al apartado 2, aunque no hubiera recibido los equipajes o el vehículo.

4. La acción judicial para la restitución de una cantidad pagada en virtud del contrato de transporte podrá ejercitarse contra el transportista que haya percibido dicha cantidad o contra aquel a cuyo favor se hubiera cobrado.

5. La acción judicial podrá ejercitarse contra un transportista distinto de los indicados en los apartados 2 y 4 cuando se presente como demanda reconvencional o como excepción en el procedimiento relativo a una demanda principal fundada en el mismo contrato de transporte.

6. En la medida en que las presentes Reglas uniformes sean aplicables al transportista sustituto, podrá igualmente entablarse una acción contra él.

7. Si el demandante pudiera elegir entre varios transportistas, su derecho de opción se extinguirá desde el momento en que entable la acción judicial contra uno de ellos; lo mismo sucederá si el demandante puede elegir entre uno o varios transportistas y un transportista sustituto.

Artículo 58

Extinción del derecho de acción en caso de muerte o de lesiones

1. Todo derecho de acción del derechohabiente fundado en la responsabilidad del transportista en caso de muerte o de lesiones de viajeros quedará extinguido si el derechohabiente no notifica el accidente ocurrido al viajero, dentro de los 12 meses a partir del conocimiento del daño, a uno de los transportistas a los que se pueda presentar una reclamación con arreglo al artículo 55, apartado 1. En caso de que el derechohabiente notifique el accidente verbalmente al transportista, este deberá entregarle una certificación de dicha notificación verbal.

2. No obstante, no se extinguirá el derecho de acción si:

a) dentro del plazo previsto en el apartado 1, el derechohabiente hubiera presentado una reclamación ante uno de los transportistas indicados en el artículo 55, apartado 1;

b) dentro del plazo previsto en el apartado 1, el transportista responsable hubiera tenido conocimiento por otro medio del accidente ocurrido al viajero;

c) el accidente no hubiera sido notificado o lo hubiera sido con retraso, por circunstancias que no sean imputables al derechohabiente;

d) el derechohabiente presenta la prueba de que el accidente ha sido causado por culpa del transportista.

Artículo 59

Extinción del derecho de acción derivado del transporte de equipajes

1. La recepción de los equipajes por parte del derechohabiente extinguirá todo derecho de acción contra el transportista, derivado del contrato de transporte, en caso de pérdida parcial, avería o retraso en la entrega.

2. No obstante, no se extinguirá el derecho de acción:

a) en caso de pérdida parcial o de avería,

   1) si la pérdida o la avería ha sido comprobada conforme al artículo 54 antes de la recepción de los equipajes por el derechohabiente;

   2) si la comprobación que hubiera debido hacerse conforme al artículo 54 no se ha efectuado por culpa únicamente del transportista;

b) en el caso de daño no aparente cuya existencia se comprueba después de la recepción de los equipajes por el derechohabiente, si este

   1) solicita la comprobación conforme al artículo 54 inmediatamente después del descubrimiento del daño y a más tardar en los tres días siguientes a la recepción de los equipajes, y

   2) prueba, además, que el daño se ha producido entre el momento de hacerse cargo el transportista del equipaje y la entrega;

c) en caso de retraso en la entrega, si el derechohabiente ha hecho valer sus derechos ante uno de los transportistas señalados en el artículo 56, apartado 3, en un plazo que no exceda de 21 días;

d) si el derechohabiente presenta pruebas de que el daño ha sido causado por culpa del transportista.

Artículo 60

Prescripción

1. Las acciones por daños y perjuicios basadas en la responsabilidad del transportista en caso de muerte o de lesiones de viajeros prescribirán:

a) en lo que respecta al viajero, a los tres años, que se contarán a partir del día siguiente al del accidente;

b) con respecto a los demás derechohabientes, a los tres años, que se contarán a partir del día siguiente al de fallecimiento del viajero, sin que, no obstante, este plazo pueda sobrepasar de cinco años a partir del día siguiente al del accidente.

2. Las demás acciones nacidas del contrato de transporte prescribirán al transcurrir un año. No obstante, prescribirán a los dos años si se trata de una acción fundada en un daño resultante de un acto o una omisión cometidos, bien con intención de provocar ese daño, o bien temerariamente y sabiendo que de ello podría resultar dicho daño.

3. El plazo de prescripción previsto en el apartado 2 correrá:

a) para la acción de indemnización por pérdida total: desde el decimocuarto día siguiente al de expiración del plazo previsto en el artículo 22, apartado 3;

b) para la acción de indemnización por pérdida parcial, avería o retraso en la entrega: desde el día en que haya tenido lugar la entrega;

c) para todas las demás acciones relativas al transporte de viajeros: desde el día de expiración de la validez del título de transporte.

El día indicado como punto de partida del plazo de prescripción nunca estará comprendido en el plazo.

4. […]

5. […]

6. A reserva de lo anteriormente dispuesto, la suspensión y la interrupción de la prescripción se regirán por el Derecho nacional.

TÍTULO VII

RELACIONES ENTRE TRANSPORTISTAS

Artículo 61

Repartición del precio del transporte

1. Todo transportista estará obligado a pagar a los transportistas interesados la parte que les corresponda del precio de transporte que haya percibido o que hubiera debido percibir. Las modalidades de pago quedarán fijadas por convenio entre los transportistas.

2. El artículo 6, apartado 3, el artículo 16, apartado 3, y el artículo 25 se aplicarán igualmente en las relaciones entre transportistas subsiguientes.

Artículo 62

Derecho de repetición

1. El transportista que haya pagado una indemnización en virtud de las presentes Reglas uniformes tendrá derecho a repetir contra los transportistas que hayan participado en el transporte conforme a las disposiciones siguientes:

a) el transportista causante del daño será el único responsable del mismo;

b) si son varios los transportistas causantes del daño, cada uno de ellos responderá del daño que hubiera causado; si la distinción es imposible, se repartirá entre ellos la carga de la indemnización, conforme los principios enunciados en la letra c);

c) si no puede probarse cuál de los transportistas ha causado el daño, se repartirá la carga de la indemnización entre todos los transportistas que hayan participado en el transporte, a excepción de aquellos que demuestren que no fueron causantes del daño acaecido; el reparto se hará proporcionalmente a la parte del precio del transporte que corresponda a cada uno de los transportistas.

2. En caso de insolvencia de uno de dichos transportistas, la parte que le corresponda y que no haya pagado se repartirá entre todos los demás transportistas que hubieren intervenido en el transporte, proporcionalmente a la parte del precio del transporte que corresponda a cada uno de ellos.

Artículo 63

Procedimiento en caso de repetición

1. El transportista contra el que se entable una acción de repetición no estará facultado para impugnar el fundamento de un pago efectuado por el transportista que la haya entablado en virtud del artículo 62 si la indemnización ha sido fijada judicialmente y el primer transportista ha recibido debidamente la notificación de las actuaciones y ha tenido oportunidad de intervenir en el proceso. El juez que entienda de la acción principal fijará los plazos concedidos para la notificación de la demanda y para la intervención.

2. El transportista que desee ejercer su derecho de repetición deberá formular la demanda en una sola y única instancia contra todos los transportistas con los cuales no hubiere transigido, so pena de perder su derecho de repetición contra aquellos a quienes no haya incluido en la demanda.

3. El juez deberá resolver en una misma sentencia todas las acciones de que sea competente sometidas a su decisión.

4. El transportista que desee hacer valer su derecho de repetición podrá entablar la correspondiente acción ante los tribunales del Estado en cuyo territorio alguno de los transportistas participantes en el transporte tenga su sede principal o la sucursal o el establecimiento que hubiera concluido el contrato de transporte.

5. Cuando la acción deba entablarse contra varios transportistas, el transportista que la ejercite podrá elegir para hacerlo uno cualquiera de los tribunales competentes en virtud del apartado 4.

6. No podrán acumularse los procedimientos de repetición a las acciones de indemnización ejercidas por el derechohabiente con arreglo al contrato de transporte.

Artículo 64

Acuerdos relativos a las acciones

Los transportistas gozan de libertad para convenir entre ellos disposiciones que dejen sin efecto lo dispuesto en los artículos 61 y 62.

ANEXO II

INFORMACIÓN MÍNIMA QUE DEBEN FACILITAR LAS EMPRESAS FERROVIARIAS Y/O LOS PROVEEDORES DE BILLETES

Parte I: Información previa al viaje

Condiciones generales aplicables al contrato

Horarios y condiciones del viaje más rápido

Horarios y condiciones de las tarifas más baratas

Accesibilidad, condiciones de acceso y disponibilidad de instalaciones a bordo para personas con discapacidad y personas de movilidad reducida

Accesibilidad y condiciones de acceso para bicicletas

Asientos o plazas disponibles en los vagones de fumadores y de no fumadores, en primera y en segunda clase y en literas y coches-cama

Actividades que puedan perturbar o retrasar los servicios

Disponibilidad de servicios a bordo

Procedimientos para recuperar el equipaje extraviado

Procedimientos para presentar reclamaciones.

Parte II: Información durante el viaje

Servicios a bordo

Estación siguiente

Retrasos

Principales servicios de enlace

Cuestiones de seguridad.

ANEXO III

NORMAS MÍNIMAS DE CALIDAD DEL SERVICIO

Información y billetes

Puntualidad de los servicios y principios generales para hacer frente a las perturbaciones de los servicios

Cancelaciones de servicios

Limpieza del material rodante y de las instalaciones de las estaciones (calidad del aire en los vagones, higiene de las instalaciones sanitarias, etc.)

Estudios sobre satisfacción de los usuarios

Tramitación de reclamaciones, reembolsos e indemnizaciones por el incumplimiento de las normas de calidad del servicio

Prestación de asistencia a las personas con discapacidad y las personas de movilidad reducida.

I

(Actos cuya publicación es una condición para su aplicabilidad)

REGLAMENTO (CE) Nº 1107/2006 DEL PARLAMENTO EUROPEO Y DEL CONSEJO

de 5 de julio de 2006

sobre los derechos de las personas con discapacidad o movilidad reducida en el transporte aéreo

(Texto pertinente a efectos del EEE)

EL PARLAMENTO EUROPEO Y EL CONSEJO DE LA UNIÓN EUROPEA,

Visto el Tratado constitutivo de la Comunidad Europea y, en particular, su artículo 80, apartado 2,

Vista la propuesta de la Comisión,

Visto el dictamen del Comité Económico y Social Europeo ([1]),

Previa consulta al Comité de las Regiones,

De conformidad con el procedimiento establecido en el artículo 251 del Tratado ([2]),

Considerando lo siguiente:

(1) El mercado único de servicios aéreos debe resultar beneficioso para todos los ciudadanos. Por consiguiente, las personas con discapacidad o movilidad reducida por motivos de discapacidad, edad o cualquier otro factor deben tener las mismas oportunidades de utilizar el transporte aéreo que los demás ciudadanos. Las personas con discapacidad o movilidad reducida tienen el mismo derecho que todos los demás ciudadanos a la libertad de circulación, la libertad de elección y la no discriminación. Esto se aplica tanto al transporte aéreo como a otros ámbitos de la vida.

(2) No debe por lo tanto denegarse el transporte a las personas con discapacidad o movilidad reducida alegando su discapacidad o movilidad reducida, salvo por motivos justificados por razones de seguridad y establecidos en la ley. Antes de aceptar reservas de personas con discapacidad o movilidad reducida, las compañías aéreas, sus agentes y los operadores turísticos deben hacer todos los esfuerzos que sean razonables para comprobar si existe un motivo justificado por razón de seguridad que impida que dichas personas viajen en los vuelos en cuestión.

(3) El presente Reglamento no debe afectar a los demás derechos de los pasajeros establecidos en la normativa comunitaria, y, especialmente, en la Directiva 90/314/CEE del Consejo, de 13 de junio de 1990, relativa a los viajes combinados, las vacaciones combinadas y los circuitos combinados ([3]), y en el Reglamento (CE) nº 261/2004 del Parlamento Europeo y del Consejo, de 11 de febrero de 2004, por el que se establecen normas comunes sobre compensación y asistencia a los pasajeros aéreos en caso de denegación de embarque y de cancelación o gran retraso de los vuelos ([4]). En caso de que un mismo suceso diera lugar al mismo derecho de reembolso o de cambio de reserva con arreglo a uno de esos actos legislativos así como al presente Reglamento, la persona interesada debe poder ejercer tal derecho una sola vez como mejor le convenga.

(4) Para conseguir que las oportunidades de viajar en avión de las personas con discapacidad o movilidad reducida sean comparables a las de los demás ciudadanos, es preciso prestarles asistencia para satisfacer sus necesidades particulares tanto en los aeropuertos como a bordo de las aeronaves, haciendo uso del personal y del equipamiento necesarios. El objetivo de inclusión social exige que esta asistencia no implique cargo adicional alguno.

(5) La asistencia dispensada en los aeropuertos situados en el territorio de un Estado miembro sujeto a las disposiciones del Tratado debe, entre otras cosas, permitir a las personas con discapacidad o movilidad reducida desplazarse desde un punto designado de llegada al aeropuerto hasta el avión, y desde el avión hasta un punto designado de salida del aeropuerto, incluyendo las operaciones de embarque y desembarque. Estos puntos deben designarse como mínimo en las entradas principales de los edificios terminales, en zonas con mostradores de facturación, en estaciones de tren, tren de cercanías, metro y autobús, paradas de taxi y otros puntos de bajada, así como en los aparcamientos del aeropuerto. La asistencia debe organizarse de modo que no sea objeto de interrupción ni demora alguna, presentar un nivel de calidad elevado y homogéneo en toda la Comunidad y hacer el mejor uso posible de los recursos, con independencia del aeropuerto o la línea aérea de que se trate.

([1]) DO C 24 de 31.1.2006, p. 12.

([2]) Dictamen del Parlamento Europeo de 15 de diciembre de 2005 (no publicado aún en el Diario Oficial) y Decisión del Consejo de 9 de junio de 2006.

([3]) DO L 158 de 23.6.1990, p. 59.

([4]) DO L 46 de 17.2.2004, p. 1.

(6) Para alcanzar estos objetivos, garantizar una asistencia de alta calidad en los aeropuertos debe ser responsabilidad de un órgano central. Dado que las entidades gestoras de los aeropuertos desempeñan un papel crucial en la prestación de servicios en todo el aeropuerto, debe atribuírseles esa responsabilidad general.

(7) Las entidades gestoras de los aeropuertos pueden proporcionar ellas mismas asistencia a las personas con discapacidad o movilidad reducida. Como alternativa, en vista del papel positivo desempeñado en el pasado por determinados operadores y compañías aéreas, las entidades gestoras pueden contratar con terceros la prestación de esta asistencia, sin perjuicio de la aplicación de las normas pertinentes del Derecho comunitario, incluidas las relativas a la contratación pública.

(8) La asistencia debe financiarse de forma que los costes se distribuyan equitativamente entre todos los pasajeros que utilicen el aeropuerto y con la finalidad de evitar cualquier factor que desincentive el transporte de las personas con discapacidad o movilidad reducida. La imposición a cada una de las compañías aéreas usuarias de un aeropuerto de una tarifa proporcional al número de pasajeros que transporte con origen o destino en el mismo se considera la mejor forma de financiación.

(9) Con objeto de garantizar, en particular, que las tarifas impuestas a una compañía aérea sean proporcionales a la asistencia proporcionada a las personas con discapacidad o movilidad reducida, y que dichas tarifas no sirvan para financiar actividades de la entidad gestora distintas de las relacionadas con la prestación de dicha asistencia, las tarifas deben adoptarse y aplicarse de una forma totalmente transparente. Por lo tanto, la Directiva 96/67/CE del Consejo, de 15 de octubre de 1996, relativa al acceso al mercado de asistencia en tierra en los aeropuertos de la Comunidad [1], y, en particular, las disposiciones relativas a la separación de actividades, deben aplicarse siempre que no entren en conflicto con el presente Reglamento.

(10) Al organizar la prestación de asistencia a las personas con discapacidad o movilidad reducida, así como la formación de su personal, los aeropuertos y las compañías aéreas deben tener en cuenta el documento 30 de la Conferencia Europea de Aviación Civil (CEAC), parte I, sección 5, y sus anexos, en particular el Código de conducta para la asistencia en tierra de las personas con movilidad reducida establecido en su anexo J, con la redacción que tenga en el momento de adopción del presente Reglamento.

(11) A la hora de decidir el diseño de los nuevos aeropuertos y terminales, o en caso de renovaciones importantes, las entidades gestoras de los aeropuertos deben tener en cuenta, siempre que sea posible, las necesidades de las personas con discapacidad o movilidad reducida. Asimismo, en la medida de lo posible, las compañías aéreas deben tomar dichas necesidades en consideración a la hora de decidir el diseño de los aviones nuevos y nuevamente acondicionados.

(12) La Directiva 95/46/CE del Parlamento Europeo y del Consejo, de 24 de octubre de 1995, relativa a la protección de las personas físicas en lo que respecta al tratamiento de datos personales y a la libre circulación de estos datos [2], debe ser de estricta aplicación, con el fin de garantizar que se respete la intimidad de las personas con discapacidad o movilidad reducida, que la información requerida se limite a cumplir las obligaciones de asistencia establecidas en el presente Reglamento y que no se utilice en contra de los pasajeros que solicitan el servicio.

(13) Toda la información esencial facilitada a los pasajeros del transporte aéreo debe proporcionarse en formatos alternativos que sean accesibles para las personas con discapacidad o movilidad reducida, y estar disponible, como mínimo, en los mismos idiomas que la proporcionada a los demás pasajeros.

(14) En caso de que las sillas de ruedas u otros equipos de movilidad y dispositivos de asistencia se pierdan o sufran daños durante el manejo en el aeropuerto o durante el transporte a bordo de las aeronaves, se debe indemnizar al pasajero a quien pertenezcan con arreglo a las normas del Derecho internacional, comunitario y nacional.

(15) Los Estados miembros deben supervisar y asegurar el cumplimiento del presente Reglamento y designar al organismo responsable del control del mismo. Esa supervisión no afecta al derecho de las personas con discapacidad o movilidad reducida a recurrir a los tribunales para obtener indemnización con arreglo a las leyes nacionales.

(16) Es importante que una persona con discapacidad o movilidad reducida que considere que se ha infringido el presente Reglamento pueda hacerlo saber a la entidad gestora del aeropuerto o a la compañía aérea interesada, según proceda. En caso de que la persona con discapacidad o movilidad reducida no obtuviera satisfacción de esa manera, puede elevar una reclamación al organismo u organismos designados a tal efecto por el Estado miembro pertinente.

(17) Las reclamaciones relativas a la asistencia prestada en un aeropuerto deben elevarse al organismo u organismos designados para dar cumplimiento al presente Reglamento por el Estado miembro donde esté situado el aeropuerto. Las reclamaciones relativas a la asistencia prestada por una compañía aérea deben elevarse al organismo u organismos designados para dar cumplimiento al presente Reglamento por el Estado miembro que haya otorgado la licencia de operador a la compañía aérea.

[1] DO L 272 de 25.10.1996, p. 36. Directiva modificada por el Reglamento (CE) nº 1882/2003 del Parlamento Europeo y del Consejo (DO L 284 de 31.10.2003, p. 1).

[2] DO L 281 de 23.11.1995, p. 31. Directiva modificada por el Reglamento (CE) nº 1882/2003.

(18) Los Estados miembros deben establecer las sanciones aplicables a las infracciones del presente Reglamento y garantizar la ejecución de las mismas. Dichas sanciones, que podrían incluir una orden de pago de una compensación a la persona afectada, deben ser eficaces, proporcionadas y disuasorias.

(19) Dado que los objetivos del presente Reglamento, a saber, garantizar unos niveles de protección y asistencia elevados y equivalentes en todos los Estados miembros y asegurar que los agentes económicos operan en condiciones armonizadas en un mercado único, no pueden ser alcanzados de manera suficiente por los Estados miembros y, por consiguiente, debido a la escala o los efectos de la actuación, pueden lograrse mejor en el ámbito comunitario, la Comunidad puede adoptar medidas, de acuerdo con el principio de subsidiariedad consagrado en el artículo 5 del Tratado. De conformidad con el principio de proporcionalidad enunciado en dicho artículo, el presente Reglamento no excede de lo necesario para alcanzar dichos objetivos.

(20) El presente Reglamento respeta los derechos fundamentales y observa los principios reconocidos, entre otros textos, en la Carta de Derechos Fundamentales de la Unión Europea.

(21) Las disposiciones relativas a una mayor cooperación en el uso del aeropuerto de Gibraltar fueron el resultado de un acuerdo alcanzado en Londres el 2 de diciembre de 1987 por el Reino de España y el Reino Unido de Gran Bretaña e Irlanda del Norte en una declaración conjunta de los Ministros de Asuntos Exteriores de ambos países. Dichas disposiciones todavía no se han aplicado.

HAN ADOPTADO EL PRESENTE REGLAMENTO:

Artículo 1

Objetivo y ámbito de aplicación

1. El presente Reglamento establece las normas de protección y asistencia de personas con discapacidad o movilidad reducida en el transporte aéreo, tanto para protegerlas de la discriminación como para asegurar que reciban asistencia.

2. Las disposiciones del presente Reglamento serán aplicables a las personas con discapacidad o movilidad reducida que utilicen o pretendan utilizar vuelos comerciales de pasajeros que salgan de los aeropuertos situados en el territorio de un Estado miembro sujeto a las disposiciones del Tratado, lleguen a esos aeropuertos o transiten por ellos.

3. Lo dispuesto en los artículos 3, 4 y 10 se aplicará, asimismo, a los pasajeros que salgan de un aeropuerto situado en un tercer país con destino a otro aeropuerto situado en el territorio de un Estado miembro sujeto a las disposiciones del Tratado, si la compañía aérea operadora es comunitaria.

4. El presente Reglamento no afectará a los derechos de los pasajeros establecidos en la Directiva 90/314/CEE y en el Reglamento (CE) nº 261/2004.

5. En la medida en que las disposiciones del presente Reglamento entren en conflicto con las de la Directiva 96/67/CE, prevalecerá el presente Reglamento.

6. La aplicación de las disposiciones del presente Reglamento al aeropuerto de Gibraltar se entenderá sin perjuicio de las respectivas posiciones jurídicas del Reino de España y del Reino Unido de Gran Bretaña e Irlanda del Norte acerca de la controversia respecto de la soberanía sobre el territorio en el que el aeropuerto se encuentra situado.

7. La aplicación de las disposiciones del presente Reglamento quedará suspendida hasta que comience la aplicación del régimen contenido en la Declaración conjunta de los Ministros de Asuntos Exteriores del Reino de España y del Reino Unido de Gran Bretaña e Irlanda del Norte de 2 de diciembre de 1987. Los Gobiernos de España y del Reino Unido informarán al Consejo sobre dicha fecha de aplicación.

Artículo 2

Definiciones

A efectos del presente Reglamento se entenderá por:

a) «persona con discapacidad» o «persona con movilidad reducida»: toda persona cuya movilidad para utilizar el transporte se halle reducida por motivos de discapacidad física (sensorial o locomotriz, permanente o temporal), discapacidad o deficiencia intelectual, o cualquier otra causa de discapacidad, o por la edad, y cuya situación requiera una atención adecuada y la adaptación a sus necesidades particulares del servicio puesto a disposición de los demás pasajeros;

b) «compañía aérea»: toda empresa de transporte aéreo que posee una licencia de explotación válida;

c) «compañía aérea operadora»: la compañía aérea que realiza o pretende realizar un vuelo en virtud de un contrato con un pasajero, o en nombre de otra persona, física o jurídica, vinculada a dicho pasajero por un contrato;

d) «compañía aérea comunitaria»: toda compañía aérea que posee una licencia de explotación válida expedida por un Estado miembro de conformidad con el Reglamento (CEE) nº 2407/92 del Consejo, de 23 de julio de 1992, sobre la concesión de licencias a las compañías aéreas [1];

e) «operador turístico»: con excepción de las compañías aéreas, todo organizador o detallista definido en el artículo 2, apartados 2 y 3, de la Directiva 90/314/CEE;

f) «entidad gestora del aeropuerto» o «entidad gestora»: organismo cuya finalidad principal, con arreglo a la legislación nacional, es la administración y gestión de las infraestructuras aeroportuarias, así como la coordinación y el control de las actividades de los distintos operadores presentes en el aeropuerto o el sistema aeroportuario correspondiente;

[1] DO L 240 de 24.8.1992, p. 1.

g) «usuario del aeropuerto»: toda persona física o jurídica responsable del transporte de pasajeros por vía aérea con origen o destino en el aeropuerto correspondiente;

h) «comité de usuarios de aeropuertos»: comité de representantes de los usuarios de los aeropuertos o de las organizaciones que los representen;

i) «reserva»: el hecho de que el pasajero disponga de un billete o de otra prueba que demuestra que la reserva ha sido aceptada y registrada por la compañía aérea o el operador turístico;

j) «aeropuerto»: todo terreno especialmente adaptado para el aterrizaje, despegue y maniobra de aviones, incluidas las instalaciones auxiliares que estas operaciones necesitan para el tráfico y los servicios aéreos, e incluidas asimismo las instalaciones necesarias para los servicios aéreos comerciales;

k) «aparcamiento del aeropuerto»: aparcamiento reservado a los vehículos automóviles y situado dentro de los límites del aeropuerto o bajo control directo de la entidad gestora de un aeropuerto, que sirve directamente a los pasajeros que utilizan dicho aeropuerto;

l) «servicio comercial de transporte aéreo de pasajeros»: servicio aéreo de transporte de pasajeros operado por una compañía de transporte aéreo mediante vuelos regulares o no regulares ofrecidos al público en general mediante pago separado o como parte de un paquete.

Artículo 3

Prohibición de denegar el embarque

Las compañías aéreas, sus agentes o los operadores turísticos no podrán negarse, alegando la discapacidad o movilidad reducida del pasajero a:

a) aceptar una reserva para un vuelo que salga de o llegue a un aeropuerto sujeto a las disposiciones del presente Reglamento;

b) embarcar a una persona con discapacidad o movilidad reducida en un aeropuerto de este tipo, siempre que la persona de que se trate disponga de un billete válido y de una reserva.

Artículo 4

Excepciones, condiciones especiales e información

1. No obstante lo dispuesto en el artículo 3, las compañías aéreas o sus agentes o los operadores turísticos podrán negarse, por motivos de discapacidad o movilidad reducida, a aceptar una reserva de una persona con discapacidad o movilidad reducida o denegarle el embarque:

a) con el fin de cumplir los requisitos de seguridad establecidos mediante legislación internacional, comunitaria o nacional, o con el fin de cumplir los requisitos de seguridad establecidos por la autoridad que emitió el certificado de operador aéreo a la compañía aérea en cuestión;

b) si las dimensiones de la aeronave o sus puertas imposibilitan físicamente el embarque o transporte de la persona con discapacidad o movilidad reducida.

En caso de denegación de aceptación de una reserva por los motivos mencionados en las letras a) o b) del párrafo primero, la compañía aérea, su agente o el operador turístico deberán hacer esfuerzos razonables para proponer una alternativa aceptable a la persona en cuestión.

Se ofrecerá a toda persona con discapacidad o movilidad reducida a quien se haya denegado el embarque a causa de ello, así como a su acompañante, en aplicación de lo dispuesto en el apartado 2 del presente artículo, el derecho al reembolso o a un transporte alternativo con arreglo al artículo 8 del Reglamento (CE) nº 261/2004. El derecho a la opción de un vuelo de vuelta o de un transporte alternativo estará sujeto a que se cumplan todas las disposiciones de seguridad.

2. En las mismas condiciones a que hace referencia el apartado 1, párrafo primero, letra a), la compañía aérea, su agente o el operador turístico podrán exigir que una persona con discapacidad o movilidad reducida vaya acompañada por otra persona capaz de facilitarle la asistencia necesaria.

3. Las compañías aéreas o sus agentes pondrán a disposición del público, en formatos accesibles y como mínimo en los mismos idiomas que la información proporcionada a los demás pasajeros, las normas de seguridad que apliquen al transporte de personas con discapacidad o movilidad reducida, así como toda restricción del transporte de estas personas o del equipo de movilidad debida a las dimensiones de la aeronave. Los operadores turísticos se encargarán de que esas normas y restricciones de seguridad en relación con los vuelos incluidos en los viajes combinados, las vacaciones combinadas y los circuitos combinados que organicen, vendan o pongan a la venta estén disponibles.

4. Cuando una compañía aérea, su agente o un operador turístico se acojan a las excepciones fijadas en los apartados 1 o 2, deberán notificar por escrito sus motivos a la persona con discapacidad o movilidad reducida afectada. Si esta así lo solicita, la compañía aérea, su agente o el operador turístico le comunicarán dichos motivos por escrito en un plazo de cinco días hábiles desde la fecha de la solicitud.

Artículo 5

Designación de los puntos de llegada y salida

1. En colaboración con los usuarios de los aeropuertos a través del comité de usuarios de aeropuertos, cuando exista, y con las organizaciones representantes de las personas con discapacidad o movilidad reducida, las entidades gestoras de los aeropuertos designarán, teniendo en cuenta las condiciones locales, puntos de llegada y salida dentro de los límites del aeropuerto o en puntos bajo control directo de la entidad gestora, tanto dentro como

fuera de los edificios terminales, en los que las personas con discapacidad o movilidad reducida podrán, sin dificultad, anunciar su llegada al aeropuerto y solicitar asistencia.

2. Los puntos de llegada y salida mencionados en el apartado 1 estarán señalizados claramente y contarán con información básica sobre el aeropuerto disponible en formatos accesibles.

Artículo 6

Transmisión de información

1. Las compañías aéreas, sus agentes o los operadores turísticos adoptarán cuantas medidas sean necesarias para poder recibir las notificaciones de necesidad de asistencia de personas con discapacidad o movilidad reducida en todos sus puntos de venta situados en el territorio de un Estado miembro sujeto a las disposiciones del Tratado, incluidas las ventas por teléfono e Internet.

2. Cuando una compañía aérea, su agente o un operador turístico reciba una notificación de necesidad de asistencia al menos cuarenta y ocho horas antes de la hora de salida del vuelo publicada, transmitirá la información en cuestión a más tardar 36 horas antes de la hora de salida del vuelo publicada:

a) a las entidades gestoras de los aeropuertos de salida, llegada y tránsito, y

b) a la compañía aérea operadora del vuelo, si no se ha efectuado una reserva con la misma, salvo que se desconozca la identidad de la compañía aérea operadora en el momento de la notificación, en cuyo caso la información se transmitirá lo antes posible.

3. En todos los demás casos distintos del contemplado en el apartado 2, la compañía aérea o su agente o el operador turístico transmitirán la información lo antes posible.

4. En cuanto sea posible después de la salida del vuelo, la compañía aérea operadora notificará a la entidad gestora del aeropuerto de destino, si este se halla situado en el territorio de un Estado miembro sujeto a las disposiciones del Tratado, el número de personas con discapacidad o movilidad reducida que requerirán la asistencia especificada en el anexo 1 y las características de esa asistencia.

Artículo 7

Derecho a asistencia en los aeropuertos

1. Cuando una persona con discapacidad o movilidad reducida llegue a un aeropuerto para viajar en un vuelo, la entidad gestora del aeropuerto asumirá la responsabilidad de garantizar la prestación de la asistencia que se especifica en el anexo I de forma que esa persona pueda coger el vuelo para el que dispone de reserva, siempre que las necesidades particulares de asistencia de esa persona se notifiquen a la compañía aérea, a su agente o al operador turístico en cuestión al menos 48 horas antes de la hora de salida del vuelo publicada. Esta notificación cubrirá, asimismo, un vuelo de regreso si el vuelo de ida y el de vuelta han sido contratados con la misma compañía.

2. Cuando se requiera el uso de un perro guía, se admitirá al animal a condición de que se haya notificado previamente su presencia a la compañía aérea o a su agente o al operador turístico de conformidad con la normativa nacional aplicable al transporte de perros guía a bordo de aeronaves, si procede.

3. Si no se efectúa notificación alguna con arreglo al apartado 1, la entidad gestora hará todos los esfuerzos razonables por prestar la asistencia especificada en el anexo I de forma que la persona interesada pueda coger el vuelo para el que dispone de reserva.

4. Lo dispuesto en el apartado 1 se aplicará siempre y cuando:

a) la persona se presente para facturación:

   i) a la hora fijada por anticipado y por escrito (incluso por medios electrónicos) por la compañía aérea o su agente o el operador turístico, o

   ii) si no se ha fijado hora alguna, como mínimo una hora antes de la hora de salida publicada, o

b) la persona llegue a uno de los puntos designados dentro de los límites del aeropuerto, con arreglo al artículo 5:

   i) a la hora fijada por anticipado y por escrito (incluso por medios electrónicos) por la compañía aérea o su agente o el operador turístico, o

   ii) si no se ha fijado hora alguna, como mínimo dos horas antes de la hora de salida publicada.

5. Cuando una persona con discapacidad o movilidad reducida transite por un aeropuerto sujeto a las disposiciones del presente Reglamento o sea transferida del vuelo para el que disponga de reserva a otro vuelo por una compañía aérea o un operador turístico, la entidad gestora asumirá la responsabilidad de garantizar la prestación de la asistencia especificada en el anexo I de forma que dicha persona pueda coger el vuelo para el que dispone de reserva.

6. Cuando una persona con discapacidad o movilidad reducida aterrice en un aeropuerto sujeto a las disposiciones del presente Reglamento, la entidad gestora del aeropuerto asumirá la responsabilidad de garantizar la prestación de la asistencia especificada en el anexo I de forma que dicha persona pueda llegar al punto de salida del aeropuerto mencionado en el artículo 5.

7. La asistencia prestada se adaptará, en la medida de lo posible, a las necesidades particulares del pasajero.

Artículo 8

Responsabilidad de la asistencia en los aeropuertos

1. Las entidades gestoras de los aeropuertos asumirán la responsabilidad de garantizar la prestación de la asistencia especificada en el anexo I a las personas con discapacidad o movilidad reducida, sin ningún cargo adicional.

2. Las entidades gestoras de los aeropuertos podrán prestar la asistencia por sí mismas. Como alternativa y para asumir su responsabilidad, la entidad gestora podrá contratar con terceros la prestación de la asistencia, cumpliendo siempre las normas de calidad mencionadas en el artículo 9, apartado 1. En colaboración con los usuarios de los aeropuertos, a través del comité de usuarios de aeropuertos, cuando exista, la entidad gestora podrá celebrar este tipo de contratos por propia iniciativa o previa solicitud, incluida la procedente de una compañía aérea, teniendo en cuenta los servicios presentes en el aeropuerto en cuestión. En caso de rechazo de la solicitud, la entidad gestora deberá justificarlo por escrito.

3. Las entidades gestoras de los aeropuertos podrán imponer, con carácter no discriminatorio, una tarifa específica a los usuarios del aeropuerto para la financiación de la asistencia.

4. Esta tarifa específica, que deberá ser razonable, proporcional a los costes y transparente, se fijará por la entidad gestora del aeropuerto en cooperación con los usuarios de los aeropuertos a través del comité de usuarios de aeropuertos, cuando exista, o cualquier otro organismo idóneo. Dicha tarifa se distribuirá entre los usuarios del aeropuerto, de forma proporcional al número total de pasajeros que cada una de ellas transporte con origen y destino en el mismo.

5. La entidad gestora del aeropuerto deberá separar las cuentas de sus actividades relacionadas con la asistencia prestada a personas con discapacidad o movilidad reducida, de las cuentas de sus restantes actividades, en consonancia con las prácticas comerciales habituales.

6. La entidad gestora del aeropuerto pondrá a disposición de los usuarios del mismo, a través del comité de usuarios de aeropuertos, cuando exista, o cualquier otro organismo idóneo, así como de los organismos responsables de la aplicación del presente Reglamento a que se refiere el artículo 14, un resumen anual auditado de las tarifas percibidas y los gastos efectuados en relación con la asistencia prestada a personas con discapacidad o movilidad reducida.

Artículo 9

Normas de calidad de la asistencia

1. Salvo en los aeropuertos cuyo tráfico anual sea inferior a 150 000 pasajeros comerciales, las entidades gestoras fijarán normas de calidad aplicables a la asistencia que se indica en el anexo I y determinarán los requisitos acerca de los recursos necesarios para su cumplimiento, en cooperación con los usuarios de los aeropuertos, a través del comité de usuarios de aeropuertos, cuando exista, y con las organizaciones representantes de los pasajeros con discapacidad o movilidad reducida.

2. Al fijar dichas normas, tendrán plenamente en cuenta las políticas y los códigos de conducta internacionalmente reconocidos para la facilitación del transporte de personas con discapacidad o movilidad reducida, y en particular el Código de conducta para la asistencia en tierra de las personas con movilidad reducida de la CEAC.

3. Las entidades gestoras de los aeropuertos publicarán sus normas de calidad.

4. Las compañías aéreas y las entidades gestoras de los aeropuertos podrán convenir en que estas últimas presten a los pasajeros transportados por las compañías aéreas desde y hasta el aeropuerto una asistencia de nivel superior al fijado con arreglo a las normas mencionadas en el apartado 1, o servicios adicionales a los especificados en el anexo I.

5. Para la financiación de esta asistencia superior o adicional, las entidades gestoras podrán imponer a las compañías aéreas una tarifa adicional a la indicada en el artículo 8, apartado 3, que también será transparente y proporcional a los costes y se fijará previa consulta a las compañías aéreas interesadas.

Artículo 10

Asistencia prestada por las compañías aéreas

Las compañías aéreas prestarán, sin cargo adicional, la asistencia indicada en el anexo II a las personas con discapacidad o movilidad reducida que salgan de, lleguen a o transiten por un aeropuerto sujeto a las disposiciones del presente Reglamento, y que cumplan las condiciones establecidas en el artículo 7, apartados 1, 2 y 4.

Artículo 11

Formación

Las compañías aéreas y las entidades gestoras de los aeropuertos:

a) velarán por que su personal y el personal empleado por cualquier subcontratista que preste asistencia directa a las personas con discapacidad o movilidad reducida tengan el conocimiento necesario para responder a las necesidades de las personas con diversas discapacidades o dificultades para su movilidad;

b) proporcionarán a todo su personal que trabaje en el aeropuerto y tenga trato directo con los viajeros formación relativa a igualdad de trato y sensibilización en materia de discapacidad;

c) velarán por que, en el momento de la contratación, los nuevos empleados reciban formación relativa a la discapacidad y por que su personal reciba asimismo cursos de actualización cuando sea necesario.

Artículo 12

Indemnizaciones por pérdida o daños a sillas de ruedas, otros equipos de movilidad y dispositivos de asistencia

En caso de pérdida o daños a sillas de ruedas u otros equipos de movilidad o dispositivos de asistencia durante el manejo en el

aeropuerto o el transporte a bordo de la aeronave, el pasajero al que pertenezca el efecto será indemnizado con arreglo a las normas del Derecho internacional, comunitario y nacional.

Artículo 13

Inadmisibilidad de exenciones

Las obligaciones para con las personas con discapacidad o movilidad reducida que se establecen en el presente Reglamento no podrán limitarse ni derogarse.

Artículo 14

Organismos de aplicación y competencias

1. Cada uno de los Estados miembros designará uno o varios organismos responsables de la aplicación del presente Reglamento en relación con los vuelos que salgan de los aeropuertos situados en su territorio o lleguen a los mismos. Cuando proceda, ese o esos organismos adoptarán las medidas necesarias para asegurarse de que se respetan los derechos de las personas con discapacidad o movilidad reducida, incluida la observancia de las normas de calidad mencionadas en el artículo 9, apartado 1. Los Estados miembros comunicarán a la Comisión el nombre del organismo u organismos designados.

2. Los Estados miembros establecerán que, cuando proceda, el o los organismos responsables de la aplicación del presente Reglamento a que se refiere el apartado 1 garanticen también la correcta aplicación del artículo 8, incluido lo relativo a las tarifas destinadas a evitar la competencia desleal. Los Estados miembros podrán, asimismo, designar un organismo específico al efecto.

Artículo 15

Procedimiento de reclamación

1. Una persona con discapacidad o movilidad reducida que considere que se ha infringido el presente Reglamento podrá hacerlo saber a la entidad gestora del aeropuerto o a la compañía aérea interesada, según proceda.

2. Si la persona con discapacidad o movilidad reducida no obtuviera satisfacción de esa manera, podrá presentar la reclamación por presunta infracción del presente Reglamento ante cualquiera de los organismos designados con arreglo al artículo 14, apartado 1, o cualquier otro organismo competente designado por los Estados miembros.

3. Todo organismo de un Estado miembro que reciba una reclamación sobre un asunto que sea competencia de un organismo designado de otro Estado miembro remitirá la reclamación a este último organismo.

4. Los Estados miembros adoptarán las medidas necesarias para informar a las personas con discapacidad o movilidad reducida de sus derechos en el marco del presente Reglamento y de la posibilidad de presentar reclamaciones ante los organismos designados.

Artículo 16

Sanciones

Los Estados miembros determinarán el régimen de sanciones aplicable a las infracciones de las disposiciones del presente Reglamento y adoptarán cuantas medidas sean necesarias para garantizar su ejecución. Las sanciones previstas deberán ser eficaces, proporcionadas y disuasorias. Los Estados miembros notificarán esas disposiciones a la Comisión y le comunicarán con la mayor brevedad toda posterior modificación de las mismas.

Artículo 17

Informe

No más tarde del 1 de enero de 2010, la Comisión presentará al Parlamento Europeo y al Consejo un informe sobre la aplicación y los resultados del presente Reglamento. En caso necesario, se adjuntarán a dicho informe las propuestas legislativas pertinentes que detallen las disposiciones del presente Reglamento o las modifiquen.

Artículo 18

Entrada en vigor

El presente Reglamento entrará en vigor a los veinte días de su fecha de publicación en el *Diario Oficial de la Unión Europea*.

Será aplicable a partir del 26 de julio de 2008, a excepción de los artículos 3 y 4, que se aplicarán a partir del 26 de julio de 2007.

El presente Reglamento será obligatorio en todos sus elementos y directamente aplicable en cada Estado miembro.

Hecho en Estrasburgo, el 5 de julio de 2006.

Por el Parlamento Europeo	*Por el Consejo*
El Presidente	*La Presidenta*
J. BORRELL FONTELLES	P. LEHTOMÄKI

ANEXO I

Asistencia prestada bajo la responsabilidad de las entidades gestoras de los aeropuertos

Asistencia y disposiciones necesarias para permitir a las personas con discapacidad o movilidad reducida:

— comunicar su llegada a un aeropuerto y su solicitud de asistencia en los puntos designados dentro y fuera de los edificios terminales que se mencionan en el artículo 5,

— desplazarse desde uno de esos puntos designados al mostrador de facturación,

— proceder a la comprobación de su billete y a la facturación de su equipaje,

— desplazarse desde el mostrador de facturación al avión, pasando los controles de emigración, aduanas y seguridad,

— embarcar en el avión, para lo que deberán preverse elevadores, sillas de ruedas o cualquier otro tipo de asistencia que proceda,

— desplazarse desde la puerta del avión a sus asientos,

— guardar y recuperar su equipaje dentro del avión,

— desplazarse desde sus asientos a la puerta del avión,

— desembarcar del avión, para lo que deberán preverse elevadores, sillas de ruedas o cualquier otro tipo de asistencia que proceda,

— desplazarse desde el avión hasta la sala de recogida de equipajes, pasando los controles de inmigración y aduanas,

— desplazarse desde la sala de recogida de equipajes hasta un punto designado,

— conectar con otros vuelos, cuando se hallen en tránsito, para lo que habrá que prever asistencia en el aire y en tierra y tanto dentro de las terminales como entre terminales, si es preciso,

— desplazarse a los servicios si es preciso.

Cuando una persona con discapacidad o movilidad reducida reciba la ayuda de un acompañante, esta persona deberá poder prestar, si así se solicita, la asistencia necesaria en el aeropuerto y durante el embarque y desembarque.

Manejo en tierra de todos los equipos de movilidad, incluidos equipos como las sillas de ruedas eléctricas (previa notificación con una antelación de 48 horas y siempre que las limitaciones de espacio a bordo del avión no lo impidan, y sometido todo ello a la aplicación de la legislación pertinente en materia de mercancías peligrosas).

Sustitución temporal del equipo de movilidad extraviado o averiado, aunque no necesariamente por idéntico tipo de equipo.

Asistencia en tierra a los perros guía reconocidos, cuando así proceda.

Comunicación de la información necesaria para tomar los vuelos en formato accesible.

ANEXO II

Asistencia prestada por las compañías aéreas

Transporte de perros guía reconocidos en cabina, con arreglo a las normativas nacionales.

Además del equipo médico, transporte de hasta dos aparatos de equipos de movilidad por persona con discapacidad o movilidad reducida, incluidas las sillas de ruedas eléctricas (previa notificación con una antelación de 48 horas y siempre que las limitaciones de espacio a bordo del avión no lo impidan, y sometido todo ello a la aplicación de la legislación pertinente en materia de mercancías peligrosas).

Comunicación de la información esencial relativa a los vuelos en formato accesible.

Realización de todos los esfuerzos razonables para disponer los asientos conforme a las necesidades de cada persona con discapacidad o movilidad reducida que así lo soliciten, siempre que los requisitos de seguridad y la disponibilidad lo permitan.

Ayuda para desplazarse a los servicios si es preciso.

Cuando una persona con discapacidad o movilidad reducida reciba la ayuda de un acompañante, la compañía aérea hará todos los esfuerzos razonables para ofrecer a la persona acompañante un asiento junto a la persona con discapacidad o movilidad reducida.

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Comunicación de la Comisión Comunicación sobre el alcance de la responsabilidad de las compañías aéreas y los aeropuertos en caso de destrucción, daños o pérdida de equipos de movilidad de pasajeros aéreos con movilidad reducida en el transporte aéreo (Texto pertinente a efectos del EEE) / * COM/ 2008/ 0510 final */

[pic] | COMISIÓN DE LAS COMUNIDADES EUROPEAS |

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COMUNICACIÓN DE LA COMISIÓN

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1. CONTEXTO

El 5 de julio de 2006, el Consejo y el Parlamento Europeo adoptaron el Reglamento (CE) nº 1107/2006 sobre los derechos de las personas con discapacidad o movilidad reducida en el transporte aéreo[1] (en lo sucesivo, «el Reglamento»). El objetivo general del Reglamento es garantizar que las personas con discapacidad o movilidad reducida (en lo sucesivo, «PMR») no sean discriminadas cuando viajan en avión. El 30 de noviembre de 2005, en el transcurso del proceso de negociación política sobre la propuesta de la Comisión, y en relación con el futuro artículo 12 (Indemnizaciones por pérdida o daños a sillas de ruedas, otros equipos de movilidad y dispositivos de asistencia), la Comisión presentó una declaración para el acta[2] en la que se comprometía a realizar un estudio sobre la posibilidad de reforzar los derechos de los pasajeros aéreos cuyas sillas de ruedas u otros equipos de movilidad se destruyen, se pierden o sufren daños durante el manejo en el aeropuerto o el transporte a bordo de la aeronave, así como a presentar un informe al respecto.

La Comisión publicó un anuncio de licitación[3] para un «Estudio relativo a los umbrales de compensación aplicables a la pérdida o al daño ocurridos en equipamiento y aparatos de propiedad de pasajeros aéreos con movilidad reducida» (en lo sucesivo, «el estudio»), que está disponible en el sitio web de la Comisión. La presente Comunicación tiene por objeto informar del resultado del estudio y analizar la posibilidad de reforzar los derechos vigentes en este ámbito.

2. ALCANCE DEL PROBLEMA

«Que el equipaje sufra daños o se extravíe es una contrariedad. Que un equipo de movilidad sufra daños o se extravíe puede estropear todo un día de viaje y complicar considerablemente la vida de su propietario durante mucho tiempo. Es una pérdida de autonomía y dignidad[4].»

En la actualidad, una proporción significativa de la población de la UE tiene problemas de movilidad que exigen el uso de una silla de ruedas u otros equipos de ayuda a la movilidad o dispositivos de asistencia (en lo sucesivo, denominados «equipos de movilidad»). A medida que la población de la UE envejece, la proporción de PMR corre el riesgo de aumentar.

La Comisión no pretende reproducir en la presente Comunicación los datos que ya se facilitan en el estudio, que debe leerse como complemento de ésta. No obstante, a la luz de estos datos, la Comisión observa que hay indicios claros de que los pasajeros con movilidad reducida que necesitan equipos de movilidad viajan menos en avión que la población general. Es bastante

probable que el miedo a que sus equipos de movilidad se destruyan, sufran daños o se pierdan contribuya a desanimarles a viajar y, por tanto, a obstaculizar su integración en la sociedad. Este miedo se debe a varias razones objetivas:

1) La pérdida o el deterioro de sillas de ruedas y otros equipos de movilidad restan autonomía a las PMR y afectan a todos los aspectos de su vida cotidiana hasta que el problema se resuelve adecuadamente.

2) La pérdida, los daños o la destrucción de sus equipos de movilidad suponen un riesgo para la salud y seguridad de las PMR, ya que no siempre hay equipos sustitutivos disponibles y, si los hay, no siempre se ajustan a las necesidades específicas de la persona.

3) El tiempo que toman las compañías aéreas y los aeropuertos para resolver los problemas prácticos ligados a los daños o la pérdida de equipos de movilidad es desproporcionado, dado el carácter urgente de estas situaciones.

4) Los procedimientos vigentes y el nivel medio de formación del personal de la mayoría de las compañías aéreas y los aeropuertos en lo relativo a las actuaciones necesarias ante la pérdida o el deterioro de equipos de movilidad son deficientes.

5) Las implicaciones económicas de la pérdida, deterioro o destrucción de equipos de movilidad suponen un riesgo adicional para las PMR que viajan en avión en comparación con los demás pasajeros.

6) Las indemnizaciones por daños, pérdida o destrucción de equipos de movilidad varía de una compañía aérea a otra y de un aeropuerto a otro.

3. RESULTADO DEL ESTUDIO: LOS RETOS

El número real de accidentes por año y por compañía aérea que implican incidentes con equipos de movilidad es muy reducido. La cifra total de reclamaciones oscila entre 600 y 1000 al año, sobre un total de 706 millones de personas que se desplazan cada año en avión en la Unión Europea[5]. Así pues, la proporción oscila entre menos de una y una reclamación y media, como máximo, por millón de pasajeros.

El estudio analiza tanto la experiencia en los Estados Unidos como la situación en Europa. Ambos análisis proporcionan una base razonable para creer que esta estimación se aproxima a las cifras reales. Asimismo, el estudio ha concluido que algunos aspectos cuantitativos y cualitativos del problema que siguen pendientes en este ámbito merecen atención:

3.1. Objetivo cuantitativo: reducir el número de incidentes

El número de incidentes de destrucción, daños o pérdida de equipos de movilidad de PMR está ligado al correcto manejo y traslado de los equipos de movilidad a bordo de la aeronave, y la custodia de estos equipos en los aeropuertos es una parte esencial de las condiciones de transporte de las PMR a fin de atender sus necesidades; el personal debe tener una formación adecuada para desempeñar estas tareas. El objetivo ha de ser en todo momento permitir que las PMR utilicen sus propios dispositivos de ayuda el mayor tiempo posible. La situación ideal es que la PMR entregue el equipo de movilidad y éste le sea devuelto a la entrada de la aeronave cuando resulte imposible utilizarlo a bordo. Pueden establecerse otros procedimientos si así lo exigen razones de seguridad o de orden práctico.

El apéndice del Compromiso de Servicio de las Compañías Aéreas con los Pasajeros de 2001[6], firmado por la mayoría de las compañías aéreas nacionales europeas (en lo sucesivo, «el Compromiso de las Compañías Aéreas») establece que las compañías firmantes deben tomar todas las medidas razonables para evitar que los equipos de movilidad y otros dispositivos de asistencia se extravíen o dañen, desarrollar sus propios planes de servicios individualizados incorporando el Compromiso de las Compañías Aéreas, establecer programas de formación del personal e introducir cambios en sus sistemas informáticos para aplicar el Compromiso; asimismo, debe permitirse a las PMR mantener su autonomía en la mayor medida posible.

El Compromiso Voluntario de Servicio de los Aeropuertos con los Pasajeros (en lo sucesivo, «el Compromiso de los Aeropuertos»), desarrollado por los aeropuertos europeos bajo los auspicios de la Conferencia Europea de Aviación Civil[7], establece que debe dotarse al personal de la formación adecuada para comprender y satisfacer las necesidades de las PMR. El objetivo de los signatarios era desarrollar sus propios planes de servicios individualizados sobre la base del Compromiso incorporando las disposiciones pertinentes del Documento 30 (Sección 5)[8] de la Conferencia Europea de Aviación Civil (CEAC) y de la Organización Internacional de Aviación Civil[9] (OACI, anexo 9).

El punto 5.2.3.2 del documento 30 de la CEAC[10] establece que los Estados miembros deberían promover la distribución de una guía al personal de las compañías aéreas y los aeropuertos sobre procedimientos y facilidades de ayuda a las PMR, que deberían contener toda la información necesaria sobre las condiciones de transporte de estas personas y la asistencia que debe facilitárseles, así como sobre los pasos que éstas deben dar en este contexto. Dispone asimismo que deberían garantizar que las compañías aéreas incluyan en sus manuales todos los procedimientos relacionados con las PMR. El punto 5.5 del mismo documento establece que los Estados miembros deberían garantizar la prestación en los aeropuertos de un servicio de asistencia en tierra a las PMR que cuente con personal formado y cualificado para atender sus necesidades y con los equipos necesarios para prestarles asistencia.

Sin embargo, estos acuerdos voluntarios no siempre se cumplen debidamente. En primer lugar, pocas compañías y aeropuertos de la UE han desarrollado en la práctica sus propios planes o políticas de servicios a la clientela para aplicar estos acuerdos voluntarios. En segundo lugar, los que sí lo han hecho han implantado planes o políticas tan diferentes que el resultado es un amplio abanico de distintos niveles de protección de las PMR. En tercer lugar, estos planes y políticas no siempre se publican, lo que dificulta enormemente a las PMR saber con antelación qué pueden esperar.

En el contexto del Compromiso de los Aeropuertos, la mayoría de los aeropuertos proporciona espontáneamente asistencia a los pasajeros con movilidad reducida. Con todo, los procedimientos por los cuales se permite a las PMR acceder hasta la entrada de la aeronave en su propia silla de ruedas o recibir ésta al llegar al punto de destino difieren de un aeropuerto a otro.

3.2. Objetivo cualitativo: reducir al mínimo las consecuencias de los incidentes

3.2.1. Falta de un procedimiento común que aporte soluciones inmediatas sobre el terreno

El alcance de los daños sufridos por los equipos de movilidad puede tener implicaciones graves, y no sólo por su coste económico. El problema afecta también al tiempo durante el cual la PMR no puede utilizar su equipo, así como al largo periodo de tiempo que transcurre hasta que por fin se le paga la indemnización. Las dificultades para determinar dónde presentar una reclamación y pedir asistencia a la llegada a un aeropuerto a menudo desconocido viene a sumarse al tiempo y al estrés que supone encontrar incluso una solución temporal a los problemas prácticos de la vida cotidiana cuando la PMR está desprovista de su equipo de movilidad.

Actualmente no existe legislación internacional, comunitaria ni nacional relativa a la prestación de asistencia inmediata a las PMR en caso de pérdida, daños o destrucción de sus equipos de movilidad, o a las condiciones o elementos esenciales de esta asistencia.

El Compromiso de las Compañías Aéreas no precisa cómo deben tramitarse las correspondientes reclamaciones ni qué medidas deben tomarse sobre el terreno cuando se daña o se extravía una silla de ruedas u otro tipo de equipo de movilidad.

La mayoría de los aeropuertos no cuenta con una política sobre reclamaciones por daños o destrucción de sillas de ruedas u otros equipos de movilidad. Las indemnizaciones y los procedimientos por los cuales los aeropuertos proporcionan equipos de sustitución difieren de un aeropuerto a otro pese a la existencia del Compromiso de los Aeropuertos[11]. Esto puede dar lugar a divergencias e incoherencias en lo que respecta a los equipos de sustitución y las indemnizaciones a las PMR cuyos equipos sufren daños o se destruyen mientras están bajo la custodia del aeropuerto. Esta situación, sin lugar a dudas, suscita inseguridad y confusión a las PMR, que nunca saben qué hacer o a quién dirigirse en caso de incidente en relación con sus equipos de movilidad.

3.2.2. Diferencias entre la naturaleza y los límites de la responsabilidad de las compañías aéreas y de los aeropuertos

Tradicionalmente ha habido diferencias en la naturaleza y los límites de la responsabilidad de las compañías aéreas y de los aeropuertos. Estas diferencias pueden causar confusión entre las partes interesadas.

3.2.2.1. Transporte de los equipos de movilidad a bordo de la aeronave (responsabilidad de la compañía aérea)

En la actualidad, las compañías aéreas prestan asistencia a las PMR en el marco de la asistencia en tierra. Pueden prestar esta asistencia directamente, a través de una tercera empresa o a través del aeropuerto si éste opera como prestador de servicios para la compañía. La responsabilidad de las compañías aéreas está limitada por toda una serie de convenios

internacionales[12], Reglamentos comunitarios de aplicación de esos convenios internacionales en la UE[13] y procedimientos legales y administrativos que otros países imponen a las compañías de la UE que desean introducirse en sus mercados nacionales. Las compañías pueden renunciar a su responsabilidad limitada y acceder a indemnizar por el valor total del equipo de movilidad extraviado o de su reparación.

Todos estos textos legales funcionan según el mismo mecanismo, a saber, la presunción de responsabilidad de la compañía aérea en el caso del equipaje facturado[14]. Esto significa que la víctima no tendrá que demostrar la culpa de la compañía aérea para que se origine la responsabilidad de ésta. Lo único que debe demostrar la PMR es que el daño o la pérdida tuvo lugar mientras el equipo estaba bajo la custodia de la compañía aérea (lo que se denomina también «periodo de transporte»).

En cuanto a los equipos facturados en el mostrador de facturación (siempre por la compañía aérea o en su nombre) y, por consiguiente, etiquetados como equipaje, está claro que el periodo de transporte se inicia cuando comienza el procedimiento de facturación. Lo mismo es aplicable al equipaje que se entrega en cabina. Aunque el equipo puede etiquetarse antes de su entrega efectiva a la compañía aérea (en la puerta de embarque o a la entrada de la aeronave), la responsabilidad de la compañía aérea sólo debería originarse en el momento de la entrega física del equipo a la compañía (ya sea en la puerta de embarque o a la entrada de la aeronave).

3.2.2.2. Manejo de los equipos de movilidad en el aeropuerto (responsabilidad del aeropuerto)

Los aeropuertos han asumido la responsabilidad de prestar asistencia a las PMR desde la plena entrada en vigor del Reglamento el 26 de julio de 2008. En principio, la responsabilidad de los aeropuertos no está limitada[15], y se determinada con arreglo a la legislación nacional en materia de responsabilidad civil. El hecho de que la legislación aplicable sea diferente según los aeropuertos y las compañías aéreas genera dos importantes diferencias en la naturaleza de su respectiva responsabilidad. En primer lugar, como regla general, la responsabilidad del aeropuerto se origina cuando se demuestra la culpa de la entidad gestora del aeropuerto. En segundo lugar, mientras que la responsabilidad de los aeropuertos no está limitada, la de las compañías aéreas es indudable que sí lo está. Esto significa que, en el caso de los aeropuertos, la PMR tendrá que recurrir a un tribunal para demostrar la culpa si el aeropuerto no acepta la reclamación (lo que no ocurre en el caso de la responsabilidad de la compañía aérea), pero podrá ser indemnizada por el daño total (lo que no ocurre en el caso de la responsabilidad de la compañía aérea, por lo general limitada).

