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Disability law and reasonable accommodation beyond employment

**A legal analysis of the situation in
EU Member States**

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Disability law and reasonable accommodation beyond employment

A legal analysis of the situation in EU Member States

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with the assistance of Anne Poulos

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Executive summary

Introduction

This report analyses the situation in the 28 EU Member States with regard to obligations to provide reasonable accommodation outside the field of employment. More specifically, the report outlines the duties contained in Member States' laws and policies with respect to reasonable accommodation in the areas covered by the 2008 proposal of the European Commission for a directive to protect people from discrimination on the ground of disability, as well as discrimination on a number of other grounds (henceforth 2008 proposal).¹ The 2008 proposal addresses the fields of social protection, including social security, healthcare and social housing; education; and access to, and supply of, goods and services, including housing.² It seeks to prohibit six kinds of discrimination including, in the context of disability, an unjustified denial of a reasonable accommodation.³

The 2008 Commission proposal complements pre-existing EU non-discrimination legislation in the form of the Employment Equality Directive.⁴ That Directive required the adoption of national legislation prohibiting discrimination, as well as mandating that all EU Member States introduce an obligation to provide reasonable accommodations in favour of disabled individuals in the context of employment and vocational training.⁵ However, the failure to meet the reasonable accommodation duty was not explicitly defined as a form of discrimination. In that respect, the 2008 proposal represents a shift in approach in comparison with the Employment Equality Directive.⁶

In 2010, the EU became a party to the United Nations Convention on the Rights of Persons with Disabilities⁷ (henceforth Convention or CRPD).⁸ The CRPD is a progressive human rights convention, which seeks to tailor already existing human rights⁹ to the situation of people with disabilities and imposes wide-ranging obligations on states parties. The Convention addresses both civil and political rights, and economic, social and cultural rights. Much of the focus of the Convention is on the prohibition of discrimination and the equality norm. In that regard, it is important to note that the CRPD defines an unjustified failure to make a reasonable accommodation as a form of discrimination.¹⁰ Following the conclusion of the CRPD the EU is bound by the Convention to the extent of its competences, including in the field of non-discrimination (an area of shared competence with the Member States).

1 Proposal for Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Brussels, 2 July 2008, COM(2008) 426 final. For the purposes of this report, the most recent publicly available version of the proposal, which differs in a number of respects from the original 2008 proposal, is taken as the reference point. See Note from General Secretariat of the Council, 11 December 2014, Council (EPSCO), Proposal for Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Brussels, 8 December 2014, 15705/14, ADD 1 REV 2.

2 Article 3, 2008. Proposal, Version 15705/14 ADD 1 REV.

3 Article 2, 2008. Proposal, Version 15705/14 ADD 1 REV.

4 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive), [2000] OJ L23/35.

5 Article 5, Employment Equality Directive.

6 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive), [2000] OJ L303/16.

7 United Nations (UN), Convention on the Rights of Persons with Disabilities (CRPD), 13 December 2006.

8 See Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC), [2010] OJ L 303/16.

9 In, for example, the International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, and the International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966.

10 Article 2 and Article 5 CRPD.

In order to analyse the situation existing in the EU Member States with regard to the duty to provide reasonable accommodation outside the field of employment, the present report is divided into nine principal sections. Section 1 sets out the current approach to disability discrimination and reasonable accommodation under international and EU law, including in the 2008 proposal. The report then moves on to look at the situation in the 28 EU Member States. Sections 2, 3 and 4 provide a general overview of disability law and policy in the Member States. This part of the report therefore focuses on relevant constitutional provisions (section 2), disability non-discrimination law (section 3), and general disability law and policy, including measures relating to accessibility (section 4). The next part of the report explores the duty to make a reasonable accommodation in the three fields covered by the 2008 Commission proposal. It begins with section 5, which contains a general overview of the extent to which there are reasonable accommodation duties in the Member States in the covered fields. Sections 6, 7 and 8 of the report then analyse reasonable accommodation duties in the areas covered by the 2008 proposal, namely social protection, education and access to, and supply of, goods and services, respectively. This makes up the bulk of the report. Section 9 of the report contains the conclusion.

The international and EU law context

Section 1 of the report sets out the international and European context. In light of the fact that the EU is a party to the CRPD, section 1 of the report reflects on the approach taken in the CRPD to disability discrimination, before reflecting on the scope and manner in which EU law prohibits, and proposes to prohibit, discrimination on the basis of disability including failure to provide reasonable accommodation. This facilitates a comparison of the similarities and differences between EU law and the CRPD. It also allows for an identification of the areas where gaps exist between the Employment Equality Directive and the Commission's 2008 proposal, on the one hand, and the CRPD, on the other hand, in the context of discrimination.

