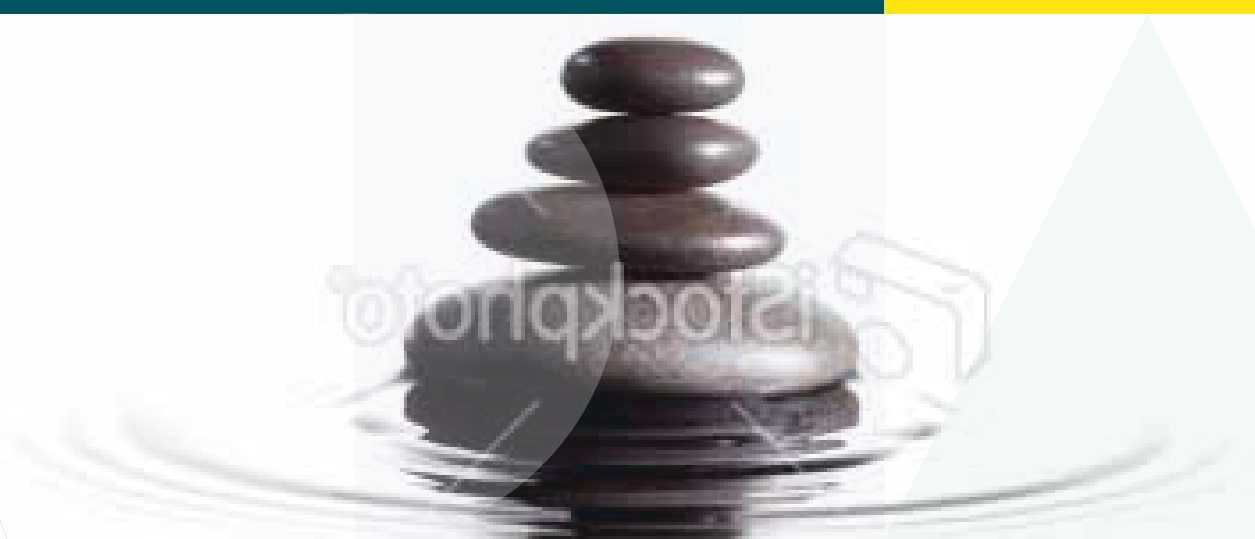


EQUALITY



The legal protection of persons with mental health problems under non-discrimination law

Understanding disability as defined
by law and the duty to provide
reasonable accommodation in
European Union Member States



FRA

EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS



This report addresses issues related to the right to life (Article 2), freedom from degrading treatment (Article 4), respect for private and family life (Article 7), the right to marry and found a family (Article 9), freedom of expression and information (Article 11), freedom of assembly (Article 12), the right to asylum (Article 18), the principle of non-discrimination (Article 21), and freedom of movement and residence (Article 45) falling under the Chapters I 'Dignity', II 'Freedom', III 'Equality' and V 'Citizens' rights' of the Charter of Fundamental Rights of the European Union.

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the duty to provide reasonable accommodation in
European Union Member States

Foreword

Over the past decade the protection of the rights of persons with disabilities has been reinforced at both the international and European levels. At the international level, the United Nations Convention on the Rights of Persons with Disabilities (CRPD) was adopted by the General Assembly of the United Nations (UN) in December 2006 and entered into force in May 2008. The EU acceded to the CRPD on 23 December 2010, and as of October 2011 it has been signed by all EU Member States and ratified by 19 EU Member States. At the European level, the Employment Equality Directive was adopted in 2000. Furthermore, the European Commission adopted the European Disability Strategy on 15 November 2010, with the overall aim of empowering people with disabilities and ensuring the effective implementation of the CRPD across the EU.

In light of the commitment by the EU and its Member States to protect the rights of persons with disabilities, the European Union Agency for Fundamental Rights (FRA) launched its first project on disability in 2009. It addresses the fundamental rights protection of persons with mental health problems and persons with intellectual disabilities. The project aims to assess the fundamental rights situation of these two groups of persons and is carried out in the spirit of the CRPD.

In its first Concluding Observations on a State Party report, the Committee on the Rights of Persons with Disabilities expressed its concern “at the risk of exclusion of persons who should be protected by the Convention, in particular persons with psychosocial disabilities (‘mental illness’) or intellectual disabilities”. Indeed, it is at times unclear whether the notion of disability also includes mental health problems. Against this backdrop, this report analyses how the scope of disability is defined by national and international law, to assess whether persons in the EU with mental health problems can benefit from the prohibition of discrimination on the grounds of disability. Our findings show this protection extends to persons with mental health problems throughout the EU.

Moreover, it is important to assess how the duty to provide reasonable accommodation for persons with disabilities is organised, to determine whether persons with mental health problems can benefit from this protection in the field of employment. This report reveals that in the majority of EU Member States persons with mental health problems may benefit from reasonable accommodation measures in the field of employment. As international standards expand the principle of reasonable accommodation beyond the traditional remit of employment, the report suggests further steps which may contribute to the strengthening of the protection of persons with mental health problems in other areas of daily life.

Morten Kjærøum
Director

Country codes

Country code	EU Member State	Country code	EU Member State
AT	Austria	IT	Italy
BE	Belgium	LT	Lithuania
BG	Bulgaria	LU	Luxembourg
CY	Cyprus	LV	Latvia
CZ	Czech Republic	MT	Malta
DE	Germany	NL	Netherlands
DK	Denmark	PL	Poland
EE	Estonia	PT	Portugal
EL	Greece	RO	Romania
ES	Spain	SE	Sweden
FI	Finland	SK	Slovakia
FR	France	SI	Slovenia
HU	Hungary	UK	United Kingdom
IE	Ireland		



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Introduction

In 2009, the European Union Agency for Fundamental Rights (FRA) launched its first research project in the area of disability focusing on the 'Fundamental rights of persons with intellectual disabilities and persons with mental health problems'.

The project follows an established FRA socio-legal methodology, which includes legal research covering all 27 EU Member States and sociological fieldwork research covering nine EU Member States: Bulgaria, France, Germany, Greece, Hungary, Latvia, Romania, Sweden and the United Kingdom. The countries chosen for the fieldwork research reflect a mix of disability policy in the EU. The first publication resulting from this project was a report on *The right to political participation of persons with mental health problems and persons with intellectual disabilities* in 2010.¹

There is no common approach or agreement to the terms used to describe the two target groups, and the language used varies between stakeholders, including their representative organisations, and jurisdictions. After consultation with disabled persons' organisations (DPOs), the FRA has decided to use the terms: 'persons with intellectual disabilities' and 'persons with mental health problems'. For the purposes of this report, which deals solely with the rights of persons with mental health problems, the FRA applies a definition used by the Mental Disability Advocacy Center: "People with psycho-social disabilities [here: mental health problems] are those who experience mental health issues, and/or who identify as 'mental health consumers', 'psychiatric survivors', or 'mad'. These are not mutually exclusive groups."²

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) acknowledges that disability is an evolving concept. The drafters of the Convention opted for an open-ended 'definition' of disability and Article 1 of the CRPD provides relevant guidance which enables States Parties to adopt a more protective scope.³ While in the spirit of the CRPD it may seem inappropriate to try to label various forms of disability, welfare law and social protection systems, as well as non-discrimination legislation, need to clarify who benefits from their provisions. As such, this report examines whether existing legal definitions of disability

allow for the protection of people with mental health problems against discrimination.

This research focuses specifically on persons with mental health problems and the question of whether their rights are protected by non-discrimination legislation. It aims to contribute to legal reforms in the field of disability that are currently being implemented by EU Member States, particularly in the context of the ratification of the CRPD.

A 2010 study by the European Foundation Centre on the implementation of the CRPD argued that in some EU Member States the fact that the legal definitions of the term disability refer to specific types of impairments might prove an obstacle for the full protection and inclusion of all persons with disabilities.⁴ As mental health problems are not automatically considered as disabilities by some EU Member States' legislation, this report examines how far the rights of persons with mental health problems are adequately protected by existing non-discrimination legislation. It takes as a benchmark the way the duty to provide reasonable accommodation is upheld for persons with mental health problems in EU Member States' legal frameworks. While it might be easier to understand and therefore reasonably accommodate the needs of a person with physical or sensory impairments, the barriers faced by a person with mental health problems are often harder to identify.⁵

This report is based on legal information provided by the FRA network of legal experts, FRALEX. Its legal analysis does not assess the practical implementation of the relevant legislation.⁶ Additional information was gathered through exchanges with key partners, including Mental Health Europe, the Belgian Centre for Equal Opportunities and Opposition to Racism, the Danish Institute for Human Rights, the Dutch Equal Treatment Commission (ETC), the Secretariat of the European Committee of Social Rights, the Secretariat of the European Co-ordination Forum for the Council of Europe Disability Action Plan 2006-2015 (CAHPAH) and individual experts, including Professor Gerard Quinn of Galway University and Professor Lisa Waddington of Maastricht University. The FRA expresses its gratitude for these valuable contributions. The FRA emphasises,

1 FRA (2010).

2 Mental Disability Advocacy Center (2011), p. 55.

3 See Lawson (2008), pp. 18-19.

4 European Foundation Centre (2010), p. 42.

5 See Lawson (2008), p. 7.

6 For an analysis of practices on reasonable accommodation, see KMU Forschung Austria (2008).

however, that the conclusions in this report do not necessarily represent the views of its collaborating organisations or individual experts.

The report first presents relevant international law at the level of the UN and the Council of Europe, as well as EU law in the field of disability rights protection. It then examines how national legislation protects persons with mental health problems in the 27 EU Member States. It analyses how national non-discrimination legislation and case law defines the term disability and what consequences this has for the duty to provide reasonable accommodation in the field of employment, as provided by the Employment Equality Directive. The report concludes with some instances where legislation extends the duty to provide reasonable accommodation to other areas.