3.2.3. Indemnizaciones: importe y procedimiento

Durante mucho tiempo, las organizaciones de PMR han estado presionando para conseguir la responsabilidad ilimitada en caso de incidentes relacionados con equipos de movilidad durante el manejo en los aeropuertos y durante el transporte a bordo de las aeronaves. Este planteamiento viene motivado por el elevado coste de los equipos de movilidad modernos[16] y por el hecho de que el límite que establecen en la actualidad los convenios internacionales, concretamente el Convenio de Montreal[17], respecto de la responsabilidad sobre los equipajes es bastante reducido, lo que de hecho permite suponer que el importe de la indemnización previsto en los convenios internacionales puede no ser el adecuado en todos los casos.

Casi todas las compañías aéreas fijan sus indemnizaciones con arreglo al Convenio de Montreal. Los daños sufridos por los equipos de movilidad que superan los 1 000 DEG corren a cargo del propio pasajero, salvo que éste, al entregar el equipaje facturado a la compañía aérea, haya presentado una declaración especial de interés en la entrega de su equipaje en el lugar de destino y abonado una suma suplementaria si el caso así lo exige[18]. Sólo una minoría de compañías aéreas, y en muy pocos aeropuertos, propone un seguro especial para los equipos de movilidad de las PMR. La mayor parte de ellas no ofrece un seguro especial que cubra las sillas de ruedas u otros equipos de movilidad dañados o destruidos.

Según el estudio, sólo una minoría de compañías de la UE permite a las PMR declarar respecto de su equipo de movilidad un valor más elevado que, por consiguiente, puede ser reclamado llegado el caso. Algunas limitan la declaración del valor adicional a un importe dado por encima de la indemnización fijada por la legislación internacional y de la UE, pero por debajo del coste real del equipo. Algunas compañías señalaron que la declaración de un valor específico exige el pago de un suplemento por parte del pasajero.

Todas las partes interesadas coinciden en señalar que el coste de atender las necesidades de las PMR no deben sufragarlo directamente estas personas. Sin embargo, muy pocas han actuado en consecuencia indemnizando por el coste total del daño o la pérdida del equipo de movilidad. El

Reglamento consolida el principio de que la asistencia debe proporcionarse sin coste adicional para las PMR[19], pero no precisa el importe específico de la indemnización, que debe ser fijada con arreglo a las «normas del Derecho internacional, comunitario y nacional»[20].

Es interesante señalar que, en el transporte por ferrocarril, la legislación comunitaria impone a las empresas ferroviarias la obligación de indemnizar íntegramente cuando son responsables de la pérdida total o parcial o de los daños del equipo de movilidad[21].

3.2.4. Inclusión o exclusión de los equipos de movilidad en la definición de «equipaje».

En opinión de las organizaciones de PMR y de la mayoría de las autoridades de Aviación Civil que respondieron a la encuesta ligada al estudio, los equipos de movilidad no deben considerarse equipaje. La razón de esta exclusión es que los equipos de movilidad no deberían quedar sujetos a las normas sobre la responsabilidad limitada de las compañías aéreas establecidas por los convenios internacionales, como consecuencia de lo cual las compañías aéreas y los aeropuertos deberían compensar el coste total de los equipos de movilidad perdidos o de su reparación.

La Ley norteamericana de accesibilidad en el transporte aéreo (ACAA) no define los equipos de movilidad ni los excluye expresamente de la definición de equipaje. Sin embargo, impone una responsabilidad objetiva plena, sin limitación económica, en caso de incidentes relacionados con equipos de movilidad, a todas las compañías aéreas que deseen cubrir rutas domésticas en los Estados Unidos[22]. El Ministerio de Transporte norteamericano tiene previsto modificar próximamente su reglamento de aplicación de la ley ACAA a fin de que las compañías aéreas que operan rutas con origen o destino en los Estados Unidos queden sujetas a la mayor parte de los requisitos relativos a las discapacidades aplicables en la actualidad a las compañías norteamericanas con arreglo a la Parte 382, incluido el tratamiento de los equipos de ayuda a la movilidad y dispositivos de asistencia.

La legislación canadiense vigente en relación con las PMR la constituye la Parte VII del Reglamento sobre el transporte aéreo: Condiciones del transporte de pasajeros[23]. La agencia nacional canadiense del transporte parece definir los equipos de ayuda a la movilidad como artículos de facturación prioritaria de carácter personal, aun cuando los equipos de movilidad no quedan excluidos strictu sensu de la definición de equipaje. De esta manera, la agencia no permite a las compañías que operan en su territorio aplicar a los equipos de movilidad las disposiciones de los convenios internacionales sobre limitación de la responsabilidad sobre equipajes perdidos, dañados o destruidos. Se presupone que, para aterrizar en Canadá, las compañías aéreas deben respetar la legislación canadiense. No parece que ninguna compañía aérea haya intentado poner en cuestión este principio.

4. UNA RESPUESTA A ESTOS RETOS: EL REGLAMENTO (CE) Nº 1107/2006

4.1. Objetivo cuantitativo: reducir el número de incidentes

Tal como se ha expuesto en el punto 3.1 de la presente Comunicación, la falta de procedimientos específicos para el manejo de sillas de ruedas u otros equipos de movilidad y el hecho de que no todos los aeropuertos y compañías aéreas faciliten formación al respecto indican que sería fácil introducir mejoras. El Reglamento (CE) nº 1107/2006 ha abordado estas deficiencias en la situación actual estableciendo una serie de obligaciones legales relativas a los procedimientos necesarios y la formación del personal requerida para garantizar una asistencia adecuada a las PMR[24].

Estas obligaciones legales comprenden, en particular, el manejo de equipos de movilidad en el aeropuerto o su transporte a bordo de las aeronaves. Por tanto, está previsto que mejoren en una medida sustancial la calidad e idoneidad de la asistencia prestada por las compañías aéreas y los aeropuertos. Una serie de procedimientos específicos sobre facturación y formación del personal en el manejo de equipos de movilidad permitirá sensibilizar a empleadores y empleados y contribuirá a reducir aún más el número y la gravedad de los incidentes, así como los costes personales y económicos.

4.2. Objetivo cualitativo: reducir al mínimo las consecuencias de los incidentes

El punto 3.2.1 de la presente Comunicación subraya las deficiencias debidas a la actual falta de un procedimiento común que aporte soluciones inmediatas sobre el terreno en caso de daños o pérdida de equipos de movilidad. El Reglamento (CE) nº 1107/2006 cubre en parte este vacío legal. Por un lado, su anexo I incluye específicamente en la definición de asistencia en el aeropuerto la «sustitución temporal del equipo de movilidad extraviado o averiado, aunque no necesariamente por idéntico tipo de equipo» [25] . Por su parte, el artículo 9 establece la obligación legal en virtud de la cual los aeropuertos fijarán «normas de calidad aplicables a la

asistencia que se indica en el anexo I y determinarán los requisitos acerca de los recursos necesarios para su cumplimiento».

En cuanto a las diferencias en la naturaleza y los límites de la responsabilidad de las compañías aéreas y de los aeropuertos, a la que se alude en el punto 3.2.2 de la presente Comunicación, el artículo 12 del Reglamento (CE) nº 1107/2006 establece la obligación de indemnización «con arreglo a las normas del Derecho internacional, comunitario y nacional».

La Comisión supervisará estrechamente la aplicación de esta responsabilidad por parte de aeropuertos y compañías aéreas en el nuevo contexto desarrollado por el Reglamento, a fin de evaluar en el futuro si podría incluirse una definición más precisa de la responsabilidad del aeropuerto, en consonancia con lo establecido respecto de las compañías aéreas en el Reglamento (CE) nº 889/2002.

En cuanto al importe de las indemnizaciones y el procedimiento aplicable, que se analiza en el punto 3.2.3 de la presente Comunicación, el número de incidentes relacionados con equipos de movilidad ya es reducido, y la nueva protección que ofrece el Reglamento (CE) nº 1107/2006 contribuirá en principio a reducirlo aún más y a mitigar sus consecuencias. Por tanto, parece evidente que, si se modifican las normas vigentes en materia de indemnizaciones, cualesquiera consecuencias económicas que tales incidentes conllevarían para las compañías aéreas o los aeropuertos no tendrían un impacto económico significativo para ellos.

Por último, el punto 3.2.4 de la presente Comunicación aborda la cuestión de si los equipos de movilidad deben considerarse incluidos en el concepto de «equipaje». Esta cuestión es pertinente porque está ligada al importe de las indemnizaciones, ya que los límites sobre la responsabilidad establecidos en los convenios internacionales sólo se aplican a los equipajes. Algunos de los socios más importantes de la Comunidad en el transporte aéreo ya han desarrollado procedimientos administrativos relativos a los derechos de las PMR en este campo. En términos generales, estos procedimientos administrativos imponen una responsabilidad objetiva y una indemnización íntegra a las compañías aéreas y, en algunos casos, a los aeropuertos. Las compañías aéreas europeas que cubren rutas transoceánicas a Canadá o vuelos domésticos en los Estados Unidos o Canadá ya están cumpliendo estas normas fuera de las fronteras de la Comunidad. Algunas compañías han renunciado a la limitación de su responsabilidad a través su propia política de servicio a la clientela o de sus normas de calidad internas.

Como muestran estos ejemplos, pueden examinarse distintas opciones al abordar el importe de las indemnizaciones en caso de destrucción, daños o pérdida de equipos de movilidad a fin de aproximarlo al valor real de estos equipos. Este objetivo puede conseguirse tratando de interpretar o definir el concepto de equipaje de manera que excluya los equipos de movilidad al tiempo que se garantiza la cobertura legal de estos equipos por los convenios internacionales aplicables, o, como alternativa, suprimiendo o revisando los límites de las indemnizaciones establecidas en estos convenios internacionales. Por último, las compañías aéreas y los aeropuertos podrían renunciar voluntariamente a la limitación de su responsabilidad sobre los equipos de movilidad.

La Comisión considera que sería conveniente abordar esta cuestión en el marco de la OACI con el objetivo de suprimir o revisar los límites económicos en relación con los daños, la pérdida o la destrucción de equipos de movilidad, fijados en el Convenio de Montreal. La Comisión reconoce las dificultades que conlleva la renegociación de los convenios internacionales. No obstante, el hecho de que algunos miembros de la OACI hayan decidido unilateralmente modificar sus normas e imponer una indemnización íntegra de los equipos de movilidad en sus rutas domésticas indica que una iniciativa de la UE en este sentido podría obtener apoyo político.

A medio plazo, la Comisión considera que la plena aplicación del Reglamento (CE) nº 1107/2006 mejorará tanto la supervisión y aplicación de los derechos de las PMR en relación con las indemnizaciones o la sustitución de equipos de movilidad destruidos, dañados o perdidos, así como el tipo de asistencia prestada sobre el terreno cuando ocurren estos incidentes. Antes de decidir acerca de la presentación de una propuesta legislativa a este respecto, la Comisión considera prudente que empiece a aplicarse el Reglamento (CE) nº 1107/2006 antes de evaluar su impacto sobre el probable descenso del número de incidentes. Al tiempo que se toman en consideración las prácticas actuales en otros países, y teniendo en cuenta la legislación comunitaria sobre el transporte por ferrocarril, a corto plazo la Comisión sugiere a las compañías aéreas que renuncien voluntariamente a su responsabilidad limitada.

5. CONCLUSIONES

1) La Comisión recuerda a aeropuertos y compañías aéreas su obligación de implantar las

normas de calidad y la formación y procedimientos necesarios en relación con el manejo de equipos de movilidad y los derechos de las PMR en caso de incidentes relacionados con sus equipos de movilidad, en consonancia con el documento nº 30 de la CEAC y sus anexos pertinentes.

2) En lo que respecta al importe de las indemnizaciones, y con objeto de adaptarlas mejor al valor real de los equipos, la Comisión propondrá al Consejo que, con la cooperación de los Estados miembros, la Comunidad lance una iniciativa en el marco de la OACI a fin de aclarar o definir el término «equipaje» de tal modo que excluya los equipos de movilidad o, como alternativa, de suprimir o revisar cualesquiera límites de responsabilidad sobre los daños, la pérdida o la destrucción de equipos de movilidad en el marco del Convenio de Montreal.

3) La Comisión anima a las compañías aéreas en la UE a que renuncien voluntariamente a sus actuales límites de responsabilidad con objeto de ajustar el importe de las indemnizaciones al valor real de los equipos de movilidad.

4) En 2008-2009, la Comisión supervisará la observancia de la legislación comunitaria, en particular del Reglamento (CE) nº 1107/2006, por parte de los Estados miembros, las compañías aéreas y los aeropuertos.

5) La Comisión anima a las partes interesadas a recabar mejor y de forma más sistemática los datos relativos a las reclamaciones relativas a equipos de movilidad.

6) En el informe previsto en el artículo 17 del Reglamento (CE) nº 1107/2006, la Comisión incluirá un capítulo sobre los derechos de las PMR en caso de pérdida, daños o destrucción de sus equipos de movilidad. En ese momento, la Comisión examinará la evolución efectiva de la situación tras la entrada en vigor del Reglamento (CE) nº 1107/2006 y los progresos de la iniciativa de la OACI mencionada en el punto 2 de estas conclusiones. Si la evaluación demuestra que no se han logrado las mejoras necesarias, la Comisión presentará una propuesta legislativa para reforzar los derechos de los pasajeros aéreos vigentes con arreglo a la legislación comunitaria en caso de pérdida, daños o destrucción de equipos de movilidad durante su manejo en los aeropuertos o su traslado a bordo de las aeronaves, lo que implica la revisión del límite actual de las indemnizaciones y la necesidad de definir mejor la responsabilidad de los aeropuertos.

[1] DO L 204 de 26.7.2006, p. 1.

[2] Documento de trabajo del Consejo nº 15206/05 (COD 2005/007).

[3] Anuncio de contrato 2006/S 111-118193 de 14.6.2006.

[4] Pasajes extraídos de una de las respuestas de una asociación de PMR a los consultores.

[5] En 2005 se desplazaron en avión 705,8 millones de pasajeros en la UE.

[6] Compromiso de Servicio de las Compañías Aéreas con los Pasajeros; véanse el artículo 8 y el apéndice.

[7] Consejo Internacional de Aeropuertos Europa (ACI Europe) (2001), Compromiso Voluntario de Servicio de los Aeropuertos con los Pasajeros y su protocolo especial para atender las necesidades de las personas con movilidad reducida (PMR).

[8] Declaración política de la CEAC en el ámbito de la facilitación de la aviación civil [CEAC DOC nº 30 (PART I) 10ª edición/diciembre 2006].

[9] Normas y métodos recomendados de la Organización de Aviación Civil Internacional (anexo 9 del Convenio de Chicago).

[10] Véase la nota a pie de página 8.

[11] Véase la nota a pie de página 6.

[12] Se trata de los siguientes: 1) El Convenio de Varsovia para la unificación de ciertas reglas relativas al transporte aéreo internacional, firmado en Varsovia en octubre de 1929, abreviado: Convenio de Varsovia (1929); 2) El Protocolo que modifica el Convenio de Varsovia para la unificación de ciertas reglas relativas al transporte aéreo internacional, firmado en Varsovia el 12 de octubre de 1929; firmado en La Haya el 28 de septiembre de 1955, abreviado: Protocolo de La Haya (1955); 3) El Convenio para la unificación de ciertas reglas para el transporte aéreo internacional, firmado en Montreal el 28 de mayo de 1999, abreviado: Convenio de Montreal (1999).

[13] Reglamento (CE) n° 889/2002 del Parlamento Europeo y del Consejo, de 13 de mayo de 2002 (DO L 140 de 30.5.2002, p. 2), por el que se modifica el Reglamento (CE) n° 2027/97 del

Consejo sobre la responsabilidad de las compañías aéreas en caso de accidente.

[14] Véase el artículo 1.10 del Reglamento (CE) nº 889/2002.

[15] Ni los convenios internacionales ni la legislación comunitaria regulan la responsabilidad de los aeropuertos.

[16] Por ejemplo, una silla de ruedas eléctrica puede costar hasta 10 000 euros.

[17] Hasta 1 000 DEG (valor aproximado en euros sobre la base del valor de los DEG a 10.3.2008, según la valoración del FMI: 1 060 euros).

[18] En consonancia con lo establecido en el artículo 22.2 del Convenio de Montreal y en el artículo 1.5 del Reglamento (CE) nº 889/2002.

[19] Véase el artículo 8 del Reglamento (CE) nº 1107/2006.

[20] Véase el artículo 12 del Reglamento (CE) nº 1107/2006.

[21] Reglamento (CE) nº 1371/2007 del Parlamento Europeo y del Consejo, de 23 de octubre de 2007, sobre los derechos y las obligaciones de los viajeros de ferrocarril, DO L 315 de 31.12.2007, p. 14, artículo 25.

[22] La ACAA (Air Carrier Access Act) prohíbe la discriminación de las personas con discapacidad en el transporte aéreo. El Ministerio de Transporte estadounidense adoptó un reglamento de aplicación de la ACAA (14 CFR Part 382) que alude de manera explícita al tratamiento de los equipos y dispositivos de ayuda a la movilidad.

[23] Part VII of the Air transport Regulations: Terms and Conditions of Carriage Regulations , publicada en virtud de la Ley canadiense del transporte (Canada Transportation Act) . La Parte V de la Ley aborda el transporte de personas con discapacidades. La Sección 155 de esta Parte V explica las disposiciones relativas a los equipos de ayuda extraviados o dañados.

[24] Véanse los artículos 9 y 11 del Reglamento.

[25] Véase el anexo I del Reglamento (CE) nº 1107/2006.

EVALUATION OF REGULATION 1107/2006

Final report

Main report and Appendices A-B

June 2010

Prepared for:

European Commission
Directorate-General Energy and Transport
DM28 5/70
Brussels
Belgium

Prepared by:

Steer Davies Gleave
28-32 Upper Ground
London
SE1 9PD

+44 (0)20 7910 5000
www.steerdaviesgleave.com

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EXECUTIVE SUMMARY

Background

1. Regulation 1107/2006, which took full effect in July 2008, introduced new protections for people with reduced mobility when travelling by air. Key provisions included:

   - The right, subject to certain derogations, not to be refused embarkation or reservation.
   - The right to be provided with assistance at airports, at no additional cost, in order to allow access to the flight.
   - Responsibility for provision of assistance to PRMs at airports is placed with the airport management company; previously, these services were usually contracted by airlines.
   - The costs of providing assistance at airports can be recovered from airlines through transparent and cost-reflective charges levied for all passengers.

2. The Regulation also required Member States to introduce sanctions into national law for non-compliance with the Regulation, and create National Enforcement Bodies (NEBs) responsible for enforcement of the Regulation. The Regulation applies to all flights from and within the European Union (EU), as well as to flights to the EU operated by EU-registered carriers.

3. The Regulation requires the Commission to report to the Council and the Parliament on its operation and results, and if appropriate to bring forward new legislative proposals. In order to inform this report, the Commission has asked Steer Davies Gleave to undertake an independent review of the Regulation.

Factual conclusions

4. Our review has gathered evidence on the implementation of the Regulation through in-depth discussions and consultation with stakeholders, supplemented by desk research. Stakeholders included airports, airlines, NEBs and PRM organisations. The evidence gathered shows that most of the airports and airlines examined for the study have implemented the requirements of the Regulation. However, there is significant variation in the quality of service provided by airports, and in the policies of airlines on carriage of PRMs. We also identified relatively little activity by NEBs to monitor the Regulation's implementation, or to promote awareness of the rights it grants.

5. Conclusions regarding each of the groups of stakeholders are set out below.

Airlines

6. The key issue we identified in the study is the lack of consistency in policies on carriage, and the significant variation between carriers. For example, Ryanair permits a maximum of 4 PRMs who require assistance on any flight, and Brussels Airlines permits at most 2 on most aircraft; in contrast, British Airways does not impose any restrictions. There is similar variation in policies on whether PRMs have to be accompanied. Approval of policies is the responsibility of national safety regulators, however typically airlines propose policies which are then approved with little or no challenge by the licensing authority (often the same organisation as the NEB).

Although the rationale for these restrictions is safety, there is limited evidence to justify them. Limitations on carriage of PRMs are specifically prohibited by the equivalent US regulation on carriage of PRMs[1].

7. All airlines in the study sample had published some information on carriage of PRMs, however 13 of the 21 did not publish on their websites all of the restrictions on carriage of PRMs that they imposed. Most stated in their Conditions of Carriage that PRMs would not be refused, but this was usually conditional on pre-notification; this may be an infringement of the Regulation.

8. The Regulation encourages PRMs to pre-notify their requirements for assistance to airlines, which are then required to pass on this information to the relevant airports. In theory this should both ensure that PRMs promptly receive the services they need, and allow airports to minimise resourcing costs through efficient rostering. However, our research found that levels of pre-notification too low to allow this: at 11 of 16 airports for which we were provided with information, pre-notification rates were lower than 60%.

9. PRM representative organisations informed us that loss or damage to mobility equipment could still be a significant issue. The Regulation requires airports to handle mobility equipment but does not introduce any new provisions which reduce the risk of loss or damage, or increase the amount of compensation payable, which is restricted by the limits defined in the Montreal Convention.

Airports

10. All airports in the study sample had implemented the Regulation, although we were informed that the Regulation had not been implemented at all at regional airports in Greece. Most had subcontracted the service through a competitive tender; several informed us that they were considering or were in the process of retendering the service, generally because service quality in the initial period had not been sufficient.

11. The frequency with which the PRM services are used varies considerably between airports: among the airports for which we have been able to obtain data use of services varies by a factor of 15, although in most cases between 0.2% and 0.7% of passengers requested assistance.

12. Most airports in the case study States had published quality standards, typically following the format of the minimum recommended standards in ECAC Document 30. Most undertook some form of internal monitoring of performance, however few used external checks of service such as ‘mystery shoppers’. Most stakeholders informed us that airports were providing an adequate level of service quality.

13. Variability in airport service quality (including safety) was reported by PRM organisations and some airlines, but this is subjective and hard to quantify. Airports reported variation in equipment and facilities provided, and we observed significant

[1] US Department of Transport 14 CFR part 382.

variation in the level of training given to personnel providing services to PRMs. In the sample examined, training varied between 3 and 14 days, ostensibly to provide the same services.

14. Charges levied by airports varied considerably (between €0.16 and €0.90 per departing passenger), and we were unable to identify any apparent link to frequency of service use, price differentials between States or service quality. Airports in Spain and mainland Portugal levied uniform charges across all airports managed by the national airport company; this may be an infringement of the Regulation. Many airlines believed consultation by airports regarding charges was poor; Cyprus, Spain and Portugal were identified as particular issues.

NEBs

15. All States except Slovenia have designated NEBs; in most cases the NEB is the CAA, and is the same organisation as the NEB for Regulation 261/2004. All States except Poland and Sweden have introduced penalties into national law for infringements of the Regulation, although several have not introduced sanctions for all possible infringements. The maximum sanction which can be imposed varies significantly, and in some States may not be at a high enough level to be dissuasive; for example, in Estonia, Lithuania and Romania the maximum sanction is lower than €1,000.

16. Most States have received very few complaints to date; in total 1,110 received to date, compared to a total of 3.2m passengers assisted in 2009 across 21 case study airports. 80% of all complaints regarding infringements of the Regulation had been submitted to the UK NEBs; this may be the result of national law in the UK which permits financial compensation to be claimed under the Regulation. No sanctions have yet been imposed, although the NEBs for France, Portugal and Spain have opened proceedings to impose fines. In a number of States we identified significant practical difficulties in imposing and collecting sanctions, typically in relation to imposing fines on carriers registered in other States. These issues are in most cases equivalent to those that apply in relation to Regulation 261/2004[2].

17. Although most case study NEBs had taken some action to monitor the services provided under the Regulation beyond the monitoring of complaints (14 out of 16 had undertaken at least one inspection of airports), in most cases this was limited. Most inspections focussed on checks of systems and procedures, and did not assess the experience of passengers using the services. Monitoring of PRM charges was also poor: NEBs in 9 of the 16 States had undertaken no direct monitoring of airport charges.

18. Few NEBs had made significant efforts to promote awareness of the Regulation by passengers, as required by the Regulation; only two informed us of national public awareness campaigns they had undertaken. This lack of promotion undermines the claims of some NEBs that reviewing complaints is sufficient to monitor the

[2] See Evaluation of Regulation 261/2004, February 2010: http://ec.europa.eu/transport/passengers/studies/doc/2010_02_evaluation_of_regulation_2612004.pdf.

implementation of the Regulation. Awareness of the NEBs' performance appeared in general to be poor: most stakeholders contacted for the study held no opinion on the effectiveness of enforcement by NEBs, and many informed us that this was because they had had no interaction with them.

Other issues

19. A particular issue raised by stakeholders was the conflict between the Regulation and the equivalent US legislation (14 CFR Part 382), which applies to European carriers operating flights to/from the US, and other flights where these are operated as codeshares with US carriers. The most significant conflict is the allocation of responsibilities for assistance: the Regulation requires airports to arrange the provision of services to PRMs, while under the US legislation it is the airlines that have this responsibility. The US legislation also prohibits airlines from imposing numerical limits on PRMs, and from requiring pre-notification from PRMs. This has caused issues for carriers who are required to comply with pieces of legislation that conflict, although the US legislation does allow carriers to apply for a waiver where there is a conflict of laws.

20. A number of other issues regarding specific Articles are discussed in the section below on recommended changes to the Regulation.

Recommendations

21. We have made a number of recommendations, addressing:

- improvements to the implementation of the Regulation which would not require any legislative changes; and
- further recommendations which could only be implemented through amendment to the text of the Regulation.

Measures to improve the operation of the Regulation

22. Several airlines argued in their submissions to the study that they should be permitted to provide or contract their own PRM assistance services, as they could provide this more cost-efficiently than airports. We believe that this could create an incentive to minimise the service provided and hence would risk a reduction in service quality. Whilst there were initially significant issues with the quality of PRM service provision at certain airports, most stakeholders believed that these issues had now been addressed, and our most important recommendation is therefore that allocation of responsibility for PRM services to airports should not be amended.

23. Many of the concerns raised regarding airports relate to inconsistency of application of the Regulation. To address this, we suggest that the Commission should:

- improve provision of information regarding accessibility of airports, through a centralised website listing factors such as maximum likely walking distance within an airport, means used for access to aircraft, and any facilities available for PRMs;
- develop and share best practice on contracting of PRM service providers, both to improve the content and structure of the contracts used and therefore reduce

the likelihood of unnecessary retendering, and to recommend methods of cooperation; and

- develop and share best practice advice on training of staff providing PRM services, so that a more consistent standard of service is provided.

24. Similarly, many of the concerns raised regarding airlines also relate to inconsistency of application of the Regulation, in particular to inconsistent policies on carriage of PRMs. We therefore suggest that the Commission should:

- work with EASA to determine safe policies on carriage of PRMs, in particular to address the wide and unjustifiable variation in airline policies on carriage of PRMs (in particular on numerical limits and circumstances under which PRMs are required to be accompanied); and
- ensure that the airlines we have identified as not publishing clear policies on carriage of PRMs do so, through actions by the relevant NEBs (which could also review airlines outside the study sample for the same reason).

25. Given the current low rates of rates pre-notification, we suggest that the Commission monitor this issue, through encouraging NEBs to collect rates of pre-notification. In future, the Commission should assess the situation and consider either eliminating the requirement for pre-notification or alternatively retaining it and providing passengers and carriers with more incentive to pre-notify.

26. An additional problem reported with pre-notification is where PRMs had pre-notified their requirements for assistance, but then found that this information had not been passed on to airport or airline staff. To address this, and to provide PRMs with evidence that they can use when making a complaint, we recommend that the Commission encourage airlines to provide PRMs with a receipt for pre-notification.

27. The greatest problem identified by the study regarding NEBs was the lack of pro-active measures taken to monitor or enforce the Regulation. In most cases this has not had significant detrimental effect, as most airports and airlines have implemented the provisions of the Regulation, but could become an issue if the situation changes in the future. We suggest that the Commission should encourage all Member States to:

- designate NEBs and introduce penalties for all infringements of the Regulation;
- take measures to inform PRMs of their rights under the Regulation and of the possibility of complaint to the relevant NEB, for example through national promotional campaigns; and
- pro-actively monitor the application of the Regulation (rather than relying on complaints), for example through increased interaction with PRM organisations, and through direct monitoring of quality of service provided.

28. We also recommend that the Commission should, in consultation with stakeholders, develop a detailed good practice guide regarding implementation of the Regulation. This could include sections regarding recommendations on safety limits, the format and content of policies on carriage, and consultation. It could also specify recommended minimum quality standards covering qualitative aspects of the services provided. Publishing voluntary policies such as these would allow potential future amendments to the Regulation to be tested in practice before adoption.

Changes to the Regulation

29. There are some areas where improvements can only be effected through changes to the text of the Regulation. These include minor amendments which we recommend should be implemented as soon as possible, and more significant amendments to be considered in the longer term.

30. The minor amendments we would suggest are:

- Extend Article 11 to require airlines to ensure that the personnel of their ground handling companies are trained to handle mobility equipment.
- Amend Article 8 to make specific PRM charges obligatory for airports wishing to recover costs from users, and therefore ensure costs are transparent, reasonable and cost-related.
- Amend Article 8 to make clear that that PRM charges are airport-specific and cannot be set at a network level.
- Amend Article 14 to require that NEBs must be independent of any bodies responsible for providing services under the Regulation (at present this is not the case in Greece).
- Amend Article 14 to clarify that NEBs are responsible for flights departing from (rather than both departing from and arriving at) airports in their territory, in addition to flights by Community carriers arriving at airports within the State's territory but departing from a third country.
- Amend Recital 17 to be consistent with Article 14, so that both state that complaints regarding the Regulation should be addressed to the NEB of the State where the flight departed, rather that of the State which issued the operating license to the carrier.

31. These changes would improve the functioning of the Regulation in its current form, without making significant changes to its overall approach.

32. A key issue with the Regulation is its lack of detail when compared to equivalent legislation (in particular, the equivalent US regulations on carriage of PRMs); in our view, as a result of this, it leaves too much scope for interpretation and variation in service provision. We suggest that, to ensure greater consistency, and that PRMs' rights are adequately respected, the Commission should consider making the text more detailed and specific about the requirements for airlines and airports. Some key areas in which we suggest that changes could be made are as follows:

- Specify the circumstances under which carriage of PRMs may be restricted (including any numerical limits) or where PRMs may be required to be accompanied[3].
- Clarify the definitions of 'PRM', 'mobility equipment' and 'cooperation'.

[3] This could be implemented either through amendment to this Regulation or through amendment to Commission Regulation (EC) 859/2008

- Clarify whether airlines may levy additional charges for supply of medical oxygen and for multiple seats where one seat is insufficient for the passenger (for example, in the case of obese or injured passengers).
- Extend the Regulation to include a provision requiring airports to publish information on the rights of PRMs (including the right to complain) at accessible points within the airport.

33. It would be necessary to consult with stakeholders about these changes and to undertake an impact assessment, and therefore these changes could not be introduced immediately.

34. We also suggest that the Commission and the Member States should work with other contracting States to amend the Montreal Convention so as to exclude mobility equipment from the definition of baggage. This would address the problem faced by users of technologically advanced wheelchairs, the values of which often substantially exceed the maximum compensation allowable under the Montreal Convention (1,131 SDRs, or €1,370). Although most airlines we contacted for the study informed us that they waived the Montreal limits in this type of situation, several PRM organisations informed us of cases where they did not, and even in the case that an airline voluntarily waives the limit the PRM is in a position of uncertainty.

1. INTRODUCTION

Background

1.1 Approximately 10% of the EU population has some type of disability[4]. Equal access to air transport services is necessary to enable full and equal participation in modern society. In order to ensure equal treatment as far as possible, Regulation 1107/2006 introduced new protections for people with reduced mobility when travelling by air, including the right, subject to certain derogations, not to be refused embarkation or reservation, and the right to be provided with assistance at airports, at no additional cost, in order to allow access to the flight. Before the introduction of the Regulation, there had been some well-publicised examples of carriers charging passengers for the provision of assistance that was essential in order to travel[5].

1.2 The Regulation creates obligations towards disabled persons and persons of reduced mobility (PRMs) for air carriers and their agents, tour operators, airport management companies, and Member States:

- Airlines are prohibited from refusing carriage (except where necessary to comply with safety regulations or where it is physically impossible) and have to provide certain types of assistance on board the aircraft.
- Airlines, their agents and tour operators have to ensure that they can accept notification of the need for assistance at all points of sale, and transmit this information to the airport and the operating air carrier.
- Airport management companies have to provide assistance at the airport, and develop and publish quality standards for this assistance. The costs of providing this assistance can be recovered through transparent and cost-reflective charges levied for all passengers.
- Member States are required to introduce sanctions into national law for non-compliance with the Regulation, create bodies responsible for enforcement of the Regulation, and promote awareness of the rights created by the Regulation and how to complain about infringements.

The need for this study

1.3 Article 17 of the Regulation requires the Commission, by 2010, to report to the Parliament and the Council on the operation and results of the Regulation. In order to inform this report, the Commission requires an independent evaluation of the operation of the Regulation.

This report

1.4 This report is the Final Report for the study. It sets out the work undertaken over the five month duration of the study, and draws conclusions on the current functioning of the Regulation. The recommendations set out in this report were discussed at the final

[4] ECAC document 30, section 5, annex N

[5] For example, on January 2004 a UK court ruled that Ryanair had acted unlawfully by charging a passenger Bob Ross £18 in each direction for wheelchair hire at London Stansted airport

meeting with the Commission.

Structure of this document

1.5 The rest of this report is structured as follows:

- Section 2 summarises the methodology used for this study;
- Section 3 sets out how the Regulation is being applied by airports;
- Section 4 sets out how the Regulation is being applied by airlines;
- Section 5 describes enforcement and complaint handling by NEBs;
- Section 6 summarises stakeholder views on other policy issues relating to the Regulation;
- Section 7 summarises the factual conclusions; and
- Section 8 summarises the recommendations.

1.6 Further detailed information on the policies of airlines regarding carriage of PRMs is provided in Appendices A and B.

1.7 Case studies have been undertaken of complaint handling and enforcement in 16 Member States. These are provided in Appendix C, which, due to its size, is provided as a separate document.

2. RESEARCH METHODOLOGY

Introduction

2.1 This section provides a summary of the research methodology used. It describes:

- the overall approach used;
- the selection of case studies;
- the scope of the desk research that has been undertaken; and
- the stakeholders that have participated in the study, and how they have provided inputs.

Overview of our approach

2.2 The Commission requested us to collect evidence to address a number of questions, most of which can be categorised as either relating to:

- enforcement and complaint handling undertaken by National Enforcement Bodies (NEBs); and
- application of the Regulation by air carriers, their agents, tour operators and airports.

2.3 In order to address these questions, we developed a research methodology divided into two parts:

- case study research; and
- cross-EU interviews and analysis.

2.4 The rationale for this division is that enforcement and complaint procedures are specific to Member States and are therefore best evaluated through a case study approach. It was agreed to undertake case studies of complaint handling and enforcement in 16 Member States as part of this study. The case studies also describe state-specific aspects of airline and airport implementation of the Regulation.

2.5 Key airlines cover the whole of the EU rather than restricting operations primarily to one State (for example, the Irish-registered carrier Ryanair operates domestic flights in the UK, France, Spain and Italy). In addition, the issues faced by airports in implementing the Regulation are, in most cases, not State-specific. Questions relating to the application of the Regulation by airlines and airports have therefore been addressed through a cross-EU approach. Information from both elements of the research has been used for the conclusions, and will be used in the development of recommendations.

2.6 Both the case study and the cross-EU research use a mixture of stakeholder interviews and desk research. The desk research has been useful to supplement the information provided by stakeholders, particularly regarding the charges levied by airports for services to PRMs.

Selection of case study States

2.7 The 16 case study states were selected in agreement with the Commission, with reference to the following criteria:

- The Member States with the largest aviation markets (measured by passenger numbers these are UK, Spain, Germany, Italy, France, Greece, Netherlands and Ireland);
- At least some of the Member States that, at the time the study commenced, had not introduced sanctions into national law;
- Member States in which the structure of the NEB is unusual (for example, in the UK, the Equality and Human Rights Commission is responsible for complaint handling);
- Member States in which airlines are based with which we identified significant issues of non-compliance with Regulation 1107/2006 in our 2008 review of Conditions of Carriage (carriers with some particularly non-compliant terms were based in Denmark and Italy); and
- States covering a wide geographical scope and variation in sizes.

2.8 The case study states are:

- Belgium;
- Denmark;
- France;
- Germany;
- Greece;
- Hungary;
- Ireland;
- Italy;
- Latvia;
- Netherlands;
- Poland;
- Portugal;
- Romania;
- Spain;
- Sweden; and
- United Kingdom.

2.9 In order to present a thorough analysis of the operation of the Regulation across the EU we conducted a more limited programme of data collection and stakeholder interviews in the remaining 11 Member States.

Stakeholder selection and inputs

2.10 The stakeholders important for the study were:

- NEBs;
- Airlines;
- Airport managing bodies; and
- Organisations representing disabled people, and people with reduced mobility (PRM organisations).

2.11 In addition to these, we spoke to cross-EU bodies which represented these organisations at a European level.

National Enforcement Bodies

2.12 We interviewed (face-to-face or by telephone) the NEB(s) notified to the Commission in every case study State, and obtained written responses from the NEBs of all other States.

2.13 We obtained the following information from each NEB:

- The legal basis for complaint handling and enforcement in the Member State;
- The degree of compliance by airlines;
- The degree of compliance by airports;
- Statistics on the number of complaints and the process for handling them;
- Issues relating to enforcement; and
- Any other issues.

2.14 Non-case study states were provided with a shorter question list which, while addressing the areas listed above, does so at a less detailed level.

2.15 Engagement of the NEBs was obtained through a combination of written responses, meetings and telephone interviews, depending on whether the State concerned is one of the 16 case study states. The approach adopted for case study NEB is listed in Table 2.1, together with the final status of contact as we drafted this Report.

TABLE 2.1 STAKEHOLDER INTERVIEWS: CASE STUDY NEBS

Member State	Organisation	Form of input
Belgium	SPF Mobilité et Transport	Written response and face-to-face interview
Denmark	CAA-Denmark (Staetens Luftfarsvaesen)	Face-to-face interview
France	DGAC Sous-direction du tourisme	Face-to-face interview
Germany	Luftfahrt-Bundesamt (LBA) BM für Verkehr, Bau und Stadtentw	Face-to-face interview
Greece	CAA, Air Transport Economics Section CAA, Airports Division	Written response and telephone interview

Member State	Organisation	Form of input
Hungary	Nemzeti Közlekedési Hatóság (Directorate for Aviation) Egyenlő Bánásmód Hatóság (Equal Treatment Authority)	Face-to-face interview
Ireland	Commission for Aviation Regulation	Face-to-face interview
Italy	ENAC - Direzione Centrale Operazioni	Face-to-face interview
Latvia	Civil Aviation Agency	Written response and telephone interview
Netherlands	Inspectie Verkeer en Waterstaat	Written response and face-to-face interview
Poland	Civil Aviation Office	Face-to-face interview
Portugal	Instituto Nacional de Aviação Civil	Face-to-face interview
Romania	Autoritatea Nationala Pentru Persoanele cu Handicap Romanian Civil Aeronautical Authority	Face-to-face interview
Spain	Servicio de inspección y relaciones con usuarios	Written response and face-to-face interview
Sweden	Swedish Civil Aviation Authority	Written response and telephone interview
United Kingdom	Equality and Human Rights Commission (England) Civil Aviation Authority	Face-to-face interview

2.16 We obtained responses from all NEBs in the non-case study States, as shown in Table 2.2. We requested written responses from all non-case study NEBs and these were followed up with telephone interviews where necessary for clarification.

TABLE 2.2 STAKEHOLDER INTERVIEWS: NON-CASE STUDY NEBS

Member State	Organisation
Austria	Civil Aviation Authority
Bulgaria	Civil Aviation Administration Ministry of Transport, Information Technologies and Communications
Cyprus	Department of Civil Aviation
Czech Republic	Civil Aviation Authority
Estonia	Consumer Protection Body
Finland	Civil Aviation Authority
Lithuania	Civil Aviation Administration
Luxembourg	Direction de l'Aviation Civile
Malta	Department of Civil Aviation
Slovakia	Slovak Trade Inspection Ministry of Transport, Posts and Telecommunications, Directorate General of Civil Aviation and Water Transport, Air Transport Department
Slovenia	Ministry of Transport, Directorate of Civil Aviation

Airlines

2.17 20 airlines have been selected to include a sample with variation across several criteria. These are:

- One key airline with major operations in each case study State;
- At a minimum to include the top 10 European airlines measured in terms of passenger numbers;
- Also to include a mix of different airline types (legacy, low cost and charter), States of registration, and sizes; and
- At least 2 non-EU airlines.

2.18 The airlines selected, and their relevance to each of the criteria, is shown in Table 2.3. We were originally planning to consider Air France-KLM as one airline, but various differences (for example, in its Conditions of Carriage) have meant that it is more logical to consider it as two airlines, meaning there are 11 airlines under the 'Top 10 passenger numbers' criterion. We have consequently excluded the 11th (Austrian) from the interview sample, although the airline still forms part of the desk research.

TABLE 2.3 AIRLINE SELECTION CRITERIA

Airline	Case study State coverage		Airline type				
	Selected for case study state coverage	Case study states	Non-EU	Legacy	Low cost	Charter	Top 10 passenger numbers
Aegean Airlines	✓	Greece			✓		
Air Berlin					✓		✓
Air France	✓	France / Netherlands		✓			✓
AirBaltic	✓	Latvia			✓		
Alitalia	✓	Italy		✓			✓
British Airways	✓	UK		✓			✓
Brussels Airlines	✓	Belgium		✓			
Delta			✓	✓			
EasyJet					✓		✓
Emirates			✓	✓			
Iberia	✓	Spain		✓			✓
KLM	✓	Netherlands		✓			✓
Lufthansa	✓	Germany		✓			✓
Ryanair	✓	Ireland			✓		✓
SAS	✓	Denmark / Sweden		✓			✓
TAP Portugal	✓	Portugal		✓			
TAROM	✓	Romania		✓			
Thomas Cook						✓	
TUI (Thomsonfly)						✓	

Wizzair	✓	Hungary / Poland	✓	

2.19 We approached all 21 case study airlines requesting either a face-to-face or telephone interview. The methods they chose to respond are shown in Table 2.4 below.

TABLE 2.4 STAKEHOLDER INTERVIEWS: AIRLINES

Airline	Form of input
Aegean Airlines	Written response and telephone interview
Air Berlin	Input through IACA only
Air France	Telephone interview
AirBaltic	Did not respond
Alitalia	Written response
British Airways	Declined to participate
Brussels Airlines	Did not respond
Delta	Written response
easyJet	Face-to-face interview
Emirates	Did not respond
Iberia	Telephone interview
KLM	Face-to-face interview
Lufthansa	Declined to participate
Ryanair	Face-to-face interview
SAS	Written response
TAP Portugal	Face-to-face interview
TAROM	Face-to-face interview
Thomas Cook	Face-to-face interview
TUI (Thomsonfly)	Input through IACA only
Wizzair	Did not respond

2.20 We also consulted the five main associations representing airlines operating airlines within the EU, listed in Table 2.5 below.

TABLE 2.5 STAKEHOLDER INTERVIEWS: AIRLINE ASSOCIATIONS

Organisation	Full Name	Type of airline represented	Form of input
IATA	International Air Transport Association	Legacy	Written response and telephone interview
ELFAA	European Low Fares Airline Association	European low cost	Face-to-face interview
AEA	Association of European Airlines	European legacy	Face-to-face interview
ERA	European Regions Airlines Association	European regional	Face-to-face interview
IACA	International Air Carrier Association	Leisure / charter	Face-to-face interview

Airports

2.21 The 21 case study airports were selected according to the following criteria:

- All of the top 10 European airports in terms of passenger numbers;
- The main airport in each of the 16 case study Member States; and
- A sample of smaller airports.

2.22 The airports selected under each criterion, and the methods they chose to respond, are shown in Table 2.6. Note that three of the top 10 airports were excluded from the case study consultation as they were operated by the same organisations as others in the top 10. These comprise Paris Orly, London Gatwick, Zaragoza and Barcelona airports which, at the time the study was planned, were managed by the same companies as Paris CDG, Heathrow and Madrid Barajas respectively[6]. These airports do still form part of the desk research, however.

TABLE 2.6 AIRPORT SELECTION CRITERIA

Airport	State	Main airport in case study State	Top 10 passenger numbers	Smaller airport	Form of input
Amsterdam	Netherlands	✓	✓		Face-to-face interview
Athens	Greece	✓			Written response and telephone interview
Bologna	Italy			✓	Face-to-face interview
Brussels	Belgium	✓			Face-to-face interview
Bucharest Otopeni	Romania	✓			Face-to-face interview
Budapest	Hungary	✓			Face-to-face interview
Brussels Charleroi	Belgium			✓	Face-to-face interview
Copenhagen	Denmark	✓			Written response and telephone interview
Dublin	Ireland	✓			Face-to-face interview
Frankfurt Main	Germany	✓	✓		Face-to-face interview
Lisbon	Portugal	✓			Face-to-face interview
London Heathrow	United Kingdom	✓	✓		Face-to-face interview
London Luton	United Kingdom			✓	Face-to-face interview
Madrid Barajas	Spain	✓	✓		Face-to-face interview*
Munich	Germany		✓		Not able to obtain a response
Paris Charles De Gaulle	France	✓	✓		Face-to-face interview
Riga	Latvia	✓			Written response and telephone interview
Roma Fiumicino	Italy	✓	✓		Written response and telephone interview

[6] Gatwick ceased to be managed by BAA, the operator of Heathrow, on 2 December 2009

Stockholm	Sweden	✓			Written response and telephone interview
Warsaw	Poland	✓			Face-to-face interview
Zaragoza	Spain			✓	Face-to-face interview*

* Interview with AENA covered all State airports in Spain

Selection of PRM organisations and other passenger groups

2.23 In each case study State we selected a PRM organisation representing all disabilities and impairments at a national level. We initially approached the national council organisations that are members of the European Disability Forum (EDF); however in a small number of cases we were unable to obtain a response from this organisation and had to contact an alternative organisation in their place. The table also includes four cross-EU PRM organisations.

TABLE 2.7 PRM AND PASSENGER ORGANISATIONS BY CASE STUDY STATE

State	Organisation	Form of input
Belgium	Belgium Disability Forum	Telephone interview
Denmark	Danske Handicaporganisationer (DH; Disabled Peoples Organisations Denmark)	Face-to-face interview
France	Conseil Français des personnes Handicapées pour les questions Européennes (CFHE ; French Council of Disabled People for European Affairs)	Telephone interview
Germany	Deutscher Behinderten Rat (DBR; German Disability Council)	Unable to obtain a response
Greece	National Confederation of Disabled People (ESAEA)	Written response and telephone interview
Hungary	National Council of Federations of People with Disabilities (FESZT)	Written response and telephone interview
Ireland	People with Disabilities in Ireland (PWDI)	Face-to-face interview
Italy	Forum Italiano sulla Disabilità (FID; Italian Disability Forum)	Face-to-face interview
Latvia	Latvian Umbrella Body for Disability Organisations (SUSTENTO)	Written response and telephone interview
Netherlands	CG-Raad*	Face-to-face interview
Poland	Polskie Forum Osob Niepelnosprawnych (PFON; Polish Disability Forum)	Face-to-face interview
Portugal	Confederação Nacional dos Organismos de Deficientes (CNOD; National Confederation of Organisations of Disabled People)	Unable to obtain a response
Romania	National Disability Council (CNDR)	Face-to-face interview
Spain	Fundación ONCE*, on request of Comité Español de Representantes de Personas con Discapacidad (CERMI)	Face-to-face interview
Sweden	Swedish Disability Federation (HSO)	Written response and telephone interview
United Kingdom	UK Coalition for Disability Rights in Europe (UKCDRE)	Telephone interview

EU	European Disability Forum	Face-to-face interview
EU	European Blind Union	Face-to-face interview
EU	European Union of the Deaf	Written response and telephone interview
EU	Inclusion Europe	Declined to respond

* Not a national council organisation member of EDF

Selection of other organisations

2.24 In addition to the stakeholders listed above, we contacted a number of cross-EU organisations. These comprised:

- **Passenger organisations:** the European Passenger Federation;
- **Travel agent associations:** ECTAA;
- **Airport association:** ACI Europe; and
- **Advisory bodies:** EASA, ECAC.

2.25 At the level of Member States, there were stakeholders which did not correspond to the categories described so far, but which we believed would provide useful information. These organisations were as follows:

- **Wings on Wheels (UK):** This organisation provides package holidays tailored to the needs of disabled people.
- **Thomas Cook, TUI:** Elements of the Regulation apply to travel agents as well as to airlines.
- **Air Transport Users Council (UK):** Prior to the introduction of the Regulation, this organisation had handled complaints from disabled passengers regarding travel by air, and as a result continued to receive some complaints after the Regulation came into force. In addition, the AUC is the only government-funded body in the EU specifically to represent the interests of air passengers

2.26 The form of input adopted by each stakeholder is shown in Table 2.8.

TABLE 2.8 STAKEHOLDER INTERVIEWS: OTHER ORGANISATIONS

State	Association name	Form of input
EU	ECTAA	Written response
EU	EPF	Did not respond
EU	ACI Europe	Face-to-face interview
EU	EASA	Written information provided
EU	ECAC	Face-to-face interview
United Kingdom	Wings on Wheels	Unable to obtain a response
Germany	Thomas Cook	Face-to-face interview
United Kingdom	TUI	Through IACA only
United Kingdom	Air Transport Users Council	Face-to-face interview

Desk research

2.27 The main objectives of the desk research were:

- To evaluate the extent to which air carriers demonstrate compliance with the Regulation through published information, such as Conditions of Carriage and policies on carriage of PRMs; and
- The extent to which airports have complied with the requirement to develop and publish PRM quality standards, as specified in Article 9 of the Regulation, and the content of these standards.

2.28 Conclusions emerging from the desk research were supplemented by the information collected through stakeholder interviews.

Airlines

2.29 The research methodology employed for this part of the study was based on a review of the websites of the 21 case study airlines listed above. Although the focus was on the English language version of the websites, versions in other languages were checked to check whether additional information was provided.

2.30 Three key sources of information were surveyed from each website:

- Conditions of Carriage, with particular regard to the conditions set out for the carriage of PRMs;
- Other policies on the carriage of PRMs: a more detailed search across the airline's website for any policies and relevant information on PRM travel; and
- Options to notify carriers of assistance requirements.

Airports

2.31 Again, the research conducted for this part of the study was internet-based. The websites of each of the case study airports was surveyed against the following criteria:

- whether the airport publishes quality standards;
- how easy these are to find;
- the content of the standards; and
- whether the airport publishes details of its performance against the standards.

Review of relevant legislation and other documentation

2.32 We also reviewed airline and airport policies with reference to other applicable legislation and guidance. The only other EU-wide legislation which relates to the carriage of PRMs by air is EU-OPS 1 (Commission Regulation 859/2008). In addition, many EU carriers which operate flights to the US are also covered by the corresponding US regulation (14 CFR Part 382, Nondiscrimination on the Basis of Disability in Air Travel); this is significantly different from Regulation 1107/2006 and this has an impact on the operating procedures of some carriers.

2.33 Other current guidance includes:

- ECAC Document 30;
- JAR-OPS 1 Section 1;
- JAA Temporary Guidance Leaflet (TGL) No. 44; and
- UK Department for Transport (DfT), *Access to Air Travel for Disabled Persons and Persons with Reduced Mobility – Code of Practice.*

3. APPLICATION OF THE REGULATION BY AIRPORTS

Introduction

3.1 One of the most fundamental changes introduced by the Regulation was the change in responsibility for provision of assistance to PRMs: where previously these services were provided by airlines, the Regulation requires airports to provide them, and permits them to pass on the associated costs to users, provided this is done in a fair and transparent manner. The Regulation also requires airports handling over 150,000 passenger movements per year to develop and publish quality standards for assistance. The detailed requirements are set out in the following section.

3.2 In order to assess how airports are implementing these requirements, we met or sought responses from a sample of airports selected under the criteria set out above (see 2.21). The information gathered was supplemented by tours of the services provided at certain airports, by interviews with other stakeholders who gave their views on service provision, and by desk research. The desk research included analysis of the charges and quality standards set out by the airports in the sample.

Requirements of the Regulation

3.3 As noted above, the Regulation places responsibility for provision of assistance with the airport, whereas previously assistance had been provided by ground handling companies on the basis of contracts with individual airlines. The Regulation requires each airport to provide a uniform service quality for all airlines that it handles (except where an airline requests a higher level of service). The key requirements for the PRM assistance service are summarised below:

- **Designated points:** Airports are required to designate points inside and outside the terminal building at which PRMs can announce their arrival at the airport and request assistance. These must be developed in cooperation with airport users and relevant PRM organisations, must be clearly signed and must offer basic information about the airport in accessible formats.
- **Assistance:** Airports must provide assistance to PRMs so that they are able to take the flight for which they hold a reservation, providing that they have pre-notified their requirements and arrive with sufficient time before the departure of their flight. If they have not pre-notified, the airport must make all reasonable efforts to enable to them to take their flight. For PRMs on arriving flights, the airport must provide assistance to enable them to leave the airport or reach a connecting flight. The assistance provided should be appropriate to the individual passenger. An airport may contract for these services to be provided by another company, in compliance with quality standards (discussed below).
- **Charges:** An airport cannot charge a PRM for this service, but may levy a specific charge on airport users for it. The charge must be reasonable, cost-related and transparent, and the accounts for these services must be separated from its other accounts. The charge must be shared between airport users in proportion to the total number of passengers carried to and from the airport by each. If an airport wishes to contract for services or levy a charge, both must be done in cooperation with airport users through the Airport Users Committee (AUC).

- **Quality standards:** Airports with over 150,000 annual passenger movements must set and publish quality standards for these services, and decide resource requirements to meet them, in cooperation with airport users and PRM organisations. The standards must take account of relevant policies and codes, such as the ECAC Code of Good Conduct in Ground Handling for Persons with Reduced Mobility (ECAC Document 30). An airline can agree with an airport to receive a higher standard of service, for an additional charge.
- **Training:** All employees (including those employed by sub-contractors) providing direct assistance to PRMs should be trained in how to meet their needs. Disability-equality and disability-awareness training should be provided to all airport personnel dealing directly with the travelling public, and all new employees should attend disability−related training.

Categories of PRM defined by carriers and airports

3.4 The Regulation covers passengers with a wide range of impairments for which the needs for assistance are different. Although each individual is different, airlines and airports find it helpful to apply some categorisation when referring to the needs of different passengers. The most commonly used categorisation is the list of Special Service Request (SSR) codes defined by IATA. These categories are:

- **WCHR:** Wheelchair (R for Ramp). Passengers who are able to ascend and descend steps and move about inside the aircraft cabin, but who require a wheelchair or other assistance for longer distances (e.g. between the terminal and the aircraft).
- **WCHS:** Wheelchair (S for Steps): Passengers who cannot ascend or descend steps, but can move about inside the aircraft cabin. They require a wheelchair for the distances to and from aircraft and must be assisted up and down any steps.
- **WCHP:** Wheelchair (P for Paraplegic). Passengers with a disability of the lower limbs who have sufficient personal autonomy to take care of themselves, but who require assistance to embark and disembark and can move about inside the aircraft cabin only with the assistance of an onboard wheelchair.[7]
- **WCHC:** Wheelchair (C for Cabin Seat). Passengers who are completely immobile, and who can move about only with the assistance of a wheelchair or other means, and require this assistance at all points from arrival at the airport to seating (which may be fitted to their specific needs) on board the aircraft, and the reverse process on arrival.
- **BLND:** Blind or visually impaired passengers.
- **DEAF:** Deaf or hearing impaired passengers, and passengers who are deaf without speech.
- **BLND/DEAF:** Passengers who are both visually and hearing impaired, and who can only move about with the assistance of an accompanying person.
- **DPNA:** Disabled passengers with intellectual or developmental disabilities who need assistance.
- **MEDA:** Passengers whose mobility is impaired due to illness or other clinical reasons, and who are authorised to travel by medical authorities.

[7] This code is not widely used or universally recognised at present

- **STCR:** Passengers who can only be transported on a stretcher.
- **MAAS:** Meet and Assist. All other passengers requiring special assistance.

3.5 Some airlines use different categorisations. For example, Ryanair uses a more detailed classification system with 16 categories that also identify, for example, whether the passenger is travelling with their own wheelchair.

3.6 In addition to the codes above which describe the needs of the passenger, when referring to wheelchair users airlines may also add a description of the type of wheelchair which will be carried. The codes used are WCMP for manual power, WCBD for dry cell battery and WCBW for wet cell battery. These codes are useful for planning the type of assistance which will be necessary to transport them, for example if they require preparation or disassembly.

Services actually provided by airports

3.7 All of the case study airports had implemented the Regulation, and were providing the required services in some form. We were given tours of the services provided at several of the airports we visited. From these, and descriptions of services given in interviews, we have drawn together a description of a typical process by which the services required by the Regulation are provided.

Departures

Pre-notification	Almost all airports and airlines have contracted SITA (a company providing aviation information technology) to provide a telex or email service for the purpose of passing notification of the needs of PRMs (see 4.64). For each series of flights for a given aircraft, any assistance required is communicated via a telex which includes a four letter code describing the category of disability of each PRM on each flight (see 3.4). This message is known as the passenger assistance list (PAL); if requirements change prior to the flight this is updated by a change assistance list, or CAL. Where a request for assistance is made by a PRM at least 48 hours before the published departure time for the flight, the airline is obliged to transmit this information to the relevant airports at least 36 hours before the published departure time.
Recording of notification	This information arrives at a telex server in the dispatch office of the airport PRM service provider. The telex describes: the time of the flight, the flight number, the names of passengers on board requiring assistance, and the category of disability of these passengers. The information from this telex is used to update the service provider's task management system, either via an automatic link, or via manual input. The task management system can be purposely developed task management software, or in some airports a piece of paper containing notes on expected assistance. Information regarding requests for assistance may also arrive via email. Airlines and airports may use email for several reasons: some airlines (such as non-EU charter carriers) may not have a SITA terminal; larger groups (such as operators of cruises) may send an off-line message in addition to PAL/CAL messages.
PRM arrives and is assigned an assistant	Each new request for assistance creates a new task; if a passenger arrives without notification, the task is created on their arrival. The task management software lists PRMs requiring assistance as tasks, and sets out expected arrival times and real-time information about their flights. When the passenger announces their arrival (either via a designated point or a check-in desk), the type of assistance they require is confirmed, and the task is assigned to one or more available assistants. At some airports, assistants carry personal digital assistants (PDAs) which record progress on a particular task; if this is the case, information regarding the passenger to be met will be forwarded to the PDA of the selected assistant. At other airports (for example in Spain) the management of tasks is a manual process. More than one assistant may be assigned if the passenger requires more involved assistance, such as carrying into their seat or is in a stretcher.

