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**Published version**

WHITTLE, R. (2002). The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective. *European law review*, 27 (3), 303-326.

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# The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective

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*The purpose of this paper is to analyse the recently adopted directive establishing a general framework for equal treatment in employment and occupation from a disability rights perspective. The adoption of this directive represents merely the first stage in the prohibition of discrimination on the grounds falling within its protective remit. The next and arguably most important stage is the implementation of this directive into national law. Of the protected grounds, disability offers what is arguably the greatest challenge for national authorities in the implementation process. It demands flexibility in the legislative approach traditionally used to combat discrimination as well as the introduction of new legal concepts into the national legal order of most Member States. Whilst European Disability Non-Governmental Organisations, together with the European Parliament, are calling on the Commission of the European Union to propose a more expansive directive prohibiting disability discrimination, it is first crucial to ensure that the core aspects of the recently adopted directive are clearly understood and correctly implemented from a disability rights perspective. These core aspects include the definition of disability, the concepts of direct and indirect discrimination, and the duty to provide reasonable accommodations. Given that these core aspects will be common to any disability non-discrimination law, no amount of coverage beyond the context of employment and occupation will compensate for the subsequent loss of opportunity to make a real difference to the lives of disabled people if they are not appropriately addressed.*

## Introduction

The inclusion of Article 13 EC<sup>1</sup> was clearly a significant step forward in the promotion of disability rights within the European Union.<sup>2</sup> Whilst it provides little more than a legal basis to take “appropriate action to combat discrimination based on [inter

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<sup>1</sup> Treaty of Rome 1957, as amended by the Single European Act 1986, the Treaty on European Union 1992, The Treaty of Amsterdam 1997 and, most recently, the Treaty of Nice 2001.

<sup>2</sup> Article 13 was included within the EC Treaty by virtue of the amending Treaty of Amsterdam. These amendments were signed on October 2, 1997, and took effect on May 1, 1999, following their ratification by the Member States. Together with the non-binding declaration attached to Article 95 EC, Article 13 EC provided the first reference to disability in the Treaties. For an analysis of these amendments in the context of disability discrimination, see Whittle, ‘Disability Discrimination and the Amsterdam Treaty.’ (1998) 23 E L Rev 50.

*alia*] disability...”, its inclusion did at least offer the hope that comprehensive secondary legislation prohibiting such discrimination would follow.<sup>3</sup>

As a first step towards making that hope a reality, the European Commission presented its initial package of proposals under Article 13 EC in November 1999.<sup>4</sup> By the end of November 2000, the Council of Ministers had adopted, albeit with revisions to the text of the Commission's proposals, the three key elements of that package. These elements include two directives prohibiting discrimination.<sup>5</sup> The first directive prohibits discrimination based on racial or ethnic origin in the areas of employment and occupation, social protection and social advantages, education, and access to and supply of goods and services (the Race Directive).<sup>6</sup> The second prohibits discrimination on each of the grounds listed within Article 13 EC (with the exception of gender and race) but, in contrast to the Race directive, has a material scope that is limited to the context of employment and occupation only (the Framework Directive).<sup>7</sup> As a result, protection under Community law against discrimination based on disability will be limited (at least for the short term) to that contained in the Framework Directive and therefore to the context of employment and occupation alone.<sup>8</sup>

While the material scope of the Framework Directive does not fully reflect the legislative potential proffered by Article 13 EC,<sup>9</sup> it nonetheless provides a level of protection not previously available at Community level to each of the grounds of discrimination falling within its personal scope. The purpose of this paper, therefore, is to examine the Framework Directive from a disability rights perspective and, in particular, to address the following questions: (i) what protection is afforded by the Framework Directive? (ii) what are the exceptions to that protection? (iii) where will that protection

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<sup>3</sup> The other grounds of discrimination listed in Article 13 are: sex, racial or ethnic origin, religion or belief, age and sexual orientation.

<sup>4</sup> See COM (1999) 565, 566 and 567. See also, Bell, ‘Article 13 EC: The European Commission's Anti-discrimination Proposals.’ (2000) 29 ILJ 79.

<sup>5</sup> The third element of this package is a Council Decision implementing the Community Action Programme on Non-discrimination. This is essentially a funding programme for the promotion of activities and the exchange of information and good practice to explore and understand the issues relating to discrimination on grounds of racial or ethnic origin, religion or belief, age, disability and sexual orientation.

<sup>6</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] O.J. L 180/22.

<sup>7</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] O.J. L 303/16.

<sup>8</sup> One should note that the European Parliament has recently called on the Commission to submit a proposal (based on Article 13 EC) for a specific and more comprehensive directive prohibiting disability discrimination “covering all the EU's fields of jurisdiction ... to be submitted in the course of the 2003 European Year at the latest”, see recital 8 of the European Parliament's resolution on the Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions - Towards a barrier-free Europe for people with disabilities: COM(2000) 284-C5-0632/2000 - 2000/2296(COS).

<sup>9</sup> In the context of disability, see Whittle, ‘Disability Rights after Amsterdam: the way forward.’ [2000] EHRLR 33. The text of the Framework Directive can be found at: [europa.eu.int/comm/employment\\_social/fundamri/legln\\_en.htm](http://europa.eu.int/comm/employment_social/fundamri/legln_en.htm)

apply (its material scope)? (iv) who will benefit from it (its personal scope)? and (v) when will that protection take effect?

However, prior to addressing these questions, it is first necessary to identify the purpose behind the Framework Directive and its provisions because it is only with this purpose in mind that one can fully appreciate its intended application.

### **The purpose of the Framework Directive**

The underlying purpose of the Framework Directive is to improve the employment opportunities for certain groups of people, and people with disabilities are clearly one of those groups.<sup>10</sup> However, it should be stressed from the outset that the Framework Directive does not (in itself) provide people with disabilities, or its other protected groups, with any ‘special advantages’. It does not intend, therefore, to help an individual get a job simply because they have an impairment. Instead, the Framework Directive is designed to operate within a system based on meritocracy; a system that will still demand that the most qualified and suitable person gets the job.<sup>11</sup> What it does seek to do, however, is to inject into this system the principle of equal treatment. Thus, in the context of disability (for example), it aims to prohibit an employer from taking into account matters relating to an individual’s disability when those matters are irrelevant to their ability to do the job. In other words, the Framework Directive is designed to impose on employers no more than a duty to act fairly when making employment related decisions; its manifest purpose being, therefore, to implement and promote the principle of equality, not to deviate from it.<sup>12</sup>

#### *Realising that purpose*

The Framework Directive aims to realise this purpose by laying down minimum requirements that have to be implemented by Member States within a specified time frame. These requirements are examined below in the context of disability but the fact that they are of a ‘minimal’ nature only must be stressed at this juncture. Disability Non-Governmental Organisations (NGOs) throughout the European Union must therefore take heed of this observation, particularly in light of Article 8(1) of the Framework Directive which provides that Member States are entitled to “introduce or maintain provisions which are *more favourable* to the protection of ... equal treatment than those laid down [elsewhere] in this Directive.” (Emphasis added). In other words, Member States are

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<sup>10</sup> The other characteristics protected by the Framework Directive are religion and belief, age and sexual orientation (see in this regard Article 1 of the Framework Directive). Together with disability, these characteristics are hereinafter referred to as the ‘protected grounds’.

<sup>11</sup> This is made explicit in Recital 17 to the Framework Directive, which confirms that the directive “does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.”

<sup>12</sup> See Article 1 of the Framework Directive, which refers to “putting into effect in the Member States the principle of equal treatment”. However, it should be noted that Article 7 of the Framework Directive does allow Member States to deviate from the principle of equality by maintaining or adopting ‘positive action’ measures that are linked to the protected groups and fall within the material scope of the directive. This provision is further examined below.

allowed, and should be actively encouraged, to extend the principle of equal treatment that is embodied in the Framework Directive to areas of activity beyond employment (a horizontal expansion), as well as improve on the level and quality of the protection that it affords (a vertical expansion). Moreover, it is important to note that whilst the Framework Directive lays down what it refers to as minimum requirements only, the ‘non regression’ clause in Article 8(2) makes it very clear that these requirements cannot be relied on as an excuse by Member States to reduce the level of protection that is currently available at national level.<sup>13</sup> For this reason, therefore, disability NGOs should view the existence of the Framework Directive (and its ability to influence national policy) from the perspective that it can only reinforce or enhance the principle of equal treatment for people with disabilities, not detract from it.

### **Implementing the principle of equal treatment: the protection afforded by the Framework Directive**

In order to implement the principle of equal treatment, the Framework Directive relies primarily on the prohibition of discrimination.