1

International and European law



1.1. International and Council of Europe standards

1.1.1. United Nations standards

Evolving international standards

At the international level, there has been significant evolution in the approach to persons with mental health problems.⁷ Whereas discussions in the 1970s centred on the individual and his/her “functional limitations or psychological losses”, current debate locates the “problem of disability [...] squarely within society”, insisting that “it is not individual limitations [...] which are the cause of the problem but society’s failure to provide appropriate services and adequately ensure the needs of persons with disabilities are fully taken into account in its social organisation”.⁸ This evolution is characterised as a shift from a so-called ‘medical model’ of disability to a ‘social model’ in which “people are viewed as being disabled by society rather than by their bodies”.⁹ The latter adopts a rights-based approach to disability, where the person is at the centre of all decisions affecting him- or herself.¹⁰

This shifting approach is reflected in the various instruments developed at the level of the UN which address the rights of persons with mental health problems. The 1971 Declaration on the Rights of Mentally Retarded Persons adopts a restrictive view, stipulating that “the mentally retarded person has, to the maximum degree of feasibility, the same rights

as other human beings”.¹¹ However, the subsequent 1975 Declaration on the Rights of Disabled Persons did enshrine the right of persons with disabilities to “have their special needs taken into consideration at all stages of economic and social planning”,¹² indicating a precursor to the reasonable accommodation provisions contained in later UN, Council of Europe and EU standards.

By the 1980s, the discussion had progressed towards a more equal opportunity approach, moving away from a focus on the medical characteristics of the person.¹³ In 1982 the General Assembly adopted the World Programme of Action Concerning Disabled Persons (WPA), which specified that ‘handicap’ is “a function of the relationship between disabled persons and their environment. It occurs when they encounter cultural, physical or social barriers which prevent their access to the various systems of society that are available to other citizens”.¹⁴

Building on this, the United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities (SRE), adopted by the General Assembly in 1993, represented another breakthrough in the development of a social model of disability. The rules focus on social processes that effectively exclude persons with disabilities, observing that “in all societies of the world there are still obstacles preventing persons with disabilities from exercising their rights and freedoms and making it difficult for them to participate fully in the activities of their societies”, and emphasised the “shortcomings in the environment and in many organised activities in society [...] which prevent persons with disabilities from participating

7 For more on the debate on evolving approaches to disability see Shakespeare (2006) and Bickenbach (1999).

8 Oliver (1990), p. 2.

9 WHO (2011), p. 4.

10 Quinn and Degener (2002), p. 14.

11 UN General Assembly (1971), Art. 1 (emphasis added).

12 UN General Assembly (1975), Art. 8.

13 See Degener (2010).

14 UN General Assembly (1982), para. 8.

on equal terms".¹⁵ They also asserted that "persons with disabilities and their organizations should plan an active role as partners" in the process of removing obstacles to the exercise of rights and freedoms, for the first time giving a central role to persons with disabilities themselves.¹⁶ In this context, the CRPD marks the latest stage in the paradigm shift away from a view of disability centred on medical impairments, to one where the full, and equal, rights of persons with disabilities are accepted. Entering into force on 3 May 2008, it is based on non-discrimination, equal opportunity and human rights, and enshrines in international law a rights-based approach to disability. This approach is encapsulated in Recital (e) of the Preamble, which focuses on the interaction between persons with impairments and the barriers which prevent their "full and effective participation in society on an equal basis with others". Taken together with Article 1, this recognises that the discrimination and exclusion of persons with disabilities is largely due to barriers of various kinds, including the built environment, prejudices, stereotypes and other forms of paternalistic treatment.¹⁷

CRPD

Preamble

(e) *Recognizing* that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others, [...]

Article 1 - Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Moreover, while the 1975 Declaration focused on the right to medical, social and functional treatment, the CRPD is much broader, extending its reach beyond questions of health to include a wide range of longstanding substantive rights such as education,

habilitation, employment, standard of living, and participation in public, political and cultural life.¹⁸

In search of a definition of disability

Despite the significant steps taken towards a human rights approach to disability, the debate over an internationally accepted definition of disability was still present during the CRPD negotiations. The 1975 Declaration defines a 'disabled person' as "any person unable to ensure by him or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities",¹⁹ but its focus on disability as a broadly medical and individual issue makes it incompatible with the current rights-based approach to disability.

In keeping with its more progressive nature, the 1993 UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities (SRE) provides for an encompassing concept of disability which includes persons with mental health problems:

*"The term 'disability' summarizes a great number of different functional limitations occurring in any population in any country of the world. People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature."*²⁰

The CRPD does not include a specific definition of disability. During negotiations, numerous definitions were considered, drawn from national law, the wording used in the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities,²¹ and the World Health Organization (WHO) International Classification of Functioning, Disability and Health.²² However, many delegations considered that a definition of the terms 'disability' and 'persons with disabilities' should not be included in the Convention, as any such terminology would necessarily be exclusionary.²³ Consequently, the final text of Article 1 of the CRPD (see CRPD box above) includes an open list of individuals who are considered as 'persons with disabilities' for the purposes of the Convention. The scope embraces without doubt persons with mental health problems, at least in situations when these problems are longer-lasting in nature.

¹⁵ UN General Assembly (1993), para. 15; para. 18.

¹⁶ *Ibid.*, para. 15.

¹⁷ Schulze (2010), p. 16; p. 39.

¹⁸ Quinn (2007a), p. 9.

¹⁹ UN General Assembly (1975), Art. 1.

²⁰ UN General Assembly (1993), para. 17.

²¹ Organization of American States General Assembly (1999), Art. 2.

²² World Health Organisation World Health Assembly (2001).

²³ CRPD Ad Hoc Committee (2006a).

During the negotiations the International Disability Caucus pointed out that many states still approach mental health problems²⁴ using the medical model approach to ‘mental illness’, which excludes people with mental health problems from the category of persons with disabilities and the protection this entails. The Caucus also noted that the stigma, prejudices and stereotypes associated with people with mental health problems are themselves very disabling and frequently lead to violations of their human rights. ‘People With Disability, Australia’ further emphasised that persons especially at risk are those with mental health problems, who are not recognised as persons with disabilities in many states.²⁵

The CRPD’s approach to disability is confirmed by the Committee on the Rights of Persons with Disabilities (CieRPD). In April 2011, in its first Concluding Observations on a State Party report, the Committee expressed its concern “at the risk of exclusion of persons who should be protected by the Convention, in particular persons with psychosocial disabilities (‘mental illness’) or intellectual disabilities”.²⁶ By explicitly focusing on the frequent exclusion of persons with mental health problems from legal definitions of disability, the Committee strongly reaffirms the imperative for states to adopt an inclusive concept of disability.

Having analysed the evolving conceptualisation of disability in UN standards, the report now considers the impact of the legal wording for the duty to provide reasonable accommodation, both within and beyond the field of employment.

Reasonable accommodation in UN law

Alongside its protection of a wide range of classical and substantive rights, the CRPD includes the duty to provide reasonable accommodation,²⁷ as defined in Article 2. Moreover, it defines the denial of reasonable accommodation as itself a form of discrimination on the basis of disability.

The crux of the requirement to provide reasonable accommodation can be found in Article 5(3) of the CRPD which states that “in order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided”. Giving such a broad scope to reasonable accommodation sets the Convention apart from its predecessors in international law, and directly links the absence of reasonable accommodation to the perpetuation of

discrimination and inequality. Furthermore, it puts the onus on States Parties to take all appropriate steps to meet the reasonable accommodation requirement.

CRPD

Article 2 – Definitions

‘Discrimination on the basis of disability’ means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

‘Reasonable accommodation’ means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms; [...]

The most prominent application of the reasonable accommodation requirement remains in the field of work and employment. Article 27 of the CRPD requires States Parties to safeguard and promote the realisation of the right to work of persons with disabilities by taking appropriate steps to ensure that reasonable accommodation is provided to persons with disabilities in the workplace.

CRPD

Article 27 – Work and employment

1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:
 - (i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace; [...]

²⁴ Please note the original refers to ‘psychosocial disabilities’, but ‘mental health problems’ is used here for consistency.

²⁵ CRPD Ad Hoc Committee (2006b).

²⁶ UN Committee on the Rights of Persons with Disabilities (2011a), para. 8.

²⁷ For examples of reasonable accommodations, see WHO (2011), p. 74.

However, the duty to provide reasonable accommodation set out in the CRPD extends far beyond employment. Explicit mention of reasonable accommodation is made in Articles 24(2)(c) and 24(5) on the right to education, and Article 14(2) which enshrines the right to liberty and security of the person. Moreover, implicit references to reasonable accommodation can be found in Article 20 on personal mobility and Article 21 on freedom of expression and opinion, and access to information, which calls on States Parties to take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion.²⁸

As with the CRPD approach to the concept of disability, the CierPD will provide clarification as to the extent of States Parties' obligations regarding reasonable accommodation as it builds up its body of Concluding Observations. Confirming Article 2 CRPD, the Committee's Concluding Observations on Spain urge State Parties "to ensure the protection from denial of reasonable accommodation, as a form of discrimination, regardless of the level of disability" and reiterate that "the duty to provide reasonable accommodation is immediately applicable and not subject to progressive realisation".²⁹

1.1.2. Council of Europe standards

In order to gain a better understanding of the legislation of EU Member States, it is relevant to examine the approach to disability of the Council of Europe, and the implications this has for persons with mental health problems.

Evolving definitions within a medical model

The founding legal document setting out the approach of the Council of Europe is the European Convention on Human Rights (ECHR), adopted in 1950. A product of its time, the ECHR makes no mention of persons with disabilities, and limits its mention of persons with mental health problems to Article 5 on the right to liberty and security, which allows 'persons of unsound mind' to be deprived of their liberty.

ECHR

Article 5 – Right to liberty and security

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; [...]