PRM is met and needs are confirmed	The assistant meets the passenger at the point at which they announced their presence; when they meet the PRM, they update the dispatch office with their action. This update may be via PDA linking through to the software in the dispatch office, or via calling in. Assistants should be trained in how to approach passengers with different requirement. If the PRM has difficulty with long distances, the airport may use electric carts, or may push the passenger in a wheelchair provided by the airport. The electric carts may be capable of carrying a passenger in an airport wheelchair. The extent of the use of electric carts may be dependent on airport design. PRMs who are blind or visually impaired may require someone whose arm they can hold guide them through the airport. A PRM with an intellectual disability may require information about the airport to be presented to them in a simplified manner, or may require check-in and other procedures to be conducted in a particular manner. The assistant will help PRMs with a reasonable amount of baggage, but only as much as any other passenger would take.
PRM is assisted through check-in and security	The passenger is taken through check-in and security. At check-in, there may be lowered desks for passengers in wheelchairs. At security, there may be a track where the security staff are trained in searching PRMs, including searching wheelchairs, and a screen to provide privacy for the search. Usually it is not possible for wheelchairs to be taken through metal detector arches, and therefore wheelchair users are searched manually. The security track is not typically exclusively for PRMs, but they may receive priority. There may be a dedicated PRM lounge; if there is time before their flight leaves, they will have the option of resting there or if there is time may wish to use the facilities in the departure lounge until called for their flight. Some airports are willing to take PRMs to these facilities (such as restaurants and shops), while others require PRMs to remain in the waiting area allocated. Where the airport is willing to provide this, the assistant arranges a time at which to collect the passenger. Some airports allow PRMs to use the business lounge regardless of class of travel.
PRM is assisted through customs and to gate	Once the flight is ready for boarding, the assistant takes the passenger to the gate. Different methods of assisting a PRM into the aircraft will be used depending on the passenger's needs and on the manner in which the aircraft is embarked (e.g. via airbridge or from the apron). Some PRMs will be able to use either stairs or an airbridge and will not require specific assistance at this point.
PRM is assisted on board aircraft with airbridge	Where passengers board via an airbridge, category WCHC and WCHS PRMs are transferred to the onboard wheelchair at the door of the aircraft. If they have remained in their own chair up to this point, their wheelchair is transferred to the hold; otherwise the airport's wheelchair is returned with the assistant. The onboard wheelchair is narrower to allow it to pass down the aisle, and has straps to hold the passenger safely in the chair. Other categories of PRM board the aircraft on foot, without particular assistance. Depending on the policy of the carrier concerned, PRMs may have to board either first or last.
PRM is assisted on board aircraft without airbridge	Where passengers board via steps, category WCHC and WCHS PRMs are transferred to the onboard wheelchair on the apron before entering the aircraft. They are then lifted up to the aircraft either by an Ambulift8, by a motorised stair-climbing chair or at some airports by manual lifting. Other categories of PRM board the aircraft on foot, and may require assistance to ascend the stairs. If the aircraft is boarded away from the terminal building and passengers are brought to the aircraft by bus, a dedicated PRM vehicle may be used to bring the PRM to the aircraft.
PRM is assisted to seat on board aircraft	On board, the assistant provides the assistance necessary for the passenger to get to their seat. This may include lifting the passenger from the on-board wheelchair into the seat and if, as required by certain carriers, the PRM has to be seated in a window seat, transferring across other seats. The assistant may also help the passenger with storing any baggage in the overhead lockers. Once the passenger is installed in their seat, the airport ceases to have responsibility for providing assistance, and it transfers to the airline.

[8] An Ambulift is a vehicle with a hydraulic platform which can be raised to the level of the flight deck to allow wheelchairs to be pushed on board.

Arrivals

Notification arrives	In addition to arriving via PAL or CAL, notification for arriving passengers may arrive by passenger service message (PSM). This is a list of passengers on board the aircraft requiring particular treatment on arrival, dispatched when an aircraft departs. The message states the points of embarkation and disembarkation, the flight number and date, and lists the names of the passengers requiring particular assistance with a description of the assistance. In addition to PRMs, the PSM lists children travelling alone (unaccompanied minors, or UMs), deportees and returned inadmissible passengers. In some circumstances, no PAL or CAL is received for arriving passengers, and the only notification is via PSM; this reduces the period of notification from 36 hours to the duration of the flight. In some cases no notification is received at all.
PRM is met and assisted to disembark	The information from the PSM is input into the task management system in the same manner as the PAL or CAL. When a flight lands, available assistants are assigned to each of the PRMs on board the flight, and dispatched to meet them at the gate. On landing, if a PRM requires assistance to disembark they will typically disembark once all other passengers have disembarked. The PRM is met at the door of the aircraft or within the aircraft by their assigned assistant. Depending on the code included in the PSM the assistant may have equipment such as wheelchairs, or may be accompanied by another member of staff. If the passenger has their own wheelchair, this is removed from the hold, and the passenger may then be assisted to transfer from the aircraft wheelchair into their own. At some airports the passenger's wheelchair is not returned to them until baggage reclaim, for security reasons.
PRM is assisted from aircraft to point of arrival	The passenger is then assisted through passport control (where there may be a dedicated PRM-accessible track) to the baggage hall, where they are assisted to retrieve their bags. They are then assisted through customs, and the assistant accompanies them as far as is required, up to the designated point of arrival outside the terminal. If it is situated close to the arrival point, they may also assist the PRM to their car if requested.

Connections

Connecting flights	Where a PRM requires assistance to make a connecting flight, the assistance offered varies depending on the length of time between arrival and departure. If there is limited time, assistance is offered as described above to disembark, transfer, and embark the passenger onto their next flight. If there is a significant wait between arrival and departure, the passenger may be taken to a PRM lounge or waiting area, until their departing flight is ready for boarding.

Policies on service provision

Provision for non pre-notified passengers

3.8 The Regulation sets out the assistance which must be provided to PRMs where they have notified the air carrier or tour operator at least 48 hours before the published time of departure of their flight. It also requires that where no such notification is made, the airport should make all reasonable efforts to provide this assistance.

3.9 Of the airports we contacted, most stated that there was little or no difference in the service received by passengers who had not pre-notified, and differences in service quality only occurred when the services were busy. Even in the cases where a choice did have to be made between assisting a pre-notified and non-pre-notified passenger, some airports informed us that they would make decisions on the basis of ensuring all passengers could make their flights, rather than on the basis of notification. Some airports informed us that the level of notification was so low that it was not useful to make any distinction on this basis. Only a small minority of the case study airports stated that a slower service was provided to passengers who did not pre-notify (Table 3.1 below).

TABLE 3.1 AIRPORT SERVICE PROVIDED TO NON-PRE-NOTIFIED PRMS

Airport	Service provided to non-pre-notified PRMs
Amsterdam Schiphol	Equivalent service, priority based on ensuring passengers can make their flights
Athens	Slower service than pre-notified for departures, equal service for arrivals
Bologna	Equivalent service is provided
Brussels	Equivalent service as pre-notified, lower priority when busy
Bucharest Otopeni	Equivalent service is provided (some equipment may not be available)
Budapest	Equivalent service is provided (possible delay of a few minutes)
Brussels Charleroi	Equivalent service, priority based on ensuring passengers can make their flights
Copenhagen	Equivalent service as pre-notified, lower priority when busy
Dublin	Slower service
Frankfurt Main	Equivalent service as pre-notified, lower priority when busy
Lisbon	Standards not defined
London Heathrow	N/A
London Luton	Equivalent service is provided
Madrid Barajas	Equivalent service is provided (possible delay on arrival)
Munich	Equivalent service as pre-notified, lower priority when busy
Paris Charles De Gaulle	Equivalent service as pre-notified, lower priority when busy
Riga	Equivalent service is provided
Roma Fiumicino	Slower service
Stockholm	Slower service
Warsaw	Equivalent service as pre-notified, lower priority when busy
Zaragoza	Equivalent service is provided (possible delay on arrival)

3.10 Airports' estimates of the impact of pre-notification rates on staffing and equipment levels varied considerably. Several airports informed us that while an increase in the rate of pre-notification would improve the quality of the service provided, they would not expect it to significantly affect the number of staff they employed. In contrast, Aèroports de Paris believed that improving rates of pre-notification could allow them to reduce the costs of PRM service provision by 30%-40%. In January 2010, London Heathrow introduced a banded charge which varies the amount paid depending on the level of pre-notification of the airline (see 3.34).

Restrictions on service

3.11 Unlike for airlines, the Regulation does not explicitly state any grounds for airports to restrict the services provided. However, there may be national laws which have bearing on the functions which airport staff are permitted to undertake; for example, we were informed that in Denmark national laws on health and safety did not permit people of above a certain weight limit to be carried up stairs and into an aircraft.

Other issues noted

3.12 All of the case study airports provide the services required under the Regulation. The manner and quality of provision varies among the sample, and there have been a number of incidents of significant service failure, but we identified no fundamental problems with service provision at major airports. However, we were informed that the Regulation had not been implemented at Greek airports other than Athens: at these airports, services are provided to PRMs, but the change of responsibility from airline to airport has not yet been effected; provision of and payment for services is agreed between airlines and ground handling companies, as it was prior to the introduction of the Regulation.

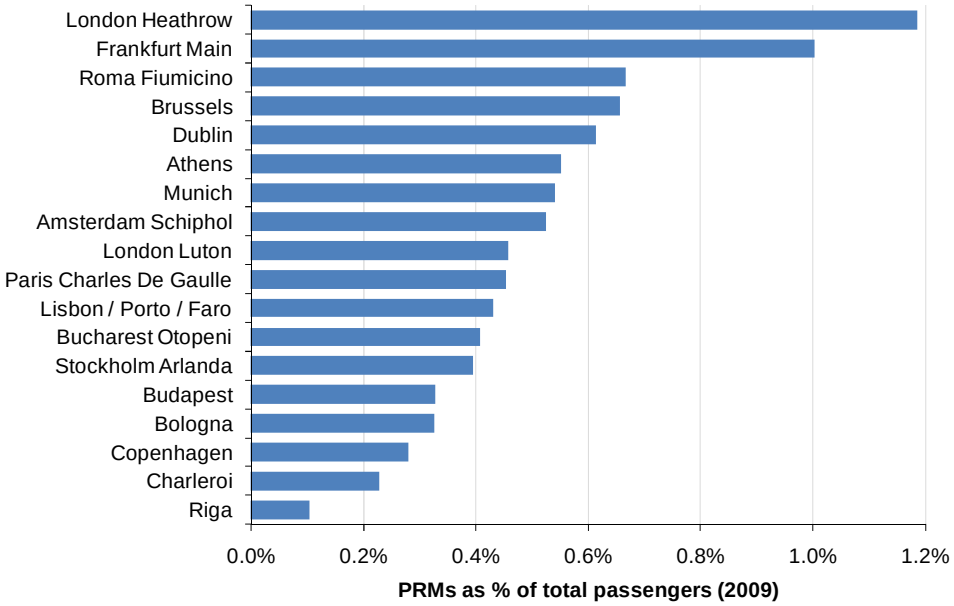
3.13 The views of stakeholders on the provision of services are discussed at the end of this chapter (see 3.76).

Statistical evidence for carriage of PRMs

The proportion of passengers requiring assistance

3.14 The frequency with which PRM assistance services are used varies considerably between airports. Figure 3.1 shows the rate of use at the airports in our sample for which we were provided with data. At London Heathrow 1.2% of passengers are PRMs requiring assistance, while at Riga only 0.1% of passengers require assistance. However, for most airports in the sample, the proportion requiring assistance is between 0.2% and 0.7%. ACI informed us that the higher rates at some airports were the result of the demographics of the passengers flying to these destinations.

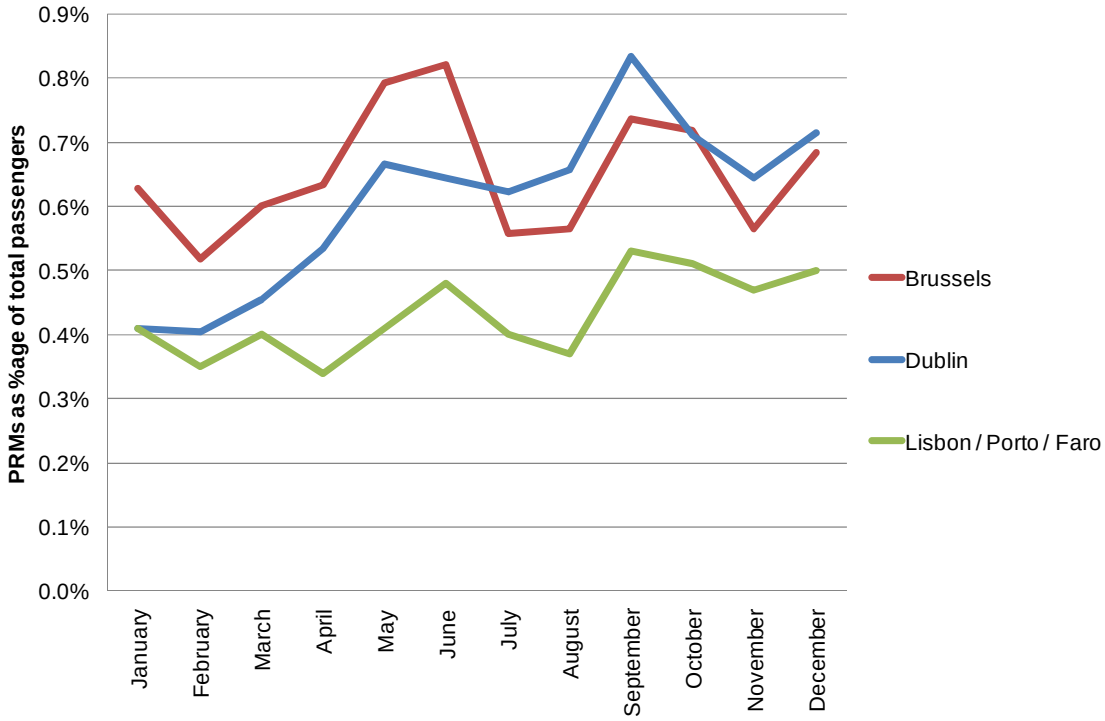
FIGURE 3.1 FREQUENCY OF PRMS REQUESTING ASSISTANCE AT AIRPORTS (2009)



3.15 Some other airports have higher proportions of PRMs requiring assistance, resulting from the demographic profile of passengers using the airports. These include holiday destinations popular with elderly people, such as Alicante, Malaga and Tenerife Sur; and pilgrimage destinations such as Lourdes.

3.16 Based on the information we have received from airports, the profile of PRM travel differs markedly from that of other passengers (see Figure 3.2). Most data indicates that the number of PRMs travelling tends to be lower in relative terms, and at some airports also in absolute terms, during July and August when total air travel is at a peak. At some airports, there appears to be a peak in December and January, however this is not consistent across all the airports for which we have data. Airports informed us that provision of services between April and September can be particularly affected by passengers travelling to cruise ships: these often carry high numbers of PRMs, and since a cruise ship usually disembarks passengers at the same time as it embarks the next load, there is a twofold increase in the number of PRMs travelling through the airport. The winter peak in PRMs is partly due to high rates of injury amongst passengers returning from winter sports holidays.

FIGURE 3.2 FREQUENCY OF PRMS OVER THE YEAR (2009)

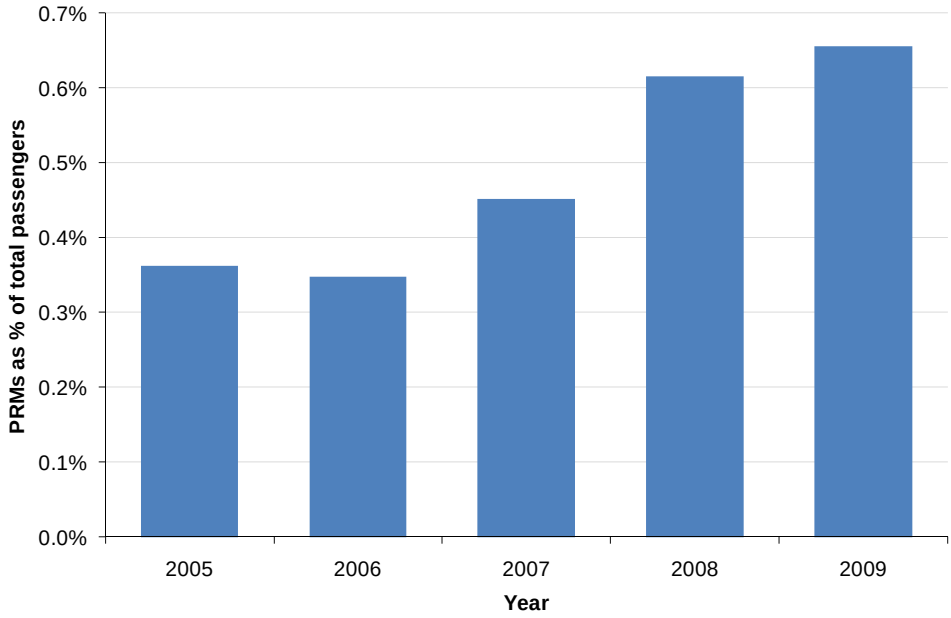


Trend in PRM travel

3.17 Several airports and airlines informed us that the number of PRMs requiring assistance has increased significantly since the introduction of the Regulation. It is difficult to verify this, as airports generally did not provide PRM services before July 2008, and therefore did not have a time series of data available. However, Brussels Zaventum airport introduced a PRM service similar to that required by the Regulation earlier, and as a result was able to provide figures for PRM's travelling between 2005 and 2010. This shows an increasing trend (Figure 3.3): the proportion of passengers

requiring assistance appears stable at approximately 0.35% over 2005 and 2006, and then climbs to 0.66% in 2009. It believed that this was a result of significant abuse of the services.

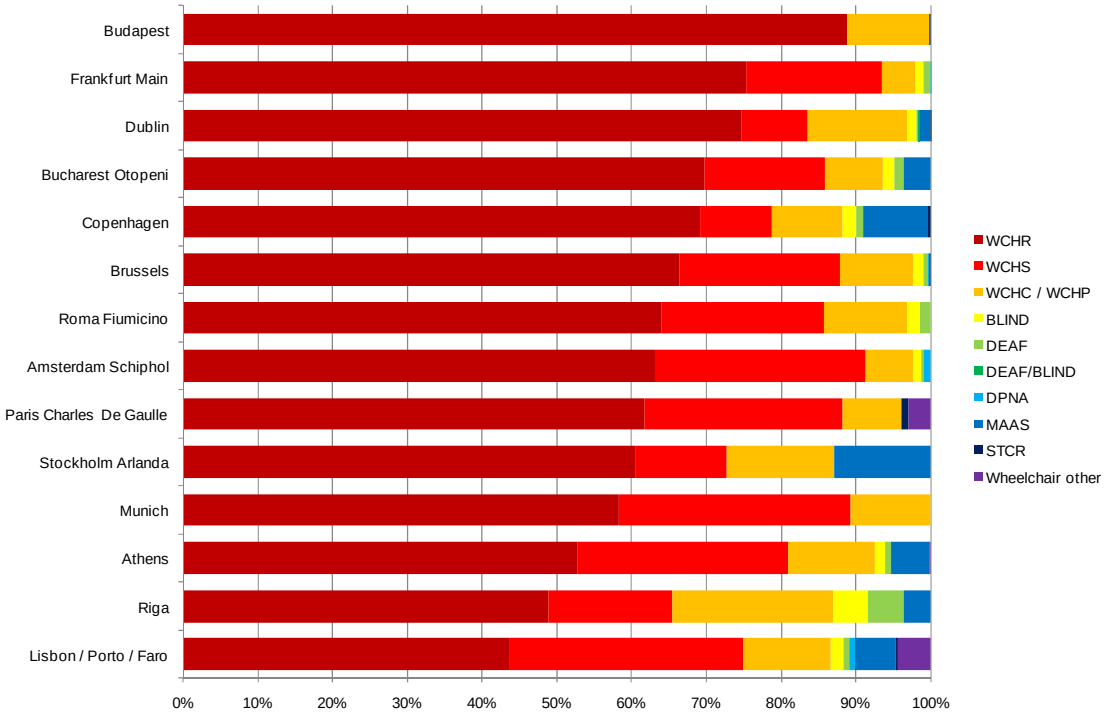
FIGURE 3.3 RATE OF PRMS OBSERVED AT BRUSSELS ZAVENTUM AIRPORT



Types of assistance provided

3.18 Assistance is often divided by airports into WCHC/WCHS (see 3.4), which requires significant time and resources, and others. We requested data on the types of passengers assisted from each of the case study airports and a summary of the data is shown in Figure 3.4. At all airports which provided data, the most frequent category of assistance was WCHR, although the proportion ranged from 44% to 89% (median 64%). The category "Wheelchair other" comprises wheelchair codes which do not fit into the other wheelchair categories: WCMP, manually powered wheelchair; WCBD, dry cell operated wheelchair; and WCBW, wet cell operated wheelchair. We have excluded the codes for medical cases and unaccompanied minors (MEDA and UM respectively) from this analysis, as they are not within the scope of the Regulation.

FIGURE 3.4 VARIATION IN TYPES OF PRMS ASSISTED (2009)



Abuse of services

3.19 Many airports – particularly larger and busier airports – reported that the services they provided for PRMs were sometimes used by passengers who did not appear to have the right to do so under the Regulation. A typical observation was of a passenger who was assisted in a wheelchair from a designated point of arrival through security and customs, and who then walked to the gate unassisted. Several types of passenger who might be motivated to do this were suggested:

- Passengers who feel confused by a large and complex airport, and do not feel that they would able to navigate it successfully;
- Passengers who do not speak the language used for the airport signs and announcements;
- Passengers who have no mobility impairment which prevented them from walking long distances within the airport, but who did not wish to; and
- Passengers (particularly those arrive at the airport with limited time before the departure of their flight) who wish to avoid lengthy queues at emigration, customs and security.

3.20 In addition, some airports reported cases where airlines had requested PRM assistance for passengers such as unaccompanied minors, passengers with excessive cabin baggage, and VIPs. These passengers might previously have been classified ‘meet and assist’ (MAAS) and any assistance required would have been paid for by the airline.

3.21 By its nature, it is hard to establish the true level of this abuse. PRM organisations noted that a passenger's disability may not always be visible. They also noted the perceived stigma attached to travelling in a wheelchair, and believed that many passengers would prefer to avoid this in preference to receiving the services offered under the Regulation.

3.22 The level of abuse reported varied between airports. Copenhagen Airport reported a rate of approximately one passenger per day whom they suspected was not entitled to services under the Regulation, while Brussels reported 20-30 passengers per day. Brussels Airport perceived abuse as a bigger problem than other airports within the sample.

3.23 However, Charleroi Airport informed us that abuse of services had decreased since the introduction of the Regulation, as a result of changes made to procedures. The two changes it identified as having had an impact were:

- requiring passengers who had not pre-notified requirements for assistance to wait; and
- boarding passengers requiring assistance after, rather than before, other passengers, and hence users of the PRM service no longer get first choice of seats on low cost carriers that do not allocate seats in advance.

3.24 These changes had the effect of reducing the number passengers without mobility needs who wished to use the services to avoid queues, and to obtain first choice of seating. However, these policies create some disadvantages for passengers who are entitled to the services.

Organisation of service delivery

3.25 Airport managing bodies may provide the services required under the Regulation themselves, or may contract with other parties to provide the assistance. Any arrangements for assistance to be provided through other parties must be compliant with published quality standards, and must be determined with the cooperation of airport users.

Overview

3.26 15 of the sample of 21 airports provided PRM services through a subcontractor (Table 3.2 below) and, of these, 12 were procured through open tenders. The advantage of procuring this service through an open tender include:

- a specialised provider might more easily be able to provide services of the cost or quality required;
- providing services through subcontractors facilitates the separation of costs of PRM services in an airport's accounts; and
- open tenders allow the airport to demonstrate that the costs are reasonable, as required by the Regulation.

3.27 Some of the largest airports split the tendering of provision into more than one contract, usually through grouping terminals together on a geographical basis.

3.28 In contrast, some of the airports provide the services required under the Regulation through specially trained airport staff. This may be through the creation of new department with this remit, or through extending the remit of a pre-existing department (for example the firefighting department). Airports may also subcontract some services (such as assisting passengers from the gate to the aircraft) to ground handling staff whilst providing other elements of the service themselves.

3.29 We also identified variation in the type of organisation providing services, where this was sub-contracted:

- **Subsidiary company of airport:** This approach is very similar to providing the services in-house, although an advantage is that it is easier for the airport to separate the accounts relating to the provision of PRM services.
- **Ground handling companies:** Airports may be able to realise economies of scope through provision of PRM services by ground handling companies.
- **Specialist PRM contractor:** Among the airports examined for this study, the most frequent type of organisation providing PRM services was a company that specialised in this kind of assistance service. Some such companies provided PRM services only, while a number provide it as part of a range of services. These other services might include cleaning services, facilities management, emergency assistance, and ambulance services.

TABLE 3.2 METHODS OF PROCURING PRM SERVICES AT AIRPORTS

Airport	Approach to procurement	Type of organisation providing PRM services
Amsterdam Schiphol	Open tender	Specialist PRM contractor
Athens	Open tender	3 ground handling companies
Bologna	In-house / non-competitive tender	Airport staff, 2 ground handling companies
Brussels	Open tender	Specialist PRM contractor
Bucharest Otopeni	In-house	Airport staff
Budapest	Open tender	Ground handling company
Brussels Charleroi	In-house	Airport staff
Copenhagen	Open tender	Specialist PRM contractor
Dublin	Open tender	Specialist PRM contractor
Frankfurt Main	Non-competitive tender	Subsidiary of airport
Lisbon	In-house	Airport staff, subcontracted ground handling staff
London Heathrow	Open tender	2 specialist PRM contractors
London Luton	Open tender	Specialist PRM contractor
Madrid Barajas	Open tender	Information not provided at interview
Munich	Open tender	Specialist PRM contractor
Paris Charles De Gaulle	Open tender	2 specialist PRM contractors
Riga	In-house	Airport staff
Roma Fiumicino	Non-competitive tender	Subsidiary of airport

Stockholm Arlanda	In-house	Airport staff
Warsaw	Non-competitive tender	Ground handling company
Zaragoza	Open tender	Information not provided at interview

3.30 Although the PRM service had only been provided by airports for around 18 months at the time of our research, we were informed by a number of airports that they were considering or were in the process of retendering the service. The primary reason given for retendering was that service quality had not been sufficiently high, although some airports cited a higher than expected increase in use of services after the introduction of the Regulation.

3.31 The Regulation also allows[9] for airlines to request a higher level of service than those set out in the quality standards for the airport, and to levy a supplementary charge for this service. However, none of the sample airports or airlines were requesting or providing such a service.

Consultation

3.32 The Regulation requires contracts for the supply of services under the Regulation to be entered into in cooperation with airport users and with organisations representing PRMs. Cooperation with airport users is usually through the airport users committee (AUC). Although this is intended to improve consultation, airlines informed us that in some circumstances it did not do so, citing examples where:

- the proceedings of the AUC were conducted only in the native language of the airport;
- only ground handlers were represented on the committee; and
- one stakeholder has a voting majority on the committee, allowing it to disregard the views of other carriers.

3.33 We were also informed of circumstances where the consultation provided by airports was extensive. London Luton retendered for PRM services in March 2010, and involved airport users (airlines and ground handling companies) at all stages of the tendering process, including the development of the specification, and the evaluation and scoring of bids.

Airport charges

3.34 The Regulation permits airports to fund the provision of assistance through a specific charge on airport users. This charge must be reasonable, cost-related, transparent and established in co-operation with airport users. It must be shared among airport users in proportion to the total number of passengers that each carries to and from the airport (this is typically calculated on the basis of departing passengers). The accounts of the airport relating to provision of PRM services must be separate from its accounts relating to other services, and it must make available to airport users and NEBs an audited annual overview of charges received and costs incurred relating to the provision.

[9] Articles 9 (4) and (5).

3.35 The majority of the case study airports recover costs for PRM assistance through a PRM charge levied on all departing passengers which is specific to the airport and set to fully recover the costs of the PRM service. However, we identified the following key variations in this approach:

- **Uniform charge:** The PRM charges in Spain and Portugal are uniform across the airports operated by AENA and ANA respectively. This approach appears to infringe the Regulation, which requires a specific charge "established by the managing body of the airport", although there is some uncertainty about this due to differences between the English and Spanish language versions of the Regulation. Both AENA and ANA believed that, since the service was provided across a network of airports, it was appropriate that there should be a uniform network charge.
- **Economic regulation:** Many airports are subject to economic regulation of the charges they may levy on airlines. At most of the airports in our sample, the PRM charge is excluded from the regulated price cap, but at Dublin and Brussels Zaventum the PRM charge is included within this. As a result, their flexibility to amend charges (for example to reflect a higher than expected use of PRM services) is constrained: for example, they may require regulatory approval for any changes, or have the level of any increases limited by a charging cap. Charges may also be fixed over the course of a given regulatory period.
- **Pre-existing provision:** Stockholm Arlanda and all other State-owned airports in Sweden provided some elements of the services required under the Regulation prior to its introduction. In Sweden, charges for services for WCHC and WCHS passengers were introduced in 2001 at a rate of 1 SEK (€0.10[10]) per departing passenger; charges have not yet been increased since the Regulation came into force to reflect the wider range of passengers requiring assistance, but we were informed that this is likely to happen in the next year.
- **Non-implementation of the Regulation:** With the exception of Athens, none of the airports in Greece provide assistance for PRMs. Assistance is provided by ground handling companies, and charges are negotiated directly between airlines and ground handling companies, and consequently not made public.

3.36 We were informed by ACI that the proportion of airports which identify this fee separately was 52% across the airports it surveyed, as opposed to 48% which include it in the passenger fee.

3.37 The types of costs which may be recovered using the PRM charge are:

- **Direct assistance costs:** The direct costs of the day-to-day running of the service.
- **Other incidental operating costs:** These may include maintenance, purchase of operating materials, other services, etc.
- **Capital expenditure:** Expenditure to invest in facilities required to provide services, such as mobility equipment and the fitting out of a dispatch office.
- **Administrative expenses:** These may include time spent by airport personnel in running the contract, and project costs such as airport management time in developing the tender.

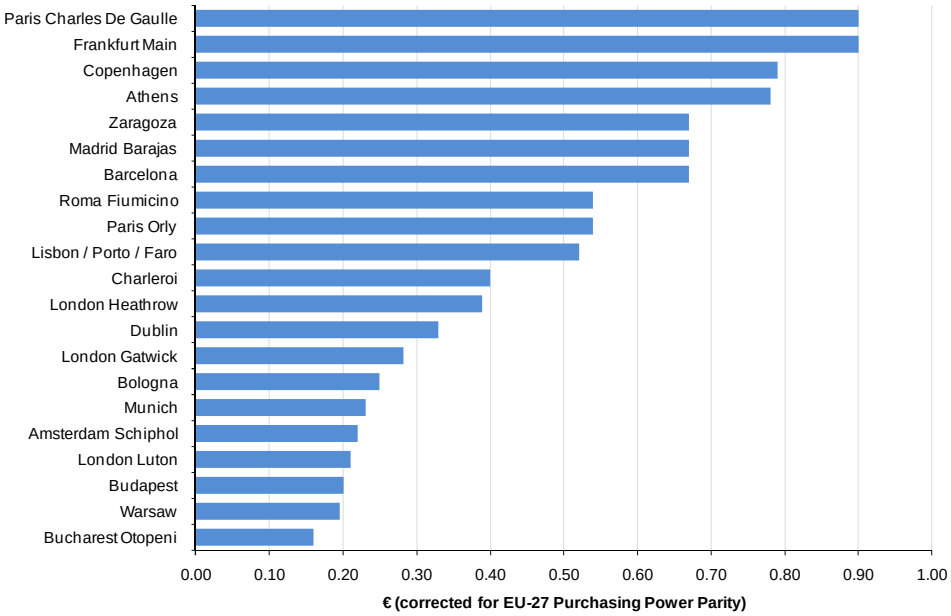
[10] Calculated on the basis of €1 = 9.7 SEK.

- **Other airport fees:** The PRM contractor may have to, for example, rent space from the airport and to pay a fee for doing so. This would also be recovered through the PRM charge.

Level of charges

3.38 Figure 3.5 shows the charges at the case study airports in euros, converted using current (January 2010) exchange rates where required. There is significant variation in the level of the PRM charge between airports, from a minimum of €0.16 in Bucharest to €0.90 at Frankfurt Main and Paris CDG.

FIGURE 3.5 AIRPORT CHARGES PER DEPARTING PASSENGER (€ AT CURRENT EXCHANGE RATES)



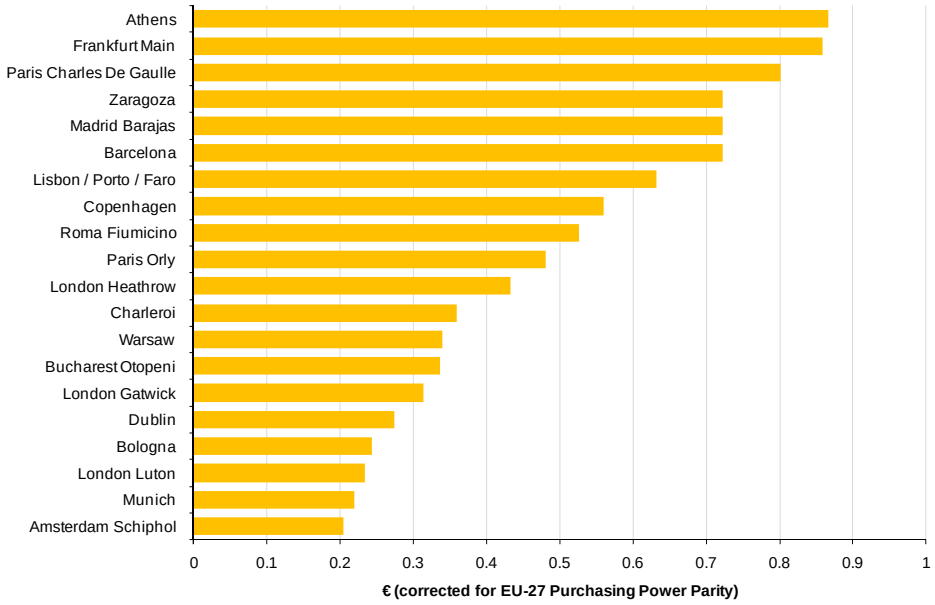
3.39 The variation in charges between airports may result from several factors, including:

- staff cost variation;
- quality standards in place;
- the frequency with which the PRM services are used;
- the proportion of connecting flights; and
- the design of the terminal or airport.

3.40 We discuss each of these possible reasons for variation in turn.

3.41 **Purchasing power parities (PPPs)** can be used to compensate for differences in price levels between States. Figure 3.6 uses Eurostat PPPs for 2008 to convert PRM charges in national currency to euros at average price levels for the EU-27. The harmonisation only very slightly reduces the variation in the charges (measured in terms of standard deviation).

FIGURE 3.6 AIRPORT CHARGES PER DEPARTING PASSENGER, 2009 (€ AT 2008 EU-27 PPP)



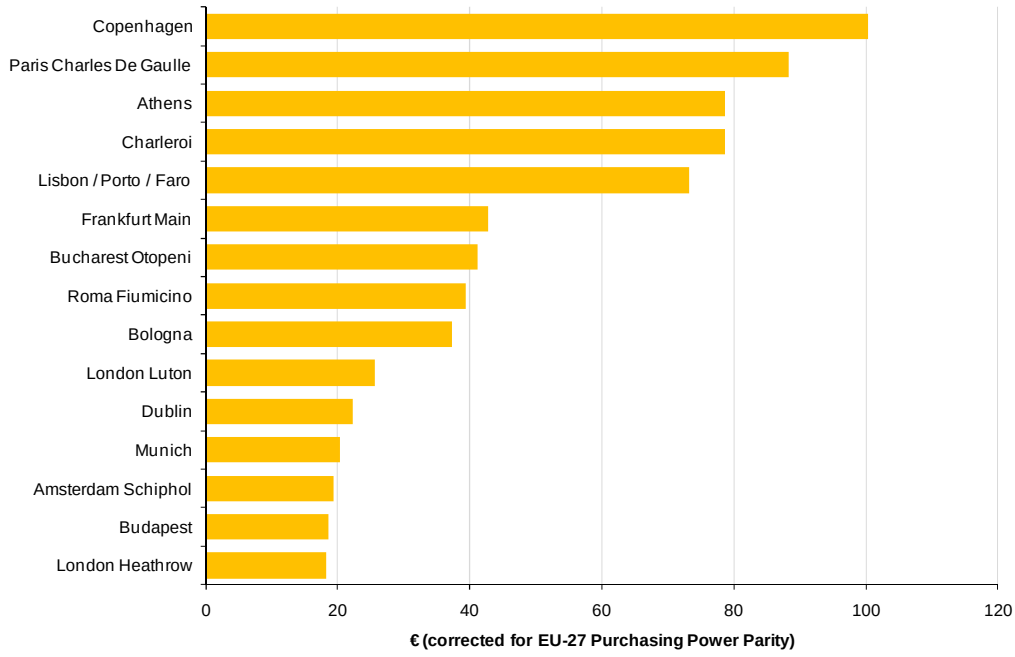
3.42 Although it was not possible to find published data showing the actual **level of service** offered to PRMs at any of the case study airports, the level of service set out in the PRM quality standards might help explain the variation in charges. To test this, we have calculated a weighted average PRM wait time and compared this with the PRM charge at each airport. This analysis suggests little or no correlation: for example, although the London airports state the highest service standards in terms of waiting times, the charges levied are lower than those at many other airports. Similarly, low charges at Bucharest are not reflected in longer proposed waiting times for PRMs requesting assistance.

3.43 It might also be expected that airports with **higher proportions of PRMs** would have higher charges. To examine this we calculated a proxy for the cost of assisting each PRM, for the airports for which we had data. This was obtained by dividing the PRM charge by the proportion of PRMs at each airport, to obtain the revenue gained by the airport for each PRM assisted.

3.44 It should be noted that there are some limitations to this analysis. It calculates revenue per PRM, and for this to be a valid proxy for costs, it must be assumed that charges are accurately cost-reflective, which is not the case in some airports: in Spain and Portugal the charge is uniform across all mainland State-owned airports, and does not therefore reflect local variation in costs; at State-owned airports in Sweden, the charge reflects only the costs of providing services for WCHC and WCHS passengers. For the costs to be cost-reflective it is also necessary that the frequency of use of the service is as forecast when the charges were calculated.

3.45 Figure 3.7 shows the results of the analysis. There is still significant variation between airports; the maximum cost per PRM assisted (€100 at Copenhagen, PPP adjusted) is 5 times the minimum cost (€18 at Bucharest, PPP adjusted). This shows that the variation in the number of PRMs does not fully explain the variation in the charge.

FIGURE 3.7 AIRPORT COSTS PER PRM ASSISTED, 2009 (€ AT 2008 EU-27 PPP)



3.46 The level of variation also does not appear to be accounted for by the **size of the airport**: the charge at London Heathrow is relatively low, while Paris CDG is relatively high.

3.47 Several airports cited **high proportions of connecting passengers** as a factor which increased costs. However, we do not believe that high proportions of connecting passengers would increase the costs of provision: transfer passengers are counted as two passengers in airport statistics and any PRM charge is levied twice, so if the service is less than twice the cost of that for an arriving or departing passenger, such passengers would in fact result in a cost saving relative to other PRMs. This view is supported by the data, where the charge at London Heathrow is relatively low.

3.48 **Terminal design** may impact on the amount of time required to provide assistance, or the efficiency with which it can be provided. For example, Amsterdam Schiphol airport, which has one integrated terminal building and the concourse is generally at the same level, can make extensive use of electric carts to transport multiple passengers together; this is not practical at airports such as CDG.

Changes to charges in 2010

3.49 The charges and costs in this section are based on those current in 2009, as this is the only complete year for which data was available. Where updated charges have been published for 2010[11], we have compared these with those for 2009. Most airports had not made any changes, but Munich and Rome Fiumicino increased charges by 48% and 28% respectively.

[11] IATA Airport, ATC and Fuel Charges Monitor, February revision, published March 2010.

3.50 London Heathrow changed the structure of its PRM charges in 2010. Whereas previously it levied a charge of £0.35 (€0.38) per passenger for all airlines, from 1 January 2010 the charges vary depending on the level of pre-notification. Airlines which pre-notify 85% or more of PRMs are charged £0.42 (€0.46) per departing passenger, while those which pre-notify 45% or less of their passengers are charged £0.83 (€0.91).

Consultation

3.51 Airports are required to determine charges in cooperation with users through airport user committees. The Regulation does not define cooperation further, however, and as a result the form this consultation has taken varies considerably. London Luton informed us that their tender process involved airlines, ground handlers and PRM organisations at all points of the tender process, from developing the specification to evaluating the bids and awarding the contract. In contrast, several airlines informed us that the consultation in Portugal and Spain was limited to the publication of a letter stating the amount the charge per person. We were also informed that consultations on PRM charges were often included in wider general charge negotiations.

3.52 A number of issues were raised regarding this cooperation.

- We were informed by several airports that certain carriers have contested the procedural steps taken by airport managing bodies to establish the charge. This has in at least one case been supported by an NEB taking a strict interpretation of the meaning of 'in cooperation with airport users', as requiring agreement between the airport and the airline both on the tender and the level of the charge. This has led to delays, particularly due to challenges by low-cost airlines, including requests to see cost information, which the airports regarded as unnecessary, after the tender processes were completed.
- Some airlines have blocked the process of approving charges by refusing to participate in the consultation.
- Some airports believed that direct involvement of users in the tender process can be problematic: without signing personal non-disclosure agreements, it may not be possible to share the commercially sensitive information included in tenders; there may also be conflicts of interests between some of the handlers and the tendering parties. However, the example of London Luton discussed above demonstrates that these barriers are not impossible to overcome.

Quality standards

Standards published

3.53 The Regulation requires all airports serving over 150,000 passenger movements per year to set and publish quality standards. Figure 3.8 indicates the proportions of airports publishing quality standards. The following airports had not yet done so:

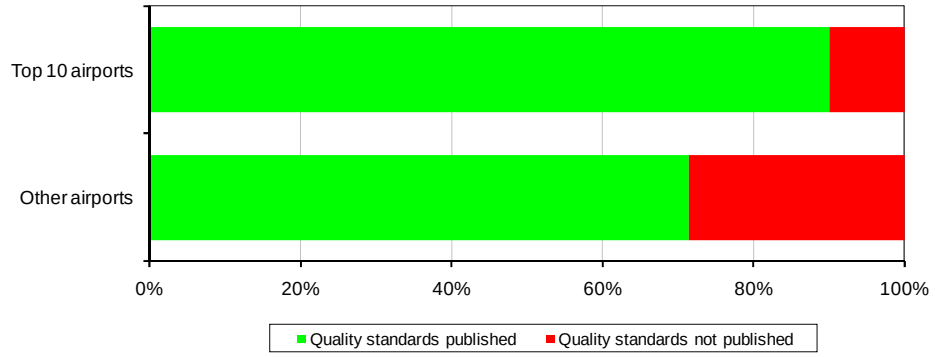
- Amsterdam Schiphol: quality standards are in the process of being re-developed with airlines, and have not been published yet;
- Bologna: standards not yet published;
- Budapest: standards published to airlines and handling companies by letter; and
- Stockholm Arlanda: standards published to airlines but not yet published on its

website; it informed us that the standards would be published soon.

3.54 Three of these airports provided the quality standards to us at interview, but Amsterdam Schiphol and Bologna did not provide any details of their quality standards.

3.55 We found that the largest ten European airports in terms of passenger numbers were more likely to publish quality standards that those outside the top 10.

FIGURE 3.8 PROPORTION OF AIRPORTS PUBLISHING QUALITY STANDARDS



Ease of finding quality standards

3.56 The ease with which the quality standards could be located on airport websites varied considerably. For the airports which published quality standards, some of the main issues encountered were:

- Having to click through an excessive number of links before finding the standards, e.g. the website of Charleroi Airport requires the user to click on five links before the standards can be viewed;
- Locating the standards on the site of the management company rather than within the section or website dedicated to the airport – this was the case for the Spanish airports for which the information is on the main AENA website;
- Using terminology which may not be obvious, avoiding the actual term 'quality standards', e.g. BAA use the term 'Service Level Agreement'; and
- Restrictions on language – Bucharest Otopeni, Brussels Charleroi and the Paris airports only publish quality standards on the local language versions of their websites.

Standards for waiting time

3.57 The standards defined by the case study airports are shown in Table 3.3 and Table 3.4 below. At all of the case study airports for which we were able to obtain standards, these are defined in terms of the percentage of PRMs who should wait for up to a given number of minutes. For example, at Barcelona, 80% of departing passengers who have pre-notified requirements for assistance should wait for 10 minutes or less from the point at which notice is given that they have arrived at the airport. This

approach is consistent with the example standards in Annex 5-C of ECAC Document 30[12], and eight of the airports in the sample (including Copenhagen, Munich and the AENA Spanish airports) follow these exactly.

3.58 There are however variations in both how the standards are structured and the level of the standards. Paris Charles de Gaulle is unusual in that, with the exception of the top 99% bracket, an additional ten minutes is added to the wait time for departing passengers located 'further away'. The published standards do not define how far away this is. Aéroports de Paris also define an additional category, of pre-notification of between 8 and 36 hours, for whom the standards are part-way between those applying to PRMs for which notification was received 36 hours or more before travel ('pre-booked'), and those for which notification was received less than 8 hours beforehand ('non-pre booked'). This is not shown in the table as it is not comparable with the standards offered by the other airports.

3.59 There are also some differences in how the wait time for arriving passengers is measured. At most airports, it is measured from when the aircraft reaches the parking position, but there are the following exceptions:

- From descent of last passenger: Rome Fiumicino;
- From boarding bridge lock: Brussels; and
- Not defined: Athens, Budapest, Lisbon, Stockholm Arlanda.

3.60 The standards proposed for pre-booked departing passengers are generally consistent, at least in terms of the waiting times which percentages are applied to: 10, 20 and 30 minutes are the most commonly used intervals, at 80%, 90% and 100% respectively. For non pre-booked passengers 80%, 90% and 100% apply to 25, 35 and 45 minutes. Better standards are offered by the UK and French airports that we reviewed. This is also reflected in the standards for arriving passengers, with the London and Paris airports targeting zero waiting time for 90-100% of passengers. There is also a clear pattern for arriving passengers, with 80% of pre-notified PRMs waiting no more than 5 minutes, 90% no more than 10 and 100% no more than 20 minutes. Standards are not as high as this for non pre-booked passengers, however.

3.61 Several airports informed us that the standards suggested by ECAC Document 30 for arriving passengers were not short enough to meet airline requirements on turnaround times: if the airports adhered only to these standards, there would be significant operational issues. Some of these airports published standards in line with Document 30, but stated that they actually provided services in much shorter times.

[12] ECAC Policy Statement in the field of Civil Aviation Facilitation, 11th Edition/December 2009.

Other elements of published quality standards

3.62 Some airports define additional standards other than the waiting time targets, generally reflective of the assistance set out in Annex 1 of the Regulation. For example, Charleroi provides detailed information regarding the level of assistance which will be provided for PRMs, for example support for embarking and disembarking the aircraft, or for dealing with customs formalities. Brussels Airport also defines how many assistants will accompany a PRM, depending on their type of disability.

3.63 Some airports also include more general, qualitative targets, less directly related to the assistance offered to an individual PRM. For example, Luton Airport's published standards include responding to 'disabled customer enquiries to offer guidance and advice', and auditing to ensure compliance with all disability legislation. Athens Airport also provides extensive details of the measures it has taken to accommodate PRMs, including disabled-access internet points and a special walkway for partially sighted PRMs.

TABLE 3.3 SCOPE OF QUALITY STANDARDS: DEPARTING PASSENGERS

	Pre-booked / airport informed *% of PRMs who should wait no longer than (minutes)*										Non-pre-booked / airport not informed *% of PRMs who should wait no longer than (minutes)*									
	5	10	15	20	25	30	35	40	45	60	5	10	15	20	25	30	35	40	45	60
Athens		80%		90%		100%							80%		90%		100%			
Barcelona		80%		90%		100%									80%		90%		100%	
Brussels		80%		90%		100%									80%		90%		100%	
Bucharest Otopeni		80%		90%		100%									80%		90%		100%	
Budapest		100%										100%								
Charleroi		80%		90%		100%									80%		90%		100%	
Copenhagen		80%		90%		100%									80%		90%		100%	
Dublin		80%		90%		100%									80%		90%		100%	
Frankfurt Main		80%		90%		100%									Not defined					
Lisbon		80%		90%		100%									Not defined					
London Gatwick	80%	90%	100%									80%	90%	100%						
London Heathrow	80%	90%	100%									80%	90%	100%						
London Luton		90%	95%	100%									90%	95%	100%					
Madrid Barajas		80%		90%		100%									80%		90%		100%	
Munich		80%		90%		100%									80%		90%		100%	
Paris CDG		90%			99%										80%		90%		99%	
Paris Orly		90%			99%				100%			40%			80%				90%	100%
Riga		80%		90%		100%									80%		90%		100%	
Roma Fiumicino		80%				100%									80%			100%		
Stockholm Arlanda		80%		90%		100%									80%		90%		100%	
Warsaw		100%													100%					
Zaragoza		80%		90%		100%									80%		90%		100%	

TABLE 3.4 SCOPE OF QUALITY STANDARDS: ARRIVING PASSENGERS

	Pre-booked / airport informed *% of PRMs who should wait no longer than (minutes)*										Non-pre-booked / airport not informed *% of PRMs who should wait no longer than (minutes)*									
	0	5	10	15	20	25	30	35	40	45	0	5	10	15	20	25	30	35	40	45
Athens		80%	90%		100%									80%		90%		100%		
Barcelona		80%	90%		100%											80%		90%		100%
Brussels		80%	90%		100%									80%		90%		100%		
Bucharest Otopeni		80%	90%		100%										80%		90%			100%
Budapest		100%										100%								
Charleroi		80%	90%		100%											80%		90%		100%
Copenhagen		80%	90%		100%											80%		90%		100%
Dublin		80%	90%		100%									80%		90%		100%		
Frankfurt Main			80%		100%										Not defined					
Lisbon		80%	90%		100%										Not defined					
London Gatwick	100%												80%	90%		100%				
London Heathrow	100%												80%	90%		100%				
London Luton	99%	100%											90%	100%						
Madrid Barajas		80%	90%		100%											80%		90%		100%
Munich		80%	90%		100%											80%		90%		100%
Paris CDG	90%		99%												80%		90%			100%
Paris Orly	90%		99%							100%					80%		90%			100%
Riga			80%	90%	100%											80%		90%		100%
Roma Fiumicino					90%	100%									Not defined					
Stockholm Arlanda		80%	90%		100%											80%		90%		100%
Warsaw		100%														100%				
Zaragoza		80%	90%		100%											80%		90%		100%

Monitoring

3.64 While the Regulation requires larger airports to develop and publish quality standards, it does not require them publish whether they are actually met, and none of the case study airports do so. Nonetheless most airports do undertake some form of monitoring and several provided us with performance statistics. There were a number of approaches to monitoring:

- **Time spent waiting to receive assistance:** This is the most common measure used by airports, as set out above. These times are often measured by time stamps inputted into the personal digital assistants (PDAs) or equivalent devices carried by staff providing assistance to PRMs (discussed earlier). The data recorded can often give wider outputs than solely the time taken to receive assistance, such as time from gate to boarding, or time waiting once disembarked from an aircraft. This approach should give accurate information on the time spent waiting by passengers, but does not address other aspects of quality of service.
- **Spot checks:** Many airports reported that the PRM service manager will undertake frequent unannounced tours of the services and infrastructure provided within the airport. They may check, for example, that the designated points of arrival and departure are functioning correctly. This approach is useful to identify wide-ranging problems but may not be sufficiently systematic to identify all problems.
- **Surveys:** A number of airports reported using surveys to obtain feedback from passengers. Typically, a postcard with survey questions to be completed was given to PRMs at some point during their use of the airport's services, which could be submitted at information desks or at various comment boxes place throughout the airport. These covered questions on the services received, and in some cases assessed the passenger's knowledge of the Regulation. A potential problem with this approach is the lack of accessibility for all passengers.
- **Mystery shoppers:** 'Mystery shoppers' are people (typically PRMs) paid to anonymously receive the service provided by the airport and afterwards give detailed reports or feedback about their experiences. This approach gives a thorough appraisal of the service provided at a particular time.

3.65 Table 3.5 sets out the actions airports have taken to monitor their quality standards. Most airports do not include any external auditing in their monitoring processes; Athens, Bucharest Otopeni, Luton, Madrid Barajas, Zaragoza include some external checks.

TABLE 3.5 AIRPORT ACTIONS TO MONITOR QUALITY STANDARDS

Airport	Measures monitored
Amsterdam Schiphol	Manual checks of numbers of PRMs and service quality
Athens	Audits, including 'mystery PRM' audit; PRM surveys
Bologna	PRM survey; time taken for assistance
Brussels	Time taken for assistance (in real time); passenger complaints
Bucharest Otopeni	Passenger surveys; complaints; external audits by NEB, PRM organisations, Commission, and airlines
Budapest	Monthly reports of time taken for assistance and passenger complaints; daily contact with service provider; 'walk-throughs' of service provided; airline audits

Brussels Charleroi	Passenger complaints received
Copenhagen	Time taken for assistance (in real time)
Dublin	Weekly audits of time taken; annual training audit
Frankfurt Main	Monthly reports of time taken for assistance
Lisbon	Time taken for assistance
London Heathrow	Time taken for assistance; missed flights; flight delays; internal audits; regular meetings with service providers; complaints from passengers and airlines; some of these measures monitored through a 'dashboard'; monthly 'scorecard' review
London Luton	Passenger feedback forms; 'walk-throughs' of service provided; internal and external audit teams of provider; airline and PRM organisation audits
Madrid Barajas	Monthly meetings with service providers and PRM organisation; surveys by service providers; independent surveys; PRM feedback forms
Munich	Monthly reports of time taken for assistance; spot checks; quality service manager as 'mystery shopper'; yearly passenger survey
Paris Charles De Gaulle	Flight delays for which PRM services are responsible; passenger complaints
Riga	Questionnaires to airlines, passengers and others; daily service monitoring by duty managers; internal audits
Rome Fiumicino	Time taken for assistance (in real time); other unspecified monitoring
Stockholm Arlanda	Time taken for assistance; passenger complaints; AOC meetings
Warsaw	Infrequent spot checks of time taken
Zaragoza	Monthly meetings with service providers and PRM organisation; surveys by service providers; independent surveys; PRM feedback forms

3.66 In addition, we found that most NEBs had not undertaken any direct, systematic monitoring of whether airports were meeting quality standards. Table 3.6 sets out the actions NEBs have taken to monitor airport quality standards.

TABLE 3.6 NEB ACTIONS TO MONITOR QUALITY STANDARDS

Member State	Monitoring
Belgium	Inspections of infrastructure and procedures
Denmark	No monitoring, biannual meetings
France	No monitoring
Germany	No monitoring
Greece	Inspections of infrastructure and procedures at Athens, not of regional airports
Hungary	Inspections of infrastructure and procedures, questionnaire on training
Ireland	No monitoring
Italy	Inspections of quality standards including infrastructure, procedures, information, training
Latvia	Inspection of infrastructure, procedures, waiting times, documentation
Netherlands	Inspection of infrastructure and procedures
Poland	No monitoring
Portugal	No monitoring

Member State	Monitoring
Romania	Request annual reports
Spain	Checks of staff training and procedures
Sweden	No monitoring
United Kingdom	Inspections of infrastructure and procedures, attend monthly PRM groups at major airports, less frequently at smaller airports

Complaints to airports

Airport processes for handling complaints

3.67 Most case study airports accepted complaints relating to PRM services in the same way as other complaints. Often airports will accept complaints via email, via information desks at the airport, or via forms which can be filled in and deposited in comment boxes located at various points within the terminals.

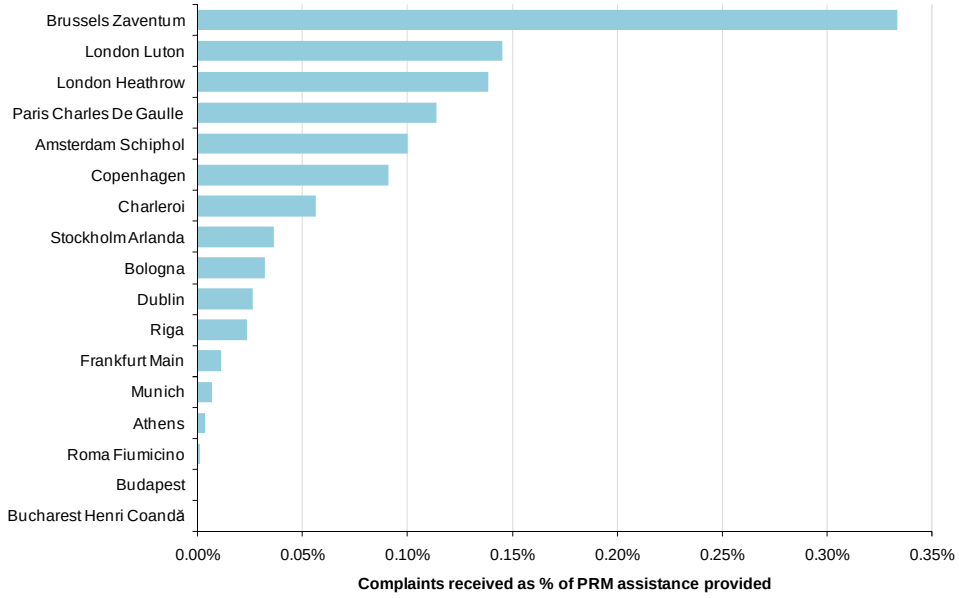
3.68 Typically, complaints are registered in a database which is reviewed by a member of staff on the service quality team. The staff member allocated to the complaint reviews documents relating to the service referred to in the complaint, and talks to the member of staff who provided the service (this member of staff may be employed by either the airport or a contractor). After investigating the complaint, the staff member writes a report including the findings and any response which is sent to the passenger. The service quality manager may review monthly reports on complaints, which will include complaints regarding the PRM service.

3.69 The level of detail to which the complaint handling process is specified varies depending on the volume of complaints received: an airport which handles many complaints may follow clearly defined procedures for handling complaints, while an airport which receives only few complaints may address them on a more ad hoc basis.