#### *Direct Discrimination – Article 2(2)(a)*

This is achieved, in the first instance, by precluding employers from treating an individual “less favourably” on grounds of, among others, disability. According to Article 2(2)(a) of the Framework Directive, less favourable treatment on this (or any of the protected grounds) would constitute a ‘direct’ form of discrimination and can only be excused under very specific and limited circumstances.<sup>14</sup>

In terms of its legal construction, the Framework Directive adopts quite a broad approach to defining direct discrimination. Like other non-discrimination laws, it requires a comparison to be drawn with another individual to identify the less favourable treatment (that is, the ‘comparator’). Generally speaking, the comparator will be the individual that actually received better treatment, but there will be occasions where such an individual does not actually exist. In the context of employment, for example, the less favourable treatment may take place in a scenario that is not an immediately competitive one and, as a result, no ‘actual’ comparator may be present. The Framework Directive takes this into account by referring to a comparator that “has been” or “would be” treated more favourably in a comparable situation. By so doing, it allows a comparison to be drawn - not only with an ‘actual’ comparator - but also with an individual that was either previously in the same situation and received better treatment (a past comparator), or would have received better treatment had they been in that situation (a hypothetical comparator).<sup>15</sup> Clearly, therefore, it is important to ensure that any national measures

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<sup>13</sup> See also Recital 28 to the Framework Directive.

<sup>14</sup> These exceptions are discussed below.

<sup>15</sup> See Whittle, ‘The Concept of Disability Discrimination and its Legal Construction’ (paper presented at the workshop ‘Discrimination and Affirmative Action in the Labour Market: Legal Perspectives’, organised by the Swedish National Institute for Working Life, November 6-7, 2000, Brussels, Belgium) at 7. Similarly argued in Waddington and Bell, ‘More Equal than others: Distinguishing the European Union Equality Directives.’ (2001) 38 CMLR 587, at 592.

adopted with a view to implementing the Framework Directive also make such a broad facility available for this purpose.

Moreover it should be noted that (unlike other grounds of discrimination) disability offers an additional level of comparison for the purposes of identifying the comparator. Thus, in the context of race or sex discrimination, for example, a comparison is drawn between a person of one race or one sex and a person of a different race or sex. In terms of disability, however, a comparison can be drawn not only between a disabled person and a non-disabled person (the most obvious comparison) but also between individuals with different disabilities.<sup>16</sup> It is therefore of great value that the Framework Directive allows such a comparison to be drawn and it does this by referring to the comparator simply as “another”. Disability NGOs should therefore work to ensure that such a comparison is also available within any national measures designed to implement the Framework Directive. The important point to note in this regard is that Member States must not rely on legal formulae such as “to whom that ground does not apply” within the definition of direct discrimination, as such a formulation would only allow a comparison between the complainant and an individual who does not have a ‘disability’ within the meaning of the law.

### *Indirect Discrimination – Article 2(2)(b)*

In addition to direct discrimination, the Framework Directive also prohibits an employer from adopting what, on the face of it, may appear to be neutral provisions, criteria or practices, but which in reality “put persons” with a “...particular disability ... at a particular disadvantage compared with other persons...”. Located within Article 2(2)(b) of the Framework Directive, this prohibition aims to combat what is generally referred to as ‘indirect’ forms of discrimination and applies in an identical manner to each of the protected grounds.

The prohibition of this form of discrimination is clearly an essential tool for achieving equality of opportunity for any protected group. As Bell identifies, the more employers become aware of the penalties for unlawful discrimination, the more overt prejudice is likely to migrate into increasingly covert forms of discrimination.<sup>17</sup> Certainly, in the context of disability, this form of discrimination is already likely to constitute a large percentage of disability discrimination cases globally.

An example that is regularly used to illustrate indirect discrimination in the context of disability is a job requirement for a driving licence. Such a requirement (although apparently neutral) would clearly place blind people at a particular disadvantage when compared to other persons and, as a result, constitute an indirect form of discrimination against them. Nonetheless, this example can also be used to demonstrate that there will be occasions where indirect forms of discrimination can and should be allowed to continue because to hold otherwise, and impose a blanket prohibition, would prevent the law operating effectively in practice (see below). Non-discrimination laws typically take this situation into account by providing the respondent with an opportunity to *objectively*

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<sup>16</sup> See, for example, *Granovsky v. Canada* [2000] 1 S.C.R. 703.

<sup>17</sup> Bell, ‘Sexual Orientation Discrimination in Employment: An Evolving Role for the European Union’ in R. Wintemute and M. Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships*, Oxford: Hart, 2001, 653 at 659.

justify the provision, criterion or practice in question (hereinafter referred to as the 'justification defence').

*The 'justification defence' – Article 2(2)(b)(i)*

In terms of the Framework Directive, the 'justification defence' can be found in Article 2(2)(b)(i). Essentially, this defence will allow a respondent to continue using a provision, criterion or practice (that would otherwise constitute a form of indirect discrimination) where he/she is able to demonstrate that he/she has a "legitimate aim and [that] the means of achieving that aim are appropriate and necessary...". Thus, to return to the driving licence example given above, such a requirement would almost certainly satisfy the criteria for the justification defence - and thus be allowed to continue - if it related to a form of employment for which the ability to drive constituted an essential element of the job (such as employment as a lorry or bus driver, for example). To hold otherwise in this regard would clearly be contrary to public safety and, as a result, detract from the law's credibility and its effectiveness in practice.

Beyond such a clear-cut example, however, the question as to whether a provision, criterion or practice would satisfy this 'justification defence' is essentially one of fact and degree and will therefore be dependent on the particular circumstances of a case.<sup>18</sup> In any event, the crucial point to ensure in this regard is that the implementation of this defence within national legislation (as well as its application by the courts) demands an assessment that is based purely on objective criteria. Given that disability discrimination is often the result of fear, prejudice and misconception as to the very nature of disability, it is clear that the introduction of subjective elements into this test would only reintroduce the very prejudices that the law is seeking to remove.<sup>19</sup>

*Indirect discrimination, the Framework Directive, and disability*

Traditionally, a claim of indirect discrimination on grounds such as race and sex has been made by an individual, or a group of individuals, that have been able to identify

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<sup>18</sup> Some guidance can be gained in this respect from the interpretation that has been accorded to an equivalent provision under Community law relating to gender discrimination. See in this regard Article 2(2) of Council Directive 97/80/EC [1998] OJ L 14/6 on the burden of proof in cases of discrimination based on sex, and its associated case law. Note also that in the explanatory memorandum attached to the original proposal for the Framework Directive, the Commission expressed the view that the aim used to justify the provision, criterion or practice "must *deserve protection* and must be *sufficiently substantial* to justify it taking precedence over the principle of equal treatment [and] the means employed to achieve that aim must be appropriate and necessary" (COM (1999) 565 at 8) (emphasis added). Whilst the explanatory memorandum does not have any binding effect under Community law, its interpretative value in this regard arguably supports the proposition that the 'justification defence' under the Framework Directive is at least as rigorous as its equivalent in respect of gender equality.

<sup>19</sup> Note, concerns as to the introduction of subjective elements into what was intended to be an objective test are not without foundation. See in this regard, the interpretation of s 5(3) of the United Kingdom's Disability Discrimination Act 1995 in *Jones v. the Post Office* [2001] IRLR 384. This is likely to be especially acute as regards the Framework Directive in the areas falling within those exceptions to the prohibition of discrimination under Article 2(5) examined below.

themselves through the existence of shared characteristics with the protected ground of discrimination. By pointing to an adverse impact on persons coming within that ground generally (usually through a showing of statistical evidence) they are then able to demonstrate their own particular disadvantage and, if successful, have the infringing provision, criterion or practice removed. Thus, whilst a claim of indirect discrimination may have been made by just one individual, the benefits of a successful challenge in this regard (that is, the removal of the provision, criterion or practice) would normally apply to all persons sharing the same (protected) characteristics and therefore benefit the 'group' as a whole.

However, this traditional formulation does not so readily apply in the context of disability. Moreover, due to the legislative construction of indirect discrimination under the Framework Directive, the accrual of any group benefits from such a claim is unlikely to occur for people with disabilities. The reasons for these inconsistencies are as follows:

First, whilst the traditional grounds of discrimination (that is, sex, race, and religion) can easily be classified into clearly defined groups, this is not the case with disability - people with disabilities simply do not form a homogenous group. There are many different forms of disabilities, each demonstrating large variations as to their nature and severity and this is further compounded by the existence of multiple disabilities. As a result, some people with disabilities would have great difficulty in identifying a particular group that is disadvantaged by the relevant provision, criterion or practice in the same manner and to the same extent as they are.