Since the entry into force of the ECHR, the terminology used by the European Court of Human Rights (ECtHR) has evolved, reflecting the Court's view that the ECHR is a "living instrument which [...] must be interpreted in the light of present-day conditions".³⁰ This approach enables the ECtHR to develop both its concept of disability and its jurisprudence with a view to increasing the protection of the rights of persons with disabilities, a flexibility it recognised explicitly in 1979 in the case of *Winterwerp v. the Netherlands*.³¹

In case law amounting to several hundred cases concerning mental disability, the ECtHR has used different terms with regard to persons with mental health problems.³³ Spanning a period of several decades, examples of the language used have ranged from "mentally handicapped",³⁴ to "mental disorder" and "mental illness".³⁵ More recently, in the case of *Alajos Kiss v. Hungary*, the ECtHR referred to the "mentally disabled" and "those

ECtHR

Winterwerp v. the Netherlands

The Convention does not state what is to be understood by the words 'persons of unsound mind'. This term is not one that can be given a definitive interpretation: [...] it is a term whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitude to mental illness changes, in particular so that a greater understanding of the problems of mental patients is becoming more wide-spread.³²

²⁸ See Waddington (2007), p. 4.

²⁹ UN Committee on the Rights of Persons with Disabilities (2011b), para. 20; para. 44.

³⁰ ECtHR, *Tyrer v. UK*, No. 5856/72, 25 April 1978, para. 31.

³¹ See Bartlett P., Lewis O. and Thorold O. (2007), p. 17.

³² ECtHR, *Winterwerp v. the Netherlands*, No. 6301/73, 24 October 1979, para. 37, a case in which the ECtHR found no violation of Art. 5(1), and a violation of 5(4) and 6(1) ECHR.

³³ For a more exhaustive list of relevant cases, see Mental Disability Advocacy Center (2007).

³⁴ ECtHR, *X. and Y. v. the Netherlands*, No. 8978/80, 26 March 1985, para. 7, a case in which the ECtHR found a violation of Art. 8 ECHR.

³⁵ ECtHR, *Berková v. Slovakia*, No. 67149/01, 24 March 2009, para. 5 and 172, a case in which the ECtHR found a violation of Art. 6(1) and 8 ECHR.

with intellectual or mental disabilities”.³⁶ Although the ECtHR approach to persons with mental health problems remains anchored in a medical model, it is clear that the ECtHR fully includes persons with mental health problems within its understanding of disability.

Aside from case law, the crucial document relating to the Council of Europe’s approach to persons with mental health problems is the non-binding Committee of Ministers Recommendation No. Rec(2004)10 concerning the protection of the human rights and dignity of persons with mental disorder. It defines persons with mental disorder “in accordance with internationally accepted medical standards”,³⁷ an example of which, according to the accompanying Explanatory Memorandum, is the WHO’s International Classification of Diseases and Related Health Problems, which concerns Mental and Behavioural Disorders (ICD-10).³⁸

Towards a social approach

Mirroring the evolution seen at the UN level, the Council of Europe has made substantial strides in its approach to disability. Article 15 of the European Social Charter (revised) of 1996 begins by setting out its intention to ensure “to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community”. Moreover, when focusing on the ‘classic’ issues of education and employment, as in Article 15(1) and 15(2), the Charter takes an enabling approach that emphasises the need to remove the barriers preventing persons with disabilities from enjoying their full fundamental rights.

More recently, Recommendation No. Rec(2006)5 of the Committee of Ministers of 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 (hereafter the Action Plan), specifically mentions what it terms a “paradigm shift from patient to citizen”:³⁹

“We have moved from seeing the disabled person as a patient in need of care who does not contribute to society to seeing him/her as a person who needs the present barriers removed in order to take a rightful place as a fully participative member of society. [...] We therefore need to further facilitate the paradigm shift from the old medical model of disability to the social and human rights based model.”⁴⁰

However, the Action Plan does not specifically mention persons with mental health problems. Nevertheless, the rights-based approach that it enshrines has been verbally extended to this group by the comments of the Council of Europe Commissioner for Human Rights.⁴¹

Reasonable adjustments in Council of Europe standards

Unlike the CRPD, Council of Europe standards do not refer to reasonable accommodation as such, instead using the term ‘reasonable adjustment’. Article 15(2) of the European Social Charter (revised) calls on Parties to “adjust the working conditions to the needs of the disabled” and to promote social integration and participation in the life of the community “through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure”.⁴²

Subsequent case law has since reiterated that states are required to provide reasonable accommodation under Article 15(2) of the revised Charter, with the European Committee of Social Rights making numerous conclusions of non-conformity with this provision.⁴³ For example, in its 2003 Conclusions on France, the Committee specifically asked France to provide further information “on how the concept of reasonable accommodation is incorporated in the legislation”.⁴⁴ This implies that the Committee views the duty of reasonable accommodation as a crucial requirement in non-discrimination legislation in the area of disability.⁴⁵

ECtHR case law has also reinforced the duty to provide reasonable accommodation, effectively reading a duty to accommodate into some provisions of the ECHR in some cases. In the case of *Glor v. Switzerland*, where the Court found a violation of Article 14 in conjunction with Article 8 of the ECHR, it suggested that people in the applicant’s situation might be offered the possibility of alternative forms of service in the armed forces that entailed less physical effort and were

36 ECtHR, *Alajos Kiss v. Hungary*, No. 38832/06, 20 May 2010, para. 41-44, a case in which the ECtHR found a violation of Protocol No. 1 ECHR.

37 Council of Europe Committee of Ministers (2004).

38 The latest version of the ICD is from 2007, after Rec(2004)10.

39 Council of Europe Committee of Ministers (2006) section 2.2.

40 *Ibid.*

41 Council of Europe Commissioner for Human Rights (2009a).

42 Council of Europe (1996), Art. 15(2) and 15(3).

43 Council of Europe, European Committee of Social Rights (2008a).

44 Council of Europe, European Committee of Social Rights (2003), p. 68.

45 See Quinn (2005), p. 292.

compatible with the constraints of a partial disability. Moreover, for the first time the Court's judgment makes explicit reference to the CRPD as an example of the existing European and universal consensus on the need to protect persons with disabilities from discriminatory treatment.⁴⁶

Furthermore, the Action Plan refers to the need for "reasonable adjustments" in order to achieve the objective of full participation of persons with disabilities. In particular, Action line No. 5 on employment, vocational guidance and training asks Member States to make reasonable adjustments. States must "ensure that people with disabilities have access to vocational guidance, training and employment-related services at the highest possible qualification level, and making reasonable adjustments where necessary".⁴⁷ States must also encourage employers to employ people with disabilities by, for example, "making reasonable adjustments to the workplace or working conditions, including telecommuting, part-time work and work from home, in order to accommodate the special requirements of employees with disabilities".⁴⁸

While the duty to make adjustments remains concentrated in the area of employment, there are signs that the concept is more broadly applicable. For example, Action line No. 9 on Health Care asks Member States to "ensure that reasonable steps are taken to provide all relevant information regarding an individual's health care needs or services in a format understandable to the disabled person".⁴⁹ In addition, Action line No. 2 on Participation in Cultural Life stipulates that measures to improve access and involvement "should reflect the concept of reasonable adjustment".⁵⁰

1.2. European Union law

1.2.1. From rehabilitation to a rights-based approach

Having only launched its first initiative promoting the participation of persons with disabilities in the community in the mid-1980s, the EU avoided the earliest forms of the medical model of disability, and entered the discussion regarding international standards with a 'rehabilitation'⁵¹ approach.⁵² The 1986 Council Recommendation on the Employment of Disabled Persons in the European Community recommends Member States to "take all appropriate measures to promote *fair* opportunities for disabled people in the field of employment and vocational training",⁵³ but stops short of calling for equal treatment.

By the 1990s, the European Commission's Communication on Equality of Opportunity for People with Disabilities: A New European Community Disability Strategy put the focus firmly on the barriers facing persons with disability, noting that "our societies are, in many ways, organised for an 'average' citizen without any disability, and, therefore, a great number of citizens are excluded from the rights and opportunities of the vast majority".⁵⁴ It also recognised the need to address disability discrimination far beyond employment, to cover education, mobility and access, housing and welfare systems.⁵⁵

Building on these policy initiatives, the Treaty of Amsterdam amending the Treaty on European Union (Amsterdam Treaty) marked a breakthrough in disability non-discrimination law, enshrining the principle of non-discrimination on the grounds of disability in primary legislation. Specifically including disability in the general non-discrimination Article 13, the Treaty expressly gave the European Community competence in the disability field for the first time.⁵⁶

The non-discrimination approach in the field of disability was further embedded by Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive). It sets out broad equality and non-discrimination objectives – specifically including disability – in the field of employment⁵⁷ and, crucially, calls on Member States to "put into effect" the principle of equal treatment.

46 *Ibid.*, para. 53.

47 Council of Europe, Committee of Ministers (2006) Section 3.5.3, iii.

48 *Ibid.*, Section 3.5.3, v.

49 *Ibid.*, Section 3.9.3, vi.

50 *Ibid.*, Section 3.2.1.

51 Degener (2010).

52 For a more detailed discussion of the evolution of EU non-discrimination law in the field of disability see Quinn (2007b).

53 Council Recommendation 86/379/EEC, OJ L 225, Section I. 1 (emphasis added).

54 European Commission (1996), para. 2.

55 However, a draft directive on the issue was only prepared in 2008.

56 European Disability Forum (2003), Section 4A.

57 Degener (2010).



Employment Equality Directive

Article 1 - Purpose

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Disability rights protection was strengthened when the Charter of Fundamental Rights of the European Union, which includes the right to non-discrimination on the grounds of disability, became legally binding with the adoption of the Lisbon Treaty in December 2009. Albeit limited to the areas of EU competence, the EU Charter of Fundamental Rights went beyond the Amsterdam Treaty in inserting Article 26 on the integration of persons with disabilities, reflecting core social model values of inclusion and equal opportunity.

This principle is given a practical bent in the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation of 2008 (draft 'horizontal' directive).⁵⁸ While still in the process of negotiation, the draft directive opens the door for equal treatment provisions to extend beyond employment. Its focus on implementation of equal rights principles by removing societal barriers, as set out in Article 4(1)(a), situates it firmly within a social approach.

Most significantly, the EU accession to the CRPD in 2010 ensured that the rights enshrined within the CRPD became part of EU law, albeit only to the extent that the EU has competence in the relevant field.⁵⁹ The CRPD is now situated between primary and secondary law in the hierarchy of EU legislation, creating new standards of protection for persons with disabilities for the EU and its Member States. Furthermore, the European Court of Justice (ECJ)⁶⁰ has a tradition of orienting itself on international standards when interpreting EU law.