Number of complaints received

3.70 For each airport in the case study sample we requested the number of complaints received relating to provision of services to PRMs. We compared the data received with the assistance provided to give a rate of complaints, shown in Figure 3.9. This shows a high level of variation in the number of complaints received. Most of the larger airports have a similar rate of complaints. The highest rate of complaints is at Brussels Zaventum (0.33%, over double the next highest).

FIGURE 3.9 RATE OF COMPLAINTS RECEIVED BY AIRPORTS, 2009



3.71 Some airports note that they have received no complaints regarding the Regulation since its introduction, while during the same period they have received several thousand complaints regarding aspects of their service not covered by the Regulation. This is evidence that their system for receiving complaints is functioning well, but it is not necessarily evidence that there are no problems regarding the implementation of the Regulation. We were informed by several PRM organisations that a mobility-impaired passenger who receives poor service may be reluctant to complain, as they may wish to forget the incident, and since these passengers may face many obstacles during a journey, they may take the view that reporting the more frequent minor incidents is not worthwhile. In addition, the lack of compensation in most Member States means there is little direct incentive to complain.

Training

3.72 The Regulation requires that airports provide training relating to PRMs for their personnel:

- All personnel who provide direct assistance to PRMs, including those employed by subcontractors, must have knowledge of how to meet the needs of various different types of PRMs.
- All airport personnel who have direct contact with the travelling public must have disability-equality and disability-awareness training.
- All new employees must attend disability-related training and personnel must have appropriate refresher training.

3.73 We requested information on the training provided at each of the airports in the sample for the study. As many considered this material confidential, we were not able to obtain many copies of training documents. From the information we have received, the content of the three types of training may typically include the following:

- **Staff assisting PRMs directly:** Most courses described included: theoretical training on rights and obligations under the Regulation, training in awareness of disabilities, and physical training in lifting and other handling of PRMs. Some elements of training may be given to all staff; these could include Ambulift licenses and sign language. It may also include training not directly related to PRMs, such as training in first aid. Not all of the training courses we were given information for included provision for 'soft' elements of interacting with PRMs, such as ensuring that the person providing assistance is at the same height as a wheelchair user when talking to them, or being aware of the type of circumstances which could cause a person with autism to become distressed.
- **Passenger-facing staff:** This training is typically the disability-equality and disability-awareness sections of the training for staff providing direct assistance to PRMs. Several airports ensured that this training was undertaken by all staff working in the airport (including external staff) by making this training a requirement for obtaining the security clearance pass needed to work in the airport. It may include specific training for security staff who perform searches on PRMs, relating for example to how to search a passenger in their own wheelchair, and awareness of the importance to blind passengers of having belongs replaced in exactly the same place within their baggage.
- **Other employees:** The form of this training was often a short video on disability awareness. Some airports did not provide this training, or did not make it compulsory, which appears to be an infringement of the Regulation.

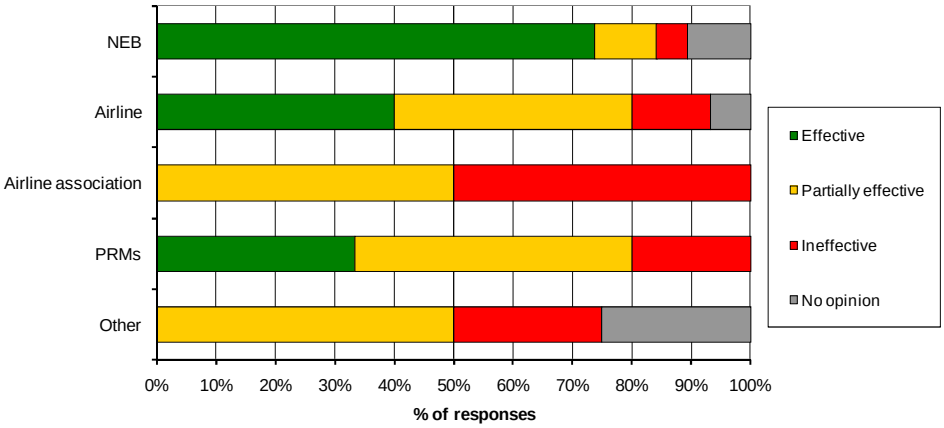
3.74 Training was delivered either internally, by external contractors specialising in training, or by PRM organisations. Several airports informed us that they used a "train the trainer" approach, where employees who have received the training then go on to train other employees. Several airports informed us that their training programmes were compliant with the guidance given in Annex 5-G of ECAC Document 30. A number of airports had involved PRM organisations in their training in some way, including in the development of the training, in its delivery, or through audit and approval. Several airports informed us that they had sought assistance from local PRM organisations but had found this problematic.

3.75 The lengths of the training programmes about which we were given information varied widely. We were given information relating to 6 training programmes for those providing direct assistance to PRMs: of these, 4 lasted 3-6 days, while two lasted 12 days or more. The length of training for passenger-facing staff also varied, with some airports requiring a full day of training whilst others only required the staff member to watch a 20 minute video. Refresher courses also varied considerably in length (between 1 and 4.5 days) and frequency: one airport informed us that it had monthly refresher training, while another required refresher training every 2 years.

Stakeholder views on effectiveness of implementation

3.76 We asked each of the stakeholders we contacted about how effectively they believed airports had implemented the Regulation; views vary considerably between different groups of stakeholders (Figure 3.10 below). Airlines and PRM organisations both believe that there are significant improvements to be made, but over 70% of NEBs believe that the actions of airports are largely sufficient. The rest of this section summarises the views expressed by stakeholders.

FIGURE 3.10 VIEWS OF STAKEHOLDERS ON AIRPORT EFFECTIVENESS



Airports

3.77 Most airports viewed their own actions as effective implementations of the Regulation. The most common problem reported by airports was misuse of the PRM service, however the level of impact of this reported misuse varied considerably between airports. The following other issues were identified by airports:

- Connecting flights: Minimum connection times, while sufficient for other passengers, can be insufficient for a PRM.
- Initial implementation of the Regulation: Several airports informed us that they had had problems with subcontracted service providers; a number had since retendered the service because of unsatisfactory service quality.
- Several airports informed us that they had had difficulty obtaining the cooperation of PRM organisations when developing quality standards.

Airlines and airline associations

3.78 Many airlines reported that quality of service and level of charges varied considerably between airports. This did not necessarily relate to size of airport: some airlines informed us that larger airports tended to provide better assistance, while other airlines informed us that their provision tended to be worse. Few airlines reported significant delays due to PRM services.

3.79 The most common problems with airport implementation of the Regulation reported by airlines related to airport charges. These issues were raised, in particular, by low cost and charter carriers:

- many airlines believed that the method of determining charges was not transparent and that the charges determined by airports were not reasonable or cost reflective;
- many airlines reported that the costs of the PRM service had increased (in some cases significantly) since the introduction of the Regulation, relative to the previous situation when the PRM service was contracted directly by the carrier, generally from its ground handler;

- this increase was believed by several airlines to be a result of overstaffing, or by some as a result of the inclusion of a margin, which they believed to be a contravention of the Regulation;
- at the same time as this perceived increase in cost, many airlines believed the quality of service had decreased, or at best not improved, since the introduction of the Regulation, and that the charges therefore represented poor value for money; and
- some States (in particular Spain and Portugal) have introduced uniform charges for services at State-operated airports, which airlines do not believe are cost-reflective or give value for money.

3.80 Some airlines informed us that they had serious concerns regarding the safety of uses of the PRM assistance services provided by airports, and noted that the airlines have no right to audit or directly influence the service provider.

3.81 Airline associations raised many of the same issues. ELFAA had particularly negative views regarding the assistance provided by airports: it believed that assistance was provided by unskilled staff and that the quality had decreased as a result, and that the cost of provision had tripled at some airports. It also believed that services were poorly synchronised with airline schedules. All of the airline associations from whom we obtained a response raised at least some concerns on all points regarding charges, including whether the costs were reasonable, cost-related and transparent, and whether the cooperation with airlines was sufficient.

NEBs

3.82 Most NEBs believed that airports had implemented the Regulation effectively. Several informed us that they believed there had initially been problems with implementation, but that these were now resolved. Those that believed there were areas which should be improved identified problems with designated points, infrastructure, delays on arrival and provision of information. It is not clear whether the level of supervision by most NEBs would be sufficient to allow an in-depth analysis of airport effectiveness (see 5.42).

PRM organisations

3.83 Most organisations representing disabled people believed there were some issues with the implementation of the Regulation by airports, and identified issues at all points of the process. Most organisations also noted that there was wide variation in the quality of service provided at different airports; several believed that this was a result of variation in the training given. Frequently identified problems included:

- **Mobility equipment is frequently damaged:** Many PRM organisations informed us that understanding of mobility equipment was poor and that training regarding it was insufficient. They believed that this poor understanding amongst airport and ground handling staff contributed to frequent damage. There was an expectation amongst most of the PRMs using wheelchairs that we spoke to that, if they travel by air, there is a high likelihood their chair will be damaged. For disabled people with extremely limited mobility who rely heavily on their wheelchair and may have adaptations particular to their needs, damage to their chair can be extremely distressing.

- **Lengthy waits for disembarkation:** Although the initial disembarking from the plane may be completed within the time set out in the quality standards, the passenger may then have to wait a long period of time in a holding area before the rest of the arrivals procedure is finished.
- **Information provision is poor:** This includes information on the layout of the airport, accessible real-time information on flights, and information on the rights of PRMs.
- **Websites are inaccessible:** We were informed by many organisations that airport websites are frequently inaccessible to visually impaired people.
- **Poor training of staff:** Several organisations reported that the interaction of airport assistance staff with PRMs could be poor. Examples of this included the assumption that all PRMs require a wheelchair, and where the assistance staff talk to a companion of a PRM rather than directly to the PRM.
- **Inability to use own wheelchair:** As discussed above, some wheelchair users with particularly limited mobility may wish to use their own wheelchair for as long as possible. We were informed that many airports do not permit the use of a passengers own chair up to the gate, and that some have a policy of transferring the passenger to an airport chair at check-in.
- **Inadequate provision where connection times are long:** Where there is a wait of several hours between the arrival of one flight and the scheduled departure of the connecting flight, at some airports this may result in a PRM being left unattended for a long period in an area without facilities or assistance.
- **Insufficient time allowed for connections:** The minimum connection time given by airports may not be sufficient to unload, transfer and board a PRM. This is a particular problem at larger, more complex airports with multiple terminals.
- **Parking provision:** A number of issues were raised with the parking spaces made available to PRMs. These included comments on inconvenient location, insufficient capacity, or inappropriate requirements for payment.
- **"Holding areas":** Some airports do not enable PRMs to access departure lounge facilities such as shops or restaurants, and require them to remain in a "holding area" for PRMs. Although such access to facilities is not required by the Regulation, it can significantly improve the experience of air travel of PRMs, and is provided by many airports.
- **Communication of arrival:** Communication of arrival at the airport can be difficult, for example through poor signage for points of communication, or points of communication failing to respond to calls for assistance.
- **Poor provision for the visually impaired:** Many airports do not provide adaptations to allow visually impaired passengers to access the airport independently. These can include tactile surfaces or Braille maps. We were also informed that training on how security staff should search the bags of these passengers was often lacking; it is important that all items are returned to their original location, as otherwise the passenger may have difficulty finding them.

Other organisations

3.84 The other organisations we interviewed raised issues which have been raised by the stakeholder groups already discussed. These included:

- "Teething problems" when the Regulation was first introduced;
- Poor provision of information;

- Variability of training; and
- Falling service levels, in particular falling standards of safety.

Conclusions

3.85 All airports in the sample for this study had implemented the provisions of the Regulation. We were informed that the regional airports in Greece had yet to effect the change from provision by ground handlers to provision by airports, but we were not told of any other airports at which the Regulation has not been implemented. Most of the sample airports had contracted the provision of PRM assistance services to an external company, and several had changed their service provider within 18 months of the Regulation coming into force; this was interpreted by some as a sign that initial procurement and specification had not met actual needs.

3.86 The service provided at the sample airports varies in terms of a number of factors including the resources available to provide the services; the level of training of the assistance staff; the type of equipment used to provide services; the facilities provided to accommodate PRMs (such as PRM lounges). According to the information provided by PRM organisations, there is resulting variability in service quality, although this is difficult to quantify.

3.87 There is also significant variation between airports in the frequency with which PRM services are requested: the level of use of the service varies by a factor of 15 between the airports for which we have been able to obtain data. The type of PRM service requested also varies considerably between airports. Both the frequency of use and the type of service required are likely to be affected by the varying demographics of the passengers using different airports.

3.88 The Regulation requires airports to publish quality standards. Most sample airports had done so, although some had published them only to airlines and other service users. Almost all quality standards followed the example format set out in ECAC Document 30, which defines the percentage of PRMs who should wait for up to given numbers of minutes. Some airports published qualitative measures in addition to these time standards, such as descriptions of the treatment the passenger should expect at all points of the service. However, none of the sample airports had published the results of any monitoring of these quality standards, and whilst most did undertake monitoring in some form, only four had commissioned external checks of the service.

3.89 The Regulation allows airports to levy a specific charge to cover the costs of assistance. All but one of the sample airports had done so. The level of charges varied considerably. We analysed this charge to examine whether variation could be explained by higher frequency of use of the service, differences in price levels between States, or differences in service quality, but there was no evidence that this was the case. The design of the airport may be a further factor influencing the cost of service provision and hence the level of charges.

3.90 Some stakeholders believe that the requirements to select contractors and establish charges in cooperation with users and PRM organisations were not followed thoroughly. Many airlines did not believe that consultation on either element had been sufficient, and this view was shared by some PRM organisations. There were a

number of barriers to effective consultation, including linguistic restrictions and airport user committees which failed to include all interested stakeholders. Consultation with airlines was reported as particularly poor in Spain, Portugal and Cyprus. In contrast to this, we note that several airports stated that they had sought the participation of PRM organisations but had found this difficult to obtain.

3.91 The Regulation requires airports to provide specialised disability training for staff directly assisting PRMs, and whilst all sample airports had done so, there were significant variations in the length and format of this training. The shortest training course among those for which we have data was 3 days long, while the longest lasted 14 days. There was similar variation in the length of training provided for passenger-facing staff who did not provide direct assistance. A number of airports informed us that they did not provide disability-awareness training for staff not in public-facing roles, or only provided it on a voluntary basis.

4. APPLICATION OF THE REGULATION BY AIRLINES

Introduction

4.1 Regulation 1107/2006 also sets out requirements for air carriers relating to their treatment of passengers with reduced mobility (PRMs). This section assesses how airlines are implementing these requirements. Information is drawn from two key sources:

- a detailed review of information published by the case study airline on their websites, against a range of criteria; and
- interviews with representatives of the carriers and other stakeholders.

4.2 This section begins by outlining the obligations imposed on airlines by the Regulation, and evaluates how airlines are implementing these requirements.

Requirements of the Regulation for air carriers

4.3 The Regulation imposes a range of requirements on airlines, which can be summarised as follows:

- **Prevention of refusal of carriage:** The Regulation prohibits airlines from refusing carriage or accepting reservations from PRMs, unless this is necessary to comply with safety requirements, or necessitated by the physical constraints of the aircraft. Where boarding is refused, the provisions of Regulation 261/2004 should apply with regard to refunds or rerouting. Airlines are permitted to require that a PRM be accompanied by a person who is able to provide any assistance that is required (again subject to this being necessary to meet safety requirements), and are required to publish any safety rules which they attach to the carriage of PRMs.
- **Transmission of information:** Airlines are required to take all necessary measures to enable the receipt of PRM assistance requests at all points of sale. Where such requests are received up to 48 hours prior to departure, the airline should transmit the information to the relevant airport(s) at least 36 hours before departure, or as soon as possible if notification is received from the passenger less than 48 hours before departure. Following departure of a flight the airline is also required to provide the destination airport with details of the PRMs requiring assistance on the arriving flight.
- **Assistance:** Annex II specifies the level of assistance which air carriers should provide to PRMs. This comprises carriage of assistance dogs, transport of up to two items of mobility equipment, communication of flight information in accessible formats, making efforts to accommodate seating requests (and seating accompanying persons next to the PRM where possible) and assistance in moving to toilet facilities.
- **Training:** All employees (including those employed by sub-contractors) handling PRMs should have knowledge of how to meet their needs. Disability-equality and disability-awareness training should be provided to all airport personnel dealing directly with the travelling public, and all new employees should attend disability‑related training.

- **Compensation for lost or damaged mobility equipment:** Airlines are required to compensate passengers for lost or damaged mobility equipment or assistive devices, in accordance with national and international law.

Published safety rules

4.4 Article 4(3) requires airlines to publish the safety rules relating to carriage of PRMs. The Regulation does not state in any more detail what these safety rules should cover, but we would expect from the context that this is intended to mean rules relating to where carriers would exercise a derogation under Article 4(1) to allow refusal or limitation of carriage, or for where passengers would have to be accompanied. This would include any rules necessitating limitations on the number of PRMs which can be carried, restrictions on the types of PRM posing specific safety risks, or limitations on their carriage or on that of mobility equipment due to the size of aircraft.

4.5 In some cases the information published by airlines is in the form of a document defined as 'safety rules' or 'information pursuant to Regulation 1107/2006', but more commonly information is provided on a web page (or pages) without these descriptions. The limited use of the 'safety rules' term by airlines may indicate that carriers do not understand what is meant by the term, or that the requirement is open to interpretation. It is also possible that airlines do not have specific PRM safety rules – both KLM and SAS informed us that the same safety rules apply to PRMs as to all other passengers.

4.6 The airlines' Conditions of Carriage may also provide a useful source of information on policy on the carriage of PRMs, and in some cases may provide more detail than dedicated PRM web pages.

4.7 Seven carriers' Conditions of Carriage also refer to other requirements (often described as 'Our regulations' or 'Other regulations') which apply to carriage of PRMs. In the sample we have reviewed, the reference to such regulations does not always specify exactly what the scope of these is or where they are to be found. This may infringe the requirement in Article 4(3) to publish any safety rules affecting PRMs, and may also raise issues of consistency with the Unfair Contract Terms Directive, as the conditions on which bookings are made should be transparent at the time. Whilst some airlines' Conditions state that these regulations are published on their websites, the following case study carriers' Conditions include such references without saying where the information can be found:

- Air Baltic;
- Emirates;
- SAS; and
- TAP Portugal.

4.8 The carriers which provided the most detailed information set out the information listed below, and we would therefore expect a comprehensive PRM web page to provide at least some information on these topics:

- Any limitations on the carriage of PRMs, for example a limit on the number that can be conveyed on a given flight;

- Advance booking requirements for any PRM requiring assistance;
- Conditions under which an accompanying passenger will be required;
- Guidance on the carriage of assistance animals;
- Policies on the carriage of equipment, e.g. wheelchairs, stretchers and oxygen; and
- Any assistance which will be offered on board.

Information actually published by carriers

4.9 Three of the sample airlines (Air Berlin, easyJet and Ryanair) provide either 'safety rules', or a notice specifically stated to be pursuant to Regulation 1107/2006. In a further six cases Regulation 1107/2006 is mentioned in a first sentence of the web page / PRM document, or elsewhere in the text.

4.10 We found that eight of the sample airlines include on their website all the information likely to be required. This was normally in the form of a web page, sometimes with sub-sections, however AirBaltic and KLM provide downloadable documents containing all PRM guidance. Delta also provides a PRM brochure, but this does not contain all the information provided on the PRM web page. In the remainder of cases airlines provide fairly comprehensive web pages, but omit certain items which may appear on other sections of the website (for example in the Conditions of Carriage).

4.11 In some cases we found inconsistencies between the PRM web page and that the information provided in the Conditions of Carriage. For example, Delta's Conditions of Carriage state that 48 hours' advance notice is required for any PRMs who wish to receive special assistance, but the PRM information section states that 48 hours' advance notice is only required if the passenger needs to use oxygen during the flight, requires the packaging of a wheelchair battery for shipment as checked luggage, or is travelling with a group of 10 or more people with disabilities. Austrian Airlines' PRM information emphasises the importance of booking in advance, but does not reflect the stronger wording in the Conditions of Carriage, which state that carriage of PRMs 'is subject to express prior arrangement'. Similarly, the Conditions of Carriage of Alitalia, Brussels Airlines, Delta, Ryanair and Wizzair state that carriage may be refused to PRMs if not arranged in advance; however although the PRM webpage states that assistance should be requested at the time of booking, it is not indicated that failure to do this may result in denial of boarding.

4.12 Some of the rules set out in airlines' Conditions of Carriage do not appear in the PRM information section of the website. For example, Thomsonfly imposes a limit on the number of PRMs or wheelchairs which will be accepted per flight in their Conditions of Carriage, which does not appear on the airline's PRM web page.

Table 4.1 outlines the coverage of the PRM web pages against the criteria set out in paragraph 4.9 above.

TABLE 4.1 INFORMATION AVAILABLE ON CARRIER WEBSITES

Airline	Information provided	Key issues and omissions
Aegean Airlines	'Travel Guide' section of website provides some information on carriage of assistance animals, wheelchairs and oxygen.	No information on advance booking, accompanying passengers or animals Information on wheelchairs is incomplete – conditions of carriage state that spillable batteries cannot be carried. No information on stretchers.
Air Berlin	Information is provided within a section entitled 'Flying barrier-free', and in a safety rules section entitled 'airberlin's safety regulations for the carriage of passengers with restricted mobility (PRMs) in accordance with EC regulation no. 1107/2206' downloadable from the same page. The safety rules discuss the following: • PRM limit • Accompanying persons • Seat allocation • Guide dogs • Information in the event of refusal of carriage	The safety rules do not include advance booking or policies on carriage of equipment. However, with the exception of stretchers this information is provided on the PRM webpage which contains the safety rules.
Air France	Information is provided within a section entitled 'Passengers with reduced mobility'	None
AirBaltic	Detailed information is provided within a document entitled 'Air travel for physically challenged passengers'	None
Alitalia	Limited information across all categories is provided in a section entitled 'No barriers travelling'.	More detailed information on some topics can be accessed only by searching the site for specific terms, e.g. 'stretcher'.
Austrian	Information on most categories is provided in a section entitled 'Barrier-free travel'.	No reference is made to the carriage of stretchers.
British Airways	Information on all categories is provided within a section entitled 'Disability assistance'	None
Brussels Airlines	Reasonably detailed information across all categories is provided in a section entitled 'Special Assistance'.	Information on accompanying passengers, wheelchairs and stretchers is incomplete.
Delta	Detailed information on all categories is provided within a section entitled 'Services for Travelers with Disabilities'. A brochure providing a summary of this information can also be downloaded from the site.	None
easyJet	Detailed information on almost all categories is provided within a notice entitled 'For passengers who are disabled or have reduced mobility (PRM) due to a physical, cognitive (learning) disability or any physical impairment, as defined by current European law, Regulation EC1107/2006 Article 2(a).' In addition detailed information is provided in the 'Carrier's Regulations'.	The information notice on the website is detailed and generally appears complete. There is no reference to provision of oxygen or carriage of stretchers although both are addressed in the Carrier's Regulations.
Emirates	Some information across all categories is provided within the sections 'Health & Travel', 'Special Needs' and 'FAQs'.	The information provided appears to be complete but it is fragmented between these

Airline	Information provided	Key issues and omissions
		three sections, which could be confusing.
Iberia	The website has a general information section entitled 'Passengers with reduced mobility or special needs'. This provides a link to a more detailed information leaflet, downloadable by clicking on a 'No barriers to travel' icon.	The location of the information leaflet is not obvious as it is not listed under 'Information of interest'. Information in the leaflet on accompanying passengers and carriage of mobility equipment appears to be incomplete. There is a document entitled 'Attending to the needs of people with reduced mobility' but this appears to be a general summary of ECAC/ICAO guidance and it is not clear what applies to Iberia.
KLM	Information is provided within a section entitled 'Physically challenged passengers' and in a 'Carefree travel' brochure.	None
Lufthansa	Information on most categories is provided in a section entitled 'Travellers with special needs'.	No information on accompanying passengers or stretchers, although some info is provided in a section on flights to and from the USA.
Ryanair	Detailed information on almost all categories is provided within a notice entitled 'NOTICE PURSUANT TO EC REGULATION 1107/2006 CARRIAGE OF DISABLED PERSONS AND PERSONS WITH REDUCED MOBILITY'.	None
SAS	Information on almost all categories is provided within a section entitled 'Special needs'.	No information on accompanying passengers or stretchers
TAP Portugal	Detailed information on all categories is provided within a section entitled 'Special Assistance'.	None
TAROM	Limited information across all categories is provided in a section entitled 'Persons with disabilities'.	Because the information is not detailed it is not clear whether it is complete, e.g. whether all circumstances where passengers need to be accompanied are listed.
Thomas Cook	Information on all categories is provided within a section entitled 'Medical - passengers with Reduced Mobility'.	None
TUI (Thomsonfly)	Some information on most categories is provided within a section entitled 'Passengers with special needs'.	No information on stretchers or oxygen
Wizzair	Limited information is provided within a section entitled 'Passengers with Special Needs'.	No information on assistance animals or stretchers, although both are referred to in the Conditions of Carriage.

Carrier requirements on carriage of PRMs

Safety requirements defined in law or by licensing authorities

4.13 Article 4(1) allows derogations from Article 3 in order to meet safety requirements defined by national or international law, or to meet safety requirements established by the authority that issued the air operator's certificate to the air carrier concerned. The only EU-wide legislation which applies is EU-OPS1 (Commission Regulation 859/2008), which is aligned with JAR-OPS 1 Section 1 guidance previously produced by the Joint Aviation Authorities.

4.14 National health and safety legislation may also provide safety-related grounds for imposing restrictions on the carriage of PRMs – for example cabin crew may not be permitted to lift passengers between their seat and an on-board wheelchair, which would then necessitate an accompanying passenger if it is expected that they will need to leave their seat at any point during the flight.

4.15 All other restrictions are governed by safety requirements established by licensing authorities, which are often (although not always) the same organisation that has been designated as the NEB for the Regulation. The main guidance material relating to carriage of PRMs that licensing authorities should take into account is that originally defined in Section 2 of JAR-OPS 1. Section 2 was not included in EU-OPS1, but ECAC Document 30 states that, pending the adoption of implementing rules related to operations based on the EASA Regulation (216/2008), Member States are allowed to use the Section 2 guidance material, provided that there is not conflict with EU-OPS. To accompany EU-OPS 1, the JAA published an updated version of Section 2 in the form of Temporary Guidance Leaflet (TGL) 44. The section relating to the carriage of PRMS, ACJ OPS 1.260, remains unchanged from the original JAR-OPS 1 Section 2. It states that:

> *1 A person with reduced mobility (PRM) is understood to mean a person whose mobility is reduced due to physical incapacity (sensory or locomotory), an intellectual deficiency, age, illness or any other cause of disability when using transport and when the situation needs special attention and the adaptation to a person's need of the service made available to all passengers.*
>
> *2 In normal circumstances PRMs should not be seated adjacent to an emergency exit.*
>
> *3 In circumstances in which the number of PRMs forms a significant proportion of the total number of passengers carried on board:*
>
> *a. The number of PRMs should not exceed the number of able-bodied persons capable of assisting with an emergency evacuation; and*
>
> *b. The guidance given in paragraph 2 above should be followed to the maximum extent possible.*

4.16 Licensing authorities may require their carriers to impose more stringent restrictions on carriage of PRMs than the 50% limit defined by TGL 44. However, this is rare: the only example identified amongst the case study States is the Belgian Civil Aviation Authority (BCAA), which has set restrictions on the numbers of certain types of PRM, and minimum numbers of accompanying passengers. The numerical limits, which are outlined in more detail in the case study for Belgium in appendix C, are reflected in the conditions imposed by Brussels Airlines. In contrast, some licensing authorities

(for example the UK CAA) have stated that they will not generally approve limits on carriage of PRMs below the 50% defined in TGL 44.

4.17 In the remainder of cases, licensing authorities do not have any defined policy and will consider any restrictions on carriage of PRMs on a case by case basis. Therefore, more stringent restrictions on carriage of PRMs may be proposed by the airlines themselves, included in their Operations Manuals and submitted for approval by the licensing authority. As a result, there are significant variations between airlines, even where operational models and types of aircraft are similar. For example, whilst Wizzair, easyJet and Ryanair have similar operational models and aircraft types, Ryanair has a limit of 4 PRMs who require assistance per aircraft whilst Wizzair has a limit of 28 PRMs and easyJet 50%. Although the limits imposed by the three airlines are all based on safety, it is difficult to imagine that all three could be 'safe' limits. There does not seem to be an evidence base for these limits and a stakeholder suggested to us that, in the event of an emergency, it is impossible to predict whether even 'able bodied' passengers will be in a physical or psychological state consistent with evacuating the aircraft in the expected time; therefore, it was discriminatory to have a PRM limit.

4.18 The policy adopted by many of the legacy carriers is influenced by the United States Department of Transport Regulation, 14 CFR Part 382 (hereafter described as rule 382). The United States Air Carrier Access Act of 1999 made rule 382 apply to non-US carriers on flights to/from the US, and to all flights which are codeshares with US carriers (even flights not to/from the US), except where there is a specific conflict with non-US law. Despite sharing the same aspiration of ensuring equal access to air travel for all, there are significant differences between the US and EU regulations. Rule 382 specifically prohibits airlines from imposing numerical limits on PRMs, on the basis that this practice is discriminatory. Lufthansa and TAP Portugal are the only case study airlines operating to and from the US to publish PRM limits.

4.19 PRM limits have also been challenged on the basis of national law. In 2009, the Madrid Provincial Court ruled that Iberia must change its Flight Operation Manual because it was indirectly discriminatory against disabled people. The case was brought by three deaf people who were refused boarding because they were unaccompanied.

4.20 The Regulation allows airlines to **request that a passenger be accompanied**, but only on the basis of safety. Three carriers cited the UK Department for Transport's *Access to Air Travel for Disabled Persons and Persons with Reduced Mobility – Code of Practice* as the basis for the criteria they use to determine whether a PRM should be accompanied. The document also supports the Regulation in providing guidance to airlines and airports on best practice approaches to the handling and transit of PRMs. The guidance states that an accompanying passenger should only be required "when it is evident that the person is not self-reliant and this could pose a risk to safety". The document defines this as being as passenger who cannot:

- Unfasten their seat belt;
- Leave their seat and reach an emergency exit unaided;
- Retrieve and fit a lifejacket;
- Don an oxygen mask without assistance; or
- Is unable to understand the safety briefing and any advice and instructions given

by the crew in an emergency situation (including information communicated in accessible formats).

4.21 The document also states that passengers who require a level of personal care which cabin crew cannot provide should be told that they should be accompanied. This includes assistance with the following:

- Breathing (reliance on supplementary oxygen);
- Feeding;
- Toileting; and
- Medicating.

4.22 The guidance implies that a passenger should only be required to be accompanied if they are likely to require such assistance during the course of the flight. This is consistent with rule 382, which states that ”concern that a passenger with a disability may need personal care services…is not a basis for requiring the passenger to travel with a safety assistant”.

4.23 The most significant difference between US and EU law relates to the **48 hour advance notification** requirement in the Regulation for passengers requiring assistance. Rule 382 states that requiring pre-notification from PRMs is discriminatory, given that the same requirement is not imposed on other passengers. It does however allow airlines to require 48 hours pre-notification in circumstances where a passenger:

- Requires oxygen on a domestic flight (72 hours notice can be requested on international flights);
- Is travelling in an incubator;
- Requires a respirator or oxygen concentrator to be connected to the aircraft power supply;
- Is travelling in a stretcher;
- Is travelling in an electric wheelchair on an aircraft with 60 seats or less;
- Requires hazardous material packaging, e.g. for an electric wheelchair;
- Is travelling in a group of 10 or more PRMs;
- Requires an on-board wheelchair on an aircraft with more than 60 seats that does not have an accessible toilet;
- Intends to travel in the cabin with an emotional support animal;
- Intends to travel in the cabin with a service animal on a flight of 8 hours or more; or
- Has both severe vision and hearing impairments.

4.24 The Regulation does not define the circumstances under which **medical clearance** can be reflected from a passenger, but rule 382 prohibits airlines from requesting medical certification unless the passenger’s condition poses a ‘direct threat’, which ‘means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services’.

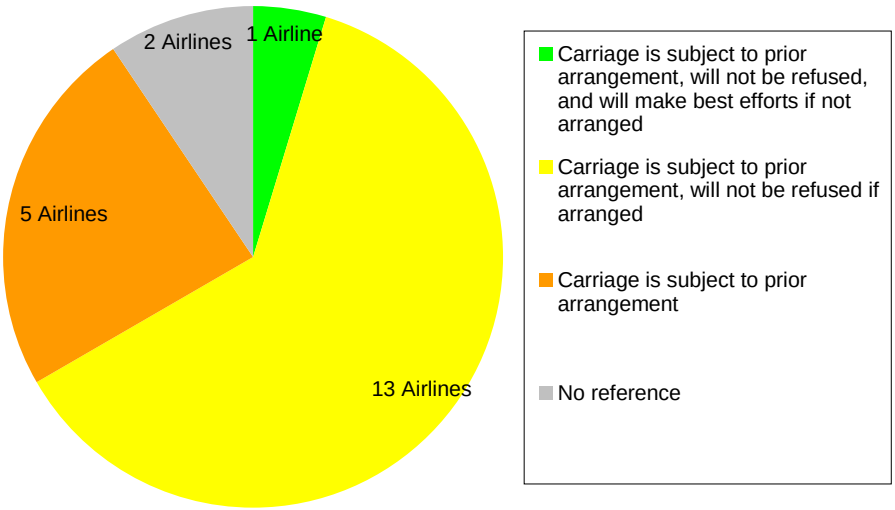
Policy on carriage of PRMs defined in Conditions of Carriage

4.25 The element of carriers' Conditions of Carriage relating to PRMs can be classified into the following six categories:

- **Will not refuse carriage on disability grounds** – all PRMs carried without restriction or requirement for pre-booking;
- **Carriage subject to prior arrangement, but will not be refused if not arranged** – the airline would prefer that advance arrangements are made, but PRMs may nevertheless be carried without this;
- **Carriage subject to prior arrangement and will not be refused if arranged –** PRMs are required to make advance arrangements, and will not be refused carriage on the basis of their disability if advance arrangements have been made;
- **Carriage is subject to prior arrangement** – as above, but without the additional clause on non-refusal of carriage to PRMs who have made arrangements;
- **Non-compliant term** – e.g. airline refuses to carry certain PRMs;
- **No reference** – PRMs not discussed in Conditions of Carriage.

4.26 Figure 4.1 shows the general approach adopted in the Conditions of Carriage of the case study airlines. None of the case study Conditions of Carriage were at the extreme ends of the scale, i.e. explicitly non-compliant terms or carriage of all PRMs without any restriction.

FIGURE 4.1 CONDITIONS ON CARRIAGE OF PRMS



4.27 Most (13) of the Conditions of Carriage of the sample airlines surveyed state a policy of not refusing carriage to PRMs on the grounds of their special requirements subject to arrangements being made in advance, although boarding may still be denied for other reasons. Alitalia adds an additional disclaimer, which states that the PRMs who have made advance arrangements will be carried, unless this is "…impossible due to objective causes of force majeure".

4.28 The advance booking requirement does not necessarily apply to all PRMs. Air Berlin states that the carriage of medical devices and mobility aids can only be guaranteed with up to 48 hours' notice, and visually impaired passengers with guide dogs are also required to make advance arrangements. No reference is made to PRMs not falling within these categories, however.

4.29 Table 4.2 shows the approaches adopted by each of the case study airlines in their Conditions of Carriage. Air Berlin is unusual in that the advance booking requirement appears only to apply to PRMs reliant on mobility aids, medical devices or assistance animals, and it appears that no such requirement exists for other PRMs.

TABLE 4.2 CONDITIONS OF CARRIAGE OF PRMS

Airline	State	General approach
Aegean Airlines	Greece	No reference
Air Berlin	Germany	Carriage of mobility aids, medical devices and assistance animals is subject to prior arrangement
Air France	France	Carriage is subject to prior arrangement, will not be refused if arranged
AirBaltic	Latvia	Carriage is subject to prior arrangement, will not be refused if arranged
Alitalia	Italy	Carriage is subject to prior arrangement, will not be refused if arranged
Austrian	Austria	Carriage is subject to prior arrangement
British Airways	UK	Carriage is subject to prior arrangement, will not be refused, and will make best efforts if not arranged
Brussels Airlines	Belgium	Carriage is subject to prior arrangement, will not be refused if arranged Also state that they will make reasonable efforts even if not arranged.
Delta	Non-EU	Carriage is subject to prior arrangement
EasyJet	UK	Carriage is subject to prior arrangement
Emirates	Non-EU	Carriage is subject to prior arrangement
Iberia	Spain	No reference
KLM	Netherlands	Carriage is subject to prior arrangement, will not be refused if arranged
Lufthansa	Germany	Carriage is subject to prior arrangement, will not be refused if arranged
Ryanair	Ireland	Carriage is subject to prior arrangement, will not be refused if arranged
SAS	Sweden	Carriage is subject to prior arrangement, will not be refused if arranged
TAP Portugal	Portugal	Carriage is subject to prior arrangement, will not be refused if arranged
TAROM	Romania	Carriage is subject to prior arrangement, will not be refused if arranged
Thomas Cook	Germany / UK	Carriage is subject to prior arrangement, will not be

Airline	State	General approach
		refused if arranged
TUI (Thomsonfly)	Germany / UK / Netherlands	Carriage is subject to prior arrangement, will not be refused if arranged
Wizzair	Hungary	Carriage is subject to prior arrangement

Circumstances under which carriage may be refused

4.30 Although all of the case study airlines impose a range of conditions on PRM bookings, only a proportion state explicitly that carriage may be refused if certain conditions are not met. In some cases, an individual PRM travelling cannot control whether the conditions are met, but some conditions can be satisfied if the PRM follows a defined course of action:

- Conditions which individual PRMs cannot control whether they meet include limits on the number of PRMs which can be carried on a given flight, and restrictions posed by the physical size and configuration of specific aircraft
- Conditions which PRMs can take actions to comply with include advance booking (discussed in the preceding section), travelling with an accompanying passenger or obtaining medical clearance.

4.31 The remaining categories are discussed in turn below.

4.32 Under Article 4 of the Regulation carriage can only be refused on safety grounds, or if boarding is physically impossible due to space constraints, a requirement with which most of the case study airlines are compliant. The only condition we have identified which is potentially non-compliant is the requirement for advance booking cited by Alitalia, Brussels Airlines, Delta, Ryanair and Wizz Air.

PRM limits and physical constraints

4.33 Ryanair is the only case study airline to set out numerical limits on carriage of PRMs in its Conditions of Carriage. In addition, Delta's Conditions of Carriage include the vague statement that carriage may be refused to any PRM on the basis of safety.

4.34 Airline PRM web pages provide more information on PRM limits, with several airlines setting out limits:

- Air Berlin;
- AirBaltic;
- Brussels Airlines;
- Lufthansa;
- TAROM (only for PRMs in wheelchairs); and
- Wizz Air.

4.35 Aegean Airlines and TAP Portugal also informed us that they have PRM limits in place, although these are not published. Full details of the PRM limits adopted by each airline are given in Table 4.3. Several of the other case study airlines informed us that they are required to adhere to the limit set out in TGL 44 that the number of PRMs

should not exceed the number of able bodied passengers; this restriction is not included in the table below, although it is possible that some of the unspecified restrictions actually relate to this. Note that other carriers may have unpublished limits which we have not been informed about.

TABLE 4.3 AIRLINE PRM LIMITS

Airline	Published limits	Unpublished limits	Applies to
Aegean Airlines	-	Unspecified restriction	All unaccompanied PRMs
AirBaltic	If number of PRMs exceeds number of cabin crew per flight (typically 3-4 on short haul aircraft)	-	All PRMs, only where PRMs form a large proportion of passengers on flight
Air Berlin	Unspecified limit for safety reasons	-	All PRMs
Brussels Airlines	2 when travelling individually, except on A330-300, where limit of 4. When travelling in group limit ranges from 9 (on BAe 146) to 27 (on A330-300), including escorts.	-	WCHS + WCHC + STCR + BLND + DEAF/BLND, in any combination
Lufthansa	Limit on unaccompanied passengers in wheelchairs: 3 on regional flights (>70 seats); 5 on other flights Limit on no. of wheelchairs per flight: 3 on most intercontinental flights, 2 on continental flights and 1 on regional flights. Also unspecified general limit on limited mobility passengers for care and safety reasons.	-	All unaccompanied PRMs
Ryanair	Limit of 4 per aircraft for safety reasons	-	Passengers with reduced mobility, blind/visually impaired or requiring special assistance.
TAP Portugal	-	Stretcher: 2, except Fokker 100 and Embraer 145; WCHC: 4-10 depending on aircraft; WCHS, blind and deaf: 9, except Fokker 100 and Embraer 145; Incubator: 1, except Fokker 100 and Embraer 145.	See left
TAROM	Limit on passengers requiring wheelchair in		

	cabin: 0 on AT42, 2 on B737 and 6 on A318. No limits on other PRMs		
Wizz Air	Limit of 28 disabled or incapacitated or passengers with reduced mobility, including a maximum of 10 who require a wheelchair from check-in to the cabin seat	-	See left

4.36 Fewer airlines refer to other physical constraints in their Conditions of Carriage, with only AirBaltic and Brussels Airlines indicating that carriage may be refused if the PRM is unable to physically board via the aircraft's doors.

Accompanying passengers

4.37 Article 4(2) of the Regulation allows airlines to require PRMs to be accompanied in order to meet the applicable safety requirements referred to in Article 4(1). As with any numerical PRM limits, requirements for PRMs to be accompanied should be set out in the carriers' Operations Manuals, which again would require the approval of the licensing authority in the relevant Member State.

4.38 Most airlines publish criteria under which a PRM would have to be accompanied. These are again generally safety related, or relate to the level of assistance cabin crew are able to give. Three common themes emerge:

- The PRM has certain specified conditions, e.g. difficulty walking;
- The PRM requires care which the cabin crew are unable to provide (typically this means that the passenger is not self-reliant); or
- The PRM is unable to evacuate the aircraft without assistance.

4.39 Although many airlines make reference to self-reliance criteria there is a difference between those requiring **all** passengers who are not self-reliant to be accompanied; and those which state that passengers who, for example, require help with eating, should be accompanied. In the latter case a passenger could argue that they will not be eating on the flight, and that this criterion is therefore irrelevant. Six of the sample airlines state that all passengers who are not self-reliant must be accompanied, and this is not limited to cases where there is a safety implication. In our view, these airlines may be infringing the Regulation as well as (if they fly to the US) rule 382.

Medical clearance

4.40 The majority of the case study airlines required medical clearance for certain types of PRM, either confirming fitness to travel, or stating a need to carry medical equipment such as syringes or oxygen, although again it is generally not explicitly stated that boarding will be refused if clearance is not obtained. In most cases, the PRM is required to ask their doctor to fill in a medical clearance form, which is then forwarded to the airline's medical department for approval.

4.41 Given the importance of not confusing disability with illness, it might be expected that

the proportion of passengers required to seek clearance before travelling would be minimised. This is the case for most of the case study airlines. Although the types of PRM required to obtain clearance varies, this normally includes those requiring oxygen or stretchers and is not overly restrictive. However, six airlines adopt slightly different policies:

- Lufthansa states that 'In the case of a physical or psychological limitation, you must obtain an assessment of your fitness for air travel from a Lufthansa doctor in advance', although it is stated elsewhere that this does not apply to blind people. Nevertheless, this requirement could potentially encompass many types of PRM, and the requirement to see a Lufthansa doctor is likely to be particularly onerous.
- The policy adopted by Wizz Air, although vague, also has the potential to be quite onerous. The airline reserves the right to require medical clearance in all cases, and will refuse the reservation if this is not obtained.
- Austrian, Iberia (both on the PRM web pages) and Wizzair (in the airline's Conditions of Carriage) all state explicitly that boarding may be refused to passengers on medical grounds if clearance has not been arranged in advance.
- Thomas Cook takes an unusually vague approach in stating that 'Some medical conditions require a fitness to fly certificate'. Passengers who consider themselves to have a condition that will require the authorisation of their doctor are advised to obtain their approval before flying. A telephone number is however provided, where presumably clarification of the conditions requiring medical authorisation can be obtained.

4.42 Policies on denial of boarding, accompanying passengers and medical clearance are summarised in Appendix A. This information is mostly derived from the PRM web pages provided by the airlines, unless explicit reference is made to the conditions of carriage. Any unpublished information provided to us directly by the airline is shown in italics.

Actions to be taken when carriage refused

4.43 Article 4(1) requires that, where a PRM is refused boarding, the airline is required to offer reimbursement or rerouting in line with Regulation 261/2004. Although none of the case study airlines make any references to this in either their PRM web pages or Conditions of Carriage, almost all of the airlines we interviewed confirmed that passengers who have been refused boarding would be offered a refund, rerouting or cost-free cancellation, depending on the circumstances. However, some carriers indicated that this situation would be rare, as refusal would most commonly occur at the booking stage.

4.44 Where boarding is refused, airlines are required under Article 4(4) of the Regulation to immediately inform the PRM of the reasons for the refusal and, on request, should communicate the reasons to the PRM in writing within five working days. Alitalia and Ryanair are the only airlines to refer to this in their Conditions or policies, Alitalia stating in its Conditions of Carriage that in the event of refusal of carriage the passenger may request additional information, and Ryanair stating on its PRM webpage that 'If we are unable to carry a disabled/reduced mobility passenger, we will inform the person concerned of the reasons for refusal of carriage'.

4.45 However, although only two of the case study airlines provide details of the actions

they will take when carriage is refused, again most indicated in their interviews with us that they will provide either written or verbal explanations to passengers who have been refused boarding.

Services provided to PRMs

Requirements defined in law or other guidance

4.46 Annex II of the Regulation requires that airlines provide the following assistance to pre-notified PRMs without additional charge:

- Carriage of recognised assistance dogs in the cabin, subject to national regulations.
- In addition to medical equipment, transport of up to two pieces of mobility equipment per disabled person or person with reduced mobility, including electric wheelchairs (subject to advance warning of 48 hours and to possible limitations of space on board the aircraft, and subject to the application of relevant legislation concerning dangerous goods.
- Communication of essential information concerning a flight in accessible formats.
- The making of all reasonable efforts to arrange seating to meet the needs of individuals with disability or reduced mobility on request and subject to safety requirements and availability.
- Assistance in moving to toilet facilities if required.
- Where a disabled person or person with reduced mobility is assisted by an accompanying person, the air carrier will make all reasonable efforts to give such person a seat next to the disabled person or person with reduced mobility.

4.47 This guidance is reflected in ECAC Document 30 and the UK DfT Code of Practice. The Code of Practice also suggests the following:

- Cabin crew should provide reasonable assistance with the stowage and retrieval of any hand baggage and/or mobility aid whilst in flight.
- Cabin crew should familiarise disabled passengers with any facilities on board designed particularly for disabled passengers. In the case of visually impaired people they should additionally offer more general familiarisation information and such other explanations as may be requested, such as about on-board shopping.
- Other printed material, such as dinner menus, should, where reasonably practicable, be accessible to blind and partially sighted people. Alternatively, cabin crew should explain the material.
- Where video, or similar systems, are used to communicate safety or emergency information, sub-titles should be included to supplement any audio commentary.
- Where possible, films and other programmes should be subtitled for deaf and hard of hearing passengers.
- In selecting catering supplies, air carriers should consider how “user-friendly” the packaging is for disabled people.
- Cabin crew should describe the food, including its location on the tray, to blind and partially sighted passengers.
- During the flight, cabin crew should check periodically to see if PRMs need any

assistance. In the case of those requiring the use of the on-board wheelchair (where one is installed), the staff must be trained in how to assist the passenger to and from the toilet by pushing the on-board wheelchair.

- Passengers' own portable oxygen concentrators should normally be allowed if battery powered, though air carriers will need to check the type of device to ensure it does not pose any technical problems.

4.48 The assistance provided by the case study airlines generally reflects this guidance, although not all provide comprehensive information on the service they provide to PRMs, particularly in terms of general assistance on-board the aircraft.

4.49 Again, there are some conflicts between Regulation 1107/2006 and the US guidance defined in rule 382, which would apply to some flights operated by EU carriers including all flights to/from the US. In particular, the US regulations do not define an upper limit on the number of items of mobility equipment that should be carried. Some additional requirements established by rule 382 include:

- Assistance in moving to and from seats;
- Assistance in preparation for eating;
- All new videos, DVDs, and other audiovisual displays played on aircraft for safety purposes should be high-contrast captioned;
- Passengers should be able to use moveable armrests seats where their condition requires it;
- Seats with additional legroom should be provided for passengers with fused or immobilised legs;

- PRMs should be permitted to use ventilator, respirator, continuous positive airway pressure machine, or portable oxygen concentrator (POC) of a kind equivalent to an FAA-approved POC on all aircraft originally designed to have a maximum passenger capacity of more than 19 seats, unless the equipment does not meet safety requirements or cannot be used or stowed safely in the cabin.

Assistance animals

4.50 Of all the case study airlines which refer to guide dogs, almost all accept them in the cabin free of charge, as required by Annex II of the Regulation, although carriage is also limited by national regulations regarding the transport of animals. However, we identified the following issues with the carriers' published policies:

- Alitalia – assistance dogs are only allowed in the cabin if space is available;
- Emirates – assistance animals can only be carried in the hold;
- TAP Portugal / Thomas Cook / Wizz Air – insufficient information regarding charging and carriage in cabin;
- TUI – assistance dogs carried for a nominal charge. It is not stated whether animals can be carried in the cabin; and
- Air France / EasyJet – not stated whether carriage is free of charge.

4.51 There is some variation in terms of the conditions applied to the carriage of guide dogs; some airlines require a carrying case, muzzle or harness, for example; Austrian,

EasyJet and TAP Portugal require certification of service animal status; and carriage in exit rows is often prohibited. Several airlines state limits on the number of guide dogs that can be carried on a given flight – AirBaltic, British Airways and Ryanair. Other airlines may enforce similar unpublished limits. Full details of airline policies are provided in Appendix B.

4.52 In most cases, the information provided by carriers on which routes service dogs can be carried on is quite vague. Two exceptions are British Airways and Iberia, which include detailed information and links to external websites; in the case of British Airways this is the UK DEFRA (Department for Environment, Food and Rural Affairs) guidance on the Pet Travel Scheme which governs the carriage of assistance animals on flights within and to/from the UK. This includes detailed guidance on travel preparation and a full list of approved routes. The guidance provided by Brussels Airlines is also reasonably detailed, and both Austrian and Thomas Cook provide links to EU and UK regulations respectively, but without detailed supporting explanations.

Mobility equipment

4.53 All the airlines reviewed accept wheelchairs, and in most cases airlines state that there is no charge for this. Three airlines allow at least certain types of personal wheelchair in the cabin, with carriage restricted to the hold or not stated in the remainder of cases. Spillable wet-cell batteries are not accepted by some airlines and where they are accepted this is usually subject to preparation. Where specified, most airlines policies on the carriage of wheelchairs are consistent with the upper limit of two items of mobility equipment per passenger specified in Annex II of the Regulation. Air Berlin is the only one of the case study airlines to define a limit below this.

4.54 Dangerous goods legislation is cited by many airlines as posing a limitation on the range of battery operated wheelchairs which may be carried. However, few airlines provide specific details of the laws and regulations which apply. Austrian does provide references to both Regulation (EC) No 820/2008 and the IATA Dangerous Goods Regulations, the latter accessible via an external link; and Delta provides a link to the US Department of Transportation's Safe Travel information, which provides information to passengers on the carriage of batteries. The Thomas Cook and TUI websites include a reference to the IATA Dangerous Goods Regulations, but without external links. It is worth noting that, although only a fraction of the case study airlines provide this level of detail on their PRM web pages, many may provide such information in their luggage regulations or elsewhere in the Conditions of Carriage.

4.55 Under Article 12 airlines are required to compensate for losses or damage to mobility equipment, up to the limits specified by national and international law, which effectively means the limits defined in the Montreal Convention. This limits any compensation to 1131 SDR (approximately €1260), which would be inadequate for technologically advanced wheelchairs which can cost up to €20,000. However, several airlines have indicated that these limits would be waived in practice, partly to avoid bad publicity associated with provision of insufficient compensation, and also because it is generally agreed that such events are rare. Air France, Iberia, KLM, TAROM, Thomas Cook and TUI informed us that they compensate passengers for the full value of the equipment; with TUI also indicating that all UK airlines have agreed to waive

the Montreal limits. In contrast, one PRM organisation informed us that it was aware of cases where airlines had not waived the limits.

4.56 Almost all stakeholders stated that the Regulation had made no impact on loss or damage to mobility equipment, both in terms of the number of incidents and levels of compensation for loss or damage; although some felt that the training requirements imposed by the Regulation has resulted in improved handling procedures.

Medical equipment

4.57 Oxygen is available on most of the case study airlines, and can either be provided by the airline or the passenger. Where stated, charges range from €100 (Ryanair / Thomas Cook) to €335 (SAS intercontinental flights). Wizzair is the only exception: the airline accepts passengers who need oxygen with medical certification, but does not provide additional oxygen or allow passengers to bring their own onboard. Such restrictions appear to equate to a complete ban on PRMs requiring oxygen.

4.58 Policies on the carriage of stretchers (where stated) tend to be based on aeroplane size, with several operators not accepting stretchers on the smaller planes in their fleet. Most low cost carriers including easyJet, Ryanair, Thomas Cook and Wizzair prohibit carriage of stretchers entirely.

Accessible information

4.59 Only 6 airlines specify the types of accessible information provided for PRMs. This tends to be safety-related, although may also include Braille seat numbers and verbally describing food-related information.

Seating

4.60 Austrian, British Airways, Delta and KLM are the only case study airlines to state on their web pages that PRMs can be allocated any seat most appropriate to their needs, subject to safety regulations restricting access to exit row seats. Where most other airlines discuss their PRM seating policy this is usually in terms of restrictions, again the most frequent being not allowing PRMs to be seated in exit rows. Many airlines provide seats with retractable armrests, although normally only a proportion of the seats on an aircraft are provided with this feature (KLM is the only airline to state that all seats have moveable armrests). British Airways state that passengers will be allocated a bulkhead seat when requested, provided that this is not already allocated to another PRM. Similarly, Delta and Lufthansa also state that customers with service animals (or immobilised legs in the case of Delta) are entitled to bulkhead seats. Again, only a proportion of the airlines (14 out of 21) provide any of this kind of information, so it is unclear what the other case study airlines offer. The results of our analysis are shown in Appendix Table A.2.

4.61 Ryanair requires PRMs to sit in window seats, so that they do not impede the evacuation of other passengers, although this could result in a difficult or uncomfortable transfer to and from the seat for some passengers. Other airlines may adopt similar policies which we were not informed about. Iberia informed us that, although they recommend that PRMs are accommodated in window seats, through

their online booking systems PRMs are able to choose any seat, with the exception of emergency exit rows.

4.62 Several airlines prohibit PRMs from being seated in exit rows 'for safety reasons', but generally do not make a specific reference to the legal basis for this, which in most cases would be EU-OPS1. Air Berlin, Delta and Ryanair are the only airlines to provide details of the regulations on which this prohibition is based – in the case of Delta this is the Exit Seat Regulation, 14 CFR 121.585; and for Air Berlin and Ryanair EU/JAR-OPS 1.260. Thomas Cook and TUI make more vague references to UK CAA regulations as a justification for their seating restrictions.

Restrictions on service

4.63 12 of the case study airlines provide an indication of the level of assistance in-flight provided to PRMs, although mostly in terms of the assistance staff are unable to provide. This generally includes feeding, lifting passengers, administering medication and assisting in personal hygiene or toilet functions. The level of assistance which is provided is generally limited to preparation for eating, assistance in moving around the aircraft and stowing and retrieving luggage.

Pre-notification of requirements

Requirements defined in law or other guidance

4.64 Article 6(1) of the Regulation requires that airlines take all measures necessary to ensure that they are able to receive PRM assistance requests via all normal points of sale. Articles 6(2) and 6(3) state that, where this information is received more than 48 hours before departure it should be transmitted to the relevant airports no later than 36 hours before the flight departs. Requests received after 48 hours should be communicated at the earliest opportunity. Article 6(4) requires that, after departure of a flight, airlines inform the destination airport (if within the EU) of the number of disabled persons and persons with reduced mobility on that flight requiring assistance, and the nature of the assistance required.

Methods by which passengers can pre-notify

4.65 In addition to the requirements of Article 6(1), the Recitals of the Regulation state that all essential information provided to air passengers should be provided "in at least the same languages as the information made available to other passengers". Several airlines do not meet this standard, although the Recitals are in themselves not binding.

4.66 Many of the major airlines provide offices and contact telephone numbers in a number of countries where the official language may not be one of the languages in which the airline website is offered. In most cases it is not possible to assess the languages offered by staff in these offices, and if the website is not offered in this language passengers may in any case have difficulty finding the contact for their country. For these reasons the language category is based on the website languages offered rather than the geographical spread of airline offices.

4.67 Some NEBs highlighted the use of premium rate special assistance telephone numbers as being an issue. Our research indicates that many carriers use phone numbers that do

charge, although rates are usually moderate, with the following exceptions:

- Some carriers, for example AirBaltic, provide international numbers only.
- Ryanair provides national phone numbers in most Member States but the rates in some States are high – for example, €0.50 per minute in Belgium
- Brussels Airlines provides (for calls from the UK) either a Belgian telephone number, or the UK reservations centre which charges £0.40 (€0.44) per minute, although this number centre deals with all reservations, and not just PRM assistance requests.
- SAS provides (for calls from the UK) a UK reservations number, which charges £0.25 (€0.28) per minute, although again this is not PRM-specific.

4.68 Each of these airlines accept notifications online, so passengers could theoretically avoid payment of these charges. However, we are not able to comment on the accessibility of these systems or whether they enable collection of all of the information that would be required in each case – some passengers may still need to use the telephone numbers for these reasons.

4.69 The notification options available to PRMs for the 21 case study airlines are shown in Table 4.4. It should be noted that options presented during the booking process could only be examined up to the point of payment for tickets. Some airlines may provide a notification option after payment has been made, which we would not have identified.