The CRPD embodies the social-contextual model of disability,¹¹ which can be contrasted with the individual or medicalised model of disability. The latter model argues that disability is a direct consequence of impairment, and is the result of an incapacity caused by an impairment. On the other hand, the CRPD recognises that disability stems primarily from the failure of the social environment to meet the needs and aspirations of people with impairments. Moreover, the scope of the Convention is extremely broad.¹² The CRPD does not simply prohibit disability discrimination. Rather, it tailors the equality norm to the lived reality of persons with disabilities and covers both civil and political rights, as well as economic, social and cultural rights. The principles of non-discrimination and equality are the core norms underlying the Convention and these norms include the duty to reasonably accommodate persons with disabilities. The CRPD creates a broad and far-reaching duty to prohibit discrimination and to provide reasonable accommodations, which spans all human rights. Under the CRPD, it falls on states parties to ensure that a wide array of social actors, including employers, schools, healthcare providers and suppliers of services, accommodate persons with disabilities. If adopted, the Commission's 2008 proposal for a new non-discrimination directive would contribute towards filling the existing lacuna between EU disability equality law and the CRPD. However, the material scope of the CRPD remains much broader than the scope of the 2008 proposal and the Employment Equality Directive, meaning that the EU Member States which have ratified the CRPD will be obliged to prohibit disability discrimination in fields beyond those

11 There is a wealth of literature addressing theoretical models of disability. See, e.g. Oliver, M. (2009), *Understanding Disability: From Theory to Practice* (2nd edition), Palgrave., and Priestley, M. (1998), 'Constructions and creations: idealism, materialism and disability theory' 13(1) *Disability and Society*, 75-94. Parts of this text on the CRPD draw on: Waddington, L. (2011), 'Future Prospects for EU Equality Law. Lessons to be Learnt from the Proposed Equal Treatment Directive', *European Law Review*, 2011. Issue 2, 163-184.

12 The Convention explicitly recognises the fact that 'disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.' Article 1, CRPD.

covered by EU equality law.¹³ Those EU Member States which have ratified the CRPD will therefore have significant obligations, in terms of prohibiting and combatting discrimination on the ground of disability. Such obligations cannot be complied with simply by transposing the Employment Equality Directive and a directive based on the 2008 proposal.

National legislation relating to disability – an overview

Section 2 of the report covers both constitutional and general principles addressing disability discrimination, as well as national constitutional provisions addressing issues related to participation and integration/inclusion and social welfare/rehabilitation issues.

The information collated in section 2 of the report reveals that the constitutions of **Austria, Finland, Germany, Hungary, Portugal** and **Slovenia** prohibit disability discrimination explicitly. In several other EU Member States (notably, **Bulgaria**, the **Czech Republic, Denmark, Greece, Ireland, Luxembourg, Malta** and **Sweden**), there is no prohibition of disability discrimination. The constitutions of the remaining EU Member States do not prohibit disability discrimination explicitly. Notwithstanding this, several EU Member States' constitutions contain an open-ended list of grounds on which discrimination is prohibited. In many cases, those grounds have been interpreted as, or can potentially be interpreted as, including disability. The **United Kingdom** has no written constitution and therefore no prohibition of disability discrimination at the constitutional level.

Beyond prohibitions of discrimination, it is notable that several national constitutions contain provisions related to inclusion and participation, on the one hand, and social welfare/rehabilitation, on the other hand. A handful of EU Member States' constitutions aim to increase participation and the inclusion of persons with disabilities in society by means of various provisions relating to education and social, economic and political aspects of society.¹⁴ Several Member States' constitutions also adopt a functional/medicalised approach to disability, focusing on social welfare, protection and rehabilitation.¹⁵ This is in sharp contrast with the social-contextual model of disability, on which the CRPD is based. While measures related to welfare/rehabilitation are integral to ensuring the overall wellbeing of persons with disabilities, they must be combined with national measures pertaining to participation and integration/inclusion of persons with disabilities in society.

13 Examples of fields where discrimination should be prohibited under the CRPD, but which are not addressed by current and proposed EU law, include access to justice (Article 13) and participation in political and public life (Article 29 CRPD). These two articles do not explicitly set out an obligation on states parties to prohibit discrimination, but require that persons with disabilities should have access or enjoy their rights 'on an equal basis with others'. Moreover these obligations should be understood in light of Article 3 and Article 4 CRPD.