⁵⁸ European Commission (2008).

⁵⁹ For further discussion of EU competence relating to the CRPD, see Waddington (2009).

⁶⁰ After amendments introduced by the Lisbon Treaty, the European Court of Justice (ECJ) is now referred to as the Court of Justice of the European Union (CJEU). However, this report continues to refer to the ECJ in order to avoid confusion since most existing literature and case law was published before the entry into force of the Lisbon Treaty in December 2009. The CJEU is the judicial authority of the EU and, in cooperation with the courts and tribunals of the Member States, it ensures the uniform application and interpretation of EU law.

1.2.2. Disability as defined by EU law

Following Article 19 of the Treaty on the Functioning of the European Union (TFEU), EU institutions may take appropriate action to combat discrimination on a number of grounds, including disability. It is also worth noting Article 10 of the TFEU, which calls for EU institutions to combat discrimination based on disability when defining and implementing their policies and activities.

The Charter of Fundamental Rights of the European Union protects persons with disabilities from discrimination, with Article 21(1) listing disability as a prohibited ground of discrimination without providing any legal definition. Likewise, Article 26 of the Charter provides for the integration of persons with disabilities without specifying who they are.

Charter of Fundamental Rights of the European Union

Article 21 – Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Article 26 – Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

The Employment Equality Directive, similarly, does not define disability, and therefore does not specify which groups of persons are protected from discrimination. In particular, it does not expressly indicate whether persons with mental health problems are included. There is thus the possibility that narrower interpretations of the concept of disability in national legislation and case law limit the protection offered by the directive and exclude certain groups, notably persons with mental health problems.

The jurisprudence of the European Court of Justice (ECJ) provides related guidance. In the case of *Chacón Navas v. Eurest Colectividades SA*, the applicant was certified as unfit for work on medical grounds and was in receipt of temporary incapacity benefit.⁶¹ She was dismissed after eight months of absence and argued that her dismissal was incompatible with the directive.

In his Opinion on the case, Advocate General Geelhoed concludes that the concept of disability “must be interpreted autonomously and uniformly throughout the Community legal system”⁶² but acknowledges the difficulties in finding a definition, as the concept of disability is “undergoing fairly rapid evolution” and may be interpreted differently in different contexts.⁶³ Arguing that “we should not endeavour to find more or less exhaustive and fixed definitions of the term ‘disability’”,⁶⁴ he made the following proposal:

Opinion of Advocate General Geelhoed

76. Disabled people are people with serious functional limitations (disabilities) due to physical, psychological or mental afflictions.
77. From this two conclusions can be drawn:
 - the cause of the limitations must be a health problem or physiological abnormality which is of a long-term or permanent nature;
 - the health problem as cause of the functional limitation should in principle be distinguished from that limitation.
78. Consequently, a sickness which causes what may be a disability in the future cannot in principle be equated with a disability. It does not therefore provide a basis for a prohibition of discrimination, as referred to in Article 13 EC in conjunction with Directive 2000/78.

The ECJ in turn provided the following interpretation of disability in the case of *Chacón Navas*:

ECJ

Chacón Navas v. Eurest Colectividades SA

41. As is apparent from Article 1, the purpose of Directive 2000/78 is to lay down a general framework for combating discrimination based on any of the grounds referred to in that article, which include disability, as regards employment and occupation.
42. In the light of that objective, the concept of ‘disability’ for the purpose of Directive 2000/78 must, in accordance with the rule set out in paragraph 40 of this judgment, be given an autonomous and uniform interpretation.
43. Directive 2000/78 aims to combat certain types of discrimination as regards employment and occupation. In that context, the concept of ‘disability’ must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.
44. However, by using the concept of ‘disability’ in Article 1 of that directive, the legislature deliberately chose a term which differs from ‘sickness’. The two concepts cannot therefore simply be treated as being the same.
45. Recital 16 in the preamble to Directive 2000/78 states that the “provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.” The importance which the Community legislature attaches to measures for adapting the workplace to the disability demonstrates that it envisaged situations in which participation in professional life is hindered over a long period of time. In order for the limitation to fall within the concept of ‘disability’, it must therefore be probable that it will last for a long time.

The ECJ thus established that a distinction must be made between ‘sickness’ and ‘disability’, and that whereas the latter is protected by the directive, the former is not automatically afforded protection.⁶⁵ The ECJ parameters of disability include three cumulative requirements: there must be a limitation which results in particular from physical, mental or psychological impairments; the limitation must hinder the participation of the person concerned in professional life; and it must be probable that the limitation will last for a long time.⁶⁶

61 ECJ, C-13/05, *Chacón Navas v. Eurest Colectividades SA*, 11 July 2006.

62 Opinion of Advocate General Geelhoed, ECJ, C-13/05, *Chacón Navas v. Eurest Colectividades SA*, 16 March 2006, para. 64.

63 *Ibid.*, para. 58.

64 *Ibid.*, para. 67.

65 ECtHR-FRA (2010), p. 100.

66 See Schiek, Waddington and Bell (2007), p. 137.

Thus, the ECJ interpretation of disability includes persons with mental health problems, insofar as there are mental or psychological impairments that hinder the participation of the person concerned in professional life, and will last for a long time.

Another judgment from the ECJ signifies that the carers of persons with disabilities can be treated as disabled for the purpose of protection against discrimination and harassment. In the case of *Coleman v. Attridge Law and Steve Law*,⁶⁷ the applicant, who was the primary carer of her disabled son, accepted voluntary redundancy after receiving unfavourable treatment compared to parents of non-disabled children. The ECJ determined that a person in her situation was protected from direct discrimination and harassment under the directive on the grounds that she had a child with disability.

This broad interpretation of discrimination, which includes 'discrimination by association', offers wide protection under the Employment Equality Directive, as it also covers, in some circumstances, victims of discrimination who do not themselves have a disability.⁶⁸

Like the Employment Equality Directive, the draft 'horizontal' directive does not contain a legal definition of disability. However, the European Parliament subsequently proposed inserting the following Recital:

*"Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others."*⁶⁹

This formulation is based on Article 1 of the CRPD, reinforcing the argument that the CRPD has had an influence on European equality law as regards disability.⁷⁰ However, as the proposal is currently the subject of negotiations within the Council and remains in draft form, it can only serve as a reference regarding the interpretation of the concept of disability in EU law. Nevertheless, it may hint towards future evolutions in the EU approach to disability.

The analysis above shows that despite the lack of a legal definition of disability in EU treaties and secondary law, ECJ case law clearly interprets the concept of

ECJ

Coleman v. Attridge Law and Steve Law

1. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, and, in particular, Articles 1 and 2(1) and (2) (a) thereof, must be interpreted as meaning that the prohibition of direct discrimination laid down by those provisions is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a).
2. Directive 2000/78, and, in particular, Articles 1 and 2(1) and (3) thereof, must be interpreted as meaning that the prohibition of harassment laid down by those provisions is not limited only to people who are themselves disabled. Where it is established that the unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the prohibition of harassment laid down by Article 2(3).

disability as including persons with mental health problems provided certain requirements are met.

1.2.3. Reasonable accommodation in EU law

As mentioned above, the Employment Equality Directive protects against discrimination on the grounds of disability as regards employment and occupation. Insofar as the directive extends to persons with mental health problems, the duty to provide reasonable accommodation also applies to this group of persons.

In particular, Article 5 of the directive includes a duty to provide reasonable accommodation for persons with disabilities. It requires employers, in certain cases, to take appropriate measures to enable persons with disabilities to have access to, participate in, or advance in employment, or to undergo training.

⁶⁷ ECJ, C-303/06, *Coleman v. Attridge Law and Steve Law*, 17 July 2008.

⁶⁸ ECtHR-FRA (2010), p. 27.

⁶⁹ European Parliament, COM(2008) 426, amendment 17.

⁷⁰ Waddington (2010).

Employment Equality Directive

Article 5 – Reasonable accommodation for disabled persons

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

The directive does not further define the concept of reasonable accommodation. In particular, it does not state whether denial of reasonable accommodation is a form of discrimination. Nevertheless, some guidance as to the meaning of the ‘appropriate measures’, which are required under the duty to provide reasonable accommodation is provided in Recital 20 of the Preamble, while Recital 21 elaborates on the concept of ‘disproportionate burden’.

Employment Equality Directive

Preamble

- (20) Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.
- (21) To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.

In this context, discussions regarding potential obstacles in the transposition and implementation of the reasonable accommodation provisions contained in the directive should be noted. Some Member States have been criticised for interpreting the directive as limiting the duty of reasonable accommodation to existing workers, thus wrongly excluding both

applicants and trainees.⁷¹ In addition, some debate has focused on the ‘individual’ and ‘reactive’ nature of the obligations, arguing that they lend themselves to individualised solutions, rather than general measures to break down the barriers impeding the full participation of persons with disabilities in employment, and do not seek to positively anticipate the needs of disabled persons.⁷²

Although still being negotiated, the draft ‘horizontal’ directive would prohibit discrimination on the grounds of disability beyond the field of employment, including social protection, social advantages, education, access to and supply of goods and other services available to the public.

Draft ‘horizontal’ directive

Article 1 - Purpose

This Directive lays down a framework for combating discrimination on the grounds of religion or belief, disability, age, or sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment other than in the field of employment and occupation.

Article 4(1)(b) of the draft includes a duty to provide reasonable accommodation to persons with disabilities, which applies unless it would impose a disproportionate burden. Article 4(2) in turn gives instruction as to the concept of disproportionate burden.

⁷¹ Lawson (2010a), p. 12.

⁷² *Ibid.*, p. 21.