TABLE 4.4 OPTIONS TO NOTIFY CARRIERS OF REQUIREMENTS

Airline	Options provided	Differences between languages of PRM info and main website	Languages for phone calls
Aegean Airlines	Telephone	None	Not stated
Air Berlin	Telephone	None	Not stated
Air France	During online booking process Email / website Telephone	Main site in 15 languages PRM info in 10 languages	Not stated
AirBaltic	Telephone	None	Not stated
Alitalia	Telephone	Main site in 8 languages PRM info in 6 languages	Not stated
Austrian	Email / website Fax	Main site in 22 languages PRM info in 2 languages	Not applicable
British Airways	During online booking process Email / website Telephone	None	Not stated
Brussels Airlines	Email / website Telephone	None	Not stated
Delta	Telephone	None	Not stated
EasyJet	During online booking process Email / website Telephone	None	Telephone numbers only accessible after logging into personal account
Emirates	Email / website Telephone	None	Not stated
Iberia	During online booking process	None	Not applicable
KLM	Email / website Telephone	Main site in 15 languages PRM info in 9 languages	Not stated
Lufthansa	Email / website Telephone	None	Not stated
Ryanair	During online booking process Telephone	None	English French Italian Spanish
SAS	During online booking process Email / website Telephone	Main site in 15 languages PRM info in 12 languages	Not stated
TAP Portugal	Telephone	Main site in 9 languages PRM info in 7 languages	Not stated

Airline	Options provided	Differences between languages of PRM info and main website	Languages for phone calls
TAROM	During online booking process	None	Not applicable
Thomas Cook	During online booking process Telephone	None	Not stated
TUI (Thomsonfly)	Telephone	None	Not stated
Wizzair	During online booking process Telephone	None	Bulgarian Czech English French German Hungarian Italian Polish Romanian Ukrainian

Process for collection and transmission of requests

4.70 Although many case study airlines enable PRMs to make special assistance requests online, this often has to be supplemented by a telephone call to the airline to establish the PRM's exact requirements. Air France informed us that, when notifying online, a 'pop up' window will appear which informs the passenger that they will be contacted by the airline to clarify the assistance required. Similarly, KLM stated that, although they do provide an online notification option, the passenger would still need to call the airline to establish their exact requirements.

4.71 The standard procedure for transmitting assistance requests to the relevant airports is the PAL (Passenger Assistance List), which under Article 6(2) should be sent 36 hours before departure. Additional requests received after this time can be included in the CAL (Change Assistance List) in line with the requirements of Article 6(3). Most requests are transmitted using the standard special assistance codes IATA codes, although some airlines their own codes.

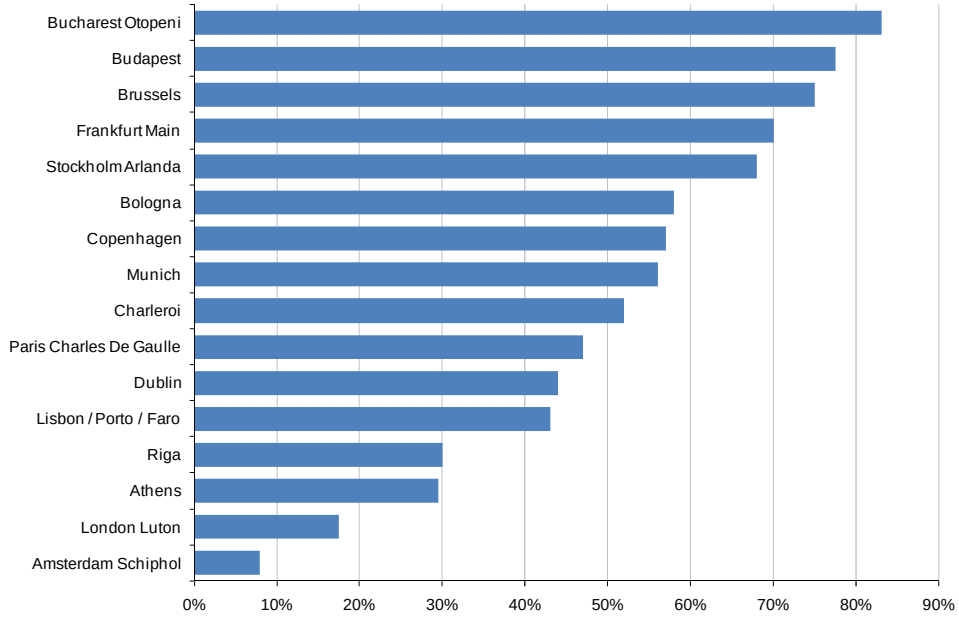
4.72 This information is supported by Passenger Service Messages (PSM) which are automatically generated by all special assistance requests recorded on the Passenger Name List of a given flight (thus complying with Article 6(4) of the Regulation). PSM messages are generated automatically on departure from the origin airport, so can be particularly useful for airports in relation to long haul flights, where there is sufficient time to mobilise staff and equipment before the aircraft arrives. Conversely, PRM messages are of less use in relation to short haul flights, as staffing arrangements cannot be so easily amended at short notice.

Effectiveness of process

4.73 All of the case study airlines interviewed use the standard PAL / CAL / PSM system, although Ryanair informed us that they also have their own system of codes and notifications (discussed in section 3 above).

4.74 Rates of pre-notification vary substantially, as shown in Figure 4.2. It should be noted that the definition of pre-booked assistance may vary between airports – for example Brussels Charleroi airport informed us that its figures for pre-notification includes notification by PSM message, which would not be received prior to the 36 hours specified by the Regulation. A number of other airports did not clarify their definition of pre-notification, including Bucharest and Budapest, which may explain why the percentages here are particularly high.

FIGURE 4.2 PRE-NOTIFICATION RATES BY AIRPORT



4.75 There a number of possible explanations for both the wide divergence of pre-notification rates, and the particularly low values observed at some airports. These include:

- **Passenger factors**, e.g. not being aware of the pre-notification requirement, abuse of the system or not realising that they would need assistance until arriving at the airport;
- **Airline factors**, e.g. not providing sufficient or appropriate means for passengers to pre-notify of their requirements, or failing to transmit assistance requests to airports within the time limits specified in the Regulation;
- **Other factors** – primarily communication and other technological failures.

4.76 Stakeholder views on the possible explanations for pre-notification issues are explored in the relevant section below.

Complaints to airlines

Airline processes for handling complaints

4.77 Most of the case study airlines have dedicated complaint forms and departments for the handling of complaints. Complaints regarding the Regulation do not necessarily require specialised procedures – both easyJet and Ryanair stated that their process for handling complaints was the same as for Regulation 261/2004, and KLM reported that PRM complaints were handled in the same way as all others. The only differences cited by the airlines were that, in the case of easyJet, complaints regarding refusal of boarding were escalated to head office; and KLM informed us that the airline's medical department may need to be involved in more complex cases. Ryanair also informed us that they will amend standard procedures for receipt of complaints where required, for example if a customer needs to complain by phone rather than in writing. KLM stated that to date they have only received complaints by phone, email or letter; and none in Braille / audio tape or other accessible formats.

4.78 Delta reported a more complex procedure, shaped primarily by the requirements of rule 382. The airline is required to designate Complaints Resolution Officials, responsible for providing a 'dispositive response' to customer complaints of an alleged violation, summarising the facts and explaining the airline's determination of the issue. If the complaint relates to the airline's policy and not a specific infringement the airline is still responsible for providing a full and final response and the reasons for its determination.

4.79 The stated time taken by airlines to respond to complaints is variable, and is not related to the airline type or business model.

4.80 Air France, SAS, TAP Portugal reported that they would (at least in theory) be able to accept complaints in any of the languages of the countries which they serve and/or have offices. Aegean Airlines, Ryanair and TAROM reported a more restricted range – despite its destinations including Albania, Egypt, Israel, Serbia, Spain and Turkey, Aegean Airlines stated that it can only accept complaints in Greek, English, German, French and Italian. Likewise, despite both Ryanair and TAROM operating services to 25 countries, the range of languages in which they will accept complaints is limited. Ryanair is only able to accept complaints in English, German, French, Spanish and Italian; and TAROM will only process complaints in Romanian, English, French, German, Spanish and Italian. Thomas Cook stated that, to date, they have only received complaints in English, although they do have a retainer with a language translation service which can be used if required.

Number of complaints received

4.81 Only TAROM and Thomas Cook were able to provide us with PRM complaint statistics. TAROM reported so far receiving no complaints from PRMs; Thomas Cook received 51 complaints in each of 2008 and 2009.

Cost of complying with the Regulation

4.82 The main compliance cost identified by airlines was the airport PRM charge. As discussed in section 3 above, several airlines (mostly low cost and charter carriers)

expressed dissatisfaction with the level of these charges; in contrast, Air France stated that it did not consider the PRM charge to be a real cost, as it was passed directly to passengers. Another legacy carrier stated that the Regulation did not generate any additional costs for it, as it was already complaint with the (generally more onerous) requirements of rule 382.

4.83 An issue raised by Air Berlin and TUI related to the additional costs likely to be associated with providing a cost-neutral special assistance telephone number. The German NEB considers that the special assistance helpline should be free, and the UK DfT Code of Practice also suggests that cost-neutral telephone numbers should be provided for PRMs, which TUI accommodates by requesting that the special assistance helpline calls the passenger back. However, the costs associated with telephone assistance calls are likely to be relatively small, particularly in relation to the staffing costs associated with providing a call centre.

4.84 TUI also highlighted the initial training costs incurred by the Regulation, which have now diminished as the focus shifts to more limited refresher training where required.

Training

4.85 Under Article 11 airlines are required to:

- Ensure that all staff (including those employed by sub-contractors) providing direct assistance to PRMs, have knowledge of how to meet the needs of these persons;
- Provide disability-equality and disability-awareness training to all staff working at airports dealing directly with the travelling public;
- Ensure that, upon recruitment, all new employees attend disability‑related training and that personnel receive refresher training courses when appropriate.

4.86 Most of the case study airlines were able to demonstrate compliance with the training criteria set out in Article 11, although the carriers informed us that training was restricted to passenger-facing staff only. Some examples of the training provided to airline staff are given below.

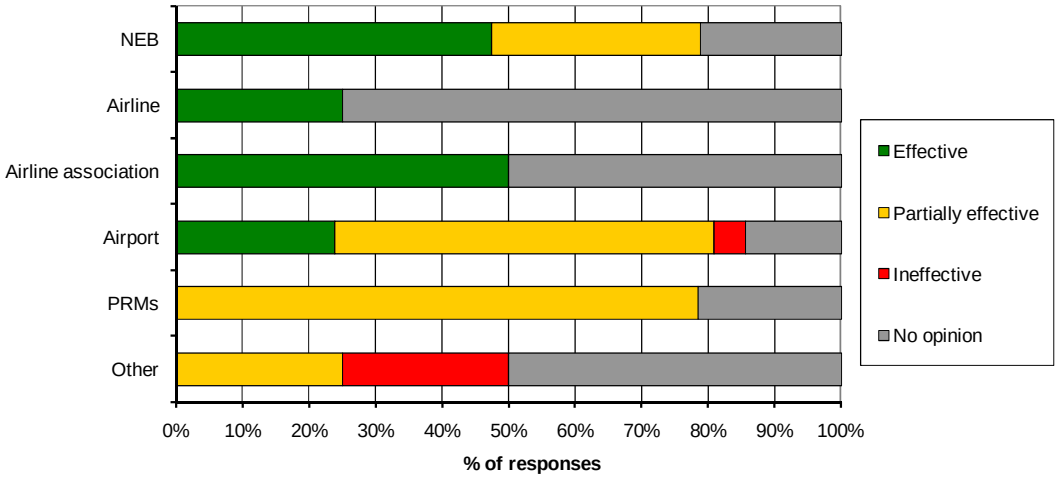
- Major European network carrier: 2.5 hours theory (e.g. responsibilities under the Regulation, how to approach PRMs) and practical (e.g. guiding blind PRMs, lifting to and from wheelchairs) training for crew; 1.5 hours theory for all other passenger-facing personnel.
- US network carrier: annual recurrent training is provided to all Complaint Resolution Officers (CROs); required under 14 CFR Part 382 to ensure effective implementation and to resolve passengers' problems as quickly as possible).
- European low cost carrier: initial and refresher cabin crew training includes PRM training, and the airline has requested that this training should be a requirement in contracts with ground handling staff.
- European low cost carrier: basic training in sign language is included.

4.87 Airlines operating to the US and therefore already compliant with rule 382 stated that few if any changes to their existing training programmes were required to comply with the Regulation.

Stakeholder views on effectiveness of implementation by airlines

4.88 Figure 4.3 summarises stakeholder views on the effectiveness of the implementation of the Regulation by airlines. Although many stakeholders did not express an opinion on this, relatively few stakeholders were dissatisfied. A summary of views of each stakeholder group is given below.

FIGURE 4.3 STAKEHOLDER VIEWS: AIRLINES



Airlines and airline associations

4.89 Unsurprisingly, the majority of airlines did not express an opinion on their own effectiveness in implementing the Regulation, and none felt that implementation was ineffective. Similarly, airline associations either expressed no opinion, or stated that implementation by their members was effective. ELFAA felt that all its members were complying and not refusing carriage. AEA was also generally satisfied that its members were not discriminating against PRMs in any way, but did suggest that there may be issues around the interpretation of the safety rules governing embarkation by PRMs, leading to inconsistencies between its members.

Airports

4.90 Pre-notification was the most frequently cited issue raised by the airports, an issue discussed separately below. The second most common theme emerging across several airports was the alleged non-payment of PRM charges by airlines.

4.91 Alongside the non-payment issue ACI highlighted several other issues relating to agreement of the PRM charges at airports. These included trying to avoid or reduce the charge, for example by requiring excessive levels of detail on the costs of PRM assistance at airports after the tender process had been completed, and refusing to cooperate with consultation meetings. Two airports with high proportions of low cost carrier traffic informed us that some carriers sought to specify the lowest possible levels of service in order to minimise PRM charges.

NEBs

4.92 The majority of NEBs informed us that compliance by airlines was satisfactory.

Although some issues were raised no common themes emerged, suggesting that any issues may be somewhat isolated. The NEBs which stated that implementation by airlines was partially effective were:

- France (DGAC): lack of information, and limited consistency in policies between airlines.
- Germany (BMBVS): use of premium rate telephone numbers by airlines.
- Portugal (INAC): some issues with the explanations provided for refusal of carriage.
- Spain (AESA): notification can incur additional costs for the passenger, airline safety rules are sometimes insufficient, and some airlines claim that passengers with mobility equipment are taking two seats, and charge for this.
- Sweden (CAA): issues around pre-notification (see section below).
- UK (CAA / EHRC / CCNI): lack of consistency in criteria for refusal of carriage. Some airlines charge for reserving specific seats.

PRM organisations

4.93 Satisfaction with implementation by airlines was generally lower among the PRM organisations, although none of the stakeholders informed us that airlines were significantly non-compliant with the Regulation. Inconsistencies in airline policies, accessibility of websites and the level of information provided by airlines emerged as the most frequently cited issues – *Danske Handicaporganisationer* (DH) suggested that less than 5% of airlines' websites were accessible. Two organisations also indicated that they had not seen any PRM safety rules published online.

4.94 Two organisations highlighted issues with medical clearance – this was felt to be requested too frequently, and that an unnecessary level of information was being requested by some airlines. Other issues raised included insufficient training, issues with handling of mobility equipment, seating, and inaccessibility of airport check-in systems. Guide Dogs reported instances where flight crew had not reported allergies which then prevented a passengers with guide dogs from flying, or had not checked that the dog was secure prior to take-off or landing. It was felt that policies of refusing boarding to unaccompanied blind passengers on the basis that they could not evacuate was misguided, given that they were accustomed to not being able to see and could therefore cope more easily in smoky conditions.

4.95 These views were echoed by the European Blind Union (EBU) and the European Disability Forum (EDF). In addition, EBU emphasised continuing difference in the handling of PRM travel between carriers, and felt that booking processes were discriminatory against those without access to a computer (we were informed that requesting assistance by phone can take several hours). The UK PRM organisation informed us that only 30% of the disabled population are online, which would increase this discrimination. EDF also noted that some airlines still only paid up to the Montreal Convention limits in cases of damage or loss of mobility equipment; that insurance for mobility equipment was extremely difficult to obtain; and that establishing liability for damage can be very complex. EDF also believe that the enforcement of numerical limits on PRMs is inappropriate and discriminatory, and that it is unacceptable for carriers to require passengers to be accompanied on self-reliance criteria.

4.96 EDF provided us with some examples of discrimination which had been reported to them. Some examples relating to treatment on-board the aircraft include:

- A blind passenger was not given any safety information in an accessible way, and the cabin crew were unaware of how to assist the passenger when serving a meal, or to communicate with the passenger more generally.
- A passenger was not allowed to check-in online, due to him using a wheelchair. Once on the aircraft he was forced to sit in a window seat at the back of the plane, which he found both discriminatory and difficult, as being tetraplegic meant that it was not easy to access the seat, or to receive assistance in an emergency.
- A passenger was informed that he had to pay extra to bring his prosthetic legs when going on holiday.
- A wheelchair user tried to book a ticket with an airline but noticed on their website that it was clearly indicated that they do not accept passengers using wheelchairs.
- A blind couple travelling with their baby were told that in order to be allowed to travel, they needed to bring an accompanying person, as it was not considered safe that the couple were responsible for their baby on board.
- A blind passenger was asked by a member of cabin crew in a rude manner whether she really was entirely blind.

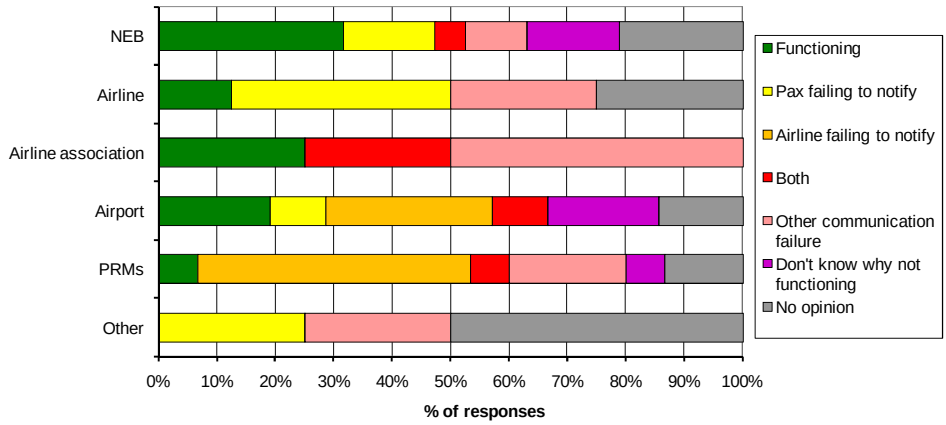
Other organisations

4.97 Key issues raised by other organisations were the application by some carriers of limits on the numbers of PRMs that could be carried, and that these limits could be further reduced based solely on arbitrary decisions by pilots. In addition, ECAC felt that information should be simplified for passengers with learning disabilities. However, ECTAA highlighted the improvements which airlines, tour operators and travel agents had made to their websites and booking procedures to enhance PRM travel.

Stakeholder views on effectiveness of pre-notification systems

4.98 Figure 4.4 shows stakeholder views on the effectiveness of the pre-notification system and reasons cited for low rates of notification. Most stakeholders believed that this system was not functioning well, although the explanations cited by each stakeholder group vary.

FIGURE 4.4 STAKEHOLDER VIEWS: PRE-NOTIFICATION



4.99 The NEBs were generally the most optimistic about how the pre-notification system was working, with fewer than half identifying problems. Where they did express a view on the cause of pre-notification issues it was most commonly that the passenger was the cause. The Irish NEB suggested that awareness of the Regulation and the need to pre-notify to receive assistance was low amongst PRMs who were not members of representative groups. Most of the PRM groups felt that the airlines were the primary cause of problems with the pre-notification system, for a variety of reasons:

- Poor design and accessibility of airline websites makes it difficult for passengers to pre-notify;
- Airlines have been unwilling to make the significant investments required to ensure an effective system; and
- Airlines have been ineffective at transmitting special requests (e.g. dietary needs) between staff and departments.

4.100 The majority of airlines believed that the main issue in terms of pre-notification was that passengers were themselves failing to notify of their assistance needs. Several airlines and airports suggested a possible explanation as being that, although they may not normally consider themselves as being in need of special assistance, some travellers (especially infrequent flyers and the elderly) may find they need this once in the airport and having to walk long distances to reach their flight. Low rates of pre-notification were also attributed partly to abuse of the system, as it was believed that 'genuine' PRMs would usually pre-notify.

4.101 However, the majority of airports stated that the most significant problem was failure by airlines to pass on notifications, or erroneous notifications. Several highlighted the large differences in pre-notification rates between airlines: some airlines are able to achieve high rates of pre-notification (60-80%) whereas others have very low rates

(10% or less). Non-EU airlines were often stated to be worse, with flights from North Africa and India often cited as being particularly problematic, both in terms of the low levels of pre-notification and the high numbers of PRMs on these flights. Aéroports de Paris stated that passengers travelling from some north African airports would be charged for assistance if pre-notifying, even though the European airport provided assistance free of charge. US flights also pose difficulties for airports as US carriers are generally not allowed, under rule 382, to request details of assistance requirements in advance; however, the relative length of these flights means that PSM messages are usually received 7-10 hours in advance of arrival.

4.102 Several airports also indicated that charter carriers had particularly low rates of pre-notification. This was attributed by some carriers to low rates of notification by travel agents – in many cases agents may have an incomplete knowledge of the full range of wheelchair codes, often simply observing that the passenger is using a wheelchair and then allocating the WCHR special assistance code.

4.103 Communication failures were also cited by a number of stakeholders, sometimes a result of the confusion generated by the IATA special assistance codes themselves, particularly unnecessary requests for wheelchairs. Although technological failures may have been a problem when the Regulation was first implemented, these did not emerge as a significant current issue.

Conclusions

4.104 The main obligation that the Regulation places on carriers is that it prohibits refusal of carriage of PRMs, unless this is necessary to meet national or international safety rules or requirements imposed by the carrier's licensing authority, or is physically impossible due to the size of the aircraft or its doors. We found that most carriers comply with this, although some make carriage of PRMs conditional on advance notification, which does not appear to be consistent with the Regulation. In addition, a small number of carriers impose requirements for medical clearance which appear to be excessively onerous.

4.105 There are significant differences in policies relating to carriage of PRMs between carriers – even between carriers with similar aircraft types and operational models. The most significant difference is that some carriers impose a numerical limit on the number of PRMs that can be carried on a given aircraft. These can be quite low: some carriers have limits of 2-4 PRMs on a standard single-aisle aircraft such as an Airbus 319. In most cases, these requirements are defined in carriers' Flight Operations Manuals, which have to be approved by the relevant licensing authority; often, although not always, this is the same organisation that has been designated as the NEB. In some cases the PRM limits are required by the licensing authority, but in most cases, they are proposed by the carrier and approved by the authority. Whilst the rationale for these limits is safety, there does not seem to be an evidence base for them, and they are specifically prohibited by the equivalent US regulation on carriage of PRMs (14 CFR part 382).

4.106 The Regulation also allows carriers to require that PRMs be accompanied, subject to the same safety-based criteria. We found that a number of carriers require PRMs to be accompanied where they are not 'self-reliant', which can mean that the PRM cannot (for example) eat unaided. In our view this may be an infringement of the Regulation because there is no direct link to safety; for those carriers that fly to the US, it is also an explicit breach of the US PRM rules. Other carriers require PRMs to be accompanied where they are not self-reliant **and** this has a safety impact (for example, if the PRM could not exit the aircraft unaided in an emergency); this is consistent with the Regulation.

4.107 The Regulation also requires carriers to publish safety rules relating to the carriage of PRMs, although it does not specifically state what issues these safety rules should cover. We found that carriers all published some PRM-related information but in some cases there appeared to be significant omissions from this information.

4.108 Annex II of the Regulation sets out various requirements for services which have to be provided to PRMs by carriers. Evidence for the extent to which this is provided is limited, and restricts a fair assessment of compliance with these requirements. There is however sufficient evidence to conclude that the vast majority of case study airlines are complying with the requirement to carry up to two items of mobility equipment free of charge. Some PRM representative groups were critical of the effectiveness of airlines in implementing the Regulation, and we were informed of some particularly bad passenger experiences, but it is difficult to assess how common such occurrences are.

5. ENFORCEMENT AND COMPLAINT HANDLING BY NEBS

Introduction

5.1 This section summarises the complaint handling and enforcement process undertaken by National Enforcement Bodies (NEBs). We set out the following information:

- an overview of the NEBs, describing the types of organisations they are and the resources they have available;
- the legal basis for complaint handling and enforcement in each State;
- statistics for the number of complaints received, the nature of the complaints, and the outcomes, and for sanctions that have been issued;
- the typical process for complaint handling and enforcement in each State, and outline a number of common issues and difficulties;
- a summary of the activities of NEBs to monitor the implementation of the Regulation; and
- an overview of other activities undertaken by NEBs in relation to the Regulation, such as interactions with other stakeholders and promotional activity.

5.2 Most of the information within this section is provided for the NEBs in all Member States. The detailed information relating to the complaint handling and enforcement process, and to monitoring and other activities undertaken by the NEB, has been collected for the case study States only. Further detail on complaint handling and enforcement in the 16 case study States is provided in the case studies, in Appendix C.

Requirements of the Regulation relating to States and NEBs

5.3 The Regulation requires each Member State to designate a National Enforcement Body (NEB) responsible for the enforcement of the Regulation regarding flights departing from or arriving at airports within its territory, and to inform the Commission of this designation. This body is required to ensure that the rights of PRMs are respected, and in particular that the quality standards defined by Article 9(1) (see 3.53) are respected. It must also ensure that the provisions of Article 8 are respected. More than one body may be designated. To allow NEBs to enforce the Regulation, Member States must set out penalties for infringements of the Regulation, which must be effective, proportionate and dissuasive.

5.4 These bodies must also accept complaints from PRMs where they are dissatisfied with the service they have received under the Regulation and have been unable to obtain satisfaction by complaining directly to the service provider. If a body receives a complaint for which a body in another State is competent, it must forward the complaint to the other NEB. Other bodies may be designated specifically for the purpose of receiving complaints.

5.5 Member States should also inform PRMs about their rights under the Regulation, and the possibility of complaint to the bodies above.

Overview of the NEBs

5.6 Most of the NEBs (68%) are Civil Aviation Authorities. The other NEBs are government departments, independent statutory bodies or consumer protection authorities. Some Member States have designated more than one NEB. In these States, the responsibilities of the NEBs are divided in two ways:

- according to which type of organisation the enforcement relates to: in France, there are separate bodies for complaints handling and enforcement relating to airlines and airports, and to tour operators; and
- according to task: in the UK, there are separate NEBs for complaints handling and for enforcement.

5.7 In Belgium, there are three NEBs and an additional body responsible for handling complaints; the case of Belgium is unique, as the Flemish- and French-speaking regions are administered separately. For some of the States, there is a body which acts as the NEB but which has not yet been explicitly designated (see 5.13).

5.8 No States have designated a separate body for the enforcement of Article 8.

5.9 Table 5.1 lists the NEBs, the nature of the organisation, and where there is more than one NEB in a State, the role of each organisation. The table is divided into case study and non-case study States.

TABLE 5.1 ENFORCEMENT BODIES

State	Enforcement Body	Nature of organisation	Role
Belgium	Belgian CAA	CAA	Enforcement and sanctions
	Departement Mobiliteit en Openbare Werken	Regional government department	Enforcement and sanctions
	Service public de Wallonie, direction générale opérationnelle de la mobilité et des voies hydrauliques	Regional government department	Enforcement and sanctions
	Passenger Rights Department of Federal Public Service of Mobility and Transport	Federal government department	Complaints handling
Denmark	Statens Luftfartsvæsen (SLV)	CAA	-
France	Direction Générale de l'Aviation Civile (DGAC)	CAA	Airlines and airports
	Ministry of Economy, Industry and Labour, Division on Competition, Industry and Services	Government department	Tour operators
Germany	Luftfahrts-Bundesamt (LBA)	CAA	-
Greece	Hellenic Civil Aviation Authority (HCAA): Airports Division	CAA	Airports
	Hellenic Civil Aviation Authority (HCAA): Air Transport Economics	CAA	Airlines and tour operators

Hungary	Equal Treatment Authority (ETA)	Independent statutory body	Complaint handling, enforcement relating to PRM complaints
	National Transport Authority Directorate for Aviation (NTA)	CAA	Other enforcement
Ireland	Commission for Aviation Regulation	Independent economic regulator	-
Italy	Ente Nazionale Aviazione Civile (ENAC)	CAA	-
Latvia	CAA, Aircraft Operations Division	CAA	-
Netherlands	Transport and Water Management Inspectorate (IVW)	CAA	-
Poland	Civil Aviation Office (CAO) Commission on Passengers' Rights	CAA	-
Portugal	National Institute for Civil Aviation (INAC)	CAA	-
Romania	Autoritatea Naţională pentru Persoanele cu Handicap (ANPH)	Independent statutory body	All Articles except 8
	Autoritatea Areonautică Civilă Română (AACR)	CAA	Article 8
Spain	Agencia Estatal de Seguridad Aérea (AESA)	CAA	-
Sweden	Swedish Transport Agency, Civil Aviation Department	CAA	-
UK	CAA	CAA	Enforcement
	EHRC	Independent statutory body	Complaints handling in UK except Northern Ireland
	CCNI	Consumer protection authority	Complaints handling in Northern Ireland
Austria	Federal Ministry of Transport, Innovation and Technology	CAA	-
Bulgaria	CAA	CAA	-
Cyprus	Department of Civil Aviation	CAA	-
Czech Republic	Civil Aviation Authority	CAA	-
Estonia	Consumer Protection Board	Consumer protection authority	-
Finland	Finnish Transport Safety Agency	CAA	-
Lithuania	Civil Aviation Administration	CAA	-
Luxembourg	Direction de l'Aviation Civile	CAA	-
Malta	Civil Aviation Directorate	CAA	-
Slovak Republic	Slovak Trade Inspectorate	Consumer protection authority	Consumer protection
	Civil Aviation Authority	CAA	Safety aspects
	Ministry of Transport, Post and	Government	Implementation, including airline

	Telecommunications	department	conditions of carriage and aspects of airport operations
Slovenia	Civil Aviation Directorate	CAA	-

5.10 Most of the bodies designated as NEBs under Regulation 1107/2006 are also designated as NEBs under Regulation 261/2004. The States which have different NEBs are shown in Table 5.2.

TABLE 5.2 STATES WHERE NEBS ARE DIFFERENT UNDER REGULATIONS 1107/2006 AND 261/2004

State	NEB(s) under Regulation 1107/2006	NEB(s) under Regulation 261/2004
Finland	Finnish Transport Safety Agency	Consumer Ombudsman & Agency
		Consumer Disputes Board
		Finnish Civil Aviation Authority
Hungary	Equal Treatment Authority (ETA)	Hungarian Authority for Consumer Protection
	National Transport Authority Directorate for Aviation (NTA)	National Transport Authority Directorate for Aviation
Latvia	CAA, Aircraft Operations Division	Consumer Rights Protection Centre
Romania	Autoritatea Naţională pentru Persoanele cu Handicap (ANPH)	National Authority for Consumer Protection
	Autoritatea Areonautică Civilă Română (AACR)	
Slovak Republic	Slovak Trade Inspectorate	Slovak Trade Inspectorate
	Civil Aviation Authority	
	Ministry of Transport, Post and Telecommunications	
Sweden	Swedish Transport Agency, Civil Aviation Department	Konsumentverket
		Allmänna reklamationsnämndens
UK	CAA	CAA
	EHRC	Air Transport Users Council
	CCNI	

5.11 Only BCAA is shown as a notified NEB for Belgium in the list published by the Commission. As a result, we were not made aware of the existence of the other Belgian NEBs until our interview with BCAA, and therefore did not seek responses from them; in addition, at the time of our research for this project, BCAA had not held meetings with the other regional departments. For these reasons, we therefore have only limited information on their operations, and the data relating to Belgian NEBs in this report refers only to BCAA.

Separation of regulation from service provision

5.12 There is no requirement in the Regulation that the NEB be independent from service providers. However, in our view, it is inappropriate for the NEB also to be a service provider, as it would be difficult for it to act independently in undertaking

enforcement in relation to an infringement that it was itself committing. The only case we have identified where an NEB is also a service provider is the Greek NEB, HCAA, which is also the operator of the regional airports in Greece. This is a significant issue because, as identified in section 4 above, the most significant failure to implement the Regulation that we have identified is that it has not been implemented at the HCAA airports.

Legal basis for complaint handling and enforcement

5.13 Most Member States have complied with the obligations set out in Articles 14 and 16 to designate an NEB and introduce sanctions into national law, with the exception of:

- **Poland:** No sanctions have yet been introduced; a proposed amendment which includes fines is before the Polish parliament, but has not yet been passed.
- **Slovenia:** As yet no body has been designated, and no sanctions have been introduced.
- **Spain:** Enforcement relies on a law which predates the Regulation and hence does not refer explicitly to it. As a result, sanctions for infringements of Regulation 261/2004 (which have an equivalent legal basis) have been challenged by airlines. In most cases, the courts have upheld the right of the NEB to impose sanctions, but cases have not as yet reached the Supreme Court, and in one case a court has ruled that the NEB was not competent to impose sanctions. This is discussed in detail in the case study for Spain (appendix C).
- **Sweden:** No sanctions have yet been introduced; a proposed amendment which includes fines is before the Swedish parliament, but has not yet been passed. The proposed amendment does not define the levels of fines.

5.14 There are a number of States where sanctions have not been introduced for all potential infringements of the Regulation:

- Bulgaria, which does not define penalties for Article 8;
- Estonia, where sanctions have only been introduced for carriers;
- Luxembourg, which only defines explicit fines for Article 4; and
- Romania, where the law defining responsibilities makes the CAA responsible for enforcing compliance with Article 8, but does not endow it with the powers to do so.

5.15 In several Member States, enforcement is dependent on more than one law; for example, the law defining how the NEB must operate and the procedure for imposing sanctions may differ from the law introducing sanctions. There may also be other laws – typically defining rights to equal treatment – which may apply at the same time as the Regulation. Table 5.3 below summarises the relevant legislation in the case study States. More detailed information is provided in the case studies in Appendix C.

TABLE 5.3 RELEVANT NATIONAL LEGISLATION

State	Summary of relevant legislation
Belgium	• Articles 32 and 45-52 of Law of 27 June 1937
Denmark	• Air Navigation Act, Articles 149(11) and 149a define sanctions

France	• Article 330-20 of the Civil Aviation Code, as amended by Decree 2008-1445 of 22 December 2008: gives the Minister of Civil Aviation the power to impose sanctions
Germany	• Air Traffic Licensing Regulation (Luftverkehrszulassungsordnung): defines LBA as the NEB and that breaches of the Regulation are considered an offence. • Air Traffic Law (Luftverkehrsgesetz): defines that breach of EU Regulations relating to air traffic is an offence, and defines the fines applying. • Law on Administrative Offences (Gesetz über Ordnungswidrigkeiten): defines the administrative process that must be followed in order to impose sanctions.
Greece	• Letter of 1 December 2006 (reference 6310/A/10909) from Permanent Representation of Greece to Commission designates NEB; National Aviation Law 1815/1988 sets out fines
Hungary	• Act CXXV of 2003 defines role and sanctions of ETA • Act CXXX of 2003, and Article 4 (2) of Government Decree No 362/2004 define complaints handling procedure • Act XCVII of 1995 on Air Traffic, implemented by Government Decree No. 141/1995 defines role and sanctions of NTA • Ministerial Order 97/2005 makes NTA responsible for approving airport charges • Act CXL of 2004 defines procedure for imposing fines and sets out administrative penalties
Ireland	• Section 45(a) of the Aviation Regulation Act 2001 as inserted by the Aviation Act 2006: defines basis for enforcement and sanctions • Statutory Instrument SI 299/2008: transposes the Regulation into law
Italy	• Legislative Decree 24/2009 of 24 February 2009: defines process to be followed by ENAC and fines that can be imposed
Latvia	• Air Navigation Order (2007): designates NEB • Administrative Violations Code: defines fines
Netherlands	• Resolution to set up the Transport and Water Management Inspectorate (Instellingsbesluit Inspectie Verkeer en Waterstaat), Article 2, paragraph 1, item d: sets up the NEB • Civil Aviation Act (Wet luchtvaart), revised December 2009, Article 11.15, section b, item 1 and Article 11.16, paragraph 1.e.3: defines circumstance under which sanctions may be imposed • General Administrative Law Act (Algemene wet bestuursrecht), chapter 4 (process to impose sanctions) and chapter 5 (level of fines).
Poland	• Aviation Act (Article 21.2(3)): designates NEB • Administrative Procedure Code: defines procedures to be followed • No sanctions yet defined - draft amendment to Aviation Act (Articles 205a, 205b, 209a, 209b) will set out fines
Portugal	• Decree Law 241/2008: designates NEB and defines level of fines which can be imposed for each infringement • Decree Law 10/2004: defines standard scale of fines
Romania	• Decree 27/2002: requires all government bodies to be able to receive complaints • Decision 787/2007: defines penalties (except for Article 8) • Decree 2/2001 (approved and modified by Law 180/2002): defines framework for imposing penalties
Spain	• Royal Decree 184/2008: designates NEB • Aviation Security Law (Law 21/2003): basis for enforcement and sanctions • Royal Decree 28/2009: defines inspection regime • Law on Public Administrations and Administrative Procedures (Law 30/1992): defines operational procedures for the NEB

	• Regulation on Procedures for the Imposition of Sanctions (Royal Decree 1398/1993): defines process for imposing sanctions
Sweden	• Förordning (1994:1808) om behöriga myndigheter på den civilia luftfartens område (ordinance on competent authorities in civil aviation): designates the NEB • No sanctions yet defined, but some are set out in a proposed amendment Regeringens proposition 2009/10:95- Luftfartens lagar • Prohibition of Discrimination Act may also apply in some circumstances (e.g. infringements of Articles 3 and 4)
UK	• Statutory Instrument 2007/1895: designates NEBs, defines penalties and introduces a right to compensation for injury to feelings resulting from an infringement • Enterprise Act 2002: defines civil powers for NEB, including power to apply for an injunction ('stop now order') and power to seek binding undertakings
Austria	• Austrian Civil Aviation Law
Bulgaria	• Civil Aviation Act, Art. 81a
Cyprus	• Civil Aviation Act N 213(I)/2002
Czech Republic	• Civil Aviation Act (No 49/1997), § 93 Articles 7 (a) - (l) and 8 • Administrative Code (No 500/2004)
Estonia	• Consumer Protection Act • Aviation Act §58 and §60
Finland	• Finnish Aviation Act (1194/2009) - Section 157 (Conditional fines and conditional orders of execution) • Conditional Fine Act (1113/1990)
Lithuania	• Paragraph 2 of Article 70 of the Act of Aviation No. VIII-2066 (O.J. 2000, No. 94-2918; 2007, No. 59-2279): designates CAA as NEB • Code of Administrative Violations, Article 115: defines penalties
Luxembourg	• Law of 31st January 1948, art 43, modified by the law of June 5, 2009, Article 1 (19)
Malta	• Civil Aviation (rights of Disabled Persons and Persons with Reduced Mobility) Regulations (LN234/07) as amended by (LN 411/07)
Slovak Republic	• Act No 128/2002 (State Inspections Act): defines powers of NEB to conduct inspections, impose preventative measures, and impose sanctions • Act No 250/2007 on Consumer Protection: provides legal framework for NEB's consumer protection activities
Slovenia	• Not yet implemented

Sanctions allowed in national law

5.16 There are significant differences between the States in the maximum sanctions for infringements of the Regulation that can be imposed under national law (Table 5.4). The highest defined maximum sanctions are in Spain (€4.5 million) but in Denmark, Finland, Netherlands and the UK unlimited fines can be imposed, and in Cyprus the maximum fine is 10% of the turnover of the carrier. In Austria, Belgium and Denmark sanctions may also include a prison sentence.

5.17 However, in many States, sanctions are low, and in some States maximum sanctions are close to or below the costs that a service provider may in some circumstances avoid through non-compliance with the Regulation. In these States, it is possible that the sanctions regime may not comply with the requirement in Article 16 for dissuasive

sanctions to be introduced by Member States; however, without data on the costs of compliance we are unable to assess this. Maximum sanctions are particularly low (less than €1,000) in Estonia, Lithuania and Romania.

5.18 In most States, fines are determined by the NEB, taking into account various factors relating to the case, including the circumstances and conditions of the case, any reasons given for non-compliance, its impact on the passenger and the size of the company. In some States, fines may be imposed which relate directly to the financial impact of the alleged infringement:

- in Germany, additional fines may be imposed to recover any financial gains to the service provider which resulted from its non-compliance; and
- in the Netherlands, reparatory fines can be imposed, which require the service provider to make good any financial loss incurred by the passenger.

TABLE 5.4 MAXIMUM FINES

State	Maximum sanction (€)	Explanation/notes
Belgium	€4,000,000 (criminal and administrative)	In addition up to 1 year's imprisonment if a criminal prosecution
Denmark	Unlimited fine	In addition up to 4 months' imprisonment
France	€7,500	Maximum sanction 'per failing', which is not defined. Can be imposed on a per-passenger basis to give a higher total sanction. Can be doubled if repeated within a year.
Germany	€25,000	Additional fines can be imposed to recover the economic advantage that the carrier has obtained from infringement
Greece	€250,000	Minimum sanction is €500. Fines are generic, and do not refer specifically to the Regulation
Hungary	€22,600 (ETA) €11,300 (NTA)	Minimum sanction €189 for ETA. In addition penalty of up to €3,774 for failure to cooperate with an investigation.
Ireland	€150,000	Maximum €5,000 if the case is heard in a District Court. Fines only applicable on failure to comply with a Direction.
Italy	€120,000	Maximum depends on Article infringed and reduced by two thirds if paid within 60 days. Minimum fines of €2,500-€30,000.
Latvia	€2,800	Fine can be applied per passenger that complains. Law makes no direct reference to the Regulation, and it is possible that penalties could be open to legal challenge.
Netherlands	Reparatory fines: unlimited Punitive fines: €74,000	Reparatory fines should be in proportion to the amount of loss and to the severity of the violation. Punitive fines are per infringement and are not multiplied by number of passengers affected. IVW are conducting a study which will define policy on punitive fines.
Poland	Not yet defined, but proposed to be €1,875	Fines vary depending on Article infringed. Fines are variable for infringements of some Articles, but otherwise are fixed. Fines are cumulative per Article and per passenger that complains, so maximum could be a multiple of this. Minimum fines €47-€1,875.
Portugal	€250,000	The maximum and minimum fines depend on the infringement ('light', 'serious' or 'very serious'), the size of the

		company, and whether the infringement was intentional or negligent. Minimum fine €350-4,500.
Romania	€608	Maximum depends on Article infringed. Per Article breached and per passenger. No penalties available for Article 8. Minimum fines €195-€243.
Spain	€4,500,000	For most infringements maximum would be €4,500
Sweden	Not yet defined	Proposed amendment does not define levels of fines
UK	Unlimited fine	Maximum fines depend on Article breached; for many Articles the maximum fine is €5,600. Unlimited fines must be imposed by Crown Court, for serious cases.
Austria	€22,000	In addition up to 6 weeks' imprisonment
Bulgaria	€5,100	No penalties available for Article 8. Minimum fines €1,020.
Cyprus	€8,000 or 10% of operators turnover	-
Czech Republic	€192,000	-
Estonia	€640	Only applies to carriers
Finland	Unlimited fine	Fines are conditional on the period of time during which a condition is unfulfilled, and should be in proportion to company's size, amongst other factors
Lithuania	€870	Minimum sanction €290. Per case, not per passenger.
Luxembourg	€10,000	Fine of €10,000 for violation of Article 4, of €5,000 for failure to provide information, but no other sanctions given.
Malta	€2,300	Criminal procedure
Slovak Republic	€66,000	Depending on number of passengers affected and whether it is repeated
Slovenia	Not yet defined	-

Statistics for complaint handling and enforcement

5.19 Most NEBs had received very few complaints in relation to the Regulation. Of the 27 NEBs, 8 had received no complaints, and 26 had received less than 50. 80% of all complaints to NEBs had been received by the UK NEBs. Although, the UK has the largest aviation market in Europe, and therefore would be expected to receive a higher number of complaints, in 2009 it received over ten times as many complaints as Germany or Spain, the next largest markets. This may be a result of the right in the UK to claim compensation for infringements of the Regulation, discussed below.

5.20 Of those NEBs that had received complaints, most were not able to give a breakdown. Table 5.5 therefore gives a brief description of the types of complaints received.

TABLE 5.5 COMPLAINTS RECEIVED

State	2009	Total	Description/notes
Belgium	1	1	Poor quality of assistance
Denmark	0	0	-
France	5	24	Transport of insulin and other liquids; denied boarding and requirements to be accompanied; damage to mobility equipment
Germany	22	34	Assistance by the carrier (55%), at the airport (18%), refusal of reservation (14%), denial of boarding (14%)
Greece	3	4	Denial of boarding; carriage of oxygen; handling of passengers
Hungary	0	1	Denial of boarding
Ireland	14	18	Conditions imposed on travel e.g. seating or carriage of oxygen.
Italy	36	40	48% refusal to embark PRMs; most of remainder lack of assistance at airports
Latvia	0	0	-
Netherlands	5	6	IVW was only competent for 1 complaint
Poland	2	2	Both related to airports outside Poland
Portugal	16	34	Not provided
Romania	0	0	-
Spain	35	46	Not provided
Sweden	3	5	Denied boarding, assistance dog policy
UK	356	883	Allocation of appropriate seating; timely provision of assistance on landing; and communicating requests for assistance on arrival at the airport.
Austria	1	2	Treatment of injured passengers
Bulgaria	0	0	Denied boarding
Cyprus	1	3	Not provided
Czech Republic	0	0	-
Estonia	0	0	-
Finland	3	4	Seating, oxygen, movement within cabin
Lithuania	0	0	-
Luxembourg	0	1	Boarding denied to deaf passengers
Malta	1	1	Carriage of guide dogs
Slovak Republic	0	0	-
Slovenia	0	1	Denied boarding
Total	499	1110	

5.21 In addition, NEBs in several States had received questions which were not complaints, regarding, for example, airline seating policy.

Sanctions applied

5.22 At the time the interviews for this study were conducted, no sanctions had yet been applied for infringements of the Regulation. At the time of drafting this report, three States were in the process of applying sanctions:

- France had opened proceedings to impose fines in one case;
- Portugal had opened proceedings to impose fines in two cases; and
- Spain had opened proceedings to impose fines in five cases.

5.23 Two other States had taken other actions to encourage compliance:

- Hungary wrote to an airline requiring it to correct its policy, and published this letter; and
- the UK has threatened several organisations with sanctions, and has taken other actions to encourage compliance, including writing to airlines, and setting out its requirements for compliance.

The complaint handling and enforcement process

Overview of the process

5.24 The complaint handling process is broadly similar in each NEB, however, since most NEBs receive very few complaints, the process for handling them is often not defined in detail. A typical process is as follows:

- complaints are recorded (since the number of complaints is frequently very low, this may be in a spreadsheet or a filing system rather than in a database);
- most undertake an initial filter of the complaints, to remove those that are not related to the Regulation, where the passenger has not first sought redress from the service provider, or where there is no *prima facie* case of an infringement;
- complaints relating to flights departing from other States are forwarded to the NEB of the State which is competent to handle the complaint;
- the complaint is investigated through contacting service providers to request information and/or justification for their actions; and
- a decision is made on the complaint.

5.25 The complaint handling process is different for complaints submitted to one of the UK NEBs (see box below). Otherwise, the main differences between the processes in different Member States are in the following areas, which are discussed in more detail below:

- the nature of the ruling or decision issued to the passenger, in particular whether the ruling is binding;
- under what circumstances the investigation of the complaint may lead to sanctions; and
- the process by which sanctions may be imposed and collected.

Complaint handling in the UK (excluding Northern Ireland) by EHRC

The legislation implementing penalties for infringements of the Regulation in the UK also grants a right to compensation for injury to feelings resulting from an infringement. This is in line with UK disability rights legislation in other sectors. As a result of this, the process for complaint handling is structured around conciliation, with a possible civil claim for compensation if conciliation fails. In other States there is no right to compensation and therefore no reason to offer conciliation proceedings.

The EHRC handles complaints relating to incidents which occurred in the UK excluding Northern Ireland. When a complaint is submitted to the EHRC and an initial evaluation shows it to be potentially valid, a letter is sent to the service provider which summarises the complaint and requests comments. This letter also explains the conciliation process, and asks if the service provider would be willing to participate. The responses are evaluated to see whether they appear to justify the actions of the service provider, but there is no technical or operational investigation, for example, to establish whether any claims made by a service provider are true.

If the complaint remains unresolved, the EHRC will consider referring the case for conciliation. If both parties agree, conciliation is provided independently, and may result in a voluntarily binding agreement on both parties. This agreement may include financial compensation, or may include non-financial reparations such as an apology.

If a service provider does not wish to participate in conciliation, the EHRC may suggest to the passenger that they initiate legal proceedings, which may result in payment of compensation. The EHRC may also consider offering litigation support for cases where it believes that the outcome could help clarify the application of the Regulation.

Complaints related to incidents occurring in Northern Ireland are handled by CCNI. This follows a procedure similar to most other NEBs, including an investigation of the facts of the case, but if this procedure fails to resolve the complaint to the passenger's satisfaction, the passenger can seek financial compensation under UK national law.

Languages in which complaints can be handled

5.26 Most NEBs are able to handle and reply to complaints written in the national language and English, but in many cases NEBs were not able to handle complaints in other Community languages. The languages in which NEBs can receive complaints, and respond to passengers, are shown below.

TABLE 5.6 LANGUAGES IN WHICH COMPLAINTS ARE HANDLED

State	Languages in which complaints may be written	Languages in which the NEB will reply to the passenger
Belgium	Flemish, French, English	Flemish, French, English
Denmark	Danish, English, German	Danish, English
France	French, English, Spanish	French only
Germany	German, English	German, English
Greece	Greek, English, French, German, Spanish, Italian	Greek, English
Hungary	Hungarian, English, German, Italian, other languages where possible	Hungarian, English, German, Italian
Ireland	English, French, German, Spanish, Italian	English, Spanish
Italy	Italian, English, French, Spanish, German	Italian, English, French, Spanish

Latvia	Information not provided at interview	Information not provided at interview
Netherlands	Dutch, English; sometimes also French and German	Dutch, English; sometimes also French and German
Poland	Polish, English, German, French	Polish, informal translation to English provided
Portugal	Portuguese, Spanish, English and French	Portuguese, Spanish, English and French
Romania	Romanian, English	Romanian, English
Spain	Spanish, English	Spanish, English
Sweden	Swedish, English	Swedish, English
UK	English, but would make arrangements to handle any other languages	English, but would make arrangements to handle any other languages

Time taken

5.27 Many NEBs informed us that they had received too few complaints to be able to draw conclusions on the average time taken to handle them (see Table 5.7 below). Several other States had received very few complaints, but had a legal limit on time to respond set by national law. Of those that were able to estimate the actual time taken to resolve complaints, most reported wide variation: for example, Italy reported variation between 1 and 6 months. The longest time taken to resolve complaints was reported in the UK, where complaints may take up to 6 months, and there are instances where complaints have taken longer than this to resolve; as a result the passenger has no longer been able to claim for compensation under UK national law (see 5.25).

TABLE 5.7 TIME TAKEN TO RESOLVE COMPLAINTS

State	Average time taken	Explanation/Notes
Belgium	Too few complaints to estimate time	
Denmark	Too few complaints to estimate time	No complaints yet received, but in principle 2-3 months
France	Varies significantly	If the case goes to CAAC, it will take longer. Overall, durations are similar to under Regulation 261/2004
Germany	Too few complaints to estimate time	Complaints are handled faster than for Regulation 261/2004, which take 3-4 months
Greece	30 days	Response time is set by law and is generic across all complaints to HCAA
Hungary	75 days	Response time is set by law and is generic across all complaints to ETA
Ireland	3-4 months	Awaiting responses (from service providers or Commission) lengthens the average time taken, so many cases handled quicker than this
Italy	30 days to 6 months	Depends on investigation required and response of service provider
Latvia	Too few complaints to estimate time	
Netherlands	Too few complaints to estimate time	Same procedure as for Regulation 261/2004: in principle 3-6 months
Poland	Too few complaints to estimate time	Likely to be quicker than for Regulation 261/2004
Portugal	Too few complaints to estimate time	May be faster than for Regulation 261/2004

Romania	30 days	Time limit set by law
Spain	Too few complaints to estimate time	Always less than six months, and delay is due to service providers. Shorter than equivalent complaints under Regulation 261/2004.
Sweden	At most 6 weeks	This is a non-binding target for the CAA; little information at present on how well this has been met.
UK	EHRC: Up to 6 months, can take longer CCNI: Up to 6 weeks	EHRC: Wide variation in time taken. Process is driven by 6 month time limit for court cases for compensation under SI. CCNI: Wide variation in time taken.

Responses issued to passengers

5.28 All of the NEBs in the case study States provide PRMs who complain with an individual response. As there is no right to compensation, the extent to which an NEB can offer assistance to obtain redress is limited; most responses state a decision on whether the NEB considers the Regulation to have been infringed, but do not state whether any payment should be made to the PRM, for example for loss due to denied boarding. The UK is an exception, for the reasons given in above. Most responses from NEBs do not have specific legal status, however in Hungary the response is legally binding, and in the Netherlands non-compliance with a decision may lead to a fine.

5.29 Almost all States would undertake some form of investigation of a complaint. The exception to this is the UK (excluding Northern Ireland), where the body responsible for handling complaints does not take an investigative role, although the CAA does investigate the facts of a proportion of cases. As discussed above, the UK process is structured around claims for compensation and the NEB sees its role as to facilitate conciliation, where the service provider is incentivised to voluntarily provide some form of compensation, or risk having a court award compensation against it.

5.30 Table 5.8 summarises the responses issued to the passenger.

TABLE 5.8 RESPONSES ISSUED TO PASSENGERS

State	Nature of response issued
Belgium	Individual non-binding evaluation sent to both service provider and passenger
Denmark	Non-binding individual evaluation provided to PRM and service provider
France	Individual response provided by DGAC summarising the conclusions of the investigation and its opinion on the case
Germany	Individual response giving the result of the investigation and their conclusions
Greece	Individual response giving the result of the investigation and their conclusions
Hungary	ETA issues legally binding decision to both passenger and service provider
Ireland	CAR writes to each passenger to summarise conclusions and whether incident was an infringement of the Regulation
Italy	ENAC writes to each complainant to inform them of its conclusions
Latvia	No specific procedures established, but passengers would be issued with an official letter communicating the final decision

Netherlands	Formal decision issued to both passenger and carrier. Not legally binding, but non-compliance may lead to a fine.
Poland	Formal decision issued to both passenger and carrier
Portugal	Individual response summarising correspondence with service provider and reasons for decision.
Romania	Individual response is sent to the passenger, setting out any infringements of the Regulation and any corrective measures taken by ANPH
Spain	Individual response, including response from carrier and AESA's view on it, and information on how passenger can obtain redress
Sweden	Individual non-binding response summarising correspondence with service provider and reasons for decision.
UK	EHRC: Does not investigate complaints, and therefore does not have standard format for output. Conciliation process may result in form agreeing actions to be taken. CCNI: Individual opinion letter sent to passengers.

Circumstances in which sanctions may be imposed

5.31 There are also significant differences between the States as to whether and when sanctions are imposed.

5.32 Some NEBs, including one of the Hungarian NEBs, Italy, Portugal, and Romania, always impose sanctions in the case that an infringement is found, even if it is a minor or technical infringement which does not significantly inconvenience passengers. If the amendments to the Aviation Act are passed in their current form, the Polish NEB will in future apply fines for every infringement. The German NEB must also take some action whenever an infringement is identified, although it has discretion to choose between a warning letter and a fine. If it chooses a fine, this has to be proven to the same standard of evidence required for criminal cases, and the NEB is therefore unlikely to impose sanctions if the infringement is 'not significant'.

5.33 In other States, the policy is to impose sanctions far less frequently:

- In two States (Belgium and Greece), a sanction would only be imposed where a service provider fails to take corrective action when required to do so by the NEB. In Ireland, this is the case for infringements of some Articles. In Spain, this is the general policy of the NEB but it could in theory impose sanctions without first warning the service provider.
- Several States have a policy of imposing sanctions where there is evidence of serious or systematic infringements, including Denmark, and the Netherlands.
- The UK will consider prosecution of a service provider where it fails to comply with CAA requests for corrective action, or for wilful non-compliance. Any case to be taken to prosecution must proven to a criminal standard of evidence, despite the due diligence defence available in UK law. The UK NEB believed that this would less difficult than under Regulation 261/2004, as Regulation 1107/2006 is more prescriptive.

5.34 The policies of the case study States on imposition of sanctions are shown in Table 5.9 below.

TABLE 5.9 POLICY ON IMPOSITION OF SANCTIONS

State	Policy on imposition of sanctions	Explanation/Notes
Belgium	Applied for serious or systematic violations (allows opportunity for corrective action first). Public prosecutor decides whether to bring criminal case; if not, BCAA may then decide whether to impose administrative sanctions.	If prosecutor brings criminal case, BCAA may not impose administrative sanctions
Denmark	Applied for serious or systematic offenses; minor offences would receive a caution, which would not be made public	
France	In consultation with CAAC. Ultimate decision made by the Minister responsible for Civil Aviation on the advice of CAAC.	Cases would only be considered by CAAC if referred by DGAC
Germany	If a complaint is upheld, imposes warning letter or sanction; LBA has flexibility to decide which	Procedure is a mix between administrative and criminal procedures: level of proof required is equivalent to a criminal case but case is decided by LBA
Greece	First send a letter of caution; if service provider infringes again, then impose penalty.	
Hungary	Choice of actions (including fines and non-pecuniary measures) which may be applied by ETA, depending on nature of case. NTA has same choice of actions but must take some form of action. Fines also imposed for non-cooperation with cases.	Fines for non co-operation can be imposed even where there was no infringement found
Ireland	CAR would consider prosecuting if a service provider did not comply with a Direction, or if it identified a breach of Articles 3 or 6 (2)	CAR can consider issuing a Direction if issue identified during an inspection, or if a service provider does not rectify a case when required to do so
Italy	Applied in every case of an infringement, identified either by investigation of complaint or inspection	Amount of fine considers facts of the case. Appeals and collection process can be lengthy, up to 7 years
Latvia	At discretion of NEB	More specific policies to be developed when Administrative Violations Code amended.
Netherlands	In principle sanctions could be applied for every violation, but IVW policy is to apply them only for severe or repeated infringements	Appeals process includes several stages, and may take in principle up to 2 years
Poland	When in force, will be applied in every case of an infringement	No sanctions yet in place
Portugal	Applied for every confirmed infringement, identified either through complaint or inspection	
Romania	Applied for every confirmed infringement	Amount of fine considers facts of the case. Any sanctions must be imposed through the Social Inspectorate; specific methodology is in development. AACR cannot impose fines for violations of Article 8.
Spain	Whenever an infringement is identified, the service provider receives warning, with a period in which to rectify the issue; if it fails to	

	do so, AESA can impose a sanction.	
Sweden	Sanctions not yet defined	
UK	Applied when service provider fails to comply with CAA requests for corrective action, or for wilful non-compliance	In addition, standard of evidence required for criminal prosecution, and 'due diligence defence' means that it must be proved that senior management of carrier had intended not to comply

Process to impose sanctions

5.35 In most Member States, the process to impose sanctions is an administrative procedure undertaken by the NEB, and the decision to impose sanctions is made by the NEB alone. Service providers, and in some cases also passengers, can appeal to the courts.