The Americans with Disabilities Act 1990 (ADA)<sup>20</sup> recognised this difficulty through its incorporation of the phrase "an *individual with a disability* or a class of individuals with disabilities" into its test for indirect discrimination - thereby allowing reference to be made to an adverse impact on just one individual (Emphasis added).<sup>21</sup> Similarly, the Commission also distinguished between individuals and groups in its *original* proposal for the Framework Directive, by the use of the words "liable to affect adversely a *person or persons*" (Emphasis added).<sup>22</sup> However, the text of the Framework Directive finally adopted by the Council omitted the reference to "a person" and, as a result, took a step back in this regard by preventing reference to an adverse impact on just one individual. Nonetheless, the adopted text does refer to persons with a particular disability and, whilst it is not as advantageous as the wording in the original proposal, this formulation clearly allows an individual to establish a claim by reference to tightly defined sub-groups within the larger ground of 'disability'. Moreover, the use of the words "would put" in this definition arguably allows for a showing of an adverse impact on a 'hypothetical' group of persons with a *particular* disability. If correct, this interpretation would effectively reinstate the person test by removing the need for an individual to identify an 'actual' group or sub-group (however small) of persons similarly affected.<sup>23</sup> Whether this interpretation was in fact intended by the legislator, or would

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<sup>20</sup> 42 U.S.C. §§ 12101-12213.

<sup>21</sup> See 42 U.S.C. § 12112 (b)(6) and the EEOC's "A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act", Jan 28, 1992, § 4.3(2).

<sup>22</sup> See COM (1999) 565 at 20.

<sup>23</sup> See Whittle, 'The Concept of Disability Discrimination and its Legal Construction' n.15

actually be upheld by the Court of Justice, however, remains unclear.

Second, reliance on the use of statistical data to establish an adverse impact is inappropriate in the context of disability (even where a reference can be made to persons with a 'particular' disability). The use of statistical data in this regard is a traditional legal tool in anti-discrimination legislation and is typically required to prove indirect discrimination on grounds of sex. Under Community law, for example, the burden on the individual is to establish that the apparently neutral provision, criterion or practice "disadvantages a *substantially higher proportion* of the members of one sex" (Emphasis added).<sup>24</sup> Clearly this is a difficult requirement to fulfil even in relation to sex discrimination, where statistics are commonplace.<sup>25</sup> In respect of disability, however, it would be a very onerous burden as the statistical data is unlikely to be available. Whilst the wording of the Framework Directive in the context of indirect discrimination does not (in itself) demand compliance with such a test, Recital 15 to the directive effectively leaves it up to the Member States to decide whether or not to rely on this method of establishing an adverse impact. Disability NGOs should therefore strive to ensure that a test based on statistical data is not implemented at a national level in relation to disability. To allow otherwise, would essentially render ineffective the protection afforded by the Framework Directive against indirect forms of disability-based discrimination.

Finally, the possibility to attain group benefits in the context of disability is severely limited by the existence of Article 2(2)(b)(ii) of the Framework Directive. This provision (which applies to disability only) is hereinafter referred to as the 'second unless' clause – the justification defence (examined above) constituting the first.

#### *The 'second unless' clause – Article 2(2)(b)(ii)*

In essence, the 'second unless' clause provides the respondent with another opportunity to retain the disputed provision, criterion or practice that is causing an adverse impact on persons with a 'particular disability'. Such an opportunity will arise where the respondent is under a legal obligation to provide the complainant with 'reasonable accommodations' to overcome that impact.<sup>26</sup>

In terms of the practical operation of this clause, reference can again be made to the driving license example (given above) and its application to a blind person. Take, for example, an employment scenario where being able to drive was an advantage for the employer but not an essential element of the job. If the employer is obliged to provide the blind person in this scenario with 'reasonable accommodations' (such as swapping some of his/her tasks with another work colleague or providing a taxi on the necessary occasions) then - by virtue of the 'second unless' clause - the job requirement for a driving license will be allowed to remain in place.<sup>27</sup> Thus, whilst this clause does not

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above, at 9.

<sup>24</sup> See, for example, Article 2(2) of Council Directive 97/80/EC [1998] OJ L 14/6.

<sup>25</sup> See, for example, Case C-167/97, *R v. Secretary of State for Employment, ex parte Seymour-Smith* [1999] ECR I-623, and Barnard and Hepple, 'Indirect discrimination: interpreting Seymour-Smith.' (1999) 58 CLJ 399.

<sup>26</sup> The duty to provide reasonable accommodations under the Framework Directive is examined in more detail below.

<sup>27</sup> Whilst it is tempting to assume that the operation of the 'second unless' clause will be triggered *only* where the respondent can *and does in fact* provide 'reasonable

prevent an individual from addressing his/her own particular concerns, the operation of the relevant provision, criterion or practice will still be allowed to continue provided that the individual in question can and should be accommodated. This will apply even if the respondent would not have otherwise been able to provide an objective justification for the provision, criterion or practice. One effect of the 'second unless' clause, therefore, is to remove any group benefits that may have otherwise accrued from a successful action in this regard.

Nonetheless, it should be noted that the existence of the 'second unless' clause does offer considerable benefits in terms of the practical impact of the Framework Directive in the context of disability. Put simply, it creates a "win-win" situation for employers and disabled people alike. For employers, it allows greater flexibility to lay down provisions and criteria and engage in practices that do not relate to the 'essential functions' of the job (and which may not be objectively justifiable) but yet remain desirable from his/her perspective. For people with disabilities, this flexibility (in turn) provides a greater chance of being accommodated in relation to provisions and criteria that might be considered as "assets" from a recruitment perspective (as opposed to 'essential job requirements') and might not have otherwise been listed in the job description (but nonetheless played an important part in the employer's decision) as well as work practices that are beneficial to promotion within a job, but not essential to its performance. As such, whilst the existence of this clause will certainly negate much of the group benefits that would otherwise accrue from a finding of indirect discrimination based on disability, its practical and beneficial impact on the overall employment opportunities for people with disabilities should not be ignored.<sup>28</sup>

Finally, one should also note that whilst the 'second unless' clause refers to the principles enunciated in the duty to provide reasonable accommodations under the Framework Directive, it specifically bases its application on obligations that may arise from national legislation in this regard. This is because the duty to provide reasonable accommodations under the Framework Directive applies to 'employers' *only* and is not, therefore, as extensive in scope as the remaining elements of the directive. Whilst the material scope of the Framework Directive is examined in more detail below, it suffices to say at this juncture that its obligations (beyond that relating to the duty to provide

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accommodations' to the individual in question, it should be noted that the wording of this clause refers merely to the *obligation* to provide such accommodations. Thus, on a strict interpretation of the 'second unless' clause, a respondent would theoretically be able to retain the disputed provision, criterion or practice despite his/her failure to comply with such an obligation. Nonetheless, it is important to note that in order to rely on this clause, the respondent would first have to demonstrate an obligation to accommodate the complainant and thereby acknowledge any failure to do so. Given that such an acknowledgement would only enhance a claim of disability discrimination, it is submitted that the individual complainant will rarely be disadvantaged by the operation of this clause.

<sup>28</sup> Whilst the 'second unless' clause does not affect the legal facility provided to the respondent under the 'justification defence' (above), its practical impact will arguably encourage employers to (i) adopt a more transparent approach to recruitment and (ii) think more in terms of accommodating the needs of disabled workers rather than focusing instead on identifying 'essential job requirements' with a view to pre-empting claims of indirect discrimination.

reasonable accommodations) apply not only to employers, but also to training providers, organisations of workers and employers, as well as professional bodies. Given that these individuals and organisations may be required by national legislation to provide reasonable accommodations for people with disabilities and at the same time would fall within the material scope of the Framework Directive<sup>29</sup> (and thus the prohibition against discrimination) it is necessary that the facility offered by the ‘second unless’ clause extends to such individuals and organisations (as well as to employers) in order to maintain a level playing field in this regard.

### *The duty to accommodate – Article 5*

As expressed earlier in this paper, the protection afforded by the Framework Directive will be of no benefit to an individual that is unqualified for the job in question. As such, a rejection from a job for which an individual does not have the necessary qualifications will not constitute discrimination under this directive. A major difficulty for people with disabilities, however, is that employers often do not recognise the abilities of disabled people but see only the barriers that they encounter on a daily basis (both within and outside the employment context). By focusing on the disability rather than an individual’s ability to perform the job, employers often conclude that he/she is unsuitable for the post. This is clearly unfair. What the employer is ignoring, or simply misunderstanding, is that these barriers can often be removed through the provision of accommodations or adjustments to work practices and/or the work environment.