Draft 'horizontal' directive

Article 4 – Equal treatment of persons with disabilities

1. In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities:
 - a) The measures necessary to enable persons with disabilities to have effective non-discriminatory access to social protection, social advantages, health care, education and access to and supply of goods and services which are available to the public, including housing and transport, shall be provided by anticipation, including through appropriate modifications or adjustments. Such measures should not impose a disproportionate burden, nor require fundamental alteration of the social protection, social advantages, health care, education, or goods and services in question or require the provision of alternatives thereto.
 - b) Notwithstanding the obligation to ensure effective non-discriminatory access and where needed in a particular case, reasonable accommodation shall be provided unless this would impose a disproportionate burden.
2. For the purposes of assessing whether measures necessary to comply with paragraph 1 would impose a disproportionate burden, account shall be taken, in particular, of the size and resources of the organisation, its nature, the estimated cost, the life cycle of the goods and services, and the possible benefits of increased access for persons with disabilities. The burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the equal treatment policy of the Member State concerned.

In addition, Article 2(5) clearly specifies that a denial of reasonable accommodation is a form of discrimination. By broadening the concept of discrimination in this way, it can be inferred that the draft 'horizontal' directive has been influenced by developments at the international level and especially by the CRPD. Indeed, the formulation of Article 2 of the draft directive echoes the CRPD, as Article 2 of the CRPD contains a similar provision.

Draft 'horizontal' directive

Article 2 – Concept of discrimination

5. Denial of reasonable accommodation in a particular case as provided for by Article 4(1)(b) of the present Directive as regards persons with disabilities shall be deemed to be discrimination within the meaning of paragraph 1.

As well as bringing the EU concept of reasonable accommodation in line with the preeminent international human rights treaty on disability, the draft 'horizontal' directive reflects a commitment by the EU to implement those parts of the CRPD which fall within its competence.

This section presented the standards of the EU as regards the concept of disability and the duty to provide reasonable accommodation. The Employment Equality Directive does not define disability but includes a duty to provide reasonable accommodation measures for persons with disabilities. The ECJ interpreted the concept of disability in the *Chacón Navas* judgment in a way which extends the directive's protection to persons with mental health problems.

1.3. Conclusion

In each of the UN, Council of Europe and EU standards explored above, the approach to disability has undergone a marked evolution from a model focused on individual limitations and medical support to one that emphasises the equal human rights of persons with disabilities and concentrates on removing the societal barriers which continue to impede equal opportunity. At the UN and EU levels this approach is enshrined in the CRPD, which puts into law a rights-based model of disability. The Council of Europe's understanding of disability has also undergone a 'paradigm shift' towards an approach that promotes the full rights and participation of persons with disability.

The open-ended concept of disability included in the CRPD ensures that persons with mental health problems are included within the concept of disability at both the UN and EU levels, given the EU's status as a party to the Convention. Regarding the Council of Europe, frequent references to persons with mental health problems in both ECtHR case law and Council documents – albeit using a wide range of different terms – indicate that here, too, the scope of the concept of disability includes this group. This view is given further weight by the comments of the Commissioner for Human Rights, which have explicitly

included persons with mental health problems within the umbrella of disability.

In terms of reasonable accommodation, again the CRPD provides the standard at both the UN and, to the extent of its competence, the EU level. This extends the principle of reasonable accommodation outside the traditional remit of employment. For the time being, the duties set out in the CRPD stretch well beyond the reasonable accommodation provisions set out in previous EU law, specifically the Employment Equality Directive. However, this would change should the draft 'horizontal' directive be passed into law with a broader concept of reasonable accommodation more closely mirroring that set out in the CRPD. Although using different terminology, Council of Europe standards also call for 'reasonable adjustments' to be provided beyond the area of employment.

The following section describes the findings of FRA research as regards the protection of persons with mental health problems in the non-discrimination legislation of the 27 EU Member States and the duty to provide reasonable accommodation for this group of persons.



2

Protection of persons with mental health problems in national non-discrimination legislation



The first section of this report served as a review of the evolution from the medical to the social model of disability at the international, European and EU levels, providing concrete examples of the transformation in terminology as well as continuous widening of the protection against discrimination for persons with disabilities in general, and persons with mental health problems, in particular. The following discussion looks at these developments at a national level across the 27 EU Member States.

It must be noted that this report examines national legislation only in the field of non-discrimination. The scope of this report is limited to non-discrimination legislation, an area of EU competence, following Article 19 of the Treaty on the Functioning of the European Union (TFEU). The report further focuses on the field of employment because the Employment Equality Directive, which protects against discrimination on the grounds of disability and includes the duty to provide reasonable accommodation, does not extend beyond this area. Furthermore, this approach ensures comparability of results, as different legislation areas may define the concept of disability in different ways, depending on the purpose of the legislation at issue. For example, whereas social security legislation on disability benefits tends to use specific and narrow definitions of disability, non-discrimination legislation tends to employ a wider definition in order to offer broad protection.⁷³

Against this backdrop, the second section of the report examines the legislative provisions in the national non-discrimination framework of EU Member States. It therefore does not address how they are implemented in practice. However, it is acknowledged that the implementation of non-discrimination legislation may strengthen the protection of persons with disabilities

in general and of persons with mental problems more specifically. Equally, the purpose of this section is not the systematic examination of decisions by national courts and equality bodies that may contribute to the interpretation of the legal definition of disability and the scope of the duty to provide reasonable accommodation in EU Member States. Nevertheless, where relevant, reference is made to such decisions and developments where they contribute to improved protection of persons with mental health problems.

This section begins by examining the extent to which the concept of disability in EU Member States' legislation covers persons with mental health problems. It then analyses the consequences of wording of that conceptualisation on the duty to provide reasonable accommodation.

2.1. Disability as defined by EU Member State law

Before entering in more detail into the analysis of national legislation, it is relevant to briefly mention the terminology used in other areas of national legislation, such as healthcare law, criminal law and civil law in order to better understand its context.

As was found in the first section of this report, laws across the EU 27 adopted several decades ago use terms to refer to persons with mental health problems that today are considered as pejorative and possibly even offensive. For example, the 1959 Mental Health Law in **Cyprus**, which has been repealed, included the terms 'insane', 'lunatic' and 'idiot'.⁷⁴ Likewise, in **Luxembourg** the terminology

⁷³ Schiek, Waddington and Bell (2007), p. 128.

⁷⁴ Cyprus, Mental Health Law Cap.252 of 1959.

evolved from ‘lunatic’ and ‘insane person’ to ‘person with mental disorders’.⁷⁵

In several Member States, changes in terminology in the legislation reflect changes in the approach to persons with mental health problems. In **Sweden**, the National Board of Health and Welfare’s terminology committee recommended replacing the term ‘handicap’ with ‘impairment’ (*funktionshinder*),⁷⁶ relating to the limitation of a disability in relation to the environment. Variations in the terminology used can also be found in different fields of legislation. For instance in **Romania**, whereas the Civil Code refers to ‘mental alienation or debility’ (*alienație ori debilitate mintal*),⁷⁷ the Mental Health Law uses the term ‘persons with psychological disorders’ (*persoane cu tulburări psihice*),⁷⁸ and the Law on the Protection and Promotion of the Rights of Persons with a Handicap refers to the World Health Organization’s International Classification of Functioning, Disability and Health in order to define ‘persons with disabilities’ (*persoane cu handicap*).⁷⁹

As noted earlier, this can be explained by the different contexts and objectives of such laws, as well as the historical context at the time they were drafted in terms of medical knowledge and societal attitudes.

As mentioned in the previous section, the Employment Equality Directive itself does not contain a definition of the term disability, although some guidance as to its interpretation can be found in ECJ jurisprudence, and in particular in the *Chacón Navas* judgment. The question whether and how the legislation of Member States defines disability is therefore particularly relevant, as this influences the scope of protection with regard to persons with mental health problems. Two categories can be identified: Member States which include a definition of disability in the transposing legislation and those which do not. Each category is examined in turn.

2.1.1. Transposing legislation defines disability

In nearly half of EU Member States the legislation transposing the directive contains or refers to a definition of disability (see Annex I for an overview). However, states have taken different approaches to providing a definition or interpretation of the concept of disability. In some countries, such as the **Czech Republic**, the legislation itself contains a definition.⁸⁰ In others, such as **Denmark**, a definition can be found in the preparatory work⁸¹ or other documents providing interpretative guidance. In several Member States, the General Equal Treatment Act refers to a definition in another act, as is the case in **Germany**.⁸² In still others transposing legislation does not introduce a new definition as a definition already exists in previously enacted laws prohibiting disability discrimination, which were amended to ensure full accordance with the Employment Equality Directive. This is the case in **Ireland**.⁸³

Overall, the language provided appears to include persons with mental health problems. As an illustrative example, Section 3 of the **Austrian Persons with a Disability Equality Act** (*Behindertengleichstellungsgesetz*) defines disability (*Behinderung*) as “the effect of a non-temporary disruption of physical, intellectual or psychiatric functions or of sensory functions likely to impede participation in society. A period expected to last more than six months is deemed non-temporary.”⁸⁴ In the **United Kingdom**, Article 6(1) of the Equality Act 2010 states that a person has a disability if she or he “has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on [this person’s] ability to carry out normal day-to-day activities”. In addition, the Secretary of State issued guidance on the scope of disability as laid down in the Equality Act 2010, which states that “a disability can arise from a wide range of impairments which can be: [...] learning difficulties; mental health conditions and mental illnesses, such as depression, schizophrenia, eating disorders, bipolar affective disorders, obsessive compulsive disorders, as well as personality disorders and some self-harming behaviour; [...]”⁸⁵

75 Compare Luxembourg, *Loi du 4 juillet 1843*, p. 477; *Loi du 7 1880*, p. 445; and *Loi du 26 mai 1988* as amended p. 560.

76 See definition of ‘funktionshinder’ in the terminology list at: <http://app.socialstyrelsen.se/termbank/QuickSearchBrowse.aspx>.

77 Romania, Art. 163, New Civil Code (2009).

78 Romania, Law 487/2002.

79 Romania, Art. 2; Art. 5 (16), Law 448/2006.

80 Czech Republic, Section 5(6), Anti-discrimination Act No. 198/2009.

81 Denmark, Preparatory work, Proposal L92 of 11 November 2004.

82 The concept of disability is not defined in the General Equal Treatment Act but according to the explanatory memorandum to the Act it corresponds to the statutory definition in Art. 2(1) Social Code - Book IX and Art. 3 of the Disabled Persons Equality Act.