5.36 The exceptions to this are the following States:

- In Germany, the procedure is similar to the administrative procedures applying in other States, but the standard of evidence required is equivalent to that in criminal cases.
- In Slovakia, the procedure is also similar to the administrative procedures in other States, but with the key difference that (as for Regulation 261/2004) an on-site inspection is required before a sanction can be issued. A consequence of this is that sanctions cannot be imposed on carriers that are not based in Slovakia.
- In Denmark, Ireland, Malta and the UK[13], sanctions are imposed under criminal law and therefore a criminal prosecution is required.
- In France, cases are referred by the NEB (DGAC) to an administrative commission (the CAAC) that meets twice per year. This makes a recommendation to the Minister of Civil Aviation, who takes the ultimate decision about whether a sanction should be imposed, and the level of any sanction.
- In Belgium, sanctions can be imposed under criminal law but administrative fines to an equivalent level are also available.
- In Austria, administrative fines can be imposed, but in aggravated cases a prison sentence of up to 6 weeks may also be imposed, under criminal law.

5.37 Some States have administrative fines to encourage compliance, which can be applied when a service provider fails to respond within a certain time; these include Hungary and Latvia.

Application of sanctions to carriers based in other Member States

5.38 A number of NEBs face difficulties in applying sanctions to carriers that are not based in their State. This arises because national law either:

- does not permit application of sanctions to carriers not based in the State; or
- requires administrative steps to be taken in order to impose a sanction, which are

[13] Issues regarding the imposition and collection of fines in the UK are discussed in further detail in the Evaluation of Regulation 261/2004, SDG for European Commission, February 2010.

either difficult or impossible to take if the carrier is not based in, or does not have an office in, the State concerned.

5.39 The problem is particularly significant in relation to carriers based in other EU Member States, as opposed to non-EU carriers. In many Member States where sanctions are imposed through an administrative process, national law requires a notification of a sanction, or the process to start imposition of a sanction, to be served at a registered office of the carrier, or on a specific office-holder within the carrier. Non-EU (long haul) carriers will usually have an office in the each of the States to which they operate, and this can be a condition of the bilateral Air Services Agreements which permit their operation; however there are no such requirements on EU carriers, which are free to operate any services within the Union.

5.40 We discussed this issue in detail in our recent report on Regulation 261/2004, and in most cases the issues are equivalent, because the process to impose the sanction is the same. However, since the research for that report was conducted, there have been changes affecting the imposition of fines on non-national carriers in two States:

- **Greece:** Until 2008, the legal process for serving a fine required that a writ was accepted by a representative in Greece of the company being fined. As a result, HCAA faced difficulties in imposing fines on non-national carriers that had not established an office in Greece. To resolve this problem, in May 2008 HCAA adopted a regulation on airline representation, requiring all non-national airlines to have representation agreements with their local representatives. This was withdrawn shortly after it came into force, as the restrictions it imposed violated Regulation 1008/2008 on common rules for the operation of air services in the Community. The difficulties in imposing sanctions on non-national carriers therefore remain.
- **Germany:** German national law requires LBA to prove that the notification of any sanction had been issued to a named person within the carrier; as these carriers often do not have offices or legal representation in Germany, at the time of the research for the study on Regulation 261/2004 it was often not possible to meet this requirement. LBA now believes that this problem has been resolved and expects to test this application within six months.

5.41 The problems with application of sanctions to carriers not based in the Member State are summarised in Table 5.10. Since no fines have yet been imposed for infringements of the Regulation, many of the procedures and issues described below have not been tested in practice. However, often the procedures for imposing fines are equivalent to those for Regulation 261/2004 and therefore where possible we have drawn conclusions on this basis.

TABLE 5.10 ISSUES WITH APPLICATION OF SANCTIONS TO CARRIERS NOT BASED IN THE STATE

State	Whether it is possible to impose sanctions	Explanation/Notes
Belgium	Yes in principle	In principle there are no problems although this has not been tested as yet as no sanctions have been imposed. BCAA believed the best approach would be through cooperation with other NEBs, but the scope of the Regulation could limit this.
Denmark	Yes, although only if the incident occurred on Danish territory	No sanctions have been imposed and therefore this has not been tested. Restriction to Danish territory means that a small proportion of incidents would not be covered, i.e. incidents occurring mid-flight on board a non-Danish carrier which had departed from or was landing at a Danish airport.
France	Yes	Sanctions have been imposed on foreign carriers without any difficulties for other Regulations, so in principle should not be a problem. Notification can be sent by registered mail, and by fax if it is not possible to obtain a receipt from the registered mail.
Germany	Yes in principle	Sanctions must be served on a named person within the airline, which caused problems when issuing fines for Regulation 261/2004. LBA believe this is now resolved, and that it should be sufficient to obtain a signed receipt either by registered mail or by a courier, or issue the sanction through the German embassy in the State concerned
Greece	Uncertain	In summer 2009 national legislation came into force on airline representation, requiring a representation agreement for all non-national airlines. This allowed HCAA to impose financial penalties on all carriers but has now been repealed. The same difficulties in imposing fines on non-national carriers are now present: the legal process of serving a fine requires that a representative of the airline in Greece accept the writ, and there are therefore difficulties in imposing fines on non-national carriers that have not established an office in Greece.
Hungary	No	ETA is only able to handle discrimination cases regarding companies based in the territory of the Republic of Hungary.
Ireland	Yes in principle	Notification of a Direction can be served at the carrier's registered office, which does not have to be within the State. Any proceedings would require proof of incorporation of an airline which could be accepted by the Irish courts.
Italy	Yes but slower / more complex	ENAC would use the process set out in Regulation 1393/2007 to serve notifications on carriers which do not have offices in Italy, but this is likely to be slow/complex. For fines imposed under Regulation 261/2004, this has been short-cut in some cases by the Italian embassy/consulate in the State serving the notification directly.
Latvia	No	The Latvian Administrative Violations Code only allows for sanctions to be imposed on 'legal persons'. This is defined as including foreign individuals but not foreign companies.
Netherlands	Yes	IVW must prove that the company being fined has been notified, for example by proving receipt of the letter setting out the fine. The law states that if IVW can prove it has sent the fine, it is up to the other party to prove it has not received it.
Poland	Yes	Notifications are sent by registered mail or courier to the head office of the carrier – there is no limitation provided a receipt is obtained. A receipt from a courier company is considered sufficient.

Portugal	Yes	No specific constraints on imposing sanctions. Procedure equivalent to that for national carriers.
Romania	No	Notification of any penalty must be made by mail with a receipt, or by physically presenting it in the presence of a witness. If an airline does not have a legal representation in Romania, this cannot be done.
Spain	Yes	Notifications are sent by registered mail – there is no limitation provided a receipt is obtained. In theory collection of sanctions is problematic if carrier does not have an office in Spain, but this has not yet proved a problem.
Sweden	Sanctions not yet defined	Proposed amendment to Civil Aviation Act is unlikely to allow this, as no other Swedish legislation does so.
UK	Yes in principle	In principle there are no problems although this has not been tested as yet as no sanctions have been imposed. As sanctions could only be imposed through a criminal process, this would be undertaken by the criminal courts system not the NEB.

Monitoring undertaken by NEBs

5.42 While the Regulation does not explicitly require NEBs to undertake monitoring of compliance with the Regulation, it does require them to take measures to ensure that the rights of PRMs are respected, including compliance with the quality standards required by Article 9 (1).

Monitoring of airport quality of service

5.43 Two NEBs, Denmark and Germany, had undertaken no actions to directly monitor airport service quality. Denmark holds biannual meetings with stakeholders including PRM organisations, airport managing bodies and airlines, but does not undertake any first-hand monitoring of service quality at airports.

5.44 NEBs in all but two of the case study States had undertaken some inspections of airports. Many undertook yearly inspections of the major airports, although some inspected airports more frequently: the Hungarian NEB inspects Budapest airport three times per year, and Spain had conducted 152 inspections since the introduction of the Regulation. Some had only undertaken one inspection, when the Regulation came into force; these included France, the Netherlands, Romania and Sweden.

5.45 Most inspections focus on checks of the systems and procedures in place to provide service. These checks included confirming the signage and functioning of the designated points of arrival, training records, and the written procedures followed by staff providing the service. Most did not assess the passenger experience; those that did were Latvia, Sweden and the UK. These checks included site visits accompanied by representatives of PRM organisations to check actual waiting times and infrastructure such as designated points.

5.46 In addition to inspections, there were a number of other approaches to monitoring quality of service, including:

- attending the PRM steering committees of larger airports on a monthly basis (UK);
- holding biannual meetings with stakeholders including PRM organisations (Denmark); and

- sending annual surveys on implementation of the Regulation to airports (Romania).

5.47 Table 5.11 summarises the actions NEBs have taken to monitor airport service quality.

TABLE 5.11 NEB ACTIONS TO MONITOR AIRPORT QUALITY OF SERVICE (EXCLUDING INDIRECT MONITORING)

State	Direct monitoring of airport quality of service
Belgium	Inspection and audit of subcontractors at Brussels Airport, covering part of Regulation
Denmark	Biannual meetings with stakeholders including PRM organisations, airport managing bodies and airlines
France	One inspection of Paris Charles De Gaulle
Germany	None
Greece	Inspections of all airports (including 3 at Athens) for compliance with quality standards (although no quality standards set at any airport other than Athens)
Hungary	Regular inspections (Budapest 3 per year, smaller airports once) covering systems and equipment; questionnaire requesting number of complaints received and training given; approves safety license of PRM service provider, including check of quality standards
Ireland	2 inspections at each airport under jurisdiction
Italy	Regular inspections by staff based at airports, reviewing equipment and procedures, application of quality standards, and provision of training
Latvia	Inspections for compliance with quality standards: checking 'time stamps', site visits to measure actual waiting times. Meetings two times a year to discuss standards.
Netherlands	Audit of systems at major Dutch airports in 2007/2008. Further investigations will be driven by complaints.
Poland	Surveys of all airports, covering: quality standards, training records and programmes, documentation of cooperation with PRM organisations and airport users. Documentation checked by inspections.
Portugal	Yearly inspections of major Portuguese airports, covering designated points and information, but excluding staff training and assistance provided.
Romania	Inspection of Bucharest Otopeni, in cooperation with Social Inspectorate. Annual surveys of airports on several topics, including training, accessible information and procurement.
Spain	152 inspections relating to the Regulation
Sweden	Inspection of Stockholm Arlanda with PRM organisation, including checks of designated points and signage. No such checks of smaller airports.
UK	CCNI: Annual PRM site visits at airports; quarterly meetings with airports. CAA: Physical inspections of airports combined with discussions with service providers. Attends airport-PRM consultative committees monthly for London Heathrow, Gatwick, Luton and Stansted, and for Manchester less frequently.

5.48 For most of the NEBs we spoke to, resource constraints were not an issue: most NEBs received few complaints, and did not undertake significant additional activity which would require additional resources. Where inspections of airports for compliance with the Regulation were undertaken, they were frequently combined with other inspections and did not therefore require significant additional resourcing. The case study States which informed us that they would undertake more inspections if they

had more resources were France and Ireland.

Monitoring of airline quality of service and policy regarding carriage of PRMs

5.49 Most NEBs did not inform us of any monitoring of airline service quality they had undertaken, and stated that they had not investigated or challenged any airline policies on carriage of PRMs.

5.50 The most pro-active approach to airline service quality was that of the Spanish NEB, which in 2009 undertook 409 inspections on passenger rights. The other NEBs which informed us of reviews of airline quality of service took a number of approaches:

- approval of ground handler training (Greece);
- reviewing operating manuals (Latvia, Poland);
- reviewing websites for accessibility (Latvia, Netherlands); and
- annual surveys on airline implementation of the Regulation (Romania).

5.51 Table 5.11 summarises the actions NEBs have taken to monitor airline service quality and policies on carriage of PRMs.

TABLE 5.12 NEB ACTIONS TO MONITOR AIRLINE QUALITY OF SERVICE AND POLICY

State	Monitoring of airline quality of service and policy on carriage of PRMs
Belgium	Developed advisory document which sets limits on PRM carriage by Belgian carriers
Denmark	No review of service quality. Discussion of hypothetical reasons for refusal of embarkation discussed at stakeholder meetings
France	None
Germany	No review of service quality.
Greece	Training of ground handlers is approved by HCAA
Hungary	Reviews requirements and Conditions of Carriage for compliance with Regulation
Ireland	Reviewed airline policies on carriage of PRMs
Italy	None
Latvia	Inspections of both main Latvian airlines: reviewed operating manuals, websites and records. Would use unannounced inspections if infringements identified.
Netherlands	Consultations with EDF to check accessibility of airline websites
Poland	NEB reviewed airline's operating manual as a result of one case
Portugal	None
Romania	Annual surveys of airlines on several topics, including refusal of carriage, training and accessible information
Spain	409 inspections in 2009 on passenger rights, including checks on information provided to passengers and compliance with conditions of carriage
Sweden	Reviewed policies on carriage in cooperation with Swedish Work Environment Authority; awaiting EASA report before defining policy on PRM limits
UK	Requested and reviewed information from airlines on the rationales for their policies

5.52 In addition, many NEBs are also the licensing authority for carriers registered in the State, and therefore have to approve carriers Operating Manuals. Where this is the case, these NEBs have to approve, and therefore could determine, carriers' policies on carriage of PRMs and requirements to be accompanied.

5.53 We have identified that in some cases the licensing authority does have specific policies on carriage of PRMs which must be reflected in carriers Operating Manuals. The stated rationale for these policies is safety, but these policies vary significantly between States, and have not been demonstrated to be evidence-based. In most cases, the licensing authorities do not have specific policies and will approve those proposed by the carriers, subject to these being reasonably based on safety. Most NEBs and licensing authorities have not done anything to challenge policies on carriage of PRMs proposed by carriers, and this has resulted in significant differences in policies between carriers. This issue is discussed in more detail in section 4 above.

Monitoring of airport charges

5.54 As noted previously (see 5.6), no Member State has designated a separate body for enforcement of Article 8 of the Regulation, and several have not yet passed legislation to allow penalties to be imposed for infringements of this Article.

5.55 7 out of 16 case study NEBs had undertaken no direct monitoring of the charges levied by airports for providing services under the Regulation, or of the consultation which airports are also obliged to undertake when setting such charges.

5.56 The NEBs for Hungary and Italy had undertaken audits of the charges levied, while a number of NEBs had undertaken high level reviews of expenses and charges (including Greece, Latvia, Poland and Romania). The Netherlands and Portugal had undertaken benchmarking exercises against other airports.

5.57 Table 5.11 summarises the actions NEBs have taken to monitor airport charges under the Regulation.

TABLE 5.13 NEB ACTIONS TO MONITOR AIRPORT CHARGES (EXCLUDING INDIRECT MONITORING)

State	Direct monitoring of airport service charges
Belgium	None
Denmark	None
France	None
Germany	None
Greece	Annual review of expenses and charges
Hungary	Approves airport charges; in-depth audit of costs and charge for Budapest
Ireland	Charges included within regulated price cap. CAR has investigated level of consultation on charges.
Italy	Charges set by ENAC in cooperation with airports and airlines
Latvia	High-level check of charge
Netherlands	Reviews against other airports with advice of Netherlands Competition Authority.

Poland	Review of charges (by other CAO department)
Portugal	Benchmarking exercise across European countries, but no auditing or analysis of whether charges are cost-reflective
Romania	Checks for: existence of charges; separation of accounts; annual report on expenses and revenues. No checks on whether reasonable or cost-reflective (but in the process of recruiting staff with economic skills).
Spain	None
Sweden	None, but review is planned.
UK	None

Other activities undertaken by NEBs

Interaction between NEBs and with other organisations

5.58 Given the low number of complaints received by NEBs, interaction with other stakeholders is important to maintain an awareness of any issues arising. Table 5.14 summarises the interactions between NEBs and other organisations.

TABLE 5.14 NEB INTERACTION WITH OTHER ORGANISATIONS

State	Form of any interaction between NEB and other organisations
Belgium	None
Denmark	Biannual meetings with stakeholders, including airports, airlines and PRM organisations
France	No information provided at interview
Germany	No information provided at interview
Greece	Meetings with PRM organisations to help define quality standards, joint accessibility reviews of regional airports
Hungary	Biannual meetings with PRM organisations
Ireland	No information provided at interview
Italy	Round table discussions to develop advisory guidance, good relationship with PRM organisation
Latvia	CAA attends quarterly PRM steering committee at Riga Airport with PRM organisations
Netherlands	Consultations with EDF to check accessibility of airline websites
Poland	Worked with PRM organisation to improve CAO understanding of problems faced by PRMs
Portugal	One day seminar for aviation industry stakeholders on Regulations 261/2004 and 1107/2006. Did not include representatives of PRM organisations.
Romania	NEB and PRM organisation cooperated with Bucharest Otopeni to develop quality standards
Spain	No information provided at interview
Sweden	Approximately monthly contact with PRM organisations, including biannual aviation focus group
UK	CCNI: Worked with Equality Commission of Northern Ireland to support introduction. CAA: Attends monthly PRM steering committees at major UK airports with PRM organisations, receives guidance from government advisory committee on disabled travel.

Promotional activity undertaken by NEBs

5.59 The Regulation requires Member States to inform PRMs of their rights and the possibility of complaints to NEBs. Relatively few NEBs have made significant efforts towards this: of the case study NEBs, only Romania and UK had undertaken nationwide campaigns to promote awareness of passengers' rights under the Regulation, and even in the UK, the PRM organisation we spoke to was not aware of the campaign the UK NEB had conducted.

5.60 Other NEBs had undertaken less direct promotional activity, including the following:

- publishing of leaflets to be distributed at airports (Belgium, Germany);
- holding a conference (Germany); and
- actions to promote awareness of the Regulation to PRM organisations and other stakeholders, but which did not directly inform passengers (Denmark, Italy, Netherlands, Poland).

5.61 A number of NEBs had published information on their websites. While such information can be useful, if a passenger is unaware that they have rights, or is aware they have rights but unaware of the role the NEB plays in enforcing them, they are unlikely to find and read NEB websites. Table 5.15 lists the activities undertaken by NEBs.

TABLE 5.15 NEB ACTIVITY TO PROMOTE AWARENESS OF THE REGULATION

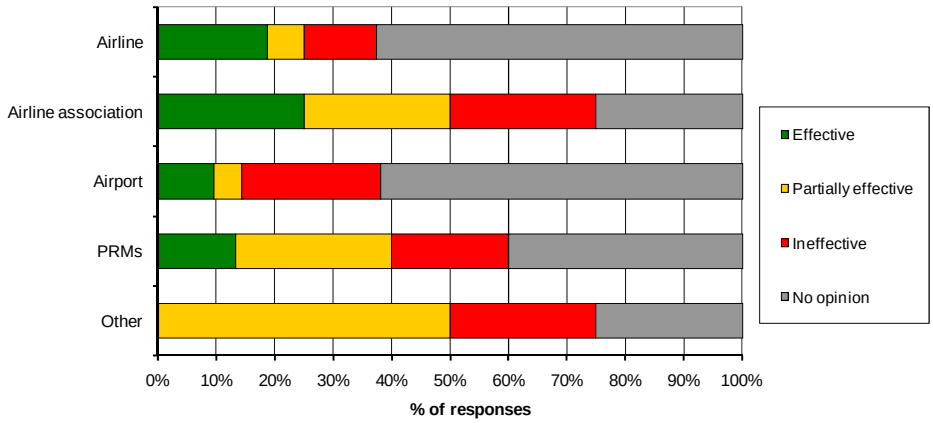
State	Actions taken by NEBs to promote awareness of the Regulation
Belgium	Leaflets sent to Brussels Airport; also available on the BCAA website.
Denmark	Letters to stakeholders on obligations under Regulation sent out when it was passed.
France	No information provided at interview. Section on website with information on Regulation.
Germany	BMBVS published a leaflet on Regulation in 2008 and held a conference with PRM organisations and the association of German air carriers; published information on website.
Greece	Information on the Regulation (including videos) placed on website.
Hungary	Information on the Regulation (including videos) placed on website.
Ireland	No information provided at interview. Section on website with in-depth information on Regulation.
Italy	Guidance on implementing the Regulation developed with and circulated to airports, airlines and PRM organisations. No direct promotional activity to passengers.
Latvia	Published PRM complaint form on website.
Netherlands	Contact with Dutch Association of Travel Agents to improve awareness and ensure correct allocation of IATA codes.
Poland	Provided information regarding the Regulation to PRM organisations.
Portugal	No information provided at interview. Section on website with information on Regulation.
Romania	Public awareness campaign with main PRM organisations, including dedicated website, posters and leaflets distributed throughout the country, through airports, carriers, travel agents and municipal bodies.
Spain	No information provided at interview. Section on website with information on Regulation.

Sweden	No information provided at interview. Section on website with information on Regulation. PRM org states well-publicised initially but not since.
UK	EHRC: distribution of guides on rights under Regulation; advertised in national media CCNI: distribution of guides on rights under Regulation, covered in regional media; advertorial piece in newspapers; exhibitions at relevant events.

Stakeholders views on complaint handling and enforcement

5.62 We asked each of the stakeholders we contacted about how effectively they believed NEBs had enforced the Regulation; there is some variation between different groups of stakeholders (Figure 3.10 below). A high proportion of stakeholders (over 60% of airports and airlines) have no opinion on how well NEBs have been enforcing the Regulation; often, the reason given for this response was that the stakeholder had had no interaction with the NEB in question. The proportion which believes that NEBs have not been enforcing the Regulation effectively is broadly consistent across stakeholder groups, at 20%-25%.

FIGURE 5.1 VIEWS OF STAKEHOLDERS ON NEB EFFECTIVENESS



5.63 In this section, we discuss the particular issues raised by each group of stakeholders.

Airlines and airline associations

5.64 Most airlines did not express strong views on whether NEBs had enforced the Regulation effectively, and did not give specific examples of areas where NEBs were performing well or poorly. One airline expressed frustration with the lack of action taken against airports, in particular relating to excessive charges and to lack of focus on safety.

5.65 Of the airline associations we spoke to, AEA believed that effectiveness of enforcement varied by State. IACA believed that in general NEBs were unfairly targeting airlines and not airports. Regarding specific NEBs, it believed that the UK complaint-handling NEB was bringing cases which were factually inaccurate, and that there was insufficient distinction between NEBs and service providers in Spain and Portugal.

Airports

5.66 A higher proportion of airports than airlines believed that NEBs were ineffective. Two airports believed actions needed to be taken by NEBs to raise the proportion of pre-notifications for assistance. One airport believed that the NEB should take more action to inform passengers of their rights and obligations. Three airports informed us that they had had no interaction with their NEBs, and two stated that their interactions with NEBs had been unsatisfactory: one informed us that the NEB was slow and unresponsive, and the other stated that it was not clear which organisation was their NEB. Only one airport informed us that it had good and close cooperation with its NEB.

NEBs

5.67 As there have been very few complaints received under the Regulation, there have also been very few complaints which have required forwarding to other NEBs. Therefore, the NEBs have no information on the effectiveness of other NEBs via their responses to forwarded complaints.

PRM organisations

5.68 13% of PRM organisations believed that NEBs were enforcing the Regulation effectively. Those that believed that NEBs were functioning ineffectively or only partially effectively believed that too little action was being taken, either through active monitoring of the services provided or through taking actions to remedy poor service. Four of the PRM organisations we spoke to had had little or no interaction with their NEB.

Other organisations

5.69 The other organisations we spoke to noted the following issues with regard to enforcement:

- lack of consistency of approach between NEBs, particularly in terms of whether they believe it is their role to handle complaints;
- unwieldy complaints systems; and
- unreasonable requests made by NEBs.

5.70 One organisation also believed that some NEBs were taking a sensible line between the demands of PRMs and of service providers.

Conclusions

5.71 Member States are required to designate a body responsible for enforcing the Regulation regarding flights from or arriving at its territory. They may also designate separate bodies responsible for handling complaints, and for enforcing Article 8. All Member States except Slovenia have designated an NEB, which in most cases is the Civil Aviation Authority and is the same organisation that is responsible for enforcement of Regulation 261/2004. In a number of States, the Regulation is not explicitly referred to in the law designating the NEB, and in Spain, the imposition of sanctions has been challenged, in one case successfully, on the basis that the NEB was not competent to impose the sanction.

5.72 There is no requirement in the Regulation that the NEB be independent from service providers and we have identified one case where it is not: the Greek NEB, HCAA, is also the operator of the airports other than Athens.

5.73 Member States are also required to introduce penalties in national law for infringements of the Regulation, which must be effective, proportionate and dissuasive. All States except Poland and Sweden have introduced sanctions into national law, although there are a number of States where sanctions have not been introduced for infringements of all Articles. In the UK, national law grants rights additional to those given in the Regulation: passengers who suffer injury to feelings as a result of an infringement of the Regulation may seek financial compensation from the service provider.

5.74 There is significant variation in the level of the maximum sanctions which can be imposed for infringements, and in some States the fines may not be at a high enough level to be dissuasive. While some States allow unlimited fines to be imposed and may also impose a prison sentence, maximum sanctions in Estonia, Lithuania and Romania are lower than €1,000.

5.75 The Regulation allows any passenger who believes that the Regulation has been infringed, and is dissatisfied with the response they have received from the service provider, to make a complaint to the appropriate body (usually an NEB). However, very few complaints have been received under the Regulation: to date, since the introduction of the Regulation, 1,110 complaints have been received, compared to a total of 3.2 million passenger assisted in 2009 across a sample of 21 EU airports. 80% of all complaints were received by the UK NEBs; none of the NEBs in the other 26 Member States has received more than 50 complaints.

5.76 Where an NEB identifies an infringement (through a complaint or other means) it may choose to enforce the Regulation by imposing sanctions. No sanctions have yet been imposed, but France, Portugal and Spain have opened proceedings to impose fines. However, in a number of States, there are likely to be significant practical difficulties in imposing and collecting sanctions, in particular in relation to airlines registered in different States.

5.77 Many NEBs had taken at least some action, other than the monitoring of complaints, to assess whether service providers were complying with the Regulation. NEBs in 14 of the 16 case study States had undertaken at least one inspection of airports for compliance with the Regulation, however most inspections have focused on checks of systems and procedures, and did not assess the actual experience of PRMs using the service provided by the airport. NEBs for 9 of the 16 States had undertaken no direct monitoring of the charges levied by airports for providing PRM services, although Hungary and Italy informed us that they had undertaken in-depth audits of the charges levied at airports.

5.78 Member States are required to take measures to inform PRMs of their rights under the Regulation, and the possibility of complaining to appropriate bodies. Of those that provided information, relatively few NEBs had made significant efforts to promote awareness of the Regulation by passengers; only two informed us of national public awareness campaigns they had undertaken.

5.79 Awareness of the NEBs performance appeared in general to be poor: most stakeholders contacted for the study held no opinion on the effectiveness of enforcement by NEBs, and many informed us that this was because they had had no interaction with them.

6. STAKEHOLDER VIEWS ON POLICY ISSUES

Introduction

6.1 This section summarises views expressed by stakeholders in the course of our consultation exercise on key policy issues, including whether any changes should be made to the scope or content of the Regulation, and what any changes should be.

6.2 Stakeholders also expressed views on the application of the Regulation by airports, carriers, and the complaint handling and enforcement process; these views are summarised in the relevant chapters above.

Whether changes should be made to the Regulation

6.3 We asked all of the stakeholders that we interviewed whether they considered that any changes should be made to the Regulation.

6.4 Half of the airports we interviewed believed that the Regulation should be changed. Several suggested that the definition of PRM was too broad, and that this was contributing to abuse of services. It was also suggested that the Regulation be amended to require proof of disability, and that the Regulation should also be amended to improve the functioning of pre-notification (for example by making it mandatory). ACI supported these positions. The airports which did not believe the Regulation should be amended, or had a neutral opinion, thought that any lack of clarity in the Regulation could be addressed through information from the Commission.

6.5 In addition, around half of the airlines we interviewed also believed that the Regulation should be changed, however this was for different reasons to those given by airports. A number of airlines believed that it should be possible for them to choose to provide the service themselves or that responsibility should lie with airlines, arguing that as customer-focussed organisations they are better able to do this. Of the airline associations, only ELFAA argued for this amendment. One airport strongly agreed with this position, however most believed that the allocation of responsibility should not be revised, as if airlines were to provide their own service, the incentive to reduce costs would result in unacceptable reductions in service quality. Airlines also supported amendments to clarify the definitions of PRM and mobility equipment, and to improve pre-notification.

6.6 Most of the NEBs we interviewed did not have a clear opinion on whether the Regulation should be amended. Seven NEBs believed that the definitions of terms such as PRM and mobility equipment should be clarified, and two of the NEBs in the case study sample supported changes which would allow airlines to opt out of the Regulation and provide the services themselves.

6.7 Slightly over half of the PRM representative organisations we interviewed believed that the Regulation should be amended. Amendments were suggested to address the following issues:

- limits on number of PRMs which can safely be carried;

- allocation of seating;
- requirements on compensation payable for damaged mobility equipment, and improvements to its handling; and
- provision of information.

6.8 EDF suggested that compensation should be introduced, as this would incentivise more complaints and therefore improve service. Those that did not believe the Regulation should be amended either believed that the Regulation had not been in force for long enough to assess its efficacy, or that poor implementation was the cause of any problems identified.

The content and drafting of the Regulation

6.9 We outline below some of the main detailed issues that have been raised by stakeholders. Few stakeholders believed that there were significant issues with the drafting of the Regulation that made it difficult to implement, however many stakeholders outlined issues relating to insufficient definition.

Definition of terms

6.10 The issue most commonly raised, particularly by airports and NEBs, is the definition of PRM set down in the Regulation. Many stakeholders believe this is too broad and opens the service to abuse, both by passengers and by airlines. A number of airports believed that airlines were using the wide definition to allow them to avoid costs: passengers who were previously classified as MAAS (including unaccompanied minors, VIPs and passengers with language issues), and therefore paid for by the airline, are now classified as WCHR and the cost is borne by all airlines. Some airports believed this could be resolved by setting out a clear definition of MAAS.

6.11 The definition in the Regulation could include a wide range of passengers who some stakeholders do not believe were the intended beneficiaries of the Regulation, including:

- obese passengers;
- stretchers;
- medical cases; and
- passengers who had sustained injuries (whose travel is often paid for by their travel insurance).

6.12 Some stakeholders believed that the definition of PRM was so broad that it could be considered to include passengers which the Regulation was clearly not intended to cover, such as passengers whose intellectual and sensory capacities were temporarily impaired by excessive consumption of alcohol.

6.13 Several stakeholders believed this issue could be resolved by requiring some proof of need for assistance in order to receive assistance, for example in the form of a disability ID card. This was opposed by some PRM organisations.

6.14 Stakeholders also considered that a number of other terms were not sufficiently defined. These included:

- **Mobility equipment:** The reference in Annex II to mobility equipment states that it should include electric wheelchairs but does not define the term any further. Stakeholders had differing views on what should be included in this: several airlines believe that it should refer only to equipment that is required to make it possible to travel by air, but a number of PRM organisations believed it should include items which make the *purpose* of the trip possible. This could include, for example, joists for lifting passengers in and out of seats.
- **Medical equipment:** Several stakeholders believed there was insufficient clarity on which items were classified as medical equipment and which as mobility equipment. It was also uncertain whether airlines could any limits (for example on weight) on its carriage.
- **Accessible formats:** It was reported that the requirement for designated points of arrival and departure to offer basic information about the airport in accessible formats did not define what was required, for example, whether all such points should include a map in Braille of the airport.
- **Safety rules:** Article 4(3) requires airlines to make publicly available the safety rules that it applies to the carriage of PRMs, and any restrictions on the carriage of PRMs or mobility equipment. Several stakeholders informed us that such documents were not defined, and it was not clear what this term referred to.

Lack of clarity in the Regulation

6.15 In one case, the requirements of the Regulation appear contradictory. Several NEBs noted that the responsibility for enforcement defined in Article 14 contradicts that specified in Recital 17. Article 14 states that NEBs are responsible for enforcement regarding flights departing from or arriving at airports within their State, while Recital 17 places responsibility on the NEB of the State which issued the carrier's operating license.

6.16 Stakeholders identified a number of other provisions where they considered the description of obligations was insufficiently clear, including:

- **Article 7:** Under this Article, airports are required to provide assistance to PRMs holding reservations so that they able to take their flight, however, it does not define what an airport is required to provide to a PRM who does not hold a valid reservation. In addition, it does not define the airport's liability when a PRM misses their flight, in particular where the passenger has not pre-notified their requirement for assistance.
- **Article 11:** One airport had been the subject of a legal challenge by an airline regarding the inclusion within its PRM service charge of the costs of providing training under Article 11(b) to subcontractors at the airport. The airline contended that since the paragraph did not refer to subcontractors (unlike Article 11(a)) the airport was not obliged to provide such training. Several airports believed that the requirement under this Article to provide disability-related training to all new staff (not just those whose role required them to interact with PRMs) was unnecessary. In contrast, some PRM organisations believed that training should be explicitly extended to Commanders of aircraft, to enable them to make better-informed decisions on whether to embark PRMs. PRM organisations also noted

that it was not clear whether airports were required to provide training on specific procedures for handling mobility equipment; as damage to mobility equipment is perceived to be a significant issue, they believed this requirement should be explicitly included.

- **Article 12:** Several PRM stakeholders raised concerns that the compensation referred to in this Article would be consistent with the Montreal Convention, and that the limits under the Convention were insufficient for some mobility equipment, such as technologically advanced wheelchairs (see 4.55). Although this had not been an issue to date – in almost all cases that we were informed of, airlines waived the limits – it creates uncertainty for wheelchair users travelling by air. This is heightened by the reported difficulties in obtaining insurance for such equipment.
- **Annex I:** A number of airlines raised concerns regarding the allocation of liability when boarding a passenger. For example, they did not believe that liability was clear in the case that an accident occurs on board an aircraft when airport staff are present. Some airports raised concerns regarding liability for damage to wheelchairs while in their care. In addition, the services which should be provided to transfer passengers and the measures which should be taken to accommodate assistance dogs are not defined.

6.17 Regarding training, some stakeholders raised the issue of the legal weight of ECAC Document 30, particularly Annex 5-G which sets out recommended guidance for training regarding PRM services. While this is referred to in the Regulation as a policy which should be considered when developing quality standards, the same reference is not made in Article 11 where training requirements are defined.

Conflicts with 14 CFR Part 382

6.18 As discussed in section 4 above, the US regulations on carriage of PRMs (14 CFR Part 382) apply to European carriers operating flights to/from the US, and other flights where these are operated as codeshares with US carriers. There are a number of differences between these rules and the Regulation, the most significant of which is the allocation of responsibilities for assistance: the Regulation requires airports to arrange the provision of services to PRMs, while under the US legislation it is the airlines that have this responsibility. This has caused difficulties for carriers who are required to comply with legislation that conflicts, although the US legislation does allow carriers to apply for a waiver where there is a conflict of laws.

Pre-notification

6.19 The requirement to pre-notify requests for assistance and problems in doing so were raised by many stakeholders (see 4.98). Stakeholders held differing views on how this should be improved. Several airlines (in particular those with operations to the US, where requiring pre-notification is usually prohibited) believed that the requirement to pre-notify should be removed; they believed that the resulting increases in costs of provision would be marginal, as most resourcing requirements could be planned on the basis of observed variation in demand (over the course of a year, a week or a day as appropriate). This approach was supported by some PRM organisations. In contrast, a number of airports believed that pre-notification should be made compulsory, and

this proposal was opposed by some PRM organisations.

Level of detail

6.20 Almost all stakeholders informed us that there was significant variation in the services provided under the Regulation. This is partly a result of the approach taken by the Regulation, which does not seek to define in detail the services to be provided. In contrast, the equivalent US rules set out in detail all aspects of the services to be provided, in effect setting out procedures to be followed by all service providers.

6.21 Several stakeholders have raised the lack of detail in the Regulation as an issue, and believe that a more prescriptive approach would lead to greater harmonisation of the services provided. In particular, they believed that the services set out in Annexes I and II and the training required under Article 11 should be defined with greater precision.

Conclusions

6.22 We asked each stakeholder we contacted for the study whether they believed that changes should be made to the Regulation. Slightly more thought that there should be changes than did not, but there was not a clear majority in favour of changes. The reasons given for making changes and what those changes should be varied depending on the stakeholder.

6.23 No significant problems were identified with the drafting of the Regulation, although there is a conflict between Recital 17 and Article 14. In general, stakeholders had not found it difficult to follow the provisions of the Regulation. The most common issue raised with regard to the text of the Regulation is that the definitions used are not sufficiently precise; in particular, the definition of PRM is believed by airports and some airlines to be too broad, and this is believed to make it difficult for them to take action to counter abuse. The Regulation is much less precise about the policies and procedures that have to be followed, particularly by air carriers, than the equivalent US regulation on carriage of PRMs, 14 CFR Part 382.

6.24 In addition, many stakeholders pointed out the significant differences between the Regulation and 14 CFR Part 382, which applies to European carriers on flights to/from the US and other flights operated as codeshares with US carriers. One of the most significant is the requirement to pre-notify requirements for assistance was raised as an issue, particularly by airlines operating to the US, and by airports where the rates of pre-notification were low. Two different approaches were proposed to address the perceived problem. Some airlines (primarily those flying to US) proposed removing the requirement to pre-notify, which would resolve the conflict with US legislation; this was opposed by airports on the grounds that it would reduce service quality and increase cost. Some airports proposed making pre-notification compulsory; this was opposed by some PRM organisations on the grounds that it would reduce the freedom of PRMs to travel.

7. FACTUAL CONCLUSIONS

Introduction

7.1 This section summarises our conclusions in relation to how effectively airports and airlines are providing the assistance required by the Regulation, and how effectively Member States and National Enforcement Bodies (NEBs) are undertaking their roles specified in the Regulation.

Implementation of the Regulation by airports

7.2 We selected a sample of 21 airports for detailed analysis for the study, and reviewed how they had implemented the Regulation, through desk research and through interviews with representatives of airport management and other stakeholders.

7.3 Prior to the introduction of the Regulation, assistance at airports was provided by airlines and usually contracted from ground handlers. The Regulation places responsibility for provision of this assistance with the airport management company. We found that all airports in the sample for this study had implemented the provisions of the Regulation, although we were informed by airlines and other stakeholders that the regional airports in Greece had yet to effect the change from provision by ground handlers to provision by airports. We were not informed by stakeholders of any other EU airports at which the Regulation has not been implemented.

7.4 Most of the sample airports had contracted the provision of PRM assistance services to an external company, generally selected through a competitive tender process. However, several airports had changed their service provider within 18 months of the Regulation coming into force; this was interpreted by some as a sign that the service initially specified and procured had been inadequate. One major hub airport acknowledged that it had had significant problems with a PRM service provider.

7.5 The service provided at the sample airports varies in terms of: the resources available to provide the services; the level of training of the staff providing assistance; the type of equipment used to provide services; and the facilities provided to accommodate PRMs (such as PRM lounges). According to the information provided by PRM organisations, this results in variability in service quality. PRM representative organisations, airlines and some airports cited a number of examples of poor quality or even unsafe provision of services at airports, although it is not possible to infer how regular these occurrences are. Overall, most stakeholders believed that the Regulation had been implemented effectively by airports.

7.6 There is also significant variation between airports in the frequency with which PRM services are requested: the level of use of the service varies by a factor of 15 between the airports for which we have been able to obtain data, although in most cases between 0.2% and 0.7% of passengers requested assistance. The type of PRM service requested also varies considerably between airports although in all cases the largest category is WCHR (passengers who cannot walk long distances but can board the aircraft, including using stairs, unaided). Both the frequency of use and the type of service required are likely to be affected by the varying demographics of the passengers using different airports; PRMs account for the highest proportions of

passengers at holiday airports, such as Alicante, and airports serving pilgrimage destinations, such as Lourdes.

7.7 The Regulation requires airports to publish quality standards. Most of the sample airports had done so, although some had published them only to airlines. Almost all quality standards followed the example format set out in ECAC Document 30, which defines the percentage of PRMs who should wait for up to given numbers of minutes. Some airports published qualitative measures in addition to these time standards, such as descriptions of the treatment the passenger should expect at all points of the service. However, none of the sample airports had published the results of any monitoring of these quality standards, and whilst most did undertake monitoring in some form, only four had commissioned external checks of the service.

7.8 The Regulation allows airports to levy a specific charge to cover the costs of assistance. All but one of the sample airports had done so. The level of charges varied considerably: the highest charges of the sample airports were at Paris CDG and Frankfurt. We analysed the charges to examine whether variation could be explained by higher frequency of use of the service, differences in levels of wages and other costs between States, or differences in service quality, but there was no evidence that this was the case. The design of the airport is a further factor influencing the cost of service provision and hence the level of charges: the assistance service can be provided at lower cost at an airport such as Amsterdam Schiphol, which is on a single level and has one integrated terminal building, than at an airport with a more complex configuration such as Paris CDG.

7.9 Some stakeholders believe that the requirements to select contractors and establish charges in cooperation with users and PRM organisations were not followed thoroughly. Many airlines did not believe that consultation on either element had been sufficient, and this view was shared by some PRM organisations. There were a number of barriers to effective consultation, including linguistic restrictions and airport user committees which did not adequately represent all air carriers. Consultation with air carriers was reported as particularly poor in Spain, Portugal and Cyprus. In contrast to this, we note that several airports stated that they had sought the participation of PRM organisations but had found this difficult to obtain.

7.10 The Regulation requires airports to provide specialised disability training for staff directly assisting PRMs, and whilst all sample airports had done so, there were significant variations in the length and format of this training. The shortest training course among those for which we have data was 3 days long, while the longest lasted 14 days. There was similar variation in the length of training provided for passenger-facing staff who did not provide direct assistance. A number of airports informed us that they did not provide disability-awareness training for staff not in public-facing roles, or only provided it on a voluntary basis.

Implementation of the Regulation by air carriers

7.11 We selected a sample of 20 air carriers for the study. We reviewed how they had implemented the Regulation, both through review of their published policies, procedures and Conditions of Carriage, and through interviews with the carriers themselves and with other stakeholders.

7.12 The main obligation that the Regulation places on air carriers is that it prohibits refusal of carriage of PRMs, unless this is necessary to meet national or international safety rules or requirements imposed by the carrier's licensing authority, or is physically impossible due to the size of the aircraft or its doors. We found that air carriers largely comply with this, although some state in their Conditions of Carriage that carriage of PRMs is conditional on advance notification. In our view, this is not consistent with the Regulation, which does not allow for a derogation on the prohibition of refusal of carriage on the basis that the passenger has not provided advance notification. In addition, we found that a small number of carriers impose requirements for medical clearance which appear to be excessively onerous and to be worded to include PRMs as well as passengers with medical conditions.

7.13 We found significant differences in policies relating to carriage of PRMs between carriers – even between carriers with similar aircraft types and operational models. The most significant difference is that some carriers impose a numerical limit on the number of PRMs that can be carried on a given aircraft. These can be quite low: some carriers have limits of 2-4 PRMs on a standard single-aisle aircraft such as an Airbus 319. These limits are not required by any international or European safety rules, although in some cases they are required by the licensing authority for the carrier concerned; often, although not always, this is the same organisation that has been designated as the NEB. However, in most cases, these requirements are defined by carriers in their Flight Operations Manuals; although the licensing authority has to approve this, it appears that in most States, little has been done to challenge the limits proposed by carriers. Whilst the stated rationale for these limits is safety, there does not seem to be a clear evidence base for them, and they are specifically prohibited by the equivalent US regulation on carriage of PRMs (14 CFR part 382).

7.14 The Regulation also allows carriers to require that PRMs be accompanied, subject to the same safety-based criteria. We found that a number of carriers require PRMs to be accompanied where they are not 'self-reliant', which can mean that the PRM cannot (for example) eat unaided. In our view this may be an infringement of the Regulation because there is no direct link to safety; for those carriers that fly to the US, it is also an explicit breach of the US PRM rules. This type of condition is also, in our view, unreasonable for short haul flights for which passengers could decide to (for example) not eat or drink during the flight. Other carriers require PRMs to be accompanied only where they are not self-reliant **and** this has a safety impact (for example, if the PRM could not exit the aircraft unaided in an emergency or put on an oxygen mask without assistance); this is consistent with the Regulation.

7.15 The Regulation also requires carriers to publish safety rules relating to the carriage of PRMs, although it does not specifically state what issues these safety rules should cover. We found that carriers all published some PRM-related information, but few published a notice specifically described as being the safety rules related to carriage of

PRMs. In some cases there appeared to be significant omissions from the information published by carriers: for example, some of the carriers which imposed a numerical limit on the number of PRMs which could be carried did not publish this.

7.16 Annex II of the Regulation sets out various requirements for services which have to be provided to PRMs by carriers. Evidence for the extent to which this is provided is limited, and restricts a fair assessment of compliance with these requirements. There is however sufficient evidence to conclude that the vast majority of case study air carriers are complying with the requirement to carry up to two items of mobility equipment free of charge. Some PRM representative groups were critical of the effectiveness of airlines in implementing the Regulation, and we were informed of some particularly bad passenger experiences, but it is difficult to assess how common such occurrences are.

Enforcement and complaint handling by NEBs

7.17 Member States are required to designate a body responsible for enforcing the Regulation regarding flights from or arriving at its territory. They may also designate separate bodies responsible for handling complaints, and for enforcing Article 8. All Member States except Slovenia have designated an NEB. In the majority of States, the NEB for this Regulation is the same organisation as the NEB for Regulation 261/2004, in most cases the Civil Aviation Authority. In a number of States, the Regulation is not explicitly referred to in the law designating the NEB, and in Spain, the imposition of sanctions has been challenged, in one case successfully, on the basis that the NEB was not competent to impose the sanction.

7.18 Member States are also required to introduce penalties in national law for infringements of the Regulation, which must be effective, proportionate and dissuasive. All States except Poland and Sweden have introduced sanctions into national law, although there are a number of States where sanctions have not been introduced for infringements of all Articles. There is significant variation in the level of the maximum sanctions which can be imposed for infringements, and in some States the fines may not be at a high enough level to be dissuasive. While some States allow unlimited fines to be imposed and may also impose a prison sentence, maximum sanctions in Estonia, Lithuania and Romania are lower than €1,000.

7.19 The Regulation allows any passenger who believes that the Regulation has been infringed, and is dissatisfied with the response they have received from the service provider, to make a complaint to the appropriate body (usually an NEB). However, very few complaints have been received relating to the Regulation: to date, since the introduction of the Regulation, 1,110 complaints have been received, compared to a total of 3.2 million passengers assisted in 2009 across the case study sample of 21 EU airports. There is also a significant disparity in which States had received complaints: 80% of all complaints about infringements of the Regulation were received by the UK NEBs; none of the NEBs in the other 26 Member States had received more than 50 complaints.

7.20 In the UK, national law grants rights additional to those in the Regulation: passengers who suffer injury to feelings as a result of an infringement of the Regulation may seek financial compensation from the air carrier or airport concerned. This is in line with

disability rights legislation applying to other sectors in the UK. A consequence of this is that the process for handling complaints is significantly different in the UK from other Member States, because passengers may have a right to claim compensation from the carrier or airport concerned. At least in part, this also explains the significantly higher number of complaints in the UK compared to the other Member States.

7.21 Where an NEB identifies an infringement (through a complaint or other means) it may choose to enforce the Regulation by imposing sanctions. No sanctions have yet been imposed, but the NEBs for France, Portugal and Spain have opened proceedings to impose fines. In most States, the process to impose sanctions is equivalent to that for Regulation 261/2004. In a number of States, there are likely to be significant practical difficulties in imposing and collecting sanctions, in particular in relation to airlines registered in different Member States. This is due to the same reasons identified in our recent study for the Commission of Regulation 261/2004[14]: either specific limitations in national law on imposition of sanctions on foreign companies, or administrative requirements which cannot be met if the carrier is based outside the State. This means that, in these States, the system of sanctions cannot be considered to be dissuasive as required by the Regulation.

7.22 There is no requirement in the Regulation that the NEB must be separate from the service providers that it has to regulate. The only case we have identified where the NEB is also a service provider is Greece, where HCAA is the operator of the airports other than Athens, as well as the NEB. Although not an infringement of the Regulation, this is a breach of the principle of separation of regulation and service provision. As noted above, the most significant failure to implement the Regulation that we have identified is at the HCAA airports, and HCAA has not imposed a sanction on itself for this failure to implement the Regulation.

7.23 Many NEBs have taken at least some action, other than the monitoring of complaints, to assess whether service providers were complying with the Regulation. NEBs in 14 of the 16 case study States have undertaken at least one inspection of airports for compliance with the Regulation. However, most inspections have focused on checks of systems and procedures, and did not assess the actual experience of PRMs using the service provided by the airport. NEBs for 9 of the 14 States have undertaken no direct monitoring of the charges levied by airports for providing PRM services, although Hungary and Italy informed us that they had undertaken in-depth audits of the charges levied at airports.

7.24 Member States are required to take measures to inform PRMs of their rights under the Regulation, and the possibility of complaining to appropriate bodies. Of those that provided information, relatively few NEBs had made significant efforts to promote awareness of the Regulation by passengers; only two informed us of national public awareness campaigns they had undertaken, and even in one of these States, a key national PRM organisation was not aware that the public campaign had taken place. Awareness of the NEBs performance appeared in general to be poor: most

[14] Evaluation of Regulation 261/2004; Steer Davies Gleave on behalf of European Commission, February 2010

stakeholders contacted for the study held no opinion on the effectiveness of enforcement by NEBs, and many informed us that this was because they had had no interaction with them.

Other issues that have arisen with the Regulation

7.25 Stakeholders also pointed out a number of other issues with the Regulation. Whilst few significant problems have been identified with the drafting of the Regulation, the following issues were identified:

- there is a conflict between Recital 17 and Article 14, regarding which NEB is responsible for enforcing the Regulation in relation to air carriers;
- the definition of PRM used in the Regulation is very broad, and could be interpreted to include some categories of passenger who it might not have been intended to cover (such as obese passengers, or even passengers temporarily incapacitated due to excess alcohol consumption); and
- the Regulation does not specify in detail the policies or procedures that have to be followed by air carriers, particularly if compared to the equivalent US regulations, and this has resulted in significant differences in policies between carriers.

7.26 In addition, stakeholders emphasised the significant differences between the Regulation and the equivalent US regulations on carriage of PRMs (14 CFR part 382). These can cause difficulties for air carriers, as part 382 applies to non-US carriers on flights to/from the US and all other flights that are operated as codeshares with US carriers (even if not to/from the US). The most significant differences are:

- in most circumstances, part 382 does not permit carriers to request pre-notification;
- part 382 does not allow limits on the number of PRMs on an aircraft and limits the circumstances in which an accompanying passenger may be required; and
- part 382 places the responsibility for provision of PRM assistance services on the air carrier, whereas the Regulation places this responsibility on the airport.

Conclusions

7.27 Overall, despite difficulties with service provision at some airports, the services required by the Regulation have been implemented at most European airports and compliance with the Regulation appears to be relatively good. Most stakeholders considered that the quality of service provision had improved since the introduction of the Regulation, although some airlines strongly disagreed with this.

7.28 The key issue we have identified with the implementation of the Regulation is that there are significant differences between carriers in their policies on carriage of PRMs. This arises in part from the fact that the Regulation does not specify in detail the services to be provided and the procedures to be followed, in particular if compared to the equivalent US regulations on carriage of PRMs. The Regulation allows carriers to refuse carriage or require a passenger to be accompanied on the basis of safety requirements, but these requirements are not specified in law, and therefore there are significant differences in interpretation of these requirements.

8. RECOMMENDATIONS

Overview

8.1 This section sets out our recommendations relating to how to improve the operation and enforcement of the Regulation. We present first a number of recommendations which would improve the operation of the Regulation without requiring any changes to be made to the text. However, we believe some changes are necessary which could only be implemented through amendments to the Regulation.

Measures to improve the operation of the Regulation

8.2 This section sets out measures to improve the operation of the Regulation. It covers the following:

- improvement in the operation of PRM services at airports;
- issues relating to the carriage of PRMs by airlines;
- actions to be taken by or in relation to NEBs; and
- guidance on PRM services and carriage which should be produced by the Commission, in consultation with other parties.

Airports

8.3 All airports in the sample for the study had implemented the provisions of the Regulation in some form, although as the Regulation does not precisely specify the quality of service to be provided, PRM organisations have reported this as being variable. We do not recommend any significant changes, and recommend a number of measures which will help airports to move towards consistency of service.

Maintain allocation of responsibility

8.4 Several airlines (primarily those operating low-cost business models) argued in their submissions to the study that they should be permitted to provide or contract their own PRM assistance services, as they could provide it more cost-efficiently than airports. We believe that this could create an incentive to minimise the service provided and hence would risk a reduction in service quality. Whilst there were initially significant issues with the quality of PRM service provision at certain airports, most stakeholders believed that these issues had now been addressed, and therefore we recommend that allocation of responsibility for PRM services to airports should **not** be amended.

Monitor misuse of services

8.5 A number of airports (in particular larger and busier airports) reported that the services they provided for PRMs were sometimes used by passengers who did not appear to have the right to do so under the Regulation. There was no consensus amongst airports about how significant this issue was. This variation in perception of the problem, combined with the nature of the problem itself, makes it difficult to accurately assess its extent. We recommend that the Commission monitor reports of misuse of services, so that it is alerted if the problem becomes more consistently serious.

Improve provision of information

8.6 Several PRM organisations informed us that provision of information on accessibility by airports could be improved. In particular, we were informed that many PRMs would find it helpful to have access to information, in a consistent format, regarding the accessibility of airports to which they were travelling. This could be provided through a webpage on an airport's website included, for example:

- the maximum likely walking distance within the airport;
- locations of any flights of stairs;
- the means used for access to aircraft (airbridge or stairs);
- any facilities available for PRMs;
- appropriate contact details for PRM services both for airlines and the airport[15].

8.7 Whilst some of this information is often available on airport websites, it can be difficult to find and is not always complete. To address this, we suggest that ACI could develop a single website which would either include all of this information or alternatively provide links to the specific pages on airport websites which include this information.

Share best practice on contracting of PRM service providers

8.8 We identified two issues with the process for selection of PRM service providers:

- several airports which had subcontracted PRM services had re-tendered within 18 months of the Regulation entering into force, as there were significant issues with the operation of the service; and
- many airlines informed us that they did not believe the extent of consultation from airports was sufficient.

8.9 To address these issues, we recommend that the Commission, in co-operation with ACI, develop and distribute best practice advice on contracting for services, including:

- **Content and structure of the contract:** This could include the level of detail at which contract terms relating to services should be specified, and any penalties for failure to meet required standards. It could be provided in the form of a sample contract. This would help to reduce the likelihood of issues with the contract leading to retendering.
- **Recommended methods of cooperation:** This could give details of the level and manner of consultation an airport should undertake. It could detail how to involve airport users in consultation at all points of a tendering process, including from drafting of invitation to tender documents, to evaluating and scoring bids, and might include input on the eventual decision. It could also include how to involve PRM organisations in this process. Where implemented, this would improve the perception by airport users and other parties of airport consultation.

[15] London Luton airport provides a good example of this; see http://www.london-luton.co.uk/en/content/3/1427/how-to-book-special-asistance.html.

Share best practice on training

8.10 Our research found that approaches to training of staff to provide PRM services varied significantly. In particular, there was significant variation in length of training (between 3 and 14 days) and method of delivery (videos, classroom-based or practical), to provide what should in principle be the same services. In addition, some airports reported that they had sought assistance on developing training from local PRM organisations, but the PRM organisations were too resource-constrained to be able to provide the required assistance. We therefore recommend that the Commission work with ACI and EDF to develop and distribute best practice advice on training, which would include recommended minimum levels.

Airlines

8.11 A key problem identified in our research is the lack of consistency between airline policies on the carriage of PRMs. These policies are subject to approval by the carriers' licensing authorities (which are often the same organisation as the NEB), but in many cases they approve policies with little or no challenge.

Work with EASA to determine safe policies on carriage of PRMs

8.12 Article 4 of the Regulation permits air carriers to refuse to accept reservations from a PRM, or to require that a PRM be accompanied, in order to meet safety requirements set out in international, Community or national law, or established by the authority that issued the carrier's operating certificate. However, other than minimal requirements in EU-OPS, Community law does not impose specific requirements regarding the safe carriage of PRMs. There is little published research into safety issues regarding carriage of PRMs, so even where licensing authorities do seek to challenge proposed airline policies or impose their own, there is a limited evidence base on which to do this. This results in wide and unjustifiable variation in airline policies.

8.13 Therefore, we recommend that the Commission work with EASA to determine policies on carriage of PRMs which are consistent with safe operation. Such policies should include any limits on the number of PRMs permitted on board an aircraft, where PRMs may be seated, and whether and under what circumstances PRMs must be accompanied. The policies should take into account the type of aircraft and the different safety implications of carriage of different types of PRMs.

Airlines to publish clear policies on carriage of PRMs

8.14 We have identified a number of airlines which are failing to publish clear policies on carriage of PRMs. We recommend that the Commission encourage the relevant NEBs to ensure that the airlines identified in Table 4.1 as not publishing sufficient information do so. The Commission could also encourage NEBs to review the policies of airlines outside the study sample to ensure that these provide sufficient information.

Monitor pre-notification

8.15 Pre-notification of requirements for assistance should have two benefits:

- it should ensure that PRMs are able, on arrival at an airport, to promptly receive the assistance they require to take their chosen flight; and
- it should allow airports to plan their staffing requirements efficiently, minimising the cost of service provision .

8.16 However, at present, as discussed in section 4.74 above, pre-notification is not functioning well. Of the 16 airports which provided us with information on levels of pre-notification, 11 have rates of pre-notification under 60%. The result of this is that at most airports, the rate of pre-notification is too low for the airport to gain efficiency benefits, and the incentive for PRMs to pre-notify is reduced (since at many airports a similar quality of service is provided regardless of pre-notification). Therefore the system as it presently operates requires airlines and airports to incur the costs of enabling pre-notification, but not to realise the benefits of reduced costs or smoother provision of services. We recommend that the Commission monitor the operation of pre-notification (for example by encouraging NEBs to collect appropriate data), and in future assess the situation and consider either eliminating the requirement for pre-notification or alternatively retaining it and providing passengers and carriers with more incentive to pre-notify.

Encourage airlines to provide receipts for pre-notification

8.17 Several PRM organisations reported problems where PRMs had pre-notified their requirements for assistance, but then found that this information had not been passed on to airport or airline staff. To address this, and to provide PRMs with evidence that they can use when making a complaint, we recommend that the Commission encourage airlines to provide PRMs with a receipt for pre-notification. Once this voluntary scheme has been in place for an appropriate length of time, the Commission could consider amending the Regulation to make it compulsory.

Monitor implementation of ECAC Document 30 recommendations on carriage

8.18 Section 5 of ECAC Document 30 contains a number of recommendations regarding on-board provisions for PRMs which it recommends airlines commission in new or significantly refurbished aircraft. These include (depending on the type of aircraft) the provision of on-board wheelchairs, provision of at least one toilet catering for the special needs of PRMs, and ensuring that at least 50% of all aisle seats should have moveable armrests[16]. We recommend that the Commission monitor uptake of these recommendations.