It is in this regard, therefore, that the Framework Directive offers the greatest potential for people with disabilities. Under Article 5 of the Framework Directive, a duty is placed on employers to provide reasonable accommodations “...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.” (Emphasis added). This is hereinafter referred to as the ‘duty to accommodate’.

In the context of employment, this duty may require adaptations to the work place or work arrangements, policies or practices, to meet the needs of a disabled worker where it is reasonable to do so.<sup>30</sup> Whilst its legislative construction makes it clear that this duty will not impose a normative obligation to make the workplace accessible for all potential employees, it nonetheless requires an employer take into account and accommodate (in an anticipatory manner) the actual needs of an individual<sup>31</sup> – a failure to do so would itself constitute discrimination.<sup>32</sup> As such, when an employer comes to decide whether an

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<sup>29</sup> As recognised by the reference in the text of the ‘second unless’ clause to “...the employer or any person or organisation to whom this Directive applies...” (Emphasis added).

<sup>30</sup> See Recital 20 to the Framework Directive, which also lists as examples “... the provision of training or integration resources.”

<sup>31</sup> The use of the words “where needed in a particular case” in Article 5, clearly suggests that the duty will only arise where the employer has knowledge of the individual’s disability. Whether such knowledge may be constructively attributed to the employer is, at present, unclear.

<sup>32</sup> Whilst the duty to accommodate in the Framework Directive is located outside the concept of discrimination as defined in Article 2, it is clear that the two are inextricably linked. The opening sentence to Article 5, *i.e.*, “In order to guarantee compliance with the principle of

individual is qualified for the job, he/she must assess the suitability of that individual in light of any accommodations that can reasonably be made. Likewise, if an employer is seeking to rely on the 'justification defence' (as opposed to the 'second unless' clause)<sup>33</sup> for a provision, criterion or practice that results in an adverse impact on persons with a particular disability, that defence must also be assessed in light of this duty. In other words, an employer must either demonstrate that no reasonable accommodations can be provided to the disabled individual *as well as* establish an objective justification for the provision, criterion or practice, or show that, *even where* he/she provides the individual with reasonable accommodations, the continued use of that provision, criterion or practice (and its resulting adverse impact generally) can still be objectively justified.

The following points, however, should be stressed about the duty to accommodate and its legal construction under the Framework Directive:

First, whilst the duty (as a legal concept) could equally apply to all grounds of discrimination,<sup>34</sup> the Framework Directive makes it very clear that (for the purposes of this directive) it applies to people with disabilities only. In this sense, therefore, people with disabilities have been singled out for special treatment. However, it is vital to ensure that this 'singling out' does not in itself lead to confusion as regards the very nature and purpose of this duty under non-discrimination laws. The concern here is that the duty to accommodate may itself be perceived as a form of 'special treatment' and, as a result, be interpreted and applied in a manner similar to disability welfare or affirmative action measures. Given that these measures not only provide 'special' benefits and/or rights to people with disabilities but are also dependent on finite public resources and/or positive forms of discrimination, it should perhaps be of no surprise that - where such confusion has arisen - attempts have been made to constrain the practical reach of disability non-

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equal treatment ... reasonable accommodation shall be provided", should be noted in this regard and cross referenced with the concept of discrimination in Article 2(1) as well as the reference to the duty to accommodate in Article 2(2)(b)(ii).

<sup>33</sup> There are at least three situations where the respondent would seek to rely on the 'justification defence'. First, where the respondent cannot provide reasonable accommodations he/she will be unable to rely on the 'second unless' clause and will therefore need to objectively justify the provision, criterion or practice (although the inability to accommodate in itself would provide support for this justification). Second, the respondent may actively choose to rely on the 'justification defence', despite the availability of the 'second unless' clause, in order to publicly legitimise the provision, criterion or practice. Third, the 'second unless' clause may not actually be available at a national level as Member States could arguably rely on Article 8 of the Framework Directive (minimum requirements) as a basis for opting not to implement this clause in order to retain the 'group benefits' associated with a claim of indirect discrimination.

<sup>34</sup> See, for example, sections 7, 8 and 9 of South Africa's Promotion of Equality and Prevention of Unfair Discrimination Act 2000. Note also that the principle behind the duty arguably emerged within the jurisprudence of the Court of Justice (as early as the 1970s) in relation to discrimination based on religion. See in this regard, Case 130/75, *Prais v. Council* [1976] ECR 1589. Whilst the complainant was unsuccessful, the principle running through the judgement clearly reflects the duty to accommodate. One may therefore anticipate an extension of this duty by the Court of Justice to other grounds of discrimination under Community law.

discrimination laws. Experience from North America under the ADA (for example) demonstrates that such confusion can result in a restrictive interpretation being accorded - not only to the way in which this duty is applied - but also to the definition of 'disability' (as a ground of discrimination) and its personal scope.<sup>35</sup> It is of great importance, therefore, that such confusion does not take place within the European Union and that the recent difficulties associated with the ADA do not also occur as regards the Framework Directive and its provisions on disability (either in its implementation by the Member States or interpretation by the courts).

Disability NGOs should therefore be proactive in educating all parties concerned with the implementation of the Framework Directive that the purpose of the duty to accommodate is not to provide 'special measures' to people with disabilities, but instead to remove barriers to their participation where it is equitable to do so. Rather than aiming to achieve identical results for disabled people, as compared to non-disabled people, it simply aims to ensure that people with disabilities are afforded an equal opportunity to achieve those results.<sup>36</sup> It should be stressed in this regard that the making of accommodations is not a new social concept; that the provision of artificial lighting, restrooms, seating and escalators (to name but a few examples) are all accommodations that are regularly made to facilitate the comfort and efficiency of employees and service recipients. The duty to accommodate requires no more than the provision of accommodations (mostly through modifications to existing facilities) to cater for the needs of people with disabilities. It does not, therefore, require anything beyond that which has already been provided to other members of society. It is simply a necessary device for achieving equality (rather than seeking to deviate from it) and should not, therefore, be confused with disability welfare or affirmative action measures that have such deviation (albeit positive in nature) as their purpose.

Second, the duty to accommodate is not unlimited in nature; the employer only has to provide reasonable accommodations. This is reinforced by the text of Article 5 itself and its reference to a "disproportionate burden" on the employer. The determination as to whether it is unreasonable or disproportionate will, of course, vary from employer to employer. Generally speaking, if the required accommodation imposes significant difficulty or expense, then it is unlikely to be considered reasonable.<sup>37</sup> However, it should be noted in this regard that the directive makes it very clear (both within the duty itself and the recitals to the directive) that the existence of public funding or other assistance

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<sup>35</sup> See, for example, Hahn, 'Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?' (2000) 21 *Berkeley Journal of Employment & Labor Law* 213 and Feldblum, 'Definition of Disability under Federal Anti-Discrimination Law: What Happened? Why? And what can we do about it?', (2000) 21 *Berkeley Journal of Employment & Labor Law* 91.

<sup>36</sup> For example, a restaurant need not provide Braille menus for blind patrons if it provides a waiter or other employee to read the menu to the client.

<sup>37</sup> Recital 21 to the Framework Directive provides that "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." (Emphasis added). Note also that the accommodation need only be 'reasonable' in nature and need not be the 'best' possible accommodation. See in this regard, Recital 20 to the Framework Directive where 'appropriate measures' under Article 5 are further defined as "effective and practical measures".

for accommodations will also be taken into account in assessing whether a disproportionate burden has been imposed. Moreover, the duty to accommodate under the Framework Directive should not be confused with similar obligations that employers already have under existing European health and safety legislation. As such, the assessment of whether a disproportionate burden has been imposed must *not* take into account accommodations that the employer is otherwise obliged to provide in this regard.<sup>38</sup> This is important because the obligations that arise under such health and safety legislation must be fulfilled irrespective of costs to the employer.<sup>39</sup>

Third, it is imperative that the duty to accommodate applies to both ‘direct’ and ‘indirect’ forms of discrimination as to hold otherwise would result in the retention of barriers to participation. The role played by this duty as regards indirect forms of disability discrimination (both in respect of the ‘justification defence’ and the ‘second unless’ clause) has been illustrated above. In terms of direct discrimination, it is important to recall that only those individuals that are actually qualified for the job will be able to claim protection against such discrimination. In other words, a finding of direct discrimination will not occur where a complainant is rejected because he/she cannot fulfil the essential functions of the job. However, if the duty to accommodate did not apply to the concept of direct discrimination, an individual who *can* perform those functions, *but only with* reasonable accommodations, will not be granted the opportunity to meet the job criteria and will be regarded as unqualified. As a result, the barriers to that individual’s participation in the employment market will remain. It is significant therefore that the application of this duty to both direct and indirect forms of discrimination is implicitly recognised under Article 5 itself and, in particular, its reference to the principle of ‘equal treatment’ when read in conjunction with Article 2(1) and Recital 16. Disability NGOs should therefore ensure that an equally wide scope of application is made available in this regard through any national measures designed to implement the Framework Directive.