83 Ireland, Section 2, Employment Equality Act 1998.

84 Austria, Art. 3, Disability Equality Act.

85 United Kingdom, Secretary of State (2010) Section A6, p. 8.

Another important aspect is that interpretations of a legal definition by judicial and quasi-judicial bodies have the potential to ensure that the phrasing used in the transposing legislation does not risk excluding persons with mental health problems from the scope of protection provided by the directive. For instance, the **Cypriot** Law on Persons with Disability includes in its definition of disability “mental or psychological limitation permanently or for an indefinite duration which, considering the background and other personal data of the particular person, substantially reduces or excludes the ability of the person to perform one or more activities or functions that are considered normal or substantial for the quality of life”.⁸⁶ The requirement that the limitation is permanent or of an indefinite duration and that it reduces or excludes the ability of the person to perform one or more activities or functions that are considered normal or substantial for the quality of life may be interpreted in a way that excludes mental health problems. At the same time, it leaves some leeway for courts to assess the situation in a given case, although to our knowledge such a case has not yet been brought in Cyprus.

Courts and national equality bodies may interpret such language to confirm that the scope of protection extends to persons with mental health problems, as was the case in Malta. The **Maltese** Equal Opportunities (Persons with Disability) Act defines disability in Section 2 as “a physical or mental impairment that substantially limits one or more of the major life activities of a person”.⁸⁷ It has been argued that the requirement that the impairment substantially limits one or more of the major life activities of a person may risk excluding persons with mental health problems from the scope of protection.⁸⁸ However, the National Commission Persons with Disability (*Kummissjoni Nazzjonali Persuni b’Dizabilità*), which investigates complaints under the Equal Opportunities (Persons with Disability) Act, has accepted complaints from persons with mental health problems.⁸⁹

2.1.2. Transposing legislation does not define disability

In the majority of EU Member States, the legislation transposing the Employment Equality Directive does not include a definition of the term disability that would indicate whether persons with mental health problems are protected by the legislation or not. In some cases, however, other indications as to the scope of protection can be found, notably in national jurisprudence and other laws. For example in **Spain**, before the adoption of Act 26/2011, courts had reiterated the understanding of disability established by the ECJ in the *Chacón Navas* judgment in their case law.⁹⁰ Therefore, even though Act 62/2003 on fiscal, administrative and social measures⁹¹ does not contain a definition of disability, it can be considered that persons with mental health problems are covered by the non-discrimination law in Spain.⁹² However, in other Member States, such as **Greece** and **Lithuania**, in the absence of language conceptualising disability and national case law, the scope of the concept is still to be clarified.

In several Member States, the legislation transposing the directive does not provide language explaining disability, but it specifically prohibits discrimination on other grounds. Hence, where it is unclear whether persons with mental health problems are protected under the concept of disability, it can be argued that such laws offer protection insofar as they also extend protection to other statuses or groups of individuals. For example, protection is provided on the grounds of ‘chronic illness’ (**Belgium**, the **Netherlands**, **Portugal**), ‘health status’ (**Hungary** and **Slovakia**) or ‘personal characteristics’ (**Finland**).

To take just few examples: in **Slovakia**, the Anti-discrimination Act, through which the Employment Equality Directive was implemented into Slovak law, does not define the term disability. However, in its Article 2a (11) (d), the Act states that “discrimination due to disability shall also mean the discrimination due to a previous health impediment or the discrimination of a person in the event that based on external signs of a person it would be possible to presume that the person has a disability”.⁹³ In the case of the **Netherlands**, the Disability Act refers to disability (handicap) and chronic

86 Cyprus, Law on Persons with Disability N. 127(I)/2000.

87 Malta, chapter 413, part 1 (2), Equal Opportunities (Persons with Disability) Act.

88 European Foundation Centre (2010), p. 134.

89 See: www.knpd.org.

90 See Spain, Superior Court of Justice of the Autonomous Community of Valencia, Social Section (*Tribunal Superior de Justicia de la Comunidad Valenciana, Sala de lo Social*), *Terra Mítica S.A.*, Judgment no 709/2007 of 13 February 2007.

91 Spain, State Official Journal No. 311 of 31 December 2003.

92 Article 1 of Act 26/2011 confirms the national courts’ jurisprudence and clearly includes persons with mental health problems in the concept of persons with disabilities. See Spain, State Official Journal No. 184 of 2 August 2011.

93 Slovakia, Art. 2a (11)(d), Anti-Discrimination Act no. 365/2004 (*Antidiskriminačný zákon*).

illness (*chronische ziekte*),⁹⁴ without defining their scope. However, the Parliamentary Records, which are a source of law, describe these terms as follows: “Disabilities and chronic illnesses can be physical, intellectual and mental in nature. A disability is moreover irreversible. A chronic illness is not always irreversible, but always long-lasting.”⁹⁵ As exemplified in the opinions adopted by the Dutch Equal Treatment Commission,⁹⁶ the Parliamentary Records have allowed for a wider interpretation of the terminology used, and persons with mental health problems could benefit from protection. A similar approach to choosing a broad interpretation of disability has been taken in **Belgium**. The Belgian Equality Body – the Centre for Equal Opportunities and Opposition to Racism (CEOOR) – interprets disability as a chronic or long-term inability to work due to an accident or illness in line with *Chacón Navas*.⁹⁷

In another group of Member States where the transposing legislation provides no common understanding of the term disability, definitions can be found in other non-discrimination laws. In general, these definitions can be interpreted so as to include persons with mental health problems. This is the case for **Bulgaria, Italy, Latvia, Luxembourg, Poland, Romania and Slovenia**.

For example in **Bulgaria**, the Integration of Persons with Disabilities Act defines disability as “any loss or impairment of the anatomical structure, physiology, or psychology of an individual”;⁹⁸ the **Slovenian** Act on equalisation of opportunities for persons with disabilities uses the following definition: “Persons with disabilities shall mean those who have long-term physical, mental or sensory impairments that in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”⁹⁹ In **Italy**, Law No. 104/1992 defines a person with disability as someone affected by a physical or intellectual disability, mental health disorder or sensory impairment, either stabilised or progressive, which causes difficulties in learning, social relations or working integration, so as to bring about social disadvantage or marginalisation.¹⁰⁰

Depending on how the assessment is made and how these legal definitions are interpreted in the context of non-discrimination legislation, great care must be taken that it is used in such a way as to include rather than exclude persons with mental health problems. Nonetheless, it appears that in countries where the transposing legislation does not define the term disability, the wider non-discrimination national framework offers guidance as regards the interpretation of this concept, which in general can be interpreted to extend protection to persons with mental health problems.

2.1.3. Conclusion

In nearly half of the 27 EU Member States the legislation transposing the directive provides language describing the scope of the term disability. In another group of Member States protection is provided to persons with mental health problems on other grounds such as ‘health status’ or ‘personal characteristics’. In others again, appropriate language is to be found in a wider non-discrimination act, or through guidance from judicial or quasi-judicial bodies.

Overall, it appears from this study that in the field of non-discrimination law, the majority of Member States adopt a similar approach to conceptualising disability, which refers to an impairment or limitation which can be physical or intellectual/mental, and which is long-lasting and so severe as to restrict the full participation of the individual in daily life or in employment. Thus, such approaches can be compared with that used by the ECJ in *Chacón Navas* insofar as they include the same requirements (see Section 1).

However, it appears from the FRA findings that there is still a lack of clarity in national legislation regarding the definition of disability and in particular whether it includes persons with mental health problems. In the majority of countries, the legislation transposing the Employment Equality Directive either does not define the term disability or provides language open to interpretation as to its exact scope. This highlights the importance of interpretation when applying such legislation and its capacity to confirm that the scope of protection extends to persons with mental health problems. Here again, the *Chacón Navas* judgment provides important guidance.

Whether and how national legislation transposing the directive defines disability and, in particular, whether it includes persons with mental health problems influences the scope of protection offered by the Employment Equality Directive, notably as regards reasonable accommodation. This is because the obligation to provide reasonable accommodation may be dependent on the definition of disability at national

94 The Netherlands, The Act on equal treatment on grounds of disability or chronic illness.

95 The Netherlands, Parliamentary Documents (*Kamerstukken II*) 2001/02, 28, 169, no. 3, p. 24.

96 The opinions of the Dutch Equal Treatment Commission can be found (in Dutch) at: www.cgb.nl.

97 Exchanges with the Centre for Equal Opportunities and Opposition to Racism.

98 Bulgaria, para. 1(1), Integration of Persons with Disabilities Act, Additional Provisions.

99 Slovenia, Art. 3(1), Equalisation of Opportunities for Persons with Disabilities Act.

100 Italy, Art. 3, Framework law on the assistance, social integration and rights of persons with disabilities.



level. If the definition does not include persons with mental health problems, and there is no case law to provide guidance, this group of persons may be excluded from the scope of protection.¹⁰¹ The following section analyses whether EU Member States' legal frameworks provide reasonable accommodation to persons with mental health problems.

2.2. Duty to provide reasonable accommodation in the field of employment

The following discussion analyses reasonable accommodation provisions in the non-discrimination legislation of the 27 EU Member States in the field of employment. It examines whether national legislation contains a duty to provide reasonable accommodation for persons with disabilities and whether this duty also applies to persons with mental health problems.

Different Member States use different terminology to refer to the term 'accommodation' as set forth in the Employment Equality Directive. While many Member States chose to use the terminology of the directive, others have replaced the word 'accommodation' with alternative terms such as 'adjustments', 'steps' or 'measures'. An analysis of the national legislation transposing the directive further reveals that the meaning of the term 'reasonable' has been interpreted by Member States in two different ways. While some Member States have interpreted the term 'reasonable' to refer to an accommodation which does not result in excessive costs, difficulties or problems for the employer, others have related the term 'reasonable' to the quality of the accommodation, meaning that the accommodation must be effective in terms of allowing an individual with a disability to carry out a particular set of employment-related tasks.¹⁰²

With respect to reasonable accommodation, the study focuses primarily on the legislation transposing the Employment Equality Directive, but also on other provisions in national non-discrimination laws where these are relevant. This is the case, above all, for countries in which the duty to provide reasonable accommodation is not contained in the transposing legislation but in other laws, and countries whose legislation does not contain an explicit duty to provide reasonable accommodation to persons with mental health problems. Likewise, this section refers to relevant decisions from courts or other bodies such as ombudspersons and national equality bodies as they may provide interpretative guidance as to the scope

of reasonable accommodation provisions for persons with mental health problems.