14 The Greek Constitution is an example of a constitution which adopts a broad approach towards ensuring participation of persons with disabilities in society. Article 21(6) thereof stipulates that disabled persons shall: 'Have the right to benefit from measures ensuring their self-sufficiency, professional integration and participation in the social, economic and political life of the Country'. Furthermore, Article 71(1) of the Portuguese Constitution refers to the equal rights of disabled citizens. It establishes that: 'Citizens with physical or mental disabilities shall fully enjoy the rights and shall be subject to the duties enshrined in this Constitution, save the exercise or fulfilment of those for which their condition renders them unfit'.

15 An example of this can be seen quite clearly in Article 21(3) of the Greek Constitution, which guarantees that the state 'shall care for the health of citizens and shall adopt special measures for the protection' of persons with disabilities, among other groups in society'. The Polish constitution also adopts a welfare approach to disability. According to Article 69 of the Polish Constitution, 'public authorities shall provide, in accordance with statute, aid to disabled persons to ensure their subsistence, adaptation to work and social communication'. The individual or medicalised approach to disability can be seen in Article 68(3) of the Polish Constitution, which provides that public authorities shall ensure special healthcare to, among others, 'handicapped people'. The medicalised approach to disability is also evidenced under the Spanish Constitution, where a focus on rehabilitation and welfare is maintained in Article 49 of the constitution. That article provides that public authorities shall carry out a policy of preventive care, treatment, rehabilitation and integration of disabled persons.

Several constitutional provisions in the EU Member States have either vertical or horizontal direct effect or both, although this is not the case in all Member States.¹⁶ Provisions having vertical direct effect (against the state), enabling individual challenges to national legislation on the basis that it discriminates on the ground of disability and breaches the constitution, are potentially significant in terms of protecting the rights of persons with disabilities. Nevertheless, the information provided by the national experts from the European network of legal experts in the field of gender equality and non-discrimination show that relatively few cases of this nature have been reported. Constitutional equality provisions which have horizontal direct effect, and which can be enforced against private parties, are also potentially significant. However, once again, little case law was reported in this field. Moreover, in practice the importance of such provisions is limited where statute law prohibits discrimination on the ground of disability and covers a broad field. In that regard, the ratification of the CRPD and the adoption of the 2008 proposal for a new equality directive are both potentially significant developments.

National legislation prohibiting disability discrimination that falls within the scope of the 2008 proposal

Section 3 of the report addresses national legislation prohibiting disability discrimination falling within the scope of the 2008 proposal. As it currently stands, EU law does not require Member States to prohibit discrimination against persons with disabilities outside the field of employment. Notwithstanding this, many Member States have extended their legislation to cover disability discrimination in fields beyond employment. In light of the foregoing, this section of the report categorises the diverse national disability non-discrimination laws on the basis of how many areas of the 2008 proposal they cover.

In a large number of EU Member States (namely, in **Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Finland, France, Germany, Hungary, Italy, Luxembourg, Portugal, Slovakia, Slovenia, Spain, Sweden** and the **United Kingdom**), disability discrimination is regulated by national laws in all three fields covered by the 2008 Commission proposal. In other Member States, there is a prohibition of disability discrimination in domestic law only in relation to two of the covered fields contained in the proposal. For instance, in **Ireland, Lithuania** and **Malta**, there is a prohibition of disability discrimination in the sphere of access to, and supply of, goods and services, as well as in the field of education. Furthermore, in the **Netherlands**, the material scope of the relevant domestic legislation law has been extended beyond employment to the fields of primary and secondary education, housing and public transport (but not to the wider field of access to, and supply of, goods and services). Domestic law in **Latvia** contains a prohibition of disability discrimination in the fields of social protection and access to, and supply of, goods and services. In **Cyprus**, legislation prohibits discrimination only in the field of access to, and supply of, goods and services. Notably, no Member State prohibits disability discrimination in the sole area of education or social protection. Finally, in **Denmark, Estonia** and **Greece**, there is no prohibition of disability discrimination outside the field of employment. Although there is a lack of direct provisions in the **Polish** Equal Treatment Act, it is possible to challenge instances of disability discrimination under the Polish Constitution. In **Romania**, disability is not referred to as a protected ground in the list of specific grounds on which discrimination is prohibited under Governmental Ordinance 137/2000 (GO 137/2000).¹⁷ However, disability is mentioned in the general prohibition of discrimination contained in Article 2(1) of GO

16 It is noteworthy that in Austria, Belgium, Latvia, Lithuania and Slovakia, the national constitutional provisions have direct effect only in relation to the state (vertical direct effect). In other Member States, the constitutional non-discrimination provisions can be enforced against both the state and private actors (vertical and horizontal direct effect). That is the case in Croatia, Cyprus, Estonia, Finland, France, Germany, the Netherlands