Fourth, implicit in the directive is the understanding that the duty to accommodate should be constructed in a way that emphasises the obligation to remove barriers. Whilst there will clearly be occasions where the requested accommodation will not be ‘reasonable’ (and will not therefore have to be performed) this must not detract from the purpose of the duty’s inclusion. The duty under Article 5 should not, therefore, be seen (or legislatively implemented) as simply another defence to disability discrimination.<sup>40</sup>

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<sup>38</sup> As implicitly recognised in the explanatory memorandum to the Framework Directive, see COM (1999) 565 at 9.

<sup>39</sup> Health and safety legislation under Community law will have an increasingly important role to play both in the removal of disabling barriers and the prevention of disabilities. See in this respect, Annex 1.20 of Directive 89/654, [1989] O.J. L393/1 concerning the minimum safety and health requirements for the workplace, and Article 6 of Directive 89/391, [1989] O.J. L183,1 on the introduction of measures to encourage improvements in the safety and health of workers at work, respectively.

<sup>40</sup> An example of a legislative construction to avoid in this regard is s 29(1) of the New Zealand Human Rights Act 1993 which provides: “*Nothing in ... this Act shall prevent different treatment based on disability where ... the position is such that the person could perform the duties of the position satisfactorily only with the aid of special services or facilities and it is not reasonable to expect the employer to provide those services or facilities...*”. (Emphasis added).

The correct emphasis in this regard should be on the anticipatory nature of the duty to remove barriers as an equality right; an emphasis that acknowledges both the duty to prevent as well as remove barriers (where reasonable to do so). This emphasis is clearly adopted in the legislative construction of the duty under Article 5 of the Framework Directive and should be similarly reflected at a national level.

Finally, whilst the protection under the Framework Directive will in some instances extend beyond the employment relationship itself (see below), the duty to accommodate under Article 5 applies to employers only. It will not, therefore, apply to the other individuals and organisations falling within the Framework Directive's sphere of operation, such as training providers,<sup>41</sup> organisations of workers and employers, and professional bodies.

### *Additional protection afforded by the Framework Directive*

In addition to the prohibition of 'direct' and 'indirect' forms of discrimination and the duty to provide reasonable accommodations, the Framework Directive also prohibits 'harassment' as well as 'an instruction to discriminate'. Both of these additional prohibitions are included within the concept of discrimination as defined in Article 2 of the Framework Directive.

**Harassment.** The prohibition of harassment is located in Article 2(3), and is defined as "...unwanted conduct ... [that] takes place with the *purpose or effect* of violating the dignity of a person *and* of creating an intimidating, hostile, degrading, humiliating or offensive environment [on grounds of, *inter alia*, disability] ...". (Emphasis added). From a disability perspective, therefore, it is clearly interlinked with the other prohibitions under Article 2 as disability-based discrimination is more often than not the result of fear, ignorance and prejudice. In terms of its definition, the legislative construction of this concept is certainly broad in nature, and it matters not whether the 'harasser' intended to create such an environment provided that the conduct in question had that effect. Moreover, from its wording, it would appear that its prohibition is not intended to be limited in application to a particular type of respondent (such as employers).<sup>42</sup> As such, one may presume that its prohibition extends to all 'potential respondents' falling within the material scope of the Framework Directive under Article 3 (examined below). However, beyond these issues, the Framework Directive leaves it to the Member States to decide how the prohibition is to be implemented ("in accordance with ... national laws and practice"). It is therefore up to Member States to deal with issues such as whether an objective or subjective test should be used to determine if and when a form of harassment has taken place, and whether the prohibition should impose any liability on third parties (such as employers and trade Unions) to take steps to prevent harassment taking place in their working environments.

**Instruction to discriminate.** The prohibition of 'an instruction to discriminate' is located in Article 2(4) of the Framework Directive. In essence, this prohibition is intended to

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<sup>41</sup> Unless of course it is the employer providing the training.

<sup>42</sup> Had such a limitation been intended, it is reasonable to assume that the Council would have made this explicit in Article 2(3) itself (as it did with the duty to accommodate under Article 5).

prevent organisations such as employers, trade unions and professional bodies from discriminating on any of the ‘protected grounds’ through an intermediary. In the context of disability (for example) it seeks to prevent an employer from instructing an employment agency to filter out people with disabilities for consideration as potential employees.

### *Required changes to the national legal order*

The Framework Directive also demands that Member States implement a number of changes to their national legal systems (where necessary) to ensure that the protection afforded by the Framework Directive is most effective. Of particular note for the purposes of this paper, are the followings three requirements: reversal of the burden of proof, legal standing for interest groups, and protection against victimisation.

**Reversal of the burden of proof.** Member States must institute a reversal in the burden of proof as regards the identification of direct and indirect forms of discrimination. In accordance with Article 10 of the Framework Directive, once the complainant establishes “facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.”. However, it is debatable whether this facility also extends to the prohibition of harassment and the duty to accommodate because Article 10 specifically refers to direct and indirect forms of discrimination only. Nonetheless it should be noted that Article 10 does refer (at an earlier stage of its text) to “...persons who consider themselves wronged because the *principle of equal treatment* has not been applied to them...” (Emphasis added). As such, given the cross references to the principle of equal treatment within the concepts of harassment and the duty to accommodate, it is arguable that the requirement laid down in Article 10 for a reversal in the burden of proof should similarly apply to those concepts as well. In any event, it should be noted that the operation of the duty to accommodate as defined in Article 5 (and its requirement on the employer to demonstrate a disproportionate burden) would arguably result in such a reversal in practice anyway.

**Legal standing for interest groups.** Member States must ensure that organisations (such as trade unions and NGOs) that are deemed by national law as having a “legitimate interest” in ensuring that the Framework Directive is complied with, are given legal standing to bring cases either on behalf of or in support of a complainant (provided that the complainant approves of such action). This requirement is located in Article 9(2) of the Framework Directive and is particularly important as regards disability discrimination because many people with disabilities will not have the necessary resources and support (financial or otherwise) to make such a claim on their own. Thus, given the experience and additional resources that may be available through organisations such as trade unions and disability NGOs, it is crucial that the facility offered by this provision is fully exploited in the context of disability.<sup>43</sup>

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<sup>43</sup> As Bell notes, however, “it is disappointing that organisations may only act on behalf of individuals, and not in their own name. In this way, the law still requires an individual to suffer discrimination before any action can be taken.” See, Bell, ‘Sexual Orientation

**Victimisation.** Article 11 of the Framework Directive provides that Member States must ensure that employees are protected “against dismissal or other adverse treatment by the employer” (victimisation) as a result of their association with a complaint made to enforce compliance with the principle of equal treatment under the directive.

### **Exceptions to the principle of equal treatment**

The Framework Directive provides three specific kinds of exceptions to the principle of equal treatment. In sequential order these exceptions are located in Article 2(5) ‘exceptions necessary in a democratic society’, Article 4 ‘genuine occupational requirements’, and Article 7 ‘positive action’.

**Exceptions necessary in a democratic society: Article 2(5).** According to Article 2(5) of the Framework Directive, the principle of equal treatment and the protection afforded by the directive is “...*without prejudice* to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the *protection of health* and for the *protection of the rights and freedoms of others*.” (Emphasis added). As Bell observes, “[t]his general exception to the principle of equal treatment is unique in EU anti-discrimination law and the text has been imported from the European Convention on Human Rights.”<sup>44</sup> In the context of disability, however, two immediate concerns should be identified as to the possible application of this exception and, in particular, those elements highlighted above.

First, it is important to ensure that the “protection of health” element is not exploited to the disadvantage of disabled people. In the context of employment (for example) when an employer assesses whether an individual is qualified for the job, they are obliged (under national and international law) to take into account whether that individual would pose a health and safety risk either to themselves or to their work colleagues. Reliance on such a risk, in the context of disability non-discrimination laws, is commonly referred to as the ‘direct threat’ defence. It is crucial, however, that such an assessment is conducted in a rational and objective way and is not turned into just another opportunity to justify disability discrimination based on fear, ignorance and prejudice.<sup>45</sup>

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Discrimination in Employment: An Evolving Role for the European Union’ in R. Wintemute and M. Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships*, Oxford: Hart, 2001, 653 at 674. Note also that it is for the Member States to determine which NGOs have a “legitimate interest”. Unfortunately, this is likely to result in variations as to the level of support available throughout the Member States and disability NGOs should therefore be vigilant to ensure that they are appropriately represented in this regard.