It should also be mentioned that this section focuses on the personal scope of reasonable accommodation provisions, namely whether they apply to persons with mental health problems. Given the limited scope of this study, it does not aim to examine other aspects of the duty to provide reasonable accommodation, such as the interpretation of the concepts 'reasonable' and 'disproportionate burden' in Article 5 of the Employment Equality Directive, or whether denial of reasonable accommodation constitutes direct or indirect discrimination.¹⁰³

2.2.1. National legislation containing a reasonable accommodation provision

In the great majority of EU Member States, non-discrimination legislation contains a duty to provide reasonable accommodation for persons with disabilities (see Annex 2 for an overview). For instance, the **Estonian Equal Treatment Act**, transposing the Employment Equality Directive, requires employers to "take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer".¹⁰⁴ Similar provisions, as part of the transposing legislation, are found, for example, in **Finland, Poland, Spain, Sweden** and the **United Kingdom**.

In a majority of countries, the scope of the transposing legislation that provides for reasonable accommodation can be interpreted to include persons with mental health problems. However, in some Member States, even though the transposing legislation provides for reasonable accommodation it does not contain a definition of disability, which makes assessing whether the duty to provide reasonable accommodation also applies to persons with mental health problems difficult. Only a judicial or quasi-judicial decision could clarify the situation. For example, in **Greece**, Article 10 of the transposing legislation closely follows the wording of the Employment Equality Directive, but as Law n. 3304/2005 does not provide any definition of disability, and there is, to date, no national case-law to provide guidance, it is unclear whether persons with mental health problems could benefit from the reasonable accommodation provision.

¹⁰¹ See Lawson (2008), p. 19.

¹⁰² Waddington and Lawson (2009), pp. 25-26.

¹⁰³ For further information see *Ibid.* and European Foundation Centre (2010).

¹⁰⁴ Estonia, para. 11, Equal Treatment Act Riigi Teataja I, 56, 315.

Similarly, in **Luxembourg** and **Portugal**, the scope of the duty to provide reasonable accommodation remains unclear. This is because the legislation providing for reasonable accommodation is not the same as that transposing the Employment Equality Directive, meaning that the scope of protection under the two laws may be different.

Besides legislative provisions, there are other aspects of national non-discrimination frameworks that provide guidance regarding the duty to provide reasonable accommodation measures for persons with mental health problems. The **Swedish** Equality Ombudsman dealt with a case in which a woman with a mental health problem was not allowed by her new boss to continue to work afternoons and evenings. As she was not able to work in the morning, the Ombudsman ruled she had suffered harassment on the grounds of her disability and awarded her SEK 45,000 in compensation.¹⁰⁵ In the **United Kingdom**, the Employment Appeal Tribunal ruled that a college lecturer who was unable to perform her duties because of acute stress leading to physical and mental impairment had been discriminated against because the college management did not provide her with reasonable accommodation, which would have included allocating less popular teaching hours to other staff members.¹⁰⁶

In five EU Member States (**France, Germany, Hungary, Slovenia** and **Spain**), the scope of the duty to provide reasonable accommodation is not the same as the scope of the prohibition of discrimination on the grounds of disability. For instance, in **France**, the obligation to provide reasonable accommodation is subject to an additional requirement to those laid down in the definition of disability under Article L 114 of the Social Policy and Family Code. Articles L 5212-13 and L 5213-6 of the Labour Code use a different and more limited definition of disability which stipulates that only individuals who are officially recognised as disabled can claim an accommodation. Therefore, 'non-registered' disabled people, along with all others not falling within the requirements laid down in Article L 5212-13 of the Labour Code, are not covered by the obligation of reasonable accommodation.

In **Germany**, the General Treatment Act, which transposes the directive, refers to the definition of disability in Article 2(1) of the Social Code Book IX. However, the duty to provide reasonable accommodation, according to Article 81(4) and (5) of the Social Code Book IX, applies to persons with a severe disability, defined in Article 2(3) of the Social

Code Book IX as persons with a degree of disability of more than 50%, or between 30% and 50%, if they would be unable without equal rights provisions to find or keep suitable employment.

Persons with mental health problems may therefore only benefit from reasonable accommodation provisions insofar as they have a degree of disability of at least 30%. The European Commission initiated infringement proceedings against Germany for incorrectly implementing its obligation to include regulations on reasonable accommodation under Article 5 of the Employment Equality Directive. Legal proceedings were closed in October 2010, after Germany presented draft laws implementing national case law which secured compliance with the directive's requirements.¹⁰⁷

Thus, it is particularly important to clarify the scope of the duty to provide reasonable accommodation in situations where the legislation specifies that a minimum degree of disability is required in order to qualify as a person with a disability and benefit from reasonable accommodation measures. It may be suggested that, given their nature, mental health problems are less likely than other types of impairments to substantially reduce a person's ability to work. This might in turn imply that lower thresholds for protection are likely to ensure that persons with mental health problems benefit from the duty to provide reasonable accommodation.

2.2.2. National legislation containing no reasonable accommodation provision

In **Italy**, while the Legislative Decree 216/2003, which transposes the Employment Equality Directive, does not contain a reasonable accommodation clause, it has been argued that reasonable accommodation is provided for by measures in other pieces of legislation, such as Law No. 104/1992 and Law No. 68/1999.¹⁰⁸ However, on 6 April 2011, the European Commission referred Italy to the Court of Justice of the European Union pointing out that Italy has not completely transposed Article 5 of the Employment Equality Directive. The European Commission considers that Italian law does not provide for a general rule of reasonable accommodation for persons with disabilities in all aspects of employment.¹⁰⁹

¹⁰⁵ Discrimination Ombudsman (*Diskrimineringsombudsmannen (DO)*) (2009).

¹⁰⁶ United Kingdom, *Fareham College v Walters*, (2009) Appeal No. UKEAT/0396/08/DM UKEAT/0076/09.

¹⁰⁷ See European Commission (2010b).

¹⁰⁸ See Giubboni (2008), p. 442 ff; Tursi (2006), p. 101.

¹⁰⁹ See European Commission (2011).



2.2.3. Conclusion

In sum, in the field of employment nearly all EU Member States include reasonable accommodation measures for persons with disabilities, either in the legislation transposing the Employment Equality Directive or in other non-discrimination legislation. In a few Member States, although there is no explicit provision on the duty to provide reasonable accommodation, persons with disabilities may benefit from other measures that have a similar effect. In both cases, the group of persons to which such measures are applicable, namely persons with disabilities, may be interpreted to include persons with mental health problems. In a few cases, the duty to provide reasonable accommodation applies to a different group of persons than the prohibition of discrimination on the grounds of disability more generally. In such cases it is important to ensure that this difference does not risk excluding persons with mental health problems.

The next section will summarise the main findings of this report and present some examples of national legislation that extends the duty of reasonable accommodation beyond the field of employment, in line with the CRPD. Furthermore, the following section suggests how such provisions may contribute to the protection of persons with mental health problems against discrimination.

3

The way forward: reasonable accommodation beyond the field of employment



The CRPD and the EU's Employment Equality Directive do not define the term disability. The ECJ has provided, in its landmark *Chacón Navas* judgment, guidance on the interpretation of this concept at the EU level. The UN, Council of Europe and EU standards do, however, include persons with mental health problems in their concepts of disability. The Employment Equality Directive also contains a duty to provide reasonable accommodation in the field of employment, while the CRPD gives a broader scope to this duty beyond the employment context.

This research finds that in the majority of EU Member States non-discrimination legislation uses a definition of disability that can be interpreted to include persons with mental health problems who therefore can benefit from protection against discrimination on the grounds of disability. Furthermore, a great majority of Member States' national legislation contains an explicit duty to provide reasonable accommodation to persons with disabilities in the field of employment. The findings show that in most cases persons with mental health problems would be able to benefit from reasonable accommodation measures, or other protection measures, in the employment context.

Beyond the field of employment, the legal situation in Member States varies considerably regarding the duty to provide reasonable accommodation.¹¹⁰ Generally, when such a guarantee is provided, it is to be found in non-discrimination legislation. This is the case in **Belgium, Bulgaria, the Czech Republic, Ireland, the Netherlands, Spain and the United Kingdom**. In **Bulgaria**, for instance, Article 32 of the Protection against Discrimination Act provides

for reasonable accommodation for persons with disabilities in education.

In **Ireland**, Section 5 of the Equal Status Act 2000-2004 includes a duty to provide reasonable accommodation in the provision of goods and services. Moreover, Section 4 of the Act states that the denial of reasonable accommodation is a form of discrimination. As the meaning of disability in the act covers persons with mental health problems, this group may benefit from reasonable accommodation measures in the provision of goods and services.

In the **United Kingdom**, the Equality Act 2010 requires a number of persons and entities to take reasonable accommodation measures for persons with disabilities, including employers, service providers, certain private clubs, schools and further and higher education providers, and public authorities. The definition of disability in the Act, as well as the Secretary of State's Guidance on the scope of disability, suggest that the duty to provide reasonable accommodation is applicable also to persons with mental health problems beyond employment. An Administrative Court decision has confirmed this, finding that the expulsion from school of a 10-year-old boy with Attention Deficit and Hyperactivity Disorder (ADHD) because of his violent behaviour was a form of discrimination based on disability, as the school had failed to make reasonable adjustments for students suffering from ADHD.¹¹¹

Thus, in some Member States, non-discrimination legislation already includes a duty to provide reasonable accommodation to persons with mental health problems beyond employment. Their legal

¹¹⁰ See Lawson (2010b), pp. 11-21.

¹¹¹ UK, *Governing Body of X Endowed Primary School v Special Educational Needs and Disability Tribunal, Mr. and Mrs. T, The National Autistic Society*, (2009) EWHC 1842 (Admin).

framework is in fact already implementing what the adoption of the draft 'horizontal' directive would achieve. Other Member States would, however, need to extend the duty to provide reasonable accommodation to areas that are not currently covered, if the draft directive were adopted.