NEBs

8.19 The greatest problem identified by the study regarding NEBs was the lack of pro-active measures taken to monitor or enforce the Regulation. In most cases this has not had significant detrimental effect, as most airports and airlines have implemented the provisions of the Regulation, but could become an issue if the situation changes in the future. In most States few complaints had been received by the NEB, and as a result

[16] See ECAC.CEAC DOC No. 30 (PART I), 11th Edition/December 2009, Section 5.10.5.

the handling of complaints has not been raised as a significant issue.

Encourage all States to implement the Regulation

8.20 We identified in section 5.13 above that some States have not as yet either introduced penalties into national law for all infringements of the Regulation, or designated an NEB. We recommend that the Commission encourage all States to comply with their obligations under the Regulation.

Encourage better promotion of rights under Regulation

8.21 Article 15(4) of the Regulation requires Member States to take measures to inform PRMs of their rights under the Regulation and of the possibility of complaint to the relevant NEB. Of the NEBs which provided information on this point, few had taken direct actions to promote the Regulation. Many had published sections with information on their websites, but unless PRMs are made aware that this website exists and is relevant to them, we do not believe that this is sufficient. Only two case study NEBs informed us that they had commissioned national promotional campaigns relating to the Regulation. We recommend that the Commission takes actions to encourage NEBs to inform PRMs of their rights under the Regulation.

Encourage NEBs to pro-actively monitor application of Regulation

8.22 Article 14 of the Regulation requires Member States to take the measures necessary to ensure that the rights of PRMs are respected. Our research found that most NEBs were taking only limited actions to monitor the application of the Regulation (see 5.42), and few NEBs were directly monitoring whether airports were meeting published quality standards. Many NEBs rely on complaints as a method of monitoring, but without promotion of awareness of rights and of the NEB as the body able to receive complaints (see above), a low number of complaints cannot be interpreted as evidence that there are no issues with the application of the Regulation.

8.23 We therefore recommend that the Commission encourage NEBs to pro-actively monitor the application of the Regulation. This could take a number of forms:

- increased interaction with PRM organisations;
- direct monitoring of quality of service provided, for example through ‘mystery shopping’ and other types of inspections of airports (which could be conducted in cooperation with PRM organisations);
- collection of airline pre-notification data; and
- reviews of airline websites for accessibility.

Guidance to be produced

8.24 We recommend that the Commission should, in collaboration with airlines, airports, PRM representatives and NEBs, develop a detailed good practice guide regarding implementation of the Regulation. This could take the code of practice issued by the

UK Department for Transport[17] as a model, and could form the basis for later detailed revisions of the Regulation. Publishing voluntary policies would allow potential future amendments to the Regulation to be tested in practice before adoption.

8.25 The good practice guide could address the following areas (some of which are discussed in previous sections on recommendations regarding airports and airlines):

- recommendations on safety limits;
- the format and content of policies on carriage (including safety rules);
- detailed training modules implementing the recommendations in Annex 5G of ECAC Document 30, in addition to recommended minimum duration;
- consultation; and
- airport accessibility information.

8.26 A key issue to be addressed in this guidance would be the quality standards to be published by airports. At present, most airports follow the format of the minimum standards recommended in ECAC Document 30[18] (see 3.57). However, these standards are a limited measure of the quality of service received by PRMs. We recommend that the Commission work with ECAC to develop recommended minimum standards which are wider in scope, and cover qualitative aspects of the service received. Airports such as London Luton, which publishes a wide range of quality standards which address all aspects of the service, could provide a model for this approach.

8.27 The guidance should also specify the information which should be included in carriers' published policies on carriage of PRMs, which should cover at least the areas identified in 4.8.

Recommendations for changes to the Regulation

8.28 The measures described above could significantly improve the operation of the Regulation. However, we believe that some issues could only be addressed through amendments to the text, and therefore we also set out:

- Recommendations for some minor amendments to address issues with the text (such as areas where the Regulation is unclear) which we believe should be implemented as soon as possible.
- Suggestions for more significant revisions to be considered in the longer term. These would require consultation with stakeholders and an impact assessment to be undertaken.

Changes to be implemented as soon as possible

Training

[17] *Access to Air Travel for Disabled Persons and Persons with Reduced Mobility – Code of Practice*, UK Department for Transport, July 2008.

[18] See ECAC.CEAC DOC No. 30 (PART I), 11th Edition/December 2009, Annex 5C section 1.6.

8.29 We recommend that Article 11 be extended to require airlines to ensure that the personnel of their ground handling companies are trained to handle mobility equipment. Several PRM organisations informed us that damage to mobility equipment was one of the most serious problems for PRMs travelling by air, and that such damage could cause considerable distress to PRMs.

8.30 We recommend that Article 11 be amended to include the provisions in Recital 10, namely to specify that the provisions regarding training in ECAC Document 30 be taken into account when commissioning and developing training. This could be phrased in the manner of Article 9(2) on quality standards.

8.31 We recommend that Article 11b be amended to clarify that disability-equality and –awareness training is required for passenger-facing subcontractors as well as personnel directly employed by an airport. This would be consistent with Article 11a regarding personnel providing direct assistance. We were informed by one airport that an airline had disputed the level of PRM charges on the basis that the charges recovered the costs of training subcontractors, which the airline believed was not required by the Regulation.

8.32 We recommend that the Commission consider removing the requirement in Article 11c for disability-awareness training for non-passenger facing personnel, as it is not clear why this should be any more necessary in this sector than in others.

Obligatory charges where costs recovered

8.33 Article 8 permits airports to levy specific charges on airport users to fund the assistance provided under the Regulation, which must be reasonable, cost-related, transparent and established in cooperation with airport users. However, it does not *require* airports to levy such charges; several of the airports we researched for the study recovered costs through their general passenger charges, and did not identify the PRM component separately. Where specific charges are not applied, airports are not required to follow the requirements on reasonability, cost-relatedness, transparency and cooperation. We therefore recommend that, for airports above a minimum size, Article 8 be amended to make specific charges obligatory if costs are to be recovered from users.

Airport charges

8.34 We recommend that Article 8 be amended where necessary to make clear that PRM charges are airport-specific and cannot be set at a network level. At present, the translation into some languages (for example Spanish) could be interpreted to permit network charges, which we believe is contrary to the intention of the Regulation.

Independence of NEBs

8.35 We recommend that Article 14 be amended to require that NEBs must be independent of any bodies responsible for providing services under the Regulation.

Scope of Regulation

8.36 We recommend that Article 14 be amended to clarify that NEBs are responsible for

flights departing from (rather than, as is currently stated, both departing from and arriving at) airports in their territory, in addition to flights by Community carriers arriving at airports within State's territory but departing from a third country.

8.37 We also recommend that Recital 17 (which states that complaints regarding assistance given by an airline should be addressed to the NEB of the State which issued the operating license to the carrier) be amended to be consistent with Article 14.

PRMs without a reservation

8.38 Article 7 requires airports to provide assistance to PRMs arriving at an airport so that they are able to take the flight for which they hold a reservation. However, there may be rare occasions where a PRM (like any other passenger) arrives at an airport *without* a reservation, expecting to purchase a ticket at the airport. We therefore recommend that Article 7 be amended to set out the airport's responsibilities to such PRMs.

Longer term changes to the Regulation

8.39 The key issue that we have identified with the Regulation is that the text is much less detailed or specific than other comparable legislation (in particular, the equivalent US regulations on carriage of PRMs) and therefore leaves much more scope for interpretation and variation in service provision. We suggest that, to ensure greater consistency and that PRMs rights are adequately respected, the Commission should consider making the text more detailed and specific about the requirements for airlines and airports. The rest of this section describes key areas in which we suggest that changes could be made.

8.40 It would be necessary to consult with stakeholders about these changes and to undertake an impact assessment, and therefore these changes could not be introduced immediately.

Provisions on safe carriage PRMs

8.41 Once the Commission has established with EASA policies on the safe carriage of PRMs, particularly regarding any permissible limits on carriage and requirements for passengers to be accompanied (see 8.13), we recommend that either the Regulation or EU-OPS be extended to include these policies.

Definitions

8.42 We recommend that the following definitions should be clarified:

- **PRM:** The definition of PRM used in the Regulation is very broad and this has led to disputes as to whether obese passengers or those impacted by temporary injuries (e.g. winter sports) are included; and even that those temporarily incapacitated e.g. due to alcohol consumption might be included. We suggest that, at a minimum, the definition should be amended to clarify this, and ideally (but subject to consultation) a much more precise definition of passengers entitled to assistance should be used, along the lines of that used in the equivalent US Regulations (see below).
- **Mobility equipment:** The Regulation should make clear whether this includes

equipment required by PRMs for the trip but not required for them to be able to take the flight (e.g. joists for assisted lifting of PRMs).

- **Cooperation:** The Regulation should to specify what measures airports must take when required by the Regulation to set out policies and charges in cooperation with airport users and PRM organisations - in particular in Article 8(4).

Definition of disability used in US CFR part 14 rule 382

Individual with a disability means any individual who has a physical or mental impairment that, on a permanent or temporary basis, substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(a) *Physical or mental impairment* means:

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory including speech organs, cardio-vascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments; cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction, and alcoholism.

(b) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(c) Has a record of such impairment means has a history of, or has been classified, or misclassified, as having a mental or physical impairment that substantially limits one or more major life activities.

(d) *Is regarded as having an impairment* means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by an air carrier as constituting such a limitation;

(2) Has a physical or mental impairment that substantially limits a major life activity only as a result of the attitudes of others toward such an impairment; or

(3) Has none of the impairments set forth in this definition but is treated by an air carrier as having such an impairment.

Supplementary charges

8.43 Although we have not been made aware of any incidences of airlines or airports charging for assistance provided under the Regulation, several airlines charge for the supply of medical oxygen, and for multiple seats where one seat is insufficient for the passenger (for example, in the case of obese or injured passengers). Several PRM organisations informed us that they believed these charges were unjust. We recommend that in any amendment of the Regulation it should be clarified whether airlines may levy such additional charges.

Information on rights of PRMs

8.44 Regulation 261/2004 requires airlines to display at check-in a notice informing passengers that they may request information on their rights under the Regulation. To assist the promotion of awareness of rights under Regulation 1107/2006, we recommend that the Regulation be extended to include a provision requiring airports

to publish information on the rights of PRMs (including the right to complain) at accessible points within the airport, for example at check-in desks and help points.

Liability for mobility equipment

8.45 The Montreal Convention allows for compensation for damage to baggage up to 1,131 SDRs (€1,370), however this is insufficient for many technologically advanced electric wheelchairs, which can cost several thousand euros. Although most airlines we contacted for the study informed us that they waived the Montreal limits in this type of situation, several PRM organisations informed us of cases where they did not. Even in the case that an airline voluntarily waives the limit, the PRM is in a position of uncertainty. This is exacerbated by the difficulty of obtaining insurance for such wheelchairs; the high cost combined with the high probability of damage means that the PRM organisations we spoke to had been unable to find any insurers willing to provide coverage.

8.46 We therefore recommend that the Commission work with non-EU States to amend the Montreal Convention to exclude mobility equipment from the definition of baggage.

APPENDIX A

AIR CARRIERS POLICIES ON CARRIAGE OF PRMS

APPENDIX TABLE A.1 POLICY ON DENIAL OF BOARDING, ACCOMPANYING PASSENGERS AND MEDICAL CLEARANCE

Airline	Circumstances for refusal of carriage	Circumstances requiring accompanying passenger	Circumstances requiring medical clearance
Aegean Airlines	Not stated *Unpublished limit on unaccompanied PRMs*	Not stated	• PRM requires oxygen
Air Berlin	May limit number of PRMs on each flight for safety reasons	'Advised' if the following apply (although the use of 'must' in terms of the criteria for the companion suggest that this may not be optional): • PRM has severe walking disability • PRM has severe visual impairment *Also required if:* • *PRM is on stretcher* • *PRM is mentally ill / blind / deaf if unable to follow crew instructions* • *ID states that continuous accompaniment required*	• *PRM has infectious disease* • *PRM is on stretcher* • *PRM requires oxygen*
Air France	Not stated	• PRM cannot safely exit aircraft alone • PRM cannot follow safety instructions • PRM has visual or hearing impairment	• PRM is on stretcher or in incubator • PRM will need extraordinary medical equipment during flight • PRM requires oxygen
AirBaltic	To meet safety requirements If aircraft doors make boarding physically impossible If number of PRMs exceeds number of cabin crew per flight, where PRMs form a large proportion of passengers on flight	PRM requires assistance beyond that provided by cabin crew. Cabin crew will provide additional information to PRMs, but will not: • Assist with eating or personal hygiene; • Administer medication; or • Lift or carry passengers. *Also required if unable to follow safety instructions, e.g. if in stretcher, incubator, of if both blind and deaf*	• PRM has infectious disease • PRM has 'unusual condition' which could affect welfare of crew or other passengers, or could be considered a potential hazard to flight or its punctuality • PRM will require medical attention or special equipment during flight • PRM has medical condition which may worsen during, or because of, flight • PRM cannot use normal seat in upright position

Airline	Circumstances for refusal of carriage	Circumstances requiring accompanying passenger	Circumstances requiring medical clearance
			• Pregnant passengers, except when uncomplicated and with more than 4 weeks until due date.
Alitalia	Conditions of Carriage state that boarding may be denied if advance arrangements have not been made	• PRM uses wheelchair • PRM is blind or deaf • PRM is on stretcher • PRM is not self sufficient	• *PRM will require medical assistance on board*
Austrian	Not stated	• PRM cannot evacuate aircraft alone • PRM cannot follow safety instructions • PRM needs assistance in feeding or using toilet • PRM is deaf and blind • PRM requires assistance beyond that provided by cabin crew	• PRM has chronic illness or disability
British Airways	Not stated	• PRM cannot lift themselves • PRM cannot evacuate aircraft alone • PRM cannot communicate with crew on safety matters • PRM cannot unfasten seat belt • PRM cannot retrieve and fit life jacket • PRM cannot fit oxygen mask.	Not stated
Brussels Airlines	To meet safety requirements If size of doors makes boarding or alighting physically impossible Limit of PRMs of up to 31 per flight depending on aeroplane type Conditions of Carriage state that boarding may be denied if advance arrangements have not been made	• PRM is mentally disabled and does not have prior medical clearance of airline	• PRM is on stretcher or bed • PRM requires oxygen • PRM is under care of a doctor • PRM has unstable medical condition • PRM suffers from illness • PRM has recently been to hospital, or has operation

Airline	Circumstances for refusal of carriage	Circumstances requiring accompanying passenger	Circumstances requiring medical clearance
			• PRM has medical disability and cannot be accompanied • PRM is more than 34 weeks pregnant
Delta	On basis of safety, or if in violation of Federal Aviation Regulations If advance arrangements have not been made (this requirement is more stringent in the Conditions of Carriage)	• PRM requires constant monitoring at departure gate • PRM requires assistance beyond that provided by cabin crew	• PRM has infectious disease • PRM requires oxygen • PRM will require extraordinary medical assistance during flight
EasyJet	If the safety and welfare of the PRM or other passengers may be compromised *In only extreme circumstances, e.g. where special seats or torso restraints are required, or if a passenger's condition makes them potentially violent or disruptive.*	• PRM cannot evacuate aircraft alone • PRM cannot communicate with staff • PRM cannot unfasten seat belt • PRM cannot retrieve and fit life jacket • PRM cannot fit oxygen mask • PRM cannot take care of own personal needs and welfare	• PRM has infectious or chronic illness • PRM has broken limb in plaster • PRM is 28-35 weeks pregnant • PRM is a child with a chronic lung disease • PRM has severe asthma or has recently been prescribed oral steroids.
Emirates	Not stated	• PRM needs to travel in stretcher or incubator • PRM requires medical attention during flight • PRM cannot follow safety instructions • PRM cannot evacuate aircraft alone • PRM has severe hearing and visual impairments and cannot communicate with staff	• PRM is on stretcher • PRM requires oxygen • PRM requires medical escort or in-flight treatment • PRM is carrying medical equipment or instruments • PRM is 29 or more weeks pregnant
Iberia	If PRM poses a risk to themselves and other passengers for medical reasons Limit on number of PRMs per flight *May also refuse carriage for security reasons, e.g. aggression.*	• In order to meet safety requirements • *PRM is considered as a 'medical case'*	Not stated
KLM	Not stated	• PRM requires assistance beyond that provided by	• PRM has infectious disease

Airline	Circumstances for refusal of carriage	Circumstances requiring accompanying passenger	Circumstances requiring medical clearance
	Passenger cannot sit up straight *Wheelchair will not fit through aircraft door.*	cabin crew • PRM cannot move unassisted between wheelchair and seat / toilet • *PRM not compliant with normal safety rules*	• PRM requires medical care or specific equipment in-flight • PRM has medical condition that could result in a life-threatening situation or could require the provision of exceptional medical care for their safety during the flight. • PRM requires in-flight personal care • PRM cannot use normal seat in upright position • PRMs up to 36 weeks pregnant who are expecting complications
Lufthansa	Limit on number of unaccompanied limited mobility PRMs per flight	• Not stated for non-US flights	Stringent medical clearance requirements – see text
Ryanair	Limit on number of disabled or sensory or mobility impaired PRMs per flight. Conditions of Carriage state that failure to advise on special needs will result in denial of boarding. *PRM limit can be overridden at the discretion of the crew on a case-by-case basis*	• PRM cannot use toilet unaided • PRM cannot feed themselves unaided • PRM cannot administer own medication.	• PRM requires oxygen, portable dialysis machine or continuous portable airway pressure machine
SAS	Not stated *When PRMs cannot be safely carried or physically accommodated*	• Not stated • *PRM is blind, deaf; or both* • *PRM is Disabled Passenger with Intellectual or Developmental Disability Needing Assistance* • *PRM is on stretcher*	• PRM requires stretcher or other flat transportation
TAP Portugal	Not stated *Unpublished limit on unaccompanied PRMs*	• PRM is in an incubator • PRM is on trolley / stretcher • PRM requires oxygen • PRM uses wheelchair or has 'great difficulty in mobility'	• PRM uses emotional support dog • PRM is more than 36 weeks pregnant

Airline	Circumstances for refusal of carriage	Circumstances requiring accompanying passenger	Circumstances requiring medical clearance
		• PRM is reliant on others	
TAROM	Not stated	• PRM suffers from a disease • *PRM cannot self-evacuate*	• PRM has disease • PRM requires stretcher • PRM requires oxygen
Thomas Cook	Not stated	• PRM cannot lift themselves • PRM cannot use toilet unaided • PRM cannot feed themselves unaided • PRM cannot administer own medication • PRM cannot communicate or follow instructions • PRM reliant on oxygen.	Unspecified – see text
TUI (Thomsonfly)	Not stated	• PRM cannot lift themselves • PRM cannot use toilet unaided • PRM cannot feed themselves unaided • PRM cannot administer own medication • PRM cannot communicate or follow instructions • PRM reliant on oxygen • PRM requires wheelchair.	• *PRM is unaccompanied and does not meet self-sufficiency requirements* • *PRM has declared medical condition* • *PRM has requested a service for which there is a risk of abuse, e.g. extra legroom seats would normally be chargeable.*
Wizzair	If medical certification is not provided on request If airline is unable to provide for specific medical requirements Limit of 28 PRMs per flight Conditions of Carriage state that boarding may be denied if advance arrangements have not been made	• PRM unable to care for themselves • PRM cannot use toilet unaided.	Unspecified, but could be required in all cases – see text.

APPENDIX B

SERVICES PROVIDED BY AIR CARRIERS

APPENDIX TABLE A.2 SERVICE AND RESTRICTIONS

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
Aegean Airlines	Prenotification required Carried free in cabin Case / carrier required Subject to weight restriction Not carried on UK flights	Wheelchairs carried free Not subject to baggage allowance Passenger's oxygen allowed with medical certification Conditions of Carriage state that wet cell batteries are not allowed in cabin	Not stated	Not stated	Not stated
Air Berlin	Carried free in cabin Case / carrier not required Harness required	Wheelchairs carried in hold only Wet cell batteries subject to safety regulations Other medical aids carried free with medical certificate Limit of one wheelchair per passenger defined in Conditions of Carriage	Not stated	Not stated	Free seat reservation for passengers with severe disability pass (or equivalent) for 50% disability or more, and for companion PRMs cannot reserve XL / extra large seats (i.e. in exit rows) Conditions of carriage state that seating may be restricted for safety reasons
Air France	Carried free in cabin Leash required, attached to seat in front Muzzle not required	Up to two wheelchairs carried free of charge Onboard wheelchairs on most flights Stretchers accepted with medical clearance Oxygen allowed on board on payment of fee	Cannot lift passengers Cannot administer medication	Braille seat numbers in new aircraft Safety briefing in French or English Braille Some crew members able to communicate in French sign language	Additional seat may be reserved at discounted rate if needed Seats with retractable armrests Easy access toilets
AirBaltic	Carried free in cabin Excluded from weight	Carried free of charge Only collapsible wheelchairs	Will provide extra information Cannot assist with eating or	Not stated	Depending on aircraft, provide movable aisle armrest seats

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
	restrictions Prohibited from exit rows	allowed in cabin Spillable batteries accepted if removed and packed and labelled Stretchers not carried Oxygen provided free with prenotification, doctor's verification and accompanying passenger	personal hygiene Cannot lift or carry passengers Cannot administer medication		PRMs cannot obstruct crew or emergency exits Companion must travel in seat next to PRM
Alitalia	Carried free in hold, or in cabin if space available Leash required Muzzle required	Wheelchairs carried free Stretcher service offered for a fee and with authorisation and accompanying passenger, only one per aircraft. Oxygen must be booked in advance, and not available on all flights	Not stated	Not stated	Not stated
Austrian	Carried free in cabin Leash required Subject to size and weight restriction Proof of status required	Up to two wheelchairs carried free, subject to space and prenotification for electric wheelchairs Onboard wheelchairs available	Preparation for eating Use of on-board wheelchair Accessing lavatory Stowing / retrieving carry-on items	Will communicate effectively as required.	Choice of seat may be limited Some seats with moveable armrests Accessible lavatories on long haul flights
British Airways	Prenotification required Limit on no. of guide dogs per flight Carried free in cabin Carried on all UK and certain international routes	Up to two wheelchairs carried free Preparation required for certain types of electric wheelchair Onboard wheelchairs on some flights Portable Oxygen Concentrators accepted with medical clearance, included in cabin	Cannot assist with breathing apparatus Cannot assist with eating Cannot administer medication Cannot assist with going to toilet Can assist in access to and from toilet when on-board wheelchair is available	Individual safety briefings and subtitles on English safety video Braille cards on some flights	Lifting armrests on some seats Cannot be seated on emergency exit aisle due to safety regulations. Will be allocated bulkhead seat when requested, unless already allocated to PRM. Adapted toilets on 747-operated flights

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
		baggage allowance Conditions of carriage state that the airline reserves the right to refuse stretchers on any flight			
Brussels Airlines	Prenotification required Carried free in cabin Leash required Muzzle required Subject to national regulations	Electric wheelchairs carried in hold Spillable batteries accepted under certain conditions In-flight wheelchair on some flights Up to two stretchers on certain planes Can supply oxygen with prenotification and payment of fee in advance	Moving to toilet facilities Cannot lift passengers Cannot assist during visit to lavatory	Not stated	Not stated
Delta	Carried free in cabin Prohibited from exit rows Must occupy space where passenger sits No documentation required Subject to national entry requirements	One wheelchair can be carried in cabin per flight Wet cell batteries accepted with preparation One onboard wheelchair per flight Personal oxygen tanks can be transported but not used in flight Can provide oxygen on many flights, subject to medical certification Conditions of Carriage state that carriage of passengers requiring stretcher kit may be refused	Cannot assist with feeding or personal hygiene and lavatory functions. Cannot lift or carry passengers Cannot provide medical services such as giving injections.	Pre-booked passengers with hearing disabilities can be accompanied by agents who will provide updates on flight information	FAA regulations limit exit seats to certain customers Customers with service animals or immobilised leg are entitled to bulkhead seats On board aircraft with 100 seats or more, Delta provides a stowage location specifically for the first collapsible wheelchair

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
EasyJet	Carried free in cabin if space available Must occupy space where passenger sits Harness required Proof of training and status required Only allowed on routes within UK or mainland Europe	Up two to portable mobility items carried free, subject to weight restriction Wet cell batteries not accepted No onboard wheelchairs Allow up to two oxygen cylinders per passenger, with medical certification Conditions of Carriage state that stretchers are not carried	Stowing and retrieving of hand baggage Opening food packages and describing the contents Cannot lift passengers Cannot provide personal care Cannot administer medication Cannot assist with feeding or children	Can provide a verbal explanation of the safety card information and location of emergency exits	Body supports required for passengers who cannot sit upright
Emirates	All animals carried in hold, subject to IATA Live Animals and national regulations	Wheelchairs carried free of charge Do not count towards baggage allowance Battery-powered wheelchairs subject to safeguards Stretcher kit provided Oxygen provided Portable Oxygen Concentrators allowed	Cannot assist with transfer Cannot assist with feeding Cannot assist with toilet functions	Not stated	Not stated
Iberia	Carried free in cabin Must not use seat Muzzle required Does not count towards luggage allowance Deaf passengers will require medical certificate	All wheelchairs carried free in hold Wet cell batteries accepted with preparation Carriage of stretchers may be restricted on smaller aircraft Oxygen allowed in cabin subject to certain conditions	Cannot provide sanitary, hygienic or safety onboard assistance.	Not stated	'The entire fleet has been adapted to carry Passengers with Reduced Mobility, despite the space limitations that air transport normally poses.'
KLM	Carried free in cabin Must be with PRM, but not using seat or blocking aisle of	Up to two pieces of mobility equipment carried free Collapsible wheelchairs allowed	Transporting passengers using on-board wheelchair	Braille safety cards Toilets with Braille attendant call	Seats with moveable armrests Leg rests available

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
	exit Leash required Subject to national regulations	in cabin, electric wheelchairs carried in hold Wet cell batteries accepted with preparation Onboard wheelchairs on all flights Stretcher service offered, subject to medically trained companion Oxygen allowed on board on payment of fee Own oxygen not allowed Approved Portable Oxygen Concentrators allowed	Cannot assist with eating Cannot lift or carry passengers Cannot administer medication Cannot assist with personal hygiene	buttons	
Lufthansa	Carried free in cabin Limited number allowed per flight Subject to national regulations	Wheelchairs carried free in hold (small collapsible devices allowed in cabin to/from US) Non leak-proof wet cell batteries not accepted except to/from US Limit on number of wheelchairs per flight Limited oxygen available with advance payment of an unspecified fee	Assistance in boarding / disembarking Stowing hand luggage Opening of food items Getting to / from toilet Cannot provide assistance in toilet Cannot lift or carry passengers Cannot feed passengers Cannot administer medication	Will explain arrangement of meal tray to partially sighted Flights to/from US section of website also includes: Separate safety briefings Separate briefings about delays and other issues Captioning of in-flight video in English and German	Disabled toilets in long-haul aircraft Flights to/from US section of website also includes: Bulkhead seats provided if travelling with service animal Some seats with lifting armrests May not be able to sit near exit
Ryanair	Carried free in cabin Must travel on floor at passenger's feet Max of 4 per flight Not carried on some international routes	Wheelchairs carried free of charge in hold Not subject to weight limit Wet cell batteries not accepted One oxygen request per flight allowed at cost of £100.	Will provide water for taking medication Cannot administer medication Cannot lift passengers Cannot assist with personal hygiene	Not stated	Passengers with reduced mobility, or whose physical size prevents them from moving quickly cannot be seated near exit. Passengers with pre-booked special assistance will be

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
		Personal oxygen not allowed on board Conditions of carriage state that stretchers are not carried			boarded after general boarding is completed as seats will be held on board. Conditions of carriage state that seating may be restricted for safety reasons
SAS	Carried free in cabin Case / carrier not required Excluded from weight restriction	One collapsible and one power-driven wheelchair carried free of charge Wet cell batteries accepted as cargo In-flight wheelchair on some flights Personal oxygen allowed if required for transport to/from aircraft Will provide oxygen with payment of fee	Cannot lift passengers Cannot assist during visit to lavatory	Not stated	Not stated
TAP Portugal	Dogs and cats allowed in cabin Leash required Must not occupy a seat Must comply with sanitary regulations Proof of status required	Prenotification of type of wheelchair battery required On-board wheelchair on larger planes Stretchers accepted in economy class subject to medically trained companion Oxygen provided with medical certification Personal oxygen not allowed	Not obliged to provide any on-board assistance contradicting passenger statement of self-reliance, e.g. assistance in toilet, lifting, carrying or feeding.	Not stated	May request an additional seat for greater comfort in coach class only. This seat must be requested when booking and is charged as an occupied place
TAROM	Prenotification required Carried free in cabin Case / carrier not required	Wheelchairs carried free and allowed in cabin on some planes Preparation of some electric	Not stated	Not stated	Not stated

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
	Muzzle required	wheelchairs may be required Stretchers not allowed on certain planes. PRM using a stretcher is considered as 'medical case' and is consequently required to obtain a medical certificate, and to be accompanied by a medical professional. Oxygen provided free, subject to limits on no of passengers per flight Personal oxygen not allowed			
Thomas Cook	Carried on many routes	Wheelchairs carried free in hold Electric wheelchairs accepted subject to IATA Dangerous Goods Regulations Limit on no of wheelchairs Stretchers not carried One oxygen request per flight allowed at cost of £100. Personal oxygen not allowed on board	Can assist in opening food containers	Will describe catering arrangements to blind people In-flight safety video includes subtitles Also offer separate briefing about safety procedures for passengers with hearing impairments	PRMs cannot be seated near exits
TUI (Thomsonfly)	Carried on many routes Conditions of Carriage state that this will incur 'a nominal charge'	Wheelchairs carried free in addition to normal baggage allowance Electric wheelchairs accepted subject to IATA Dangerous Goods Regulations Passengers may bring their own oxygen supply onboard if authorised to do so by Special	Not stated	Not stated	Not stated

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
		Assistance Team.			
Wizzair	Not stated	Wheelchairs carried subject to weight limit Spillable batteries not accepted Do not provide additional oxygen, and passengers cannot carry their own supply Conditions of carriage state that stretchers are not carried	Free 'Meet and Assistance Service' provided to deaf and blind passengers on request	Not stated	PRMs cannot be seated on exit rows

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«Hacia una sociedad de la información accesible»

COMUNICACIÓN DE LA COMISIÓN AL PARLAMENTO EUROPEO, AL CONSEJO, AL COMITÉ ECONÓMICO Y SOCIAL EUROPEO Y AL COMITÉ DE LAS REGIONES

«Hacia una sociedad de la información accesible»

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1. RESUMEN

A medida que nuestra sociedad evoluciona hacia una «sociedad de la información», va en aumento necesariamente nuestra dependencia, en la vida cotidiana, de los productos y servicios basados en la tecnología. Sin embargo, la escasa accesibilidad electrónica sigue impidiendo que muchos europeos con discapacidad disfruten de las ventajas de la sociedad de la información.

Esta cuestión de la accesibilidad electrónica ha sido objeto en los últimos años de gran atención y ha estado muy presente en las políticas. En 2006, los ministros europeos concertaron unos objetivos, plasmados en su «Declaración de Riga», a fin de conseguir progresos importantes para 2010. En 2007, una evaluación comparativa demostró que todavía no se avanzaba a un ritmo suficiente y que sería necesario redoblar los esfuerzos para alcanzar los objetivos de Riga. La accesibilidad web, especialmente en el caso de las páginas web de la administración pública, se ha erigido en una de las principales prioridades, dada la importancia creciente de Internet en la vida cotidiana.

La Comisión considera urgente en este momento elaborar un enfoque más coherente, común y eficaz en materia de accesibilidad electrónica, y en particular de accesibilidad web , para acelerar el advenimiento de una sociedad de la información accesible, según lo anunciado en la Agenda Social Renovada[1]. En la presente Comunicación, la Comisión describe la situación actual, justifica la actuación europea y expone los pasos más importantes que conviene dar.

Para construir un enfoque común y coherente en materia de accesibilidad electrónica :

- Las organizaciones europeas de normalización deben llevar a cabo unas actividades más amplias de normalización de la accesibilidad electrónica para reducir la fragmentación del mercado y facilitar la adopción creciente de los bienes y servicios que las TIC hacen posibles.

- Los Estados miembros, las partes interesadas y la Comisión deben estimular la intensificación de la innovación y el despliegue en relación con la accesibilidad electrónica, en particular mediante el uso de los programas de investigación e innovación de la UE y de los Fondos Estructurales.

- Todas las partes interesadas deben aprovechar al máximo las oportunidades de abordar la accesibilidad electrónica que ofrece la legislación actual de la UE. La Comisión incluirá los requisitos sobre accesibilidad electrónica adecuados en la legislación nueva o que se revise.

- La Comisión impulsará las actividades de cooperación entre las partes interesadas a fin de

reforzar la coherencia, coordinación y repercusión de las acciones. En particular, un nuevo grupo especial de alto nivel estará encargado de elaborar orientaciones sobre el enfoque coherente global aplicable a la accesibilidad electrónica (incluida la accesibilidad web) y proponer acciones prioritarias para superar las barreras que la dificultan.

Para acelerar los progresos en el caso particular de la accesibilidad web :

- Las organizaciones europeas de normalización deben adoptar rápidamente unas normas europeas en materia de accesibilidad web, tras el establecimiento de unas directrices actualizadas (WCAG 2.0) por parte del World Wide Web Consortium .

- Los Estados miembros deben intensificar sus esfuerzos para conseguir que los páginas web públicas sean accesibles y preparar conjuntamente la rápida adopción de las normas europeas sobre accesibilidad web.

- La Comisión efectuará un seguimiento de los progresos, los hará públicos y podría eventualmente, en una fase posterior, proponer medidas legislativas.

2. ACCESIBILIDAD ELECTRÓNICA

La accesibilidad electrónica significa superar las barreras técnicas y las dificultades que experimentan las personas con discapacidad, incluidas muchas personas de la tercera edad, cuando intentan participar en pie de igualdad en la sociedad de la información.

Si se quiere que todos tengan iguales oportunidades de participación en la sociedad actual, es preciso que la totalidad de los bienes, productos y servicios de TIC sean accesibles. Y en esto se incluyen los ordenadores, los teléfonos, los televisores, la administración pública en línea, la compra en línea, los centros de llamadas, los terminales de autoservicio (tales como los cajeros automáticos) y las máquinas expendedoras de tiques.

2.1. Situación actual

La envergadura del reto de la accesibilidad es grande y no deja de aumentar: alrededor del 15 % de la población europea padece alguna discapacidad, y hasta uno de cada cinco europeos en edad laboral padece minusvalías que exigen soluciones accesibles. En total, tres de cada cinco personas podrían beneficiarse de la accesibilidad electrónica, en la medida en que mejora la utilizabilidad general[2].

La accesibilidad electrónica tiene consecuencias socioeconómicas tanto para las personas como para Europa en su conjunto. Por ejemplo, las soluciones basadas en unas TIC accesibles podrían ayudar a los trabajadores de más edad a conservar su empleo y potenciar la aceptación de los servicios públicos en línea, por ejemplo los de administración pública y salud. La ausencia de accesibilidad electrónica excluye a importantes sectores de la población y les impide ejercer plenamente sus actividades profesionales, de educación, de ocio, sociales y de participación democrática. Reforzar la accesibilidad electrónica contribuirá al logro de los objetivos de inclusión económica y social.

Muchos países han adoptado por lo menos algunas medidas legislativas o de apoyo para promover la accesibilidad electrónica y algunos sectores de la industria de las TIC están haciendo importantes esfuerzos para mejorar la accesibilidad de sus productos y servicios[3].

La accesibilidad electrónica constituye también un elemento clave de la política europea de inclusión digital[4]. En un contexto más amplio, las TIC entran en el ámbito de aplicación de la propuesta de Directiva sobre igualdad de trato, que hace referencia al acceso a los bienes y servicios disponibles al público y al suministro de los mismos[5]. La Comunidad Europea y los Estados miembros deben también cumplir las obligaciones que les impone la Convención de las Naciones Unidas sobre los Derechos de las Personas con Discapacidad en relación con la accesibilidad de los bienes y servicios de TIC. Algunos actos de la legislación de la UE abordan ya, directa o indirectamente, problemas relacionados con la accesibilidad electrónica.

2.2. Justificación de la necesidad de nuevas actuaciones

Pese a los beneficios y a la atención política, los progresos en materia de accesibilidad electrónica siguen siendo insatisfactorios. Existen numerosos y llamativos ejemplos de deficiencias en la accesibilidad. Así por ejemplo, los servicios de retransmisión de texto, esenciales para los sordos y las personas con deficiencias en el habla, sólo están disponibles en la mitad de los Estados miembros; los servicios de urgencia son directamente accesibles por teléfono de texto en sólo siete Estados miembros; la radiodifusión con audiodescripción, los programas de televisión subtitulados y los programas de televisión con lenguaje de signos siguen siendo muy limitados; sólo el 8 % de los cajeros automáticos instalados por los dos principales bancos comerciales

europeos son capaces de «hablar»[6].

El acervo comunitario existente en materia de accesibilidad electrónica es bastante limitado. A nivel de Estado miembro, existe una fragmentación considerable en el trato dispensado a la accesibilidad electrónica, tanto en lo que se refiere a los problemas abordados (por regla general, accesibilidad en los servicios de telefonía fija, los servicios de radiodifusión televisiva y las páginas web públicas) como a la exhaustividad de los instrumentos políticos utilizados. Enfrentada a unos requisitos divergentes y a notables incertidumbres, la industria de las TIC se ve perjudicada por esta fragmentación del mercado que le impide obtener las economías de escala necesarias para la sustentar la innovación generalizada y el crecimiento del mercado. Algunos sectores de la industria manifiestan un compromiso activo y cooperan con los usuarios (p. ej., en el caso de la televisión digital accesible), pero son demasiados los que se mantienen al margen.

El problema clave de la accesibilidad electrónica es que los esfuerzos actuales no alcanzan suficiente repercusión dada la falta de coherencia, la escasa claridad en la fijación de prioridades y el magro apoyo legislativo y financiero.

Por ello, si se quieren conseguir mejoras significativas, resulta esencial un enfoque europeo común y coherente con respecto a la accesibilidad electrónica.

2.3. Acciones propuestas

1. Conseguir que la situación cambie: reforzar las prioridades políticas, la coordinación y la cooperación entre partes interesadas

A nivel europeo, se han acometido en los últimos años diversas actividades. Ahora es el momento de incrementar las sinergias entre ellas y reforzar las distintas áreas de actuación para lograr una repercusión más amplia y coherente.

Los Estados miembros, los usuarios y la industria deben intensificar sus esfuerzos y tratar de multiplicar el impacto a través de una mayor cooperación a nivel europeo y una mejor explotación de los actuales instrumentos políticos de la UE. A fin de sostener y fortalecer la coherencia y la eficacia de un enfoque común y de contribuir a definir las prioridades, la Comisión creará un grupo especial de alto nivel sobre accesibilidad electrónica , que dependerá del Grupo de alto nivel i2010, y reunirá a las organizaciones de consumidores y los representantes de los usuarios con discapacidad y de la tercera edad, las industrias de las TIC y de la tecnología y los servicios asistenciales, el mundo académico y las autoridades pertinentes.

A principios de 2009, la Comisión establecerá un grupo especial de alto nivel que facilitará orientaciones sobre las prioridades y aportará un enfoque más coherente en materia de accesibilidad electrónica. Se hace un llamamiento a las partes interesadas para que se comprometan con esta cooperación.

La Comisión potenciará su actual apoyo a la cooperación con las partes interesadas y de éstas entre sí. En particular, los grupos que siguen la ejecución de i2010, las cuestiones de normalización, los asuntos relacionados con las telecomunicaciones y el plan de acción en materia de discapacidad deberían fijar sus prioridades inspirándose en las orientaciones del grupo de alto nivel. También es importante que los usuarios, las autoridades pertinentes y la industria refuercen su compromiso y cooperación en las cuestiones relativas a la accesibilidad electrónica.

Es preciso seleccionar prioridades en relación con la accesibilidad electrónica. La primera es la accesibilidad web, a la que podrá aplicarse el enfoque coherente y común propuesto. A continuación figura la accesibilidad de la televisión digital y las comunicaciones electrónicas, incluida la accesibilidad del número único europeo de urgencia. En este caso, habrá que reforzar la cooperación de los usuarios y de la industria y, con ayuda del grupo de alto nivel, relacionarla mejor con el apoyo a la legislación y la innovación a nivel de la UE.

Los terminales de autoservicio y la banca electrónica constituyen otra de las principales prioridades[7]. Una estrecha cooperación de las partes interesadas ayudará a obtener orientaciones sobre nuevas prioridades y definir un programa común para el trabajo futuro.

La Comisión ha abordado ya la accesibilidad electrónica en su propuesta de nueva versión del marco europeo de interoperabilidad para la administración electrónica[8], y lo hará igualmente en las medidas continuadoras de la iniciativa i2010 y del Plan de acción sobre discapacidad.

La Comisión velará por que la accesibilidad electrónica siga constituyendo una prioridad política en las medidas continuadoras de i2010 y del Plan de acción sobre discapacidad.

Esta coordinación y cooperación más estrechas se verán reforzadas más aún a través de la mejor explotación de las actividades que a continuación se mencionan.

2. Seguimiento de los progresos y fortalecimiento de las buenas prácticas

La Comisión pondrá en marcha en 2009 un estudio de seguimiento de los progresos y de la aplicación de la accesibilidad electrónica en general y de la accesibilidad web en particular, continuador de los dos estudios realizados en 2006-2008[9].

Al amparo del Programa de Innovación y Competitividad (PIC) 2009, la Comisión propondrá una nueva red temática sobre accesibilidad electrónica y accesibilidad web para fomentar la cooperación entre las partes interesadas, la acumulación de experiencias y la recopilación de buenas prácticas. Tratará también de reforzar ePractice , red de intercambio de buenas prácticas en materia de administración, salud e inclusión electrónicas, que ha acumulado ya una gran cantidad de conocimientos técnicos sobre la accesibilidad electrónica.

La Comisión seguirá los progresos y la aplicación de la accesibilidad web y la accesibilidad electrónica y respaldará la cooperación y el intercambio de buenas prácticas mediante estudios y una red temática del PIC , que se pondrá en marcha en 2009.

3. Apoyo a la innovación y al despliegue

La investigación y la innovación relacionadas con la accesibilidad electrónica cuentan ya con amplios apoyos. En 2008, se financiaron 13 nuevos proyectos con aproximadamente 43 millones de euros procedentes del programa de investigación de la UE. La Comisión seguirá respaldando activamente la accesibilidad electrónica y las TIC al servicio de la autonomía de las personas de la tercera edad a través de los programas de investigación de la UE con una nueva convocatoria de propuestas en 2009.

La Comisión velará por que la accesibilidad electrónica siga siendo una de las prioridades esenciales de la investigación y la innovación en 2009 y años posteriores.

Los Estados miembros y la Comisión utilizarán el programa conjunto de investigación sobre la vida cotidiana asistida por el entorno (AAL), puesto en marcha en 2008, para fomentar las soluciones innovadoras basadas en las TIC para la vida autónoma y la prevención y gestión de las enfermedades crónicas de las personas de la tercera edad.

Al amparo del PIC de 2008, la Comisión ha financiado un proyecto piloto sobre televisión accesible y otros sobre TIC para la tercera edad a fin de acelerar el despliegue de la tecnología. En 2009, la Comisión financiará un proyecto piloto sobre «conversación total» (combinación de las comunicaciones de audio, texto y vídeo al servicio de las personas con discapacidad), que ayudará a las personas con deficiencias auditivas y del habla a acceder al número europeo de urgencia 112.

Se urge a los Estados miembros y a las partes interesadas a fomentar la innovación y el despliegue en materia de accesibilidad electrónica a través de los Fondos Estructurales, el 7º PM, el programa AAL y los programas nacionales.

El Reglamento de los Fondos Estructurales[10] exige que los Estados miembros consideren la accesibilidad de las personas con discapacidad como uno de los criterios para obtener financiación. En este contexto, la Comisión presentará en 2009 un «juego de herramientas para la discapacidad» aplicable a las TIC e instará a los Estados miembros y a las regiones a garantizar que la accesibilidad a las TIC sea incorporada en sus criterios de financiación y de contratación pública.

La Comisión presentará en 2009 un «juego de herramientas para la discapacidad» aplicable a las TIC para su uso en los Fondos Estructurales y otros programas.

4. Facilitar las actividades de normalización

La Comisión sigue prestando un decidido apoyo a la accesibilidad electrónica en su programa de trabajos de normalización. En particular, el mandato 376 conferido a las organizaciones europeas de normalización constituye una actividad de normalización importante para fomentar la accesibilidad electrónica[11]. La Comisión promoverá el uso de los resultados obtenidos en estos trabajos de normalización y procurará que se dé curso rápidamente al mencionado mandato para elaborar tanto las normas propiamente dichas como los regímenes de evaluación de la conformidad conexos. Este proceso será complementado y respaldado por el diálogo de las partes interesadas, el intercambio de buenas prácticas y proyectos piloto de despliegue, según consta en las acciones propuestas en la presente Comunicación.

En virtud del mandato 376, las organizaciones europeas de normalización deben elaborar

rápidamente unas normas comunitarias relativas a la accesibilidad electrónica, en cooperación con las partes interesadas pertinentes durante 2009 y años posteriores.

5. Explotar la legislación actual y estudiar la posible legislación nueva

Existe una correlación clara a nivel nacional entre la existencia de legislación y los progresos reales conseguidos en relación con la accesibilidad electrónica[12]. La investigación indica que existe el riesgo de fragmentación jurídica en la UE a causa de la adopción de medidas legislativas divergentes. Por este motivo, y apoyándose en las Comunicaciones de 2005 y 2007, la Comisión ha empezado a explorar un planteamiento legislativo más general en materia de accesibilidad electrónica.

No obstante, dado que el campo del accesibilidad electrónica se caracteriza por su amplitud, complejidad y rápida evolución, no existe aún un consenso claro sobre la posible legislación específica comunitaria al respecto[13], p. ej., en cuanto a elementos tales como el alcance, las normas, los mecanismos de observancia y las relaciones con la legislación en vigor. Además, aunque haya un claro consenso sobre la necesidad de actuar conjuntamente para mejorar la accesibilidad electrónica, discrepan las opiniones en cuanto a las prioridades más inmediatas. Por ello, la Comisión ha llegado a la conclusión de que todavía no es el momento de presentar una propuesta legislativa concreta sobre accesibilidad electrónica, pero seguirá evaluando su viabilidad y pertinencia, teniendo en cuenta los progresos reales registrados en este ámbito.

En cualquier caso, existen disposiciones en la actual legislación de la UE que están poco explotadas, en particular en relación con los equipos de radiocomunicación y telecomunicación, las comunicaciones electrónicas, la contratación pública, los derechos de autor en la sociedad de la información, la igualdad en el empleo, los impuestos sobre el valor añadido y las excepciones aplicables a las ayudas estatales[14]. Aprovechar al máximo estas disposiciones supondría ya una mejora significativa de la accesibilidad electrónica en los Estados miembros. Por ello, la Comisión insta a los Estados miembros a sacar el máximo partido de la legislación existente antes de pensar en otra nueva.

Varias de las disposiciones legislativas comunitarias mencionadas se encuentran actualmente, o se encontrarán pronto, en proceso de revisión[15]. La Comisión trabajará para garantizar que, cuando proceda, se tengan en cuenta y se refuercen en estas revisiones los requisitos relacionados con la accesibilidad electrónica. Además, las propuestas legislativas sobre las comunicaciones electrónicas potencian sensiblemente las disposiciones del marco actual referentes a los usuarios con discapacidad. La Comisión efectuará asimismo un atento seguimiento de la transposición y aplicación de la Directiva sobre servicios de medios audiovisuales[16], y en particular de su artículo 3 quater , que prevé que los Estados miembros alienten a los prestadores de servicios de comunicación audiovisual bajo su jurisdicción a garantizar que sus servicios sean gradualmente accesibles a las personas con una discapacidad visual o auditiva.

La Comisión velará por que se integren en las revisiones de la legislación comunitaria unas disposiciones adecuadas en relación con accesibilidad electrónica . Los Estados miembros, las partes interesadas y la Comisión deben aprovechar al máximo las oportunidades que brinda la legislación actual para reforzar la accesibilidad electrónica.

3. ACCESIBILIDAD WEB

La accesibilidad web constituye un aspecto importante del accesibilidad electrónica, pues ofrece a las personas con discapacidad la posibilidad de percibir, comprender, navegar, interactuar y realizar aportaciones a la web. También resulta beneficiosa para otras personas con limitaciones de tipo visual, cognitivo o de la destreza, como por ejemplo las personas de la tercera edad. La accesibilidad web ha adquirido particular importancia a causa del crecimiento exponencial de los servicios interactivos y de información en línea: banca, compra, administración y servicios públicos y comunicación a distancia con parientes o amigos.

3.1. Situación actual

Pese a su importancia, el nivel global de la accesibilidad web sigue siendo bajo en la UE. Varias encuestas nacionales y europeas realizadas a lo largo de los últimos años han puesto de manifiesto que la mayoría de las páginas web, públicas o privadas, no respetan ni siquiera las directrices más básicas sobre accesibilidad aceptadas internacionalmente. Una encuesta reciente reveló que sólo el 5,3 % de los sitios web de la administración pública, y apenas algunos de los comerciales, estudiados observaban plenamente las directrices básicas sobre accesibilidad[17]. Esto explica por qué a muchas personas les resulta difícil utilizar Internet y corren, en consecuencia, el riesgo de quedar parcial o totalmente excluidos de la sociedad de la

información.

La accesibilidad de los sitios web públicos ha sido objeto de una atención política creciente en los Estados miembros a lo largo de los últimos años[18]. A nivel europeo, una Comunicación de 2001 sobre accesibilidad web instaba a los Estados miembros a respaldar las Web Content Accessibility Guidelines (WCAG)[19]. En dos resoluciones[20], el Consejo ha subrayado la necesidad de acelerar la accesibilidad a Internet y a sus contenidos. El Parlamento Europeo propuso en 2002 que todos los sitios web públicos fueran plenamente accesibles para las personas con discapacidad para el año 2003[21]. En 2006, la Declaración Ministerial de Riga sobre una sociedad de la información incluyente incorporaba el compromiso de que la totalidad de los sitios web públicos fueran accesibles para el año 2010.

A nivel internacional, la versión 1 de las WCAG fue adoptada en 1999 por el World Wide Web Consortium (W3C). Sin embargo, sus ambigüedades permitieron su aplicación fragmentada por parte de los Estados miembros y, a la vista de la evolución reciente de Internet, las WCAG 1.0 están quedándose anticuadas. El W3C ha estado trabajando durante varios años sobre una versión nueva de las especificaciones (WCAG 2.0), que se encuentra ya en las etapas finales previas a su aprobación. El reto es evitar esta vez una aplicación fragmentada.

3.2. Justificación de la necesidad de nuevas actuaciones

Conseguir que los sitios web sean más accesible puede constituir en algunos casos todo un reto, pues comporta determinados gastos y exige ciertos conocimientos técnicos. Sin embargo, existen pruebas crecientes y ejemplos documentados de que las páginas web accesibles aportan beneficios reales no sólo a los usuarios con discapacidad, sino también a los propietarios del sitio y a los usuarios en general. Los servicios son más fáciles de utilizar, más sencillos de mantener y son visitados por más usuarios[22]. En consecuencia, mejorar la accesibilidad de un sitio favorece tanto a las personas con discapacidad como también a otras y puede, por lo tanto, reforzar la competitividad de las empresas europeas.

Estudio de caso: beneficios asociados a un sitio web accesible

Tras hacer accesible su sitio web, una empresa de servicios financieros británica detectó los siguientes beneficios:

- Los clientes encontraban la información con mayor rapidez y permanecían en sus páginas durante más tiempo.

- El servicio era utilizado por clientes nuevos, lo que aumentaba las ventas en línea.

- El mantenimiento del sitio web era más sencillo, rápido y barato.

- Los motores de búsqueda presentaban el sitio web en posiciones mucho más prominentes.

- Se eliminaron los problemas de compatibilidad y mejoró el acceso con dispositivos móviles.

- Recuperación total de la inversión en menos de 12 meses.

Pese a todo, la persistente fragmentación de la legislación en los Estados miembros, combinada con la ausencia de una acción legislativa clara a nivel europeo, sigue obstaculizando el mercado interior, poniendo trabas a los consumidores y a los ciudadanos en este ámbito transfronterizo y constituyendo una rémora para el desarrollo de la industria. La Convención de las Naciones Unidas sobre los Derechos de las Personas con Discapacidad prevé obligaciones relacionadas con Internet que los Estados parte deben cumplir. En consecuencia, procede adoptar nuevas medidas a nivel europeo.

3.3. Acciones propuestas

La responsabilidad primaria de mejorar la accesibilidad web corresponde a los Estados miembros y a los proveedores de servicios. No obstante, la Comisión puede emprender o facilitar algunas acciones que contribuyan a acelerar la mejora en Europa, incluso en ausencia de disposiciones legislativas comunitarias específicas sobre accesibilidad web. El éxito se conseguirá a través de un enfoque común y coherente. Los ámbitos de actuación clave serán:

6. Facilitar la rápida adopción y aplicación en Europa de las directrices internacionales

Existe un amplio consenso en que las directrices WCAG 2.0 son las especificaciones técnicas que conviene seguir estrictamente en el ámbito de la accesibilidad web. Una vez que el W3C llegue a un acuerdo sobre las directrices, cosa que se espera ocurra en un futuro próximo, el mandato 376 podrá concluir sus trabajos armonización a nivel europeo. Mientras tanto, conviene que los Estados miembros acometan acciones encaminadas a garantizar la consecución del objetivo de Riga en relación con los sitios web accesibles al público y a preparar la rápida incorporación a la

normativa nacional de las nuevas especificaciones sobre accesibilidad web, de manera común y coherente, mediante:

- la publicación, en 2009-2010, de unas orientaciones técnicas actualizadas y, cuando proceda, la traducción de las especificaciones pertinentes del W3C;

- la determinación, en 2009, de los sitios web públicos y las intranets[23] afectadas, a fin de lograr su accesibilidad en 2010 a más tardar.

La Comisión seguirá trabajando para mejorar la accesibilidad de sus páginas web, actualizando sus orientaciones internas para adecuarlas a las nuevas especificaciones.

Se insta también a los proveedores de servicios no públicos, en particular a los propietarios de sitios web que presten servicios de interés general[24] y a los proveedores de sitios comerciales que resultan clave para la participación en la economía y en la sociedad, a que mejoren la accesibilidad web (a partir de 2008).

Los Estados miembros deben conseguir la accesibilidad plena de los sitios web públicos para 2010 a más tardar y preparar una rápida transición a unas especificaciones actualizadas sobre accesibilidad web de manera común y coherente .

Los propietarios de sitios web que presten servicios de interés general y otros propietarios de sitios pertinentes deben mejorar la accesibilidad de los mismos.

Las organizaciones europeas de normalización, en cooperación con las partes interesadas, deben elaborar rápidamente unas normas comunitarias sobre accesibilidad web , apoyándose en las WCAG 2.0.

La Comisión está trabajando en la mejora de la accesibilidad de sus páginas web, actualizando las orientaciones internas para adecuarlas a las nuevas especificaciones.

La Comisión respaldará todas estas actividades y efectuará un seguimiento de las mismas, instando a los Estados miembros a tomar medidas urgentes sobre los aspectos esenciales de su aplicación y facilitando la recopilación y el intercambio de experiencias prácticas, principalmente a través de la plataforma ePractice [25]. En función de los progresos conseguidos, y cuando se disponga ya de las correspondientes normas, la Comisión estudiará la necesidad de unas orientaciones comunitarias comunes, incluidas posibles medidas legislativas[26].

La Comisión efectuará un seguimiento de los progresos conseguidos, los hará públicos y examinará la necesidad de unas orientaciones comunitarias comunes, incluidas posibles medidas legislativas (a partir de 2009).

7. Mejorar la comprensión de la accesibilidad web y fomentarla

Existe una palpable necesidad de incrementar la visibilidad, comprensión y conocimiento de las necesidades y soluciones en materia de accesibilidad web. Los Estados miembros deben asumir un papel de liderazgo al respecto:

- promoviendo ampliamente la accesibilidad de los sitios web al aportar una información y unas orientaciones claras al respecto, con inclusión de las tecnologías asistenciales[27], y fomentando el uso de las declaraciones de accesibilidad[28];

- respaldando los planes de formación, la puesta en común de los conocimientos y el intercambio de buenas prácticas;

- adquiriendo herramientas y sitios web accesibles cuando efectúen contrataciones públicas;

- asignando un punto nacional de contacto sobre accesibilidad web, p. ej., mediante un sitio web, en 2009;

- efectuando un seguimiento de los progresos conseguidos en materia de cumplimiento, satisfacción del usuario y costes de implantación de la accesibilidad web en sitios tanto públicos como de otro tipo, e informando al respecto al grupo de alto nivel propuesto y al público en general.

Los Estados miembros deben tomar la iniciativa en la mejora del conocimiento y la comprensión de la accesibilidad web de manera coherente, eficiente y eficaz e informar al grupo de alto nivel sobre los progresos conseguidos.

4. CONCLUSIÓN

Resulta necesaria una actuación común y coherente en diversos frentes para conseguir la accesibilidad electrónica. En particular, resulta esencial obtener progresos rápidos e inmediatos en relación con la accesibilidad web. Todas las partes interesadas tienen un papel decisivo que desempeñar a la hora de conseguir el objetivo común de una sociedad de la información

verdaderamente incluyente.

La Comisión invita al Consejo, al Parlamento Europeo, al Comité de las Regiones y al Comité Económico y Social Europeo a manifestar su opinión sobre las acciones que deben emprenderse para conseguir que la sociedad de la información resulte accesible para todos.