<sup>44</sup> In particular, Articles 8(2), 9(2), 10(2) and 11(2) of the Convention. See Bell, ‘Sexual Orientation Discrimination in Employment: An Evolving Role for the European Union’ in R. Wintemute and M. Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships*, Oxford: Hart, 2001, 653 at 666.

<sup>45</sup> A similar concern should be raised as regards the application of Article 15 of Directive 89/391, [1989] O.J. L183/1 on the introduction of measures to encourage improvements in the safety and health of workers at work, and its specific reference to “risk groups”. For consideration of this issue from a British perspective, see Davies and Davies, ‘Reconciling

Second, the reference to the “protection of the rights and freedoms of others” is potentially open to exploitation by employers with a view to undermining the application of the duty to accommodate under Article 5 of the Framework Directive. In particular, concern should be focused on the potential use of the ‘right to property’ in this regard; a right that has already been successfully invoked under the Irish Constitution to undermine this duty in the recent equality legislation in Ireland.<sup>46</sup> Whilst the general expectation is that the introduction of the Framework Directive and the principle of supremacy of Community law will require an amendment to this aspect of Irish legislation, it should be noted that the right to property is also contained in other national constitutions as well as international human rights instruments.<sup>47</sup> Given the influence of constitutional traditions and international legal principles on the development of Community law generally,<sup>48</sup> a similar interpretation of this right at a national or international level could, therefore, undermine the application of the duty to accommodate under the Framework Directive.

It is important, therefore, that disability NGOs (together with NGOs representing the other ‘protected grounds’) seek to ensure that these exceptions under Article 2(5) are interpreted as restrictively as possible.<sup>49</sup>

**Genuine occupational requirements: Article 4.** The second exception to the principle of equal treatment is contained in Article 4 of the Framework Directive. According to this provision, “a difference of treatment which is based on a characteristic related to any of the [protected grounds] *shall not* constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes *a genuine and determining occupational requirement*, provided that the objective is *legitimate* and the requirement is *proportionate*.” (Emphasis added). In the main, this exception will operate to the benefit of the ‘protected groups’ under the Framework Directive. In the context of disability (for

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Risk and the Employment of Disabled Persons in a Reformed Welfare State’, (2000) 29 ILJ 347.

<sup>46</sup> See s 16(3)(c) of the Employment Equality Act 1998, s 4(2) of the Equal Status Act 2000, and the decision by the Irish Supreme Court in *Re Employment Equality Bill*, 1996, [1997] 2 I.R. 321 at 360-368. Controversially, the Supreme Court reduced the application of the duty to accommodate under these statutes (due to the existence of the right to property under Article 43 of the Irish Constitution) so that it imposed no more than a *nominal* cost on employers.

<sup>47</sup> See, for example, Article 17 of the European Union Charter of Fundamental Rights and its inclusion as a ground of discrimination under Article 21 of that Charter. See also Article 1 of Protocol No. 11 to the European Convention on Human Rights and Fundamental Freedoms 1950.

<sup>48</sup> See, for example, Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 419 and Case 4/73, *Nold v. Commission* [1974] 2 CMLR 338.

<sup>49</sup> An expansive interpretation of these exceptions would certainly conflict with the Framework Directive’s objective to implement the principle of equal treatment. Such a conflict would arguably undermine the principle of ‘effective judicial control’ laid down in Article 9(1) of the Framework Directive and could be contested on this basis. Support for this interpretation can be found in recent case law concerning an equivalent provision under Community sex equality legislation, see in this respect Case C-185/97, *Coote v. Granada Hospitality Ltd.* [1998] ECR I-5199 at para 22-27.

example), it will allow an employer to discriminate in favour of people with disabilities where he/she can show that having a disability constitutes a genuine and determining occupational requirement (such as being a disability officer or representative) provided, of course, that the requirement is both legitimate and proportionate. It is likely, however, that – as with the other exceptions to the principle of equal treatment – this exception will be interpreted strictly.<sup>50</sup>

**Positive action: Article 7.** The third exception to the principle of equal treatment is contained in Article 7 of the Framework Directive. This provision recognises that equal treatment may not (in itself) be enough to achieve ‘real’ equality in practice and, under Article 7(1), allows Member States to maintain or adopt “specific measures to prevent or compensate for disadvantages linked to any of the [protected grounds].”

It is important to note that an equivalent provision in this regard can be found in relation to gender equality under Community law and the reconciliation of this provision “with the general rule of non-discrimination has proven one of the more difficult aspects of EU sex equality law” to date.<sup>51</sup> Specifically, the relevant jurisprudence from the Court of Justice indicates that a range of positive action measures, including strict quotas, will be allowed prior to the point of employment selection, but the use of positive action schemes that produce an ‘equal result’ through automatic mechanisms at the selection stage will not be endorsed. Clearly, such an interpretation in the context of disability would have serious implications for those Member States relying on the use of employment quotas and other schemes favouring people with disabilities. However, at the time of the Commission’s proposal in this regard, it was generally expected that the Court of Justice would take these political considerations into account by simply adapting its level of scrutiny to ‘fit’ the particular grounds of discrimination in question.<sup>52</sup>

Nonetheless, at the insistence of the Dutch authorities, this expectation was made explicit within the adopted text of the Framework Directive under Article 7(2). This provision is aimed at disabled people only, and sends a clear signal to the Court of Justice that positive action measures for this group must be treated differently to those in respect of gender. In particular, it refers to the maintenance or adoption of “...provisions on the *protection of health and safety at work* or to measures aimed at creating or maintaining *provisions or facilities for safeguarding or promoting [the integration of disabled*

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<sup>50</sup> For recent case law concerning an equivalent exception in the context of gender discrimination, see Case C-273/97 *Sirdar v. Army Board* [1999] ECR I-7403. Note also the concerns raised as regards the potential application of this provision in the context of sexual orientation discrimination, see Bell, ‘Sexual Orientation Discrimination in Employment: An Evolving Role for the European Union’ in R. Wintemute and M. Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships*, Oxford: Hart, 2001, 653, at 663-664.

<sup>51</sup> See in this regard Bell, ‘Sexual Orientation Discrimination in Employment: An Evolving Role for the European Union’ in R. Wintemute and M. Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships*, Oxford: Hart, 2001, 653 at 665, referring to Mancini and O’Leary, ‘The new frontiers of sex equality law in the European Union.’ (1999) 24 E.L.Rev 331.

<sup>52</sup> In the context of disability (for example) a lower level of scrutiny would certainly be appropriate given that many people with disabilities would be unable (physically and/or mentally) to take advantage of the non-discrimination norm and would therefore be dependent on positive and/or social and economic rights.

persons] into the working environment.” (Emphasis added). Clearly the reference to ‘provisions or facilities for safeguarding or promoting [the integration of disabled persons]’ is designed to cater for the use of employment quotas and similar schemes, as mentioned above. As to the reference to ‘health and safety’, however, the reason for its inclusion (in this context) remains unclear. Presumably, it is intended to allow and encourage Member States to adapt their health and safety legislation to take into account the needs of people with disabilities (although this is arguably unnecessary given the existing health and safety obligations under Community law).<sup>53</sup> In any event, a note of caution should be heeded by disability NGOs as to the possibility of this provision being relied on for the adoption of “measures ostensibly designed to guarantee the health and safety of workers with a disability [but which] could in fact result in the exclusion and denial of equal treatment to people with disabilities”.<sup>54</sup>

### **The material scope of the Framework Directive**

The material scope of the Framework Directive is set out in Article 3 and, as mentioned earlier in this paper, is limited to the context of employment and occupation alone. However, within this context, the Framework Directive does have quite an extensive application. Broadly speaking, it applies (in both the public and private sectors) to access to employment, self-employment and occupation; access to vocational training and guidance; employment and working conditions including dismissals and pay, as well as membership of and involvement in trade unions, organisations of employers, and professional bodies.