Furthermore, some Member States have gone further than the Employment Equality Directive by extending their concept of discrimination. In some cases this takes the form of mirroring the CRPD's stipulation that denial of reasonable accommodation is itself a form of discrimination. For example, the **Austrian** Persons with a Disability Employment Act provides in Article 7(c) that denial of reasonable accommodation amounts to direct discrimination.¹¹² Similar conclusions can be found in **Bulgarian** case law.¹¹³ In the **Netherlands**, the Act on Equal Treatment on Grounds of Disability or Chronic Illness provides that "discrimination is defined as direct discrimination, indirect discrimination, an instruction to discriminate, harassment and a failure to provide a reasonable accommodation (*doeltreffende aanpassing*)".¹¹⁴

The CRPD may also have an influence on national legislation as regards the definition of disability in the coming years. Early signs are that this process is already underway. In its Concluding Observations on **Spain**, the Committee on the Rights of Persons with Disabilities "takes note of the adoption of Act 26/2011 which introduces the concept of person with disabilities as defined in the Convention and expands the protection of persons with disabilities", although the Committee remains "concerned that not all persons with disabilities are covered by the law".¹¹⁵ Moreover, the Committee calls on Spain "to expand the protection of discrimination on the grounds of disability to explicitly cover multiple discrimination, perceived disability and association with a person with a disability",¹¹⁶ confirming that it expects States Parties to match its broad concept of discrimination protection. In the future, the CRPD will certainly have a harmonising effect on the legislation of EU Member States that are parties to the Convention, particularly as they enter into a dialogue with the UN treaty body in charge of CRPD implementation.

112 Austria, Art. 7(c), Persons with a Disability Employment Act.

113 Bulgarian Helsinki Committee (*Български хелзинкски комитет*) (2009).

114 The Netherlands, Art. 2, The Act on equal treatment on grounds of disability or chronic illness.

115 UN Committee on the Rights of Persons with Disabilities (2011b), para. 11.

116 *Ibid.*, para. 20.



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Annex 1: Disability as defined by EU Member State law

EU MEMBER STATE	Definition of disability in non-discrimination legislation includes persons with mental health problems	No definition of 'disability', but persons with mental health problems included
AT	Article 3, Disability Equality Act (<i>Behindertengleichstellungsgesetz</i>)	
BE	Article 4, Anti-discrimination Law of 10 May 2007	
BG	Additional Provision § 1.1, Integration of Persons with Disabilities Act (Закон за интеграция на хората с увреждания)	
CY	Article 2, Law on Persons with Disabilities N.127(I) 2000, as amended by Law No. 72(I) of 2007	
CZ	Section 5(6), Anti-discrimination Act (<i>Antidiskriminační zákon</i>)	
DE	Explanatory memorandum of the General Equal Treatment Act (<i>Allgemeines Gleichbehandlungsgesetz</i>), refers to Article 2(1)1, Social Code - Book IX and Article 3, Disabled Persons Equality Act (<i>Behindertengleichstellungsgesetz, BGG</i>)	
DK	Preparatory work, Proposal L92 of 11 November 2004, (4.1. <i>Handicapkriteriet and Bemærkninger til de enkelte bestemmelser</i>)	
EE	Article 5, Equal Treatment Act (<i>Võrdse kohtlemise seadus</i>)	
EL*		
ES	Article 1, Act 26/2011 of 1 August 2011 on the normative adoption of the Convention on the Rights of Persons with Disabilities (<i>Ley 26/2011, de 1 de agosto, de adaptación normativa a la Convención Internacional sobre los Derechos de las Personas con Discapacidad</i>)	
FI		Section 6, Non-discrimination Act Protection on other grounds than disability (health status)
FR	Article 3, Disability Act of 11 February 2005 (<i>Loi n°2005-102 du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées</i>), introduces Article L114, Social policy and families code	
HU		Article 8(g)(h), Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (2003. évi CXXV. tv. az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról)



EU MEMBER STATE	Definition of disability in non-discrimination legislation includes persons with mental health problems	No definition of 'disability', but persons with mental health problems included
IE	Part I, Section 2(1), Employment Equality Act, 1998	
IT	Article 3, Law no. 104/1992	
LT*		
LU	Article 1(1), Law of 12 September 2003 on handicapped persons (<i>Loi du 12 septembre 2003 relative aux personnes handicapées, Mémorial A-N 144</i>)	
LV	Section 5(1) Disability Law (<i>Invaliditātes likums</i>)	
MT	Article 2(1), Equal Treatment in Employment Regulations, refers Article 2, Equal Opportunities (Persons with disabilities) Act	
NL	Parliamentary Records, Parliamentary Documents (<i>Kamerstukken II</i>) 2001/02, 28 169, no. 3	
PL	Articles 1, 3, 4 and 4a, Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities	
PT		Article 3 (c), Law n. 46/2006 of 28 August 2006
RO	Article 2, Law 448/2006 on the protection and promotion of the rights of persons with a handicap (<i>Lege privind protecția și promovarea drepturilor persoanelor cu handicap</i>)	
SE	Chapter 1, Section 5.4, Discrimination Act (Swedish Code of Statutes 2008:567)	
SI	Article 3, Equalisation of opportunities for persons with disabilities act (<i>Zakona o izenačevanju možnosti invalidov (ZIMI)</i>)	
SK		Article 2a (11)(d), Anti-discrimination Act No. 365/2004
UK	Article 6(1), Equality Act 2010; Section 1(1), Disability Discrimination Act 1995	

Notes: * In the absence of national case law, the scope of the definition is unclear.

The information in the table is not exhaustive and does not include specific regional and community legislation.

Source: FRA, 2011

Annex 2: Reasonable accommodation in EU Member State law

EU MEMBER STATE	Reasonable accommodation provision in legislation on non-discrimination in the field of employment	Duty to provide reasonable accommodation has different scope than prohibition of discrimination	No reasonable accommodation duty but other provisions
AT	Article 6(1a), Persons with a Disability Employment Act (<i>Behinderteneinstellungsgesetz</i>)		
BE	Article 5, Anti-Discrimination Act of 10.5.2007 (<i>Loi tendant à lutter contre certaines formes de discrimination</i>)		
BG	Article 16, Protection Against Discrimination Act (Закон за защита от дискриминация); Article 24, Integration of Persons with Disabilities Act (ИРДА) (Закон за интеграция на хората с увреждания)		
CY	Article 5(1A), Law on Persons with Disability 127(I)/2000, as amended by law 72(I)/2007		
CZ	Section 3(2), Anti-discrimination Act		
DE		Article 81(4) and (5), Social Code - Book IX (<i>Sozialgesetzbuch IX Buch</i>)	
DK	Section 2(a), Act on Prohibition against Differential Treatment in the Labour Market		
EE	Article 11, Equal Treatment Act		
EL	Article 10, Law no. 3304/2005		
ES	Article 37, Social Integration of Disabled People Act (<i>Ley 13/1982 de Integración Social de los Minusválidos</i>), as introduced by the Fiscal, Administrative and Social Measures Act 62/2003		
FI	Section 5, Non-discrimination Act (21/2004)		
FR		Articles L5212-13 & L5213-6 Labour Code (<i>Code du travail</i>)	

EU MEMBER STATE	Reasonable accommodation provision in legislation on non-discrimination in the field of employment	Duty to provide reasonable accommodation has different scope than prohibition of discrimination	No reasonable accommodation duty but other provisions
HU		Article 15, Act on Equalisation of Opportunities of Disabled Persons (évi XXVI. törvény a fogyatékos személyek jogairól és esélyegyenlőségük biztosításáról)	
IE	Section 16, Employment Equality Act 1998		
IT			Articles 10-13, Law no 68/1999
LT	Article 7(9), Law on Equal Opportunities of the Republic of Lithuania		
LU	Article 30, Law of 28.11.2006 on equal treatment (Loi du 28.11.2006 sur l'égalité de traitement, <i>Mémorial A-N° 207</i>)		
LV	Section 7(3), Labour Law		
MT	Article 4A, Equal Treatment in Employment Regulations; Section 7(5), Article 7(5) of the Equal Opportunities (Persons with Disability) Act		
NL	Section 2, Act on equal treatment on grounds of disability or chronic illness		
PL	Article 23a, Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities		
PT	Article 86, Labour Code		
RO	Article 5(4) and Article 83(1)(b), Law 448/2006 on the protection and promotion of the rights of persons with a handicap (<i>Lege privind protecția și promovarea drepturilor persoanelor cu handicap</i>)		

EU MEMBER STATE	Reasonable accommodation provision in legislation on non-discrimination in the field of employment	Duty to provide reasonable accommodation has different scope than prohibition of discrimination	No reasonable accommodation duty but other provisions
SE	Chapter 2, Section 1, Discrimination Act (Swedish Code of Statutes 2008:567) (<i>Diskrimineringslag</i>)		
SI		Article 72, Employment and rehabilitation act for disabled (<i>Zakon o zaposlovanju invalidov (ZZRZ1-UPB2)</i>)	
SK	Article 1(7), Anti-discrimination Act		
UK	Section 20 and 39, Equality Act 2010; Section 6, Disability Discrimination Act 1995		

Note: The information in the table is not exhaustive and does not include specific regional and community legislation.

Source: FRA, 2011

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HELPING TO MAKE FUNDAMENTAL RIGHTS A REALITY FOR EVERYONE IN THE EUROPEAN UNION

This report is the second publication from the legal study carried out in the context of the European Union Agency for Fundamental Rights' (FRA) project on the 'Fundamental rights of persons with intellectual disabilities and persons with mental health problems'. The report examines how disability is defined in international and European law and then explores the obligation to provide reasonable accommodation as contained in international and European standards.

The report's findings show that in almost all EU Member States non-discrimination legislation does indeed protect persons with mental health problems. In most cases persons with mental health problems also benefit from reasonable accommodation measures, or other protection measures, in the employment context. The report concludes by presenting examples where legislation extends the duty to provide reasonable accommodation to other areas.



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