Anexo – resumen de las acciones

Accesibilidad electrónica

Acciones | Fecha | Responsable |

Establecer un grupo especial de alto nivel que facilite orientaciones sobre las prioridades y sobre un enfoque más coherente en relación con la accesibilidad electrónica. Se hace un llamamiento a las partes interesadas para que se comprometan con esta cooperación. | Principios de 2009 | CE, partes interesadas |

Velar por que la accesibilidad electrónica siga constituyendo una prioridad política en las medidas continuadoras de i2010 y del Plan de acción sobre discapacidad. | 2009- | CE |

Efectuar un seguimiento de los progresos y la aplicación de la accesibilidad web y la accesibilidad electrónica y respaldar la cooperación y el intercambio de buenas prácticas mediante estudios y una red temática del PIC. | 2009- | CE, industria y partes interesadas |

Velar por que la accesibilidad electrónica sea una prioridad esencial de la investigación y la innovación. | 2009 - | CE |

Fomentar la innovación y el despliegue en materia de accesibilidad electrónica a través de los Fondos Estructurales, el 7º PM, el programa AAL y los programas nacionales. | 2009 - | EE. MM., otras partes interesadas |

Presentar un «juego de herramientas para la discapacidad» aplicable a las TIC para su uso en los Fondos Estructurales y otros programas. | 2009 | CE |

En virtud del mandato 376, elaborar rápidamente unas normas comunitarias sobre accesibilidad electrónica, en cooperación con las partes interesadas pertinentes. | 2009- | Organizaciones europeas de normalización |

Velar por la integración en las revisiones de la legislación comunitaria de las disposiciones adecuadas en relación con la accesibilidad electrónica. | 2008- | CE |

Aprovechar al máximo las oportunidades que brinda la legislación actual para reforzar la accesibilidad electrónica. | 2008- | EE. MM., CE industria y partes interesadas |

Accesibilidad web

Conseguir la accesibilidad plena de los sitios web públicos y preparar una rápida transición a unas especificaciones actualizadas sobre accesibilidad web de manera común y coherente. | 2009-2010 | EE. MM. |

Elaborar rápidamente unas normas comunitarias sobre accesibilidad web, apoyándose en las WCAG 2.0 | 2009- | Organizaciones europeas de normalización (y partes interesadas) |

Mejorar la accesibilidad de las páginas web de la Comisión, actualizando las orientaciones internas para adecuarlas a las nuevas especificaciones. | 2009- | CE |

Mejorar la accesibilidad de los sitios web cuyos propietarios prestan servicios de interés general, así como de otros sitios web relevantes. | 2009- | Otras partes interesadas |

Efectuar un seguimiento de los progresos alcanzados, hacerlos públicos y examinar la necesidad de unas orientaciones comunitarias comunes, incluidas posibles medidas legislativas. | 2009- | CE |

Tomar la iniciativa en la mejora del conocimiento y la comprensión de la accesibilidad web de manera coherente, eficiente y eficaz, e informar al grupo de alto nivel sobre los progresos conseguidos. | 2008- | EE. MM. |

[1] COM(2008) 412.

[2] The Demographic Change — Impacts of New Technologies and Information Society .

[3] Véanse detalles en el documento de trabajo de los servicios de la Comisión adjunto.

[4] Comunicación i2010, COM(2005) 229, Comunicación sobre la accesibilidad electrónica, COM(2005) 425 y Comunicación sobre la inclusión digital, COM(2007) 694.

[5] COM(2008) 426.

[6] Véanse detalles en el estudio MeAC (Measuring progress of e-accessibility in Europe).

[7] Véase el informe sobre la consulta pública.

[8] http://ec.europa.eu/idabc/en/document/7728.

[9] MeAC y estudio sobre la accesibilidad de los productos y servicios de TIC para las personas con discapacidad y de la tercera edad.

[10] Reglamento (CE) nº 1083/2006 del Consejo.

[11] El objetivo del mandato 376 es facilitar el uso de la contratación pública y las buenas prácticas en materia de TIC para suprimir los obstáculos que dificultan la participación de las personas con discapacidad o de la tercera edad en la sociedad de la información. La Comisión Europea confirió a las organizaciones europeas de normalización el mandato de presentar una solución para los requisitos comunes (por ejemplo, tamaños de texto, contraste de pantalla, tamaños de teclados, etc.) y la evaluación de la conformidad.

[12] Véanse MeAC y estudio sobre la accesibilidad de los productos y servicios de TIC para las personas con discapacidad y de la tercera edad.

[13] En la consulta pública, el 90 % de las organizaciones de usuarios conferían una elevada prioridad a la legislación vinculante, frente a sólo un 33 % de la industria y las autoridades públicas.

[14] Directivas 2000/78/CE, 2002/21/CE, 1999/5/CE, 2004/18/CE, 2001/29/CE y 2007/65/CE.

[15] Por ejemplo, está revisándose la Directiva 1999/5/CE sobre equipos terminales: en este contexto, la Comisión velará por que se mantenga la posibilidad de activar el artículo 3, apartado 3, letra f).

[16] Directiva 2007/65/CE.

[17] Estudio MeAC.

[18] Véase el documento de trabajo de los servicios de la Comisión adjunto.

[19] COM(2001) 529.

[20] 2002/C 86/02 y 2003/C 39/03.

[21] C5-0074/2002-2002/2032(COS).

[22] Documento de trabajo de los servicios de la Comisión.

[23] De conformidad con Directiva 2000/78/CE sobre igualdad de trato en el empleo.

[24] Mencionados en COM(2007) 725.

[25] www.epractice.eu.

[26] Véase la evaluación de impacto de COM 2007 (694).

[27] Equipos de TIC que potencian las capacidades funcionales de las personas con discapacidad.

[28] Que aportan información de apoyo tal como: política del sitio web en materia de accesibilidad, cumplimiento de las especificaciones pertinentes, apoyo a las personas con discapacidad o mecanismos de presentación de quejas.

COMISIÓN DE LAS COMUNIDADES EUROPEAS

Bruselas, 13.9.2005
COM(2005)425 final

COMUNICACIÓN DE LA COMISIÓN AL CONSEJO, AL PARLAMENTO EUROPEO AL COMITÉ ECONÓMICO Y SOCIAL EUROPEO Y AL COMITÉ DE LAS REGIONES

La accesibilidad electrónica

[SEC(2005) 1095]

COMUNICACIÓN DE LA COMISIÓN AL CONSEJO, AL PARLAMENTO EUROPEO AL COMITÉ ECONÓMICO Y SOCIAL EUROPEO Y AL COMITÉ DE LAS REGIONES

La accesibilidad electrónica

Las tecnologías de la información y la comunicación (TIC) accesibles mejorarán significativamente la calidad de vida de las personas con discapacidad. Por otra parte, la desigualdad de oportunidades en el acceso a las TIC puede conducir a la exclusión. En la presente Comunicación, la Comisión propone un conjunto de iniciativas políticas para el fomento de la accesibilidad electrónica. Así, se insta a los Estados miembros y partes interesadas a que den su apoyo a iniciativas positivas de carácter voluntario que permitan difundir más los productos y servicios accesibles de las TIC en Europa.

Esta Comunicación sobre la accesibilidad electrónica contribuye a la ejecución de la reciente iniciativa «**i2010 - Una sociedad de la información europea para el crecimiento y el empleo**»[1], que presenta un nuevo marco estratégico y orientaciones políticas amplias para promover una economía digital abierta y competitiva, destacando el papel de las TIC como impulsoras de la inclusión y la calidad de vida. La Comisión alberga el ambicioso objetivo de alcanzar una «sociedad de la información para todos» fomentando una sociedad digital incluyente que brinde oportunidades a todos y reduzca al mínimo el riesgo de marginación.

1. INTRODUCCIÓN

Las personas con discapacidad representan aproximadamente el 15 % de la población europea, y muchas encuentran barreras cuando utilizan productos y servicios de TIC. En algunos casos, las personas mayores se enfrentan con problemas análogos. La accesibilidad de los productos y servicios de TIC se ha convertido en una prioridad en Europa, como consecuencia del cambio demográfico: si en 1990 el 18 % de la población europea tenía más de 60 años, este porcentaje se incrementará hasta el 30 % en el año 2030, según las previsiones actuales[2].

En un reciente estudio realizado en los Estados Unidos[3] se puso de manifiesto que el 60 % de los adultos en edad laboral podrían beneficiarse del uso de tecnologías accesibles, ya que experimentan algunas dificultades o deficiencias leves al utilizar las actuales tecnologías.

Otro estudio llevado a cabo en 2002[4] en Europa reveló que más del 48 % de los mayores de 50 años consideraban que los fabricantes no les tenían en cuenta de manera adecuada en el diseño de sus productos. Sin embargo, el número de clientes potenciales de nuevos teléfonos móviles, ordenadores y servicios de Internet en ese grupo de edad se sitúa entre 10 y 12 millones.

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1 COM(2005) 229 final de 1 de junio de 2005.

2 Perspectivas de la población en el mundo (Revisión 2002) de las Naciones Unidas, y previsiones demográficas de Eurostat.

3 Forrester Research, Inc.: The Wide Range of Abilities and Its Impact on Computer Technology, 2003.

4 Seniorwatch IST-1999-29086 www.seniorwatch.de

Las consecuencias de lo expuesto son claras: **ofrecer las ventajas de las TIC al mayor número posible de personas constituye un imperativo social, ético y político.** Además, estos mercados están generando una importancia económica cada vez mayor.

La superación de las barreras y dificultades técnicas con las que se encuentran sufren las personas con discapacidad y otros grupos cuando intentan participar en igualdad de condiciones en la sociedad de la información se conoce como «*accesibilidad electrónica*». Esta noción forma parte del concepto más amplio de «inclusión electrónica», que trata también otros tipos de barreras de carácter económico, geográfico o educativo.

La presente Comunicación se basa en trabajos realizados anteriormente en el campo de la accesibilidad electrónica en virtud de los dos planes de acción eEurope y en las conclusiones y resultados de diversos proyectos de IDT. Asimismo integra los principales datos obtenidos en una **consulta en línea**[5] que se realizó a principios de 2005, en la cual se puso de manifiesto la existencia de un amplísimo respaldo (más del 88 %) a la idea de que las instituciones europeas tomen medidas para afrontar lo que la mayoría de las respuestas (más del 74 %) entiende como una falta de coherencia en los productos y servicios de TIC accesibles en Europa. También se considera necesaria una mayor oferta de productos y servicios accesibles (84 % de las respuestas).

El principal objetivo de la presente Comunicación es promover un enfoque coherente de las iniciativas relacionadas con la accesibilidad electrónica en los Estados miembros de manera voluntaria, así como fomentar la autorregulación del sector industrial.

2. DESAFÍOS PRÁCTICOS

Las nuevas tecnologías ofrecen ya una importante ayuda para las personas con discapacidad, al brindarles la oportunidad de realizar de manera independiente funciones que en el pasado sólo eran posibles con ayuda humana. Sin embargo, a pesar de los esfuerzos del sector, las personas con discapacidades siguen quejándose de múltiples problemas cuando intentan utilizar productos y servicios relacionados con las tecnologías de información, por ejemplo:

- falta de soluciones armonizadas, por ejemplo, imposibilidad de acceder al número de urgencia112 a partir de teléfonos de texto en numerosos Estados miembros;
- falta de soluciones interoperables para TIC accesibles;
- incompatibilidades del *software* con dispositivos de apoyo: a menudo, los lectores de pantalla para usuarios ciegos presentan dificultades en el uso cuando se instala una nueva versión del sistema operativo;
- interferencia entre productos comunes y dispositivos de apoyo, por ejemplo, entre teléfonos móviles y audífonos;
- ausencia de normas de alcance europeo, por ejemplo, la incompatibilidad de la siete distintas sistemas de teléfono de texto para sordos y personas con dificultades auditivas
- falta de servicios adecuados, por ejemplo, numerosos sitios web son demasiado complicados para los usuarios no experimentados o que tienen alguna

[5] Resultados disponibles en: http://europa.eu.int/information_society/policy/accessibility/com_ea_2005/a_documents/com_consult_res.html#_Toc97028181

discapacidad cognitiva, o resultan de imposible lectura o navegación para personas con discapacidad visual;
- inexistencia de productos y servicios para determinados grupos, por ejemplo, la comunicación telefónica para usuarios del lenguaje de signos;
- diseños físicos de difícil uso, por ejemplo, los teclados y pantallas de numerosos dispositivos;
- falta de contenido accesible;
- posibilidades de elección limitadas en materia de servicios de comunicación, calidades y precios.

En principio, muchos de estos problemas podrían solventarse con facilidad desde un punto de vista técnico, pero en la práctica requieren cooperación, coordinación y determinación a nivel europeo, ya que, hasta la fecha, las fuerzas del mercado no parecen haber dado una respuesta suficiente.

En un futuro proximo, ejemplos de nuevas tecnologías cuyos aspectos relacionados con la accesibilidad se deben considerar desde un principio son los siguientes:

- la televisión digital, por ejemplo, en lo que respecta a las normas y la compatibilidad, así como el diseño de servicios y equipos;
- los teléfonos móviles de tercera generación, por ejemplo, en relación con el diseño de los equipos, del *software* y de los servicios;
- la comunicación de banda ancha, por ejemplo, utilizándose las posibilidades de las presentaciones multimodales de modo que se mejore la accesibilidad, en lugar de lo contrario.

Abordar estas cuestiones, que hace algún tiempo se consideraban de interés exclusivamente para un segmento específico de la población, tendrá repercusiones positivas para la mayor parte de los usuarios de la tecnología.

3. ASPECTOS COMERCIALES Y ECONÓMICOS

Para algunos de los desafíos expuestos en las páginas anteriores han surgido soluciones innovadoras en los ámbitos de la investigación y el mercado de las TIC. Los principales obstáculos que se oponen a la difusión de dichas soluciones son los siguientes:

- hasta hoy, estas soluciones se han enfocado a un mercado reducido (esencialmente, las personas con discapacidad y, en algunos casos, los mayores), principalmente a través de pymes y en los niveles nacional o regional;
- hay escasez de normas y especificaciones técnicas aplicables;
- la legislación europea en esta materia apenas ha comenzado a contemplar la posibilidad de incorporar requisitos de accesibilidad a las especificaciones técnicas utilizadas en los procedimientos de contratación pública;
- existen diferencias importantes en el modo en que algunos Estados miembros han elaborado sus propias soluciones.

Como consecuencia, el mercado de productos y servicios de TIC accesibles se mantiene en fase embrionaria, adolece de un importante grado de fragmentación nacional, y carece de legislación armonizada y normas técnicas aplicables. Ello no facilita el funcionamiento del

mercado interior, y supone para el sector industrial una dificultad añadida cuando se intentan cumplir los diversos requisitos exigidos por los distintos Estados miembros.

Actualmente gana terreno la consideración de que los consumidores de estos productos no son solamente las personas con discapacidad y, en algunos casos, los mayores, sino toda la población. Tal interpretación supone una transformación del mercado que empieza a observarse en la actualidad, al empezar a dirigir las grandes empresas europeas su atención a este sector, aunque todavía sin volcar en él todo su peso.

Lo mismo ocurre en el ámbito de las telecomunicaciones -la omnipresencia de sus productos y servicios es tal que incluso este nicho de mercado (relativamente pequeño hasta ahora) resulta significativo como diferenciador y generador de crecimiento y empieza a suscitar el interés de los principales actores del sector.

En conclusión, la accesibilidad electrónica y los productos y servicios relaccionadas con las tecnologías de apoyo ocupan ya un lugar en los planes y proyecciones a medio plazo incluso de los mayores mainstream proveedores generales de tecnología, no solamente europeos sino también de otros lugares del mundo.

4. ASPECTOS JURÍDICOS Y POLÍTICOS

En diversas ocasiones el Consejo ha pedido medidas a nivel de la UE en este ámbito, por ejemplo, cuando solicitó a los Estados miembros e invitó a la Comisión a «*aprovechar las posibilidades de la sociedad de la información para las personas con discapacidad y, en particular, a emprender la supresión de las barreras técnicas, legales y de otro tipo para que participen efectivamente en la economía y en la sociedad basadas en el conocimiento*»[6]. El Parlamento Europeo se ha manifestado también favorable a esta idea[7].

En particular, en las políticas y la legislación europea se considera que el empleo y la ocupación son elementos clave para garantizar la igualdad de oportunidades para todos y contribuyen decisivamente a la plena participación de los ciudadanos en la vida económica, cultural y social, así como a la realización de su potencial. La repercusión en este ámbito de una mayor disponibilidad de productos y servicios de TIC de calidad y accesibles resulta evidente. Dichos productos y servicios acrecentarían la empleabilidad y la inclusión social, y brindarían a las personas la oportunidad de vivir de manera independiente durante más tiempo.

Las instituciones europeas han manifestado en numerosos contextos la necesidad de incorporar a todos los europeos a la sociedad de la información. En los dos planes de acción eEurope, la Comisión ha propuesto iniciativas para crear una sociedad de la información más accesible. El Plan de acción 2002 incluía una línea de actuación dedicada expresamente a estas cuestiones. Allí se recomienda la adopción de las Pautas de la Iniciativa para la accesibilidad a la Web (WAI)[8], la elaboración de un Currículum europeo de diseño para todos

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6 «Accesibilidad electrónica» para las personas con discapacidades», Resolución del Consejo de 2-3 de diciembre de 2002, http://ue.eu.int/ueDocs/cms_Data/docs/pressData/es/lsa/73857.pdf

7 Resolución del Parlamento Europeo sobre la Comunicación «eEurope 2002: Accesibilidad de los sitios Web públicos y de su contenido», 2002 (0325)).

8 «eEurope 2002: Accesibilidad de los sitios Web públicos y de su contenido», COM(2001) 529 final, http://europa.eu.int/eur-lex/es/com/cnc/2001/com2001_0529es01.pdf

(DFA), y fortalece la normalizacion de las tecnologias de apoyo y del DFA. En el Plan de acción 2005 de eEurope, el objetivo es integrar la inclusión electrónica a todas las líneas de actuación. Asimismo se propone incorporar los requisitos de accesibilidad a las TIC a la contratación pública.

Apoyando este trabajo, el Consejo de Telecomunicaciones ha expresado la necesidad de mejorar la accesibilidad electrónica en Europa[9]. En la misma línea, la Declaración Ministerial sobre la inclusión electrónica[10] insta a que se tomen todas las medidas necesarias que conduzcan a una sociedad basada en el conocimiento abierta, incluyente y accesible a todos los ciudadanos.

Por otra parte, el Consejo de Asuntos Sociales, en su Resolución sobre la accesibilidad electrónica de 2003[11], instó a los Estados miembros a que abordasen la eliminación de las barreras técnicas, jurídicas y de otro tipo que dificultan la efectiva participación de las personas con discapacidad en la economía y la sociedad basadas en el conocimiento.

Análogamente, el Parlamento Europeo, en su resolución de 2002 sobre la accesibilidad a la Web[12], «*reitera la necesidad de evitar toda forma de exclusión de la sociedad y, por lo tanto, de la sociedad de la información, y aboga por la integración, en particular, de las personas con discapacidad y de edad avanzada*». Asimismo la utilización del lenguaje de signos en las telecomunicaciones europeas es mencionada en otra resolución[13].

En un sentido general, el artículo 13 del Tratado constitutivo de la CE dispone que ésta adoptará medidas para luchar contra la discriminación motivada, entre otras causas, por la discapacidad.

Sobre la base de dicho artículo, la Directiva 2000/78/CE del Consejo, de 27 de noviembre de 2000[14], tiene por objetivo expreso (artículo 1) «*...establecer un marco general para luchar contra la discriminación por motivos de religión o convicciones, de discapacidad, de edad o de orientación sexual en el ámbito del empleo y la ocupación,*». En particular, la Directiva señala que *«es preciso establecer medidas adecuadas, es decir, medidas eficaces y prácticas para acondicionar el lugar de trabajo en función de la discapacidad, por ejemplo adaptando las instalaciones,* ***equipamientos****, …»*

Además, una serie de directivas que regulan la sociedad de información contienen disposiciones relativas a la inclusión de las personas con discapacidad y los mayores. Se trata de las directivas sobre la comunicación electrónica, en particular, la Directiva marco[15] y la de servicio universal[16], la Directiva sobre equipos terminales de radio y telecomunicación

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9 Resolución del Consejo sobre el Plan de acción eEurope 2002: Accesibilidad de los sitios Web públicos y de su contenido, DO C 86, 10.4.2002.

10 Declaración Ministerial sobre la inclusión electrónica, 11 de abril de 2003 http://www.eu2003.gr/en/articles/2003/4/11/2502/

11 Resolución 14892/02 del Consejo.

12 Resolución del Parlamento Europeo sobre eEurope 2002: Accesibilidad de los sitios Web públicos y de su contenido (2002 (0325)).

13 Resolución del Parlamento Europeo sobre el lenguaje mímico - Resolución B4/ 0985/98.

14 Disponible en http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/2000_78_es.pdf

15 Directiva 2002/21/CE.

16 Directiva 2002/22/CE.

(RTTE)[17], así como la Directiva sobre contratación pública[18] y la Directiva de igualdad en el empleo[19].

El plan de acción de la Comisión[20] sobre el seguimiento del año europeo de las personas con discapacidad, publicado en 2003, incluía como una de sus cuatro líneas de actuación el acceso a las nuevas tecnologías y la utilización de éstas, y describía las actuaciones para mejorar la accesibilidad a la sociedad de la información mediante instrumentos disponibles a nivel de la UE.

Las actividades de la UE en este campo poseen un valor añadido especial, ya que varios Estados miembros están preparando leyes, reglamentaciones, normas o directrices para tratar todas estas cuestiones en el plano nacional. Tales iniciativas conducen a la existencia simultánea de requisitos similares, aunque no idénticos, en materia de accesibilidad electrónica de productos y servicios, lo cual genera un importante riesgo para el sector europeo, que puede verse obligado a operar en un mercado fragmentado, con la consiguiente pérdida de competitividad y eficacia.

Para los consumidores el riesgo es todavía mayor, en especial si se piensa en las personas con discapacidades y los mayores: un mercado fragmentado significa productos más costosos, menos conocidos y mutuamente incompatibles, así como una mayor dificultad para acceder a la información o hacerla circular a través de las fronteras, etc.

Las iniciativas de la UE tienen también en cuenta las experiencias internacionales, tales como las desarrolladas en los Estados Unidos y Canadá, países con los que la Comisión Europea ha iniciado un diálogo, en particular, con respecto al uso de disposiciones legislativas en el contexto de la contratación pública, lo que puede tener efectos muy considerables.

En consecuencia, se dan las condiciones básicas para la adopción de iniciativas a nivel de la UE, tal como manifestó una abrumadora mayoría de los “actors” en el proceso de consulta pública (84 %).

5. ACTIVIDADES DE LA UE EN CURSO DE EJECUCION

Hay en marcha varias iniciativas de la UE que serán reforzadas y continuadas.

Requisitos y normas de accesibilidad

Las normas constituyen un instrumento estratégico para la industria y el sector público, así como un factor clave para la aparición de nuevas oportunidades comerciales. Aunque la elaboración y aplicación de normas tienen carácter voluntario, las normas son una herramienta importante en apoyo de la ejecución de iniciativas políticas. La existencia de normas europeas de accesibilidad electrónica contribuiría al buen funcionamiento del mercado interior europeo y, en consecuencia, favorecería el desarrollo de nuevos mercados y promovería la competitividad y el empleo. Por este motivo, la Comisión continuará brindando su apoyo

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17 Directiva 1999/5/CE.

18 Directivas 2004/17/CE y 2004/18/CE.

19 Directiva 2000/78/CE.

20 Igualdad de oportunidades para las personas con discapacidad: un plan de acción europeo COM(2003)650 final.

económico a las actividades específicas propuestas por las organizaciones europeas de normalización (ESO) en el marco del plan de acción de normalización europea, o cursará los oportunos mandatos a dichas organizaciones[21].

Los requisitos de accesibilidad especificados en las normas deben satisfacer las necesidades del sector, los diseñadores y los proveedores de productos y servicios, para evitar convertirlos en trabas a la creatividad o la innovación. Al mismo tiempo, deben satisfacer también las necesidades de los usuarios y, por ese motivo, la participación de estos últimos en su desarrollo es esencial. Se debe encontrar un equilibrio entre el interés del sector y el interés público. Las normas deben poder aplicarse y servir de referencia en la legislación, la reglamentación y otros instrumentos que promuevan la accesibilidad. Ofrecer las normas gratuitamente o a bajo coste facilitaría tanto su asimilación, especialmente entre las pymes, que disponen de recursos limitados para su adquisición, como el acceso a las mismas por parte de los usuarios.

Aun cuando se fomente la interoperabilidad, se debe cuidar de no promover como soluciones normalizadas aquellas tecnologías patentadas que no estén sometidas a sistemas de licencia razonable y no discriminatoria (RAND).

Diseño para todos (DFA)

La metodología DFA hace referencia al diseño de productos y servicios accesibles a la mayor variedad posible de usuarios[22]. El DFA está bien consolidado actualmente, aunque todavía no se practica de forma generalizada. Por lo tanto, es esencial proseguir las actuales actividades de sensibilización y fomento en Europa. Con ese fin, la Comisión ha creado una red de centros de excelencia conocida como EDEAN[23], que cuenta con más de un centenar de miembros.

El DFA no sólo permite una **consideración más detenida de los requisitos de accesibilidad cuando se diseña un producto o servicio**, sino que también favorece **importantes ahorros al evitar que hayan de realizarse onerosos cambios de diseño o modificaciones técnicas** una vez desplegado el producto o servicio.

La estructura básica del currículum europeo de DFA para ingenieros y diseñadores se ha elaborado ya, y en los Estados miembros se han impartido cursos piloto. El fomento de su utilización en la educación post-secundaria o profesional es un modo de garantizar una sociedad de la información accesible en el futuro[24]. Un modo de profesionalizar la accesibilidad electrónica sería contar con la presencia de un responsable de accesibilidad competente en DFA en las entidades pertinentes.

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21 Este proceso está regulado por la Directiva 98/34. http://europa.eu.int/eur-lex/pri/es/oj/dat/1998/l_204/l_20419980721es00370048.pdf

22 Existen tres estrategias principales en relación con el DFA: 1) el diseño para el mayor número de usuarios sin necesidad de modificaciones, 2) el diseño para facilitar la adaptación a usuarios distintos (por ejemplo, interfaces adaptables), 3) el diseño para conexión inmediata a dispositivos de apoyo.

23 Sitio web de EDEAN (Red de accesibilidad electrónica Diseño para todos), http://www.e-accessibility.org/

24 Informe sobre el currículum DFA del proyecto IDCnet.

La accesibilidad en la Web

La Comunicación de la Comisión publicada en 2001[25] sobre accesibilidad a los sitios web públicos fue seguida por sendas resoluciones del Consejo y el Parlamento en 2002. Como resultado, los Estados miembros se han comprometido a hacer accesibles sus sitios web públicos conforme a las pautas internacionales[26].

A través del Grupo de Expertos en Accesibilidad Electrónica, la Comisión, junto con los Estados miembros, observa la evolución en este ámbito, incluyendo los nuevos procedimientos y métodos de evaluación[27], evaluación comparativa, recogida de datos y determinación de mejores prácticas. **La accesibilidad a la Web es un factor que posibilita** la prestación de servicios en línea accesibles de interés público. Para facilitarla, es importante favorecer el desarrollo de herramientas de autor que incluyan la accesibilidad[28].

El hecho de que varios Estados miembros tengan ya en vigor disposiciones legislativas que hacen obligatoria la accesibilidad y la correspondiente evaluación de la conformidad plantea la necesidad de disponer de sistemas de certificación. En estos momentos, un seminario del Comité Europeo de Normalización[29] estudia soluciones adecuadas.

Evaluación comparativa y seguimiento

Varios Estados miembros están introduciendo métodos de evaluación comparativa y seguimiento de la accesibilidad en su legislación nacional. En la UE, el Consejo y el Parlamento Europeo han pedido que se vigile la accesibilidad a la Web. El Parlamento ha solicitado también un seguimiento del uso de subtítulos y descripciones de audio en la televisión digital.

Para poder seguir elaborando políticas europeas de accesibilidad electrónica **adecuadas, es esencial disponer de datos europeos comparables de los Estados miembros.** Para ello, la Comisión se basará en las actuales actividades europeas de seguimiento, teniendo en cuenta la versión revisada de la estrategia de Lisboa.

La Comisión mantiene un diálogo con distintos organismos estadísticos a fin de elaborar y mejorar los indicadores pertinentes, en particular, integrando las cuestiones relativas a la accesibilidad en los indicadores generales existentes.

Investigación

La investigación y el desarrollo tecnológico (IDT) es un elemento fundamental en el avance hacia una sociedad de la información accesible. Desde 1991, casi 200 proyectos europeos de

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25 COM(2001) 529 final.

26 W3C/WAI/WCAG1.0 Pautas de accesibilidad al contenido web 1.0. La versión 2 está en preparación, y abordará la evolución que ha tenido lugar en las tecnologías web y facilitará la conformidad de los ensayos.

27 Web Accessibility Benchmarking (WAB) cluster.

28 W3C/WAI/ATAG Authorising Tools Accessibility Guidelines (ATAG).

29 http://www.cenorm.be/cenorm/businessdomains/businessdomains/isss/activity/ws-wac.asp

IDT, que suponen aproximadamente 200 millones de euros en cofinanciación de la CE[30], han contribuido al mejor conocimiento de los problemas y soluciones necesarias en este ámbito.

Algunos resultados de estos proyectos han demostrado soluciones, por ejemplo, servicios a domiciliar remotos accesibles para personas mayores (incluidas alarmas y servicios de urgencias). Se han creado soluciones para mejorar el acceso a la información digital por parte de personas ciegas y con deficiencias visuales (texto, gráficos, imágenes en 3D, música codificada, programas de televisión). Se han demostrado sistemas que facilitan la movilidad, la manipulación y el control destinados a personas con discapacidades motoras, así como servicios que incrementan las posibilidades de comunicación de las personas con discapacidad auditiva, incluida la generación de lenguajes gestuales y movimiento de labios. Otros ejemplos que cabe citar son los entornos informáticos que facilitan la integración educativa de niños con discapacidad o el empleo de adultos con discapacidad, y las contribuciones a la elaboración de políticas (eEurope i.e. Accesibilidad a la Web, Diseño para todos).

Numerosos resultados de proyectos comunitarios han conducido a productos comerciales, y en otras ocasiones, los conocimientos adquiridos han contribuido a una mejor accesibilidad de los productos y servicios de las TIC.

En un contexto de rápida evolución tecnológica y aparición de nuevas soluciones técnicas, es esencial invertir en investigación a fin de aprovechar el importante potencial que ello representa para las personas con discapacidad y los mayores. La actual propuesta para el Séptimo Programa Marco hace referencia a la **necesidad de proseguir y ampliar la IDT en accesibilidad electrónica**, así como de seguir impulsando el desarrollo del sector europeo de las tecnologías de apoyo[31] y convertir la accesibilidad en una cuestión normal y cotidiana en el sector.

6. UNA MAYOR ACCESIBILIDAD ELECTRONICA DE LOS PRODUCTOS Y SERVICIOS DE TIC EN EUROPA - TRES NUEVOS ENFOQUES

Además de favorecer las iniciativas ya en curso que se acaban de describir, la Comisión fomentará tres enfoques que todavía no están generalizados en Europa: i) la incorporación de requisitos de accesibilidad a la contratación pública, ii) la certificación de la accesibilidad y iii) un mejor uso de la legislación vigente.

A los dos años de la publicación de la presente Comunicación, la Comisión evaluará el resultado de dichas iniciativas. Inspirada en el principio de una mejor reglamentación[32], la Comisión intercambiará sus puntos de vista con los Estados miembros y, en función de una exhaustiva evaluación de impacto, podrá considerar la posibilidad de tomar medidas suplementarias, inclusive legislativas si se considera necesario.

1. Contratación pública

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30 Para ejemplos de proyectos, véase http://www.cordis.lu/ist/so/einclusion/home.html y http://www.cordis.lu/ist/directorate_f/einclusion/previous-research.htm

31 *Access to Assistive Technology in the European Union*, informe de la DG EMPL, CE-V/5-03-003-EN-C.

32 Comisión Europea: «La gobernanza europea – Un libro blanco « COM(2001) 428 final.

Los recursos totales destinados a contratos públicos en Europa suponen aproximadamente el 16 % del producto interior bruto. Las autoridades públicas de todos los niveles pueden exigir características de accesibilidad en los bienes y servicios que van a adquirir. De hecho, las directivas europeas de contratación pública mencionan específicamente la posibilidad de incluir requisitos de DFA y accesibilidad en las condiciones de las licitaciones (especificaciones técnicas).

Esto implica un claro compromiso con **una política incluyente que ponga los productos y servicios a disposición de un número mayor de usuarios, ciudadanos y trabajadores**. Asimismo supone un incentivo para que las empresas del sector incorporen la accesibilidad a sus productos y crezca el mercado de las TIC accesibles. Estos efectos se han observado ya en los Estados Unidos[33], donde la legislación vigente obliga a especificar requisitos de accesibilidad en los contratos federales.

En la consulta en línea, un porcentaje superior al 90 % de los participantes se mostró favorable al principio de que los organismos públicos exijan que todos los productos y servicios de TIC que adquieran sean accesibles. Algunos Estados miembros especifican ya requisitos de accesibilidad en las compras públicas. Unos requisitos de accesibilidad europeos comunes contribuirían a reducir la fragmentación del mercado y fomentarían la interoperabilidad.

Existe una evidente necesidad de coherencia en relación con los requisitos de accesibilidad exigidos en la contratación pública en Europa. Así, la Comisión está elaborando un mandato destinado a los organismos europeos de normalización para que éstos elaboren tales requisitos para la contratación pública de productos y servicios de TIC. Se prevé que dicho mandato, tras ser sometido a los Estados miembros para consulta, sea enviado a los organismos de normalización antes de que concluya 2005.

La Comisión estimulará el debate sobre esta cuestión con los Estados miembros en el marco del Grupo de Expertos en Accesibilidad Electrónica[34]. La Comisión seguirá reuniendo experiencias europeas y estimulará un diálogo internacional, en especial con los Estados Unidos, a través de la asociación económica transatlántica (TEP), en el ámbito de la armonización de los requisitos de accesibilidad electrónica en la contratación pública.

2. Certificación

Cuando se compran productos TIC, no siempre está claro qué requisitos cumplen. Ello resulta especialmente importante cuando se adquieren TIC accesibles. Actualmente existen o se están elaborando normas que definen cómo hacer accesibles los productos y servicios. Sin embargo, no existen medios fiables de evaluar la conformidad con esas normas de accesibilidad. Unos sistemas adecuados de certificación de la accesibilidad de los productos, procesos organizativos y profesionales (basados en la *key-mark*[35] y las normas europeas) servirían de orientación para los clientes que desean productos y servicios accesibles, y podrían suponer para los fabricantes de bienes y proveedores de servicios un adecuado reconocimiento por sus esfuerzos. Asimismo facilitarían la vigilancia del cumplimiento de la reglamentación en materia de accesibilidad.

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33 Sección 508 de la Rehabilitation Act, modificada por la Workforce Investment Act de 1998.

34 El Grupo de Expertos en Accesibilidad Electrónica coordina a expertos de los Estados miembros que participan en la ejecución del Plan de acción eEurope.

35 http://www.cenorm.be/conf_assess/keymark/keymarktext.htm.

En su Resolución de enero de 2003 sobre la accesibilidad electrónica, el Consejo pidió una «marca de accesibilidad electrónica» para bienes y servicios. Por otra parte, la Declaración Ministerial de 2002 sobre la inclusión electrónica afirma que «se podría considerar una etiqueta europea de accesibilidad a la Web que certifique el cumplimiento de las pautas *WAI del W3C*[36] *a fin de evitar la fragmentación del mercado»*.

La Comisión estudiará, con los principales interesados, **las posibilidades de elaborar, introducir y aplicar un sistema de certificación de productos y servicios accesibles**, incluida la definición de criterios de ensayo y métodos de evaluación. Asimismo se examinará la posibilidad de un régimen de autodeclaración o de certificación por terceros, comparándose la eficacia de las distintas posibilidades[37]. La Comisión pondrá en marcha un estudio sobre este tema en el último trimestre de 2005.[38]

3. Mejor uso de la legislación vigente

Son varias las directivas que contienen disposiciones que pueden utilizarse para hacer cumplir requisitos de accesibilidad electrónica (por ejemplo, la Directiva de igualdad de trato en el empleo[39], la Directiva sobre equipos terminales de radio y telecomunicación y las directivas de contratación pública). Es importante cooperar con los Estados miembros para elaborar una manera práctica de utilizar estas directivas en las cuestiones relacionadas con la accesibilidad electrónica.

En particular, la aplicación de las sugerencias del Grupo de Comunicaciones Incluyentes (INCOM)[40] resolvería algunos de los retos pendientes en Europa, por ejemplo, garantizar el acceso de los usuarios con discapacidad a los servicios de urgencia mediante el número europeo único 112, disponer de frecuencias armonizadas en Europa para las soluciones asistenciales inalámbricas, garantizar una comunicación de texto y gestual en tiempo real entre los Estados miembros y facilitar la adquisición de productos accesibles por parte de las autoridades públicas. A este respecto deberán abordarse las eventuales dificultades que se puedan plantear a la hora de aplicar la legislación vigente.

En su diálogo sobre política audiovisual, la Comisión fomentará la aplicación de soluciones comunes o interoperables, por ejemplo, para un mejor acceso a los programas de televisión digital. Este tipo de soluciones comunes permitirá la explotación de economías de escala.

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36 Consorcio World Wide Web (W3C), Iniciativa para la Accesibilidad de la Web (WAI).

37 La consulta en línea puso de manifiesto un amplio respaldo (superior al 72%) a la certificación y etiquetado de productos y servicios de TIC accesibles, aunque se observaron diferencias significativas entre los distintos grupos objeto de la consulta, por ejemplo, dicho respaldo se redujo al 61,4% en el grupo *Fabricantes, proveedores o vendedores de productos y servicios de accesibilidad electrónica.* Además, entre los que apoyaron la certificación y etiquetado de productos, los grupos *Personas particulares con discapacidad* y *Organismos públicos* se mostraron claramente partidarios de regímenes obligatorios, mientras que los *Fabricantes, proveedores o vendedores de productos y servicios de accesibilidad electrónica* se inclinaban por procedimientos voluntarios, situándose los demás grupos entre estos dos extremos.

38 Véase el capítulo Conclusiones y seguimiento.

39 La Directiva 2000/78/CE del Consejo, de 27 de noviembre de 200,0 prohíbe, por ejemplo, la discriminación de personas con discapacidad en el trabajo y prevé la realización de «ajustes razonables», lo que incluye las TIC.

40 Formado en 2003 y constituido por representantes de los Estados miembros, operadores de telecomunicación, asociaciones de usuarios y organismos de normalización.

Es necesario aprovechar al máximo el «potencial de accesibilidad electrónica» de la legislación europea vigente. En 2005 la Comisión iniciará un estudio[41] para determinar las mejores prácticas y entablará un diálogo con los Estados miembros y los principales interesados a través de los grupos encargados de la ejecución de las directivas pertinentes.

7. CONCLUSIONES Y SEGUIMIENTO

La presente Comunicación y los resultados de la consulta en línea ponen de manifiesto y a la vez justifican la determinación de la Comisión Europea de afrontar las cuestiones relativas a la accesibilidad electrónica y encontrar soluciones que i) transmitan a los Estados miembros la necesidad urgente de trabajar de forma conjunta buscando un enfoque coherente en relación con la accesibilidad electrónica; ii) estimulen al sector para que elabore soluciones accesibles para los productos y servicios de TIC; iii) demuestren a los usuarios con discapacidad el compromiso activo de mejorar la accesibilidad de la sociedad de la información.

Durante los próximos dos años (2005-2007), la Comisión proseguirá sus actividades de sensibilización, fomento del uso de los instrumentos propuestos, recogida de información y consulta con los interesados a fin de tomar las decisiones oportunas con conocimiento de causa.

Con este fin, la Comisión tiene previsto iniciar un estudio titulado «*Medición del avance de la accesibilidad electrónica en Europa*» en el último trimestre de 2005, con objeto de determinar y evaluar opciones políticas encaminadas a mejorar la accesibilidad electrónica en Europa. Los primeros resultados de dicho estudio estarán disponibles a principios de 2007.

A los dos años de la publicación de la presente Comunicación se realizará un seguimiento de la situación de la accesibilidad electrónica. Esta iniciativa incluirá una evaluación del resultado de los enfoques aquí propuestos, según el principio de una mejor reglamentación[42] y, en función de una exhaustiva evaluación de impacto, se podrá considerar la posibilidad de tomar medidas suplementarias, inclusive legislativas si se considera necesario. Estos trabajos en el ámbito de la accesibilidad electrónica contribuirán a la anunciada iniciativa europea sobre la inclusión electrónica de 2008[43].

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41 Véase el capítulo Conclusiones y seguimiento.

42 Comisión Europea: «La gobernanza europea – Un libro blanco» COM(2001) 428 final.

43 COM(2005) 229 «i2010 – Una Sociedad de Información para el crecimiento y el empleo.

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

(Información)

INFORMACIÓN PROCEDENTE DE LAS INSTITUCIONES, ÓRGANOS Y ORGANISMOS DE LA UNIÓN EUROPEA

TRIBUNAL DE JUSTICIA DE LA UNIÓN EUROPEA

El siguiente texto reemplaza a la nota informativa publicada en el DO C 297, de 5 de diciembre de 2009, p. 1, tras la adición de un nuevo apartado 25 y la modificación del apartado 40

NOTA INFORMATIVA

sobre el planteamiento de cuestiones prejudiciales por los órganos jurisdiccionales nacionales

(2011/C 160/01)

I – **Disposiciones generales**

1. El sistema de remisión prejudicial es un mecanismo fundamental del derecho de la Unión Europea, que tiene por objeto proporcionar a los órganos jurisdiccionales nacionales los medios para que la interpretación y la aplicación de este derecho sean uniformes en todos los Estados miembros.

2. El Tribunal de Justicia de la Unión Europea es competente para pronunciarse, con carácter prejudicial, sobre la interpretación del Derecho de la Unión Europea y sobre la validez de los actos adoptados por las instituciones, órganos u organismos de la Unión. Esta competencia general le ha sido conferida por los artículos 19, apartado 3, letra b), del Tratado de la Unión Europea (DOUE 2008, C 115, p. 13; en lo sucesivo, «TUE») y 267 del Tratado de Funcionamiento de la Unión Europea (DOUE 2008, C 115, p. 47; en lo sucesivo, «TFUE»).

3. A tenor del artículo 256, apartado 3, del TFUE, el Tribunal General será competente para conocer de las cuestiones prejudiciales, planteadas en virtud del artículo 267, en materias específicas determinadas por el Estatuto. Al no haberse llevado a cabo ninguna adaptación del Estatuto por lo que atañe a esta cuestión, el Tribunal de Justicia sigue siendo el único competente para pronunciarse con carácter prejudicial.

4. Aunque el artículo 267 TFUE confiere al Tribunal de Justicia una competencia general, diversas disposiciones prevén excepciones o restricciones a dicha competencia. En particular, se trata de los artículos 275 y 276 TFUE y del artículo 10 del Protocolo (nº 36) sobre las disposiciones transitorias del Tratado de Lisboa (DOUE 2008, C 115, p. 322).

5. Puesto que el procedimiento prejudicial se basa en la colaboración entre el Tribunal de Justicia y los jueces nacionales, resulta conveniente proporcionar a los órganos jurisdiccionales nacionales las indicaciones siguientes para garantizar la eficacia de dicho procedimiento.

6. Con estas indicaciones prácticas, que no tienen carácter obligatorio, se pretende orientar a los órganos jurisdiccionales nacionales sobre la conveniencia de iniciar un procedimiento prejudicial y, en su caso, ayudarles a formular y a presentar las cuestiones que se planteen al Tribunal de Justicia.

Función del Tribunal de Justicia dentro del procedimiento prejudicial

7. En el marco del procedimiento prejudicial, la función del Tribunal de Justicia consiste en interpretar el Derecho de la Unión o pronunciarse sobre su validez, y no en aplicar este Derecho a los hechos concretos del procedimiento principal, labor de la que es responsable el órgano jurisdiccional nacional. Al Tribunal de Justicia no le corresponde pronunciarse sobre las cuestiones de hecho que se susciten en el marco del litigio principal, ni tampoco resolver las diferencias de opinión sobre la interpretación o la aplicación de las normas del Derecho nacional.

8. El objetivo del Tribunal de Justicia cuando se pronuncia sobre la interpretación o la validez del Derecho de la Unión es proporcionar una respuesta útil para la solución del litigio, pero es el órgano jurisdiccional nacional quien tendrá que deducir las consecuencias que corresponda y, en su caso, declarar inaplicable la norma nacional.

La decisión de plantear una cuestión al Tribunal de Justicia

Quién puede plantear una cuestión prejudicial

9. Con arreglo al artículo 267 TFUE, cualquier órgano jurisdiccional de un Estado miembro, cuando tenga que pronunciarse en un procedimiento a cuyo término se dicte una resolución de naturaleza jurisdiccional, puede plantear, en principio, una cuestión prejudicial al Tribunal de Justicia. [1] El Tribunal de Justicia ha interpretado la condición de órgano jurisdiccional como un concepto autónomo del Derecho de la Unión.

10. La iniciativa de plantear al Tribunal de Justicia una cuestión prejudicial corresponde únicamente al órgano jurisdiccional nacional, independientemente de que las partes en el litigio principal lo hayan o no solicitado.

Cuestiones de interpretación

11. Cualquier órgano jurisdiccional **está facultado** para plantear al Tribunal de Justicia cuestiones sobre la interpretación de una norma del Derecho de la Unión, si lo considera necesario para resolver un litigio del que esté conociendo.

12. No obstante, los órganos jurisdiccionales nacionales cuyas decisiones no sean susceptibles de ulterior recurso judicial de Derecho interno **están obligados, en principio**, a someter al Tribunal de Justicia tales cuestiones, salvo cuando ya exista jurisprudencia en la materia (y las eventuales diferencias de contexto no planteen dudas reales sobre la posibilidad de aplicar la jurisprudencia existente) o cuando la manera correcta de interpretar la norma jurídica de que se trate sea de todo punto evidente.

13. Así, un órgano jurisdiccional cuyas decisiones puedan ser objeto de recurso puede decidir por sí mismo cuál es la interpretación correcta del Derecho de la Unión y su aplicación a los hechos que considere probados, en especial cuando estime que la jurisprudencia del Tribunal de Justicia proporciona indicaciones suficientes. Ahora bien, una remisión prejudicial puede resultar especialmente útil, en la fase adecuada del procedimiento, cuando se suscite una nueva cuestión de interpretación que presente un interés general para la aplicación uniforme del Derecho de la Unión en el conjunto de los Estados miembros, o cuando la jurisprudencia existente no parezca aplicable a una situación inédita.

14. Al órgano jurisdiccional nacional le corresponde explicar los motivos por los que la interpretación que solicita es necesaria para resolver el litigio.

Cuestiones de validez

15. Si bien los órganos jurisdiccionales nacionales tienen la posibilidad de desestimar los motivos de invalidez que se invoquen ante ellos, la posibilidad de declarar la invalidez de un acto de una institución, de un órgano o de un organismo de la Unión corresponde únicamente al Tribunal de Justicia.

16. Por consiguiente, todo órgano jurisdiccional nacional **debe** plantear una cuestión al Tribunal de Justicia cuando albergue dudas sobre la validez de tal acto, indicando los motivos por los que considera que éste podría no ser válido.

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[1] Conforme al artículo 10, apartados 1 a 3, del Protocolo nº 36, las atribuciones del Tribunal de Justicia de la Unión Europea relativas a los actos adoptados antes de la entrada en vigor del Tratado de Lisboa (DO 2007, C 306, p. 1), en virtud del título VI del TUE, en el ámbito de la cooperación policial y judicial en materia penal, y no modificados desde entonces, seguirán , no obstante, siendo las mismas durante un período máximo de cinco años a partir de la fecha de entrada en vigor del Tratado de Lisboa (1 de diciembre de 2009). Por tanto, durante dicho período, tales actos sólo podrán ser objeto de un procedimiento prejudicial cuando éste sea iniciado por los órganos jurisdiccionales de los Estados miembros que hayan aceptado la competencia del Tribunal de Justicia. Cada Estado miembro podrá decidir si confiere la facultad de plantear cuestiones prejudiciales a todos sus órganos jurisdiccionales o únicamente a los que se pronuncian en última instancia.

17. No obstante, cuando el juez nacional tenga serias dudas sobre la validez de un acto de una institución, de un órgano o de un organismo de la Unión que sirva de base a un acto interno podrá, de modo excepcional, acordar la suspensión provisional de éste u otro tipo de medida cautelar respecto del acto nacional. En tal caso está obligado a someter al Tribunal de Justicia la cuestión de validez, indicando las razones por las que considera que dicho acto no es válido.

Cuando se debe plantear una cuestión prejudicial

18. El órgano jurisdiccional nacional puede remitir al Tribunal de Justicia una cuestión prejudicial tan pronto como estime que, para poder emitir su fallo, resulta necesaria una decisión sobre algún extremo de interpretación o de validez. Él es el mejor situado para apreciar la fase del procedimiento en que procede plantear tal cuestión.

19. Es preferible, no obstante, que la decisión de plantear una cuestión prejudicial se adopte en una fase del procedimiento nacional en la que el juez remitente esté en condiciones de definir el marco fáctico y jurídico del problema, para que el Tribunal de Justicia disponga de todos los elementos necesarios para comprobar, en su caso, que el Derecho de la Unión es aplicable al litigio principal. También puede resultar útil para la recta administración de la justicia que la cuestión prejudicial se plantee después de un debate contradictorio.

Forma de la petición de decisión prejudicial

20. La decisión mediante la cual el juez nacional somete una cuestión prejudicial al Tribunal de Justicia puede revestir cualquiera de las formas admitidas en su Derecho interno para los incidentes procesales. Ahora bien, debe tenerse presente que este documento servirá de base al procedimiento que se siga ante el Tribunal de Justicia y que éste debe disponer de los elementos que le permitan proporcionar una respuesta útil al órgano jurisdiccional nacional. Además, la petición de decisión prejudicial es el único documento que se notifica a las partes interesadas que pueden presentar observaciones ante el Tribunal de Justicia –en especial, los Estados miembros y las instituciones– y el único que se traduce.

21. La necesidad de traducir dicha petición aconseja una redacción sencilla, clara y precisa, sin elementos superfluos.

22. Una decena de páginas suele bastar para exponer de modo adecuado el contexto de una petición de decisión prejudicial. Sin dejar de ser sucinta, la decisión debe ser suficientemente completa y contener toda la información pertinente, de modo que tanto el Tribunal de Justicia como las partes interesadas que pueden presentar observaciones comprendan adecuadamente el marco fáctico y normativo del asunto principal. Así, la resolución de remisión deberá:

— incluir una breve exposición del objeto del litigio, así como de los hechos pertinentes que se consideren probados o, al menos, explicar los supuestos de hecho en que se basa la cuestión prejudicial;

— reproducir el tenor de las disposiciones nacionales que puedan ser aplicables e indicar, en su caso, la jurisprudencia nacional pertinente, proporcionando en todo caso las referencias precisas (por ejemplo, la página del diario oficial o recopilación correspondiente; eventualmente, acompañada de una referencia de Internet);

— identificar con la mayor precisión posible las disposiciones del Derecho de la Unión pertinentes en el litigio principal;

— explicar las razones que han llevado al órgano jurisdiccional remitente a preguntarse sobre la interpretación o la validez de determinadas disposiciones del Derecho de la Unión, así como la relación que a su juicio existe entre dichas disposiciones y la normativa nacional aplicable en el litigio principal;

— incluir, en su caso, un resumen de los argumentos esenciales de las partes del procedimiento principal que resulten pertinentes.

Conviene numerar los apartados o párrafos de la resolución de remisión para facilitar su lectura y la posibilidad de hacer referencias.

23. Por último, el órgano jurisdiccional remitente puede, en su caso, indicar de modo sucinto su punto de vista sobre la respuesta que deben recibir las cuestiones planteadas con carácter prejudicial.

24. En la resolución de remisión, la cuestión o cuestiones prejudiciales deberán figurar en una parte separada que se pueda identificar con claridad, por lo general, al principio o al final de la resolución. Deben ser comprensibles sin referirse a los fundamentos de la petición, en los que, no obstante, se expondrá el contexto necesario para efectuar una apreciación adecuada.

25. En el marco del procedimiento prejudicial, el Tribunal de Justicia, en principio, reproduce los datos contenidos en la resolución de remisión, incluidos los datos nominativos o de carácter personal. Por tanto, corresponde al órgano jurisdiccional remitente, si así lo estima necesario, proceder, por sí mismo, en su petición de decisión prejudicial, a ocultar la identidad de una o más personas afectadas por el litigio principal.

Efectos de la remisión prejudicial en el procedimiento nacional

26. El planteamiento de una cuestión prejudicial ante el Tribunal de Justicia lleva consigo la suspensión del proceso nacional hasta que el Tribunal de Justicia se pronuncie.

27. Sin embargo, el juez nacional seguirá siendo competente para adoptar medidas cautelares, especialmente en el caso de haberse planteado una cuestión de validez (véase el punto 17).

Costas y beneficio de justicia gratuita

28. El procedimiento prejudicial es gratuito y el Tribunal de Justicia no se pronuncia sobre las costas del litigio principal. Corresponderá al órgano jurisdiccional nacional decidir sobre este particular.

29. En el caso de que alguna de las partes carezca de recursos suficientes, y en la medida en que las normas nacionales lo permitan, el órgano jurisdiccional nacional puede concederle una ayuda que cubra los gastos ocasionados por su intervención ante el Tribunal de Justicia, en particular, los de representación. Este último puede conceder también una ayuda de esta índole en el supuesto de que la parte de que se trate no disfrute ya de una ayuda en el ámbito nacional o en la medida en que dicha ayuda no cubra, o cubra sólo parcialmente, los gastos ocasionados por su intervención ante el Tribunal de Justicia.

Correspondencia entre el órgano jurisdiccional y el Tribunal de Justicia

30. La resolución de remisión y los documentos pertinentes (especialmente, en su caso, los autos del asunto, eventualmente mediante copia) deben ser enviados directamente al Tribunal de Justicia por el órgano jurisdiccional nacional mediante correo certificado (dirigido a la «Secretaría del Tribunal de Justicia, L-2925 Luxemburgo», teléfono. +352 4303-1).

31. Hasta que se dicte la decisión, la Secretaría del Tribunal de Justicia se mantendrá en contacto con el órgano jurisdiccional nacional, al que transmitirá copia de los escritos procesales.

32. El Tribunal de Justicia también transmitirá su decisión al órgano jurisdiccional remitente, encareciéndole que le informe acerca de la aplicación que haga de ella en el litigio principal y que le envíe, llegado el caso, su decisión definitiva.

II – **El procedimiento prejudicial de urgencia (PPU)**

33. Esta parte de la nota aporta indicaciones prácticas respecto al procedimiento prejudicial de urgencia aplicable a las remisiones relativas al espacio de libertad, seguridad y justicia. Este procedimiento se rige por los artículos 23 *bis* del Protocolo (nº 3) sobre el Estatuto del Tribunal de Justicia de la Unión Europea (DOUE 2008, C 115, p. 210) y 104 *ter* del Reglamento de Procedimiento del Tribunal de Justicia. La posibilidad de solicitar la aplicación de este procedimiento se añade a la posibilidad de solicitar la aplicación del procedimiento acelerado en las condiciones previstas en los artículos 23 *bis* del antedicho protocolo y 104 *bis* del Reglamento de Procedimiento.

Sobre los requisitos para la aplicación del procedimiento prejudicial de urgencia

34. El procedimiento prejudicial de urgencia sólo puede aplicarse en los ámbitos a que se refiere el título V de la tercera parte del TFUE, relativo al espacio de libertad, seguridad y justicia.

35. La decisión de aplicar dicho procedimiento corresponde al Tribunal de Justicia. En principio, tal decisión se adopta únicamente sobre la base de una petición motivada del órgano jurisdiccional remitente. Con carácter excepcional, el Tribunal de Justicia puede decidir de oficio tramitar una petición de decisión prejudicial mediante el procedimiento de urgencia, cuando éste parezca necesario.

36. El procedimiento prejudicial de urgencia simplifica las diferentes fases del procedimiento ante el Tribunal de Justicia, pero su aplicación lleva consigo mayores exigencias para este último y para las partes y demás interesados que participan en el procedimiento, en particular para los Estados miembros.

37. Por consiguiente, sólo debe solicitarse en circunstancias en las que sea absolutamente necesario que el Tribunal de Justicia se pronuncie sobre la remisión prejudicial en el menor plazo posible. Sin que puedan enumerarse aquí tales situaciones de manera exhaustiva, debido en particular al carácter variado y evolutivo de las normas de la Unión que regulan el espacio de libertad, seguridad y justicia, un órgano jurisdiccional nacional podría plantearse formular una petición de procedimiento prejudicial de urgencia, por ejemplo, en las siguientes situaciones: en el caso, contemplado en el artículo 267, párrafo cuarto, del TFUE, de una persona detenida o privada de libertad, cuando la respuesta a la cuestión planteada sea determinante para la apreciación de la situación jurídica de esta persona o, en un litigio relativo a la patria potestad o a la custodia de los hijos, cuando la competencia del juez que deba conocer del asunto en virtud del Derecho de la Unión dependa de la respuesta a la cuestión prejudicial.

Sobre la petición de aplicación del procedimiento prejudicial de urgencia

38. Para permitir al Tribunal de Justicia decidir rápidamente si es preciso aplicar el procedimiento prejudicial de urgencia, la petición debe exponer las circunstancias de Derecho que acrediten la urgencia y, en particular, los riesgos en que se incurre si la remisión sigue el procedimiento prejudicial ordinario.

39. En la medida de lo posible, el órgano jurisdiccional remitente indicará, de manera sucinta, su punto de vista sobre la respuesta que haya de darse a la cuestión o cuestiones planteadas. Tal indicación facilita la toma de postura de las partes y demás interesados que participan en el procedimiento, así como la decisión del Tribunal de Justicia, y de este modo contribuye a la celeridad del procedimiento.

40. La petición de procedimiento prejudicial de urgencia debe presentarse sin ambigüedad alguna de tal forma que la Secretaría del Tribunal de Justicia pueda apreciar de inmediato que el expediente debe recibir una tramitación específica. A tal efecto, se insta al órgano jurisdiccional remitente a que en su petición mencione el artículo 104 *ter* del Reglamento de procedimiento y a que sitúe dicha petición en un lugar claramente identificable de su resolución de remisión (por ejemplo, en el encabezamiento o en escrito judicial separado). En su caso, un escrito de acompañamiento del órgano jurisdiccional remitente puede poner eficazmente de manifiesto dicha petición.

41. En lo que atañe a la propia resolución de remisión, su carácter sucinto es tanto más importante en una situación de urgencia cuanto que contribuye a la celeridad del procedimiento.

Sobre la correspondencia entre el Tribunal de Justicia, el órgano jurisdiccional nacional y las partes

42. En lo que respecta a las comunicaciones con el órgano jurisdiccional nacional y las partes que intervienen ante él, se insta a los órganos jurisdiccionales nacionales que presenten una petición de procedimiento prejudicial de urgencia a que indiquen la dirección electrónica, en su caso el número de fax, que el Tribunal de Justicia podrá emplear, así como las direcciones electrónicas, en su caso los números de fax, de los representantes de las partes del litigio.

43. Puede transmitirse al Tribunal de Justicia una copia de la resolución de remisión firmada, junto con una petición de procedimiento prejudicial de urgencia, mediante correo electrónico (ECJ-Registry@curia.europa.eu) o fax (+352 43 37 66). La tramitación de la remisión y de la petición podrá comenzar desde la recepción de tal copia. No obstante, los originales de estos documentos deberán transmitirse a la Secretaría del Tribunal de Justicia a la mayor brevedad.

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.

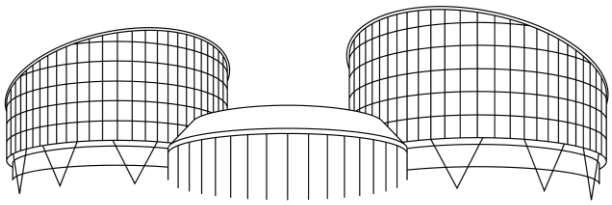
Section 4 - Locus Standi

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.



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

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 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 (but has not yet ratified), 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