Of particular interest in this regard, is the extension of the Framework Directive’s material scope to encompass matters of ‘access’ relating to “all types and to all levels of vocational guidance, vocational training [etc]”.<sup>55</sup> This particular phrasing clearly extends the material scope of the directive to vocational training that is provided outside as well as within an employment relationship. One may argue, therefore, that this would encompass any training providers, including higher educational establishments, insofar as they provide courses that can be classified as vocational training under Community law. This is significant given the breadth of the interpretation accorded to the term ‘vocational training’ by the Court of Justice in respect of the free-movement provisions under the EC Treaty.<sup>56</sup>

It is important to note, however, that the material scope of the Framework Directive specifically excludes certain matters that might otherwise be construed as falling within the employment context as defined in Article 3. In particular, it allows Member States (under Article 3(4)) to exclude the armed forces from the operation of the directive in so

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<sup>53</sup> See n. 39 above.

<sup>54</sup> Waddington and Bell ‘More Equal than others: Distinguishing the European Union Equality Directives.’ (2001) 38 CMLR 587, at 603 - 604. See also n. 49 above.

<sup>55</sup> See Article 3(1)(b) of the Framework Directive.

<sup>56</sup> It has been held to include all forms of teaching that prepares for and leads directly to a particular profession, trade or employment, or which provides the necessary skills for such profession, trade or employment, even if the programme of instruction includes an element of general education. See, for example, Case 293/83 *Gravier v. City of Liege* [1985] ECR 593; [1985] 3 CMLR 1.

far as it applies to disability and age.<sup>57</sup> In addition, Article 3(3) excludes “payments of any kind made by state schemes or similar, including state social security or social protection schemes” from the remit of the directive generally. From a disability perspective, this exclusion is significant because the provision of state assistance for the employment of disabled people in Europe is often directed towards segregated schemes even though integration into the open labour market may constitute the least restrictive alternative. The removal of state funding from the material scope of the Framework Directive, therefore, represents a lost opportunity to challenge the direction of such funding where it is unnecessarily aimed at segregation as opposed to integration and, through such a challenge, promote equality for people with disabilities within the employment market generally.<sup>58</sup>

### **The personal scope of the Framework Directive**

At first glance, the personal scope of the Framework Directive would appear to be a matter that requires little or no further analysis and debate - the protection under the Framework Directive obviously applies to those groups of people that share the relevant characteristics and, as a result, fall within the protected grounds of discrimination listed in Article 1 of the Framework Directive, that is, religion or belief, disability, age or sexual orientation. However, whilst this observation is not (in itself) incorrect, the Framework Directive has left unanswered many questions as to the specific nature of these characteristics and, as a result, the type of individuals that will fall within those ‘protected’ grounds.<sup>59</sup>

Of the grounds listed in Article 1, disability arguably raises the most questions. Questions such as: will the directive protect people with minor disabilities? Will it protect those who do not currently have a disability but had one in the past or are regarded as having one? Will it protect those that are likely to acquire a disability in the future? And what about persons - such as carers, friends and family - that do not have a disability themselves but are associated with an individual that does? Clearly, all of these scenarios

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<sup>57</sup> See also Recitals 18 and 19 to the Framework Directive.

<sup>58</sup> See for example, *Olmstead v. L.C.* 119 S. Ct. 2176 (1999) where the Supreme Court in the United States interpreted the equality principle in the ADA as prohibiting segregation where integration was the least restrictive alternative. For an analysis of this decision and its implications for people with disabilities see, Perlin, ‘“I ain't gonna work on Maggie's farm no more”: Institutional Segregation, Community Treatment, The ADA, and the Promise of *Olmstead v. L.C.*’, (2000) 17 *Thomas M. Cooley Law Review* 53. Given the dominance of the ‘welfare approach’ to disability policy in Europe, the application of the equality principle in this manner would have a tremendous impact on the lives of disabled Europeans. Similarly, the exception in Article 3(3) will also prevent challenges to mainstream state support schemes that are designed to help people into as well as remain at work and which put persons with a particular disability at a particular disadvantage.

<sup>59</sup> In the context of discrimination based on ‘race or ethnic origin’, for example, the concepts of “racial grounds” and “racial group” in the United Kingdom’s Race Relations Act 1976, have already given rise to debate in the British courts. See *Mandla v. Lee* [1983] 1 All ER 1062. It is suggested that some of the new grounds of discrimination listed in Article 13, and in particular disability, will also necessitate legislative and/or judicial criteria that clearly define the protected class.

are likely to give rise to discrimination on grounds of disability and should therefore be protected. However, the question remains as to whether the Framework Directive will actually offer such protection.

Certainly, one may argue in this regard that the relevant wording in the Framework Directive (that is, its open-ended reference in Article 1 to "...discrimination *on the grounds of ... disability ...*" (Emphasis added)) is broad enough to allow for such coverage.<sup>60</sup> However, with things as they stand, the decision as to whether this possibility is fully utilised will initially rest with national authorities and/or national courts of law,<sup>61</sup> with the Court of Justice acting as final arbiter.<sup>62</sup> Disability NGOs should therefore be proactive at both a national and international level in ensuring that an appropriate definition of disability is adopted in this regard and that the protection afforded by the Framework Directive is as far reaching and as effective as possible. Whilst the influence of the national dimension in this context must not be underestimated,<sup>63</sup> European level disability NGOs should focus in particular on encouraging the Institutions of the European Union to intervene at an early stage in the process by adopting a complementary measure to both inform debate as well as identify an appropriate and common standard for such a definition.<sup>64</sup>

In any event, it is important that policy makers and the judiciary within the European Union take heed of the lessons learnt from jurisdictions both within and outside of the European Union that have already adopted disability non-discrimination laws.<sup>65</sup> In particular, it is crucial that the purpose of such laws is not confused with that relating to

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<sup>60</sup> As regards future disabilities, particular encouragement can be gained in this regard by the inclusion of 'genetic features' as a protected ground of discrimination under Article 21 of the EU Charter of Fundamental Rights.

<sup>61</sup> It is open to the national authorities not to further define the term disability but instead leave it (at least initially) to the national courts.

<sup>62</sup> Variations amongst the Member States in terms of the definition of disability will result in a disparate application of the Framework Directive throughout the European Union. This, in turn, will have a negative impact on the fundamental principle of 'free-movement of persons' under Community law and would necessitate intervention by the Court of Justice. Given that variations already exist in this regard amongst those Member States that have so far enacted disability non-discrimination laws (*i.e.*, Ireland, the United Kingdom and Sweden), it seems highly likely that such intervention will be necessary.

<sup>63</sup> Clearly, any decision on this issue from the Court of Justice will not be made in a political and legal vacuum. Recourse will inevitably be made (if not formally) to relevant developments at a national level if only to identify a common denominator for this purpose across the Member States. Similarly, those Member States within the European Union that are yet to implement the disability aspects of the directive will clearly be influenced by the methods employed by those that have already done so.

<sup>64</sup> For example, the Commission itself could lead by example by revising its Staff Regulations to encompass an appropriate definition of disability.

<sup>65</sup> In particular, experience from North America in respect of the ADA and the United Kingdom under the Disability Discrimination Act 1995. See Feldblum, 'Definition of Disability under Federal Anti-Discrimination Law: What Happened? Why? And what can we do about it?', (2000) 21 *Berkeley Journal of Employment & Labor Law* 91, and Stacey, M and Short, A, *Challenging Disability Discrimination at Work*, Institute of Employment Rights, United Kingdom, 2000, ch. 2.

measures providing special advantages to people with disabilities (whether through disability welfare benefits or positive action measures). Where such confusion has occurred, unnecessary restrictions on the potential beneficiaries of the non-discrimination norm have been imposed, as if the protection against discrimination is itself a limited resource. Clearly, however, this is not the case. As mentioned above in the context of the 'duty to accommodate', the purpose of the disability aspects of the Framework Directive is no different to that relating to the other grounds of discrimination, that is, to implement and promote the principle of equality, not deviate from it. As such, the protection afforded by the Framework Directive should be available to all suffering such discrimination (unless otherwise justified by the law).

From this understanding of disability non-discrimination laws, two key points must be addressed for the purposes of defining disability as a ground of discrimination. First, whilst it will be necessary to base the definition of disability on the concept of 'impairment' (so that the discriminatory act or omission can itself be located within the protected ground) it is crucial that the legislative concept of impairment does not (a) incorporate phraseology that will encourage an assessment as to the extent of an individual's functional limitations<sup>66</sup> and (b) ignore the social dimension to disability.<sup>67</sup> Such a construction would result in the judiciary striving to identify a 'deserving class' of disabled people and, by so doing, excluding from the protective remit of the law a large number of the disabled population intended to come within its personal scope.<sup>68</sup> The second, and related point, is that the concept of impairment must be defined in a comprehensive manner to ensure that the question for the judiciary is more to do with whether an individual has been discriminated against on grounds of disability, rather than whether the individual's past, present, future or perceived impairment constitutes an appropriate disability for the purposes of the law.<sup>69</sup>

Beyond the legal definition of disability, the relevance of the Framework Directive to people working in 'sheltered' and 'semi-sheltered' employment should also be considered. This is a particularly important issue for people with disabilities because there are at least 350,000 disabled Europeans working in this form of employment, many of whom do not have adequate employment rights.<sup>70</sup> At present, however, it remains unclear as to whether this form of employment will actually attract the protection

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<sup>66</sup> The ADA (for example) refers to phrases such as 'substantially limits' and 'major life activities'.

<sup>67</sup> The social dimension to disability recognises that while an individual's impairment is a relevant factor in the construction of disability, it is clearly *not the only factor*. In fact, disability is more often than not the result of physical and attitudinal barriers in the social environment.

<sup>68</sup> For further discussion on this matter, see Whittle, 'The Concept of Disability Discrimination and its Legal Construction', n.15 above, at 3-6.

<sup>69</sup> Appropriate guidance in this respect can be gained from the definitions of disability found in the relevant non-discrimination laws in Australia, Ireland and New Zealand. See in this regard, s 4 of the Australian Disability Discrimination Act 1992, s 2(1) of the Irish Employment Equality Act 1998 and s 2(1) (read in conjunction with s 3(1)) of the Equal Status Act 2000, and s 21(h) of the New Zealand Human Rights Act 1993.

<sup>70</sup> See E. Samoy and L. Waterplás, *Sheltered Employment in the European Community*, Commission of the European Communities, 1992.

afforded by the Framework Directive.

The reason for this uncertainty lies in the legal definition of ‘worker’ under Community law. This definition must be complied with before an individual can benefit from certain forms of protection, including that afforded by the Framework Directive in relation to employment and working conditions.<sup>71</sup> Whether an individual falls within this definition is dependent upon, *inter alia*, whether the work undertaken by that individual meets the description of an “effective and genuine economic activity”.<sup>72</sup> Whilst most would agree that this definition will be satisfied in the majority of instances of ‘sheltered’ and ‘semi-sheltered’ employment today, the Court of Justice has held on one occasion that the work undertaken in such an environment did not satisfy this criteria because the goods produced were bought out of charity and therefore for social objectives only.<sup>73</sup> Clearly this perception of such schemes is outdated and must be revised.<sup>74</sup> However, until such clarification is obtained, doubt remains as to whether people employed in ‘sheltered’ and ‘semi-sheltered’ schemes will benefit from the protection afforded by the Framework Directive.

### **Implementation of the Framework Directive: when will its protection take effect?**

The implementation period for the Framework Directive is three years. Thus, according to Article 18, its provisions must be transposed into national law by December 2, 2003. In relation to disability and age, however, Article 18 allows Member States an additional three years to transpose the relevant provisions of the Framework Directive, if required.<sup>75</sup> If a Member State opts for this additional period, it must report annually to the Commission on the steps that it is taking to tackle age and disability discrimination and its progress towards implementation of the directive in this regard. For people with disabilities, therefore, the protection afforded by the Framework Directive may not be fully available until December 2, 2006.

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<sup>71</sup> As defined in Article 3(1)(c) of the Framework Directive. Clearly, the Community definition of ‘worker’ must prevail in this context to ensure consistency within, as well as amongst, the Member States. Nonetheless, it is important to recall that the material scope of the Framework Directive extends beyond the context of ‘employment and working conditions’ and will not always be dependent on this definition. See in this regard, Article 3(1) (a), (b) and (d). In these scenarios, the protection afforded by the Framework Directive is intended to encompass individuals that may not necessarily be employed (either as an ‘employee’ or ‘self-employed person’) within the meaning of Community law, that is, persons such as job applicants and individuals receiving vocational training and/or guidance, for example.

<sup>72</sup> See Case 53/81 *Levin v. Staatssecretaris van Justitie* [1982] ECR 1035; [1982] 2 CMLR 454.

<sup>73</sup> See Case 344/87 *Betray v. Staatssecretaris van Justitie* [1989] ECR 1621; [1991] CMLR 459.

<sup>74</sup> See further, Free Movement of Disabled People in the European Union: An examination of relevant Community provisions and a discussion of the barriers to free movement, Doc. EDF-99/11, available at [www.edf-feph.org/](http://www.edf-feph.org/)

<sup>75</sup> Member States must therefore request this additional period and presumably do so within a reasonable amount of time following the adoption of the Framework Directive in November 2000.

Nonetheless, people with disabilities (and those coming within the other protected grounds) may have some degree of protection under the Framework Directive even before the transition period has expired. Thus, if (during this period) a Member State enacts what it considers to be implementing legislation, but which is in fact incompatible with the directive and liable to "seriously compromise the result prescribed" therein, the legislation will be immediately open to challenge under Community law.<sup>76</sup> In this scenario, therefore, those affected by the legislation will not have to wait until the expiry of the transition period before asserting their rights under the Framework Directive.

In any event, it must be noted that if those affected by the Framework Directive (such as disabled people and employers) are unaware of the directive and the rights that it provides, the directive will be of limited value even when the transposition period has expired. It is vital, therefore, to establish and promote education and awareness programs concerning the scope and operation of the Framework Directive from a disability rights perspective. These programs should build on the achievements already made by national and international organisations representing people with particular disabilities. In this respect it is important to note that Articles 12, 13 and 14 of the Framework Directive place clear obligations on national authorities to disseminate information to people concerned by the directive "by all appropriate means",<sup>77</sup> to encourage dialogue between the social partners (that is, those promoting the interests of workers and employers), and to encourage dialogue with appropriate non-governmental organisations (respectively). People with disabilities should therefore ensure that such obligations are comprehensively fulfilled by every Member State of the European Union.

## Conclusion

Having analysed the scope and operation of the Framework Directive, two principal limitations should be noted.

First, the directive does not contain any requirement to establish an independent enforcement body to oversee its operation. This type of body (such as the United Kingdom's Disability Rights Commission) can play an essential role in assessing particular problems that could arise in the implementation of the directive, providing recommendations for the resolution of those problems, educating those involved at a national level with the directive, and taking cases on behalf of those whose rights have been infringed. As such, the absence of an enforcement body severely limits the ability of those affected by the Framework Directive to ensure that its provisions are effectively implemented at a national level. Nonetheless, it is here that disability NGOs and trade unions can play a vital role. It is imperative in this regard that they make the most of their ability to promote the enforcement of the Framework Directive, in particular through the opportunity provided for in Article 9(2) to support those making a claim under the directive. Additionally, by taking advantage of the Member States' obligations to disseminate information, to encourage dialogue between the social partners, and to

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<sup>76</sup> Case C-129/96, *Inter-Environnement Wallonie ASBL v. Région Wallonne* [1997] ECR I-7411.

<sup>77</sup> In relation to disability, this will clearly require information to be provided in fully accessible formats.

encourage dialogue with appropriate NGOs (provided for in Articles 12 to 14), these bodies can more effectively campaign for the establishment of an independent enforcement body such as that found in the United Kingdom.

The second, and most important, limitation is that the protection afforded by the Framework Directive is restricted to the context of employment. It has been argued elsewhere that the extension of the Framework Directive's material scope to encompass areas beyond employment (areas such as the provision of goods and services, for example) would give rise to significant benefits, not only to disabled people themselves, but also to the development of national economies and the internal market.<sup>78</sup> Moreover, it needs to be underlined that the effective application of the rights provided for in the Framework Directive itself necessitates that those services associated with employment (such as transport and education) are also provided on a non-discriminatory basis. There is clearly a need, therefore, to build on and expand the level of protection that is afforded by the Framework Directive for people with disabilities and it is noteworthy in this regard that the European Disability Forum has already commenced work on a proposed text to be submitted to the Institutions of the European Union.

Nonetheless, it is also important to stress that the key to a successful disability non-discrimination law is the effective functioning of its core aspects; aspects such as the definition of disability, the concepts of direct and indirect discrimination, and the duty to provide reasonable accommodations. These aspects, and the concerns pertaining thereto, have been examined in this paper and are equally important for any future European measure as they are for the Framework Directive itself. Put simply, if they do not function effectively, no extension of coverage beyond the context of employment will compensate for the subsequent loss of opportunity to make a real difference to the lives of disabled Europeans. Clearly, therefore, whilst more comprehensive protection at a European level must certainly feature heavily in the long-term campaign for disability rights, it is imperative that the disability movement first strives to ensure that the core aspects of the Framework Directive are clearly understood and properly implemented from a disability rights perspective.

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<sup>78</sup> See Whittle, 'Disability Rights after Amsterdam: the way forward.' [2000] EHRLR 33, at 42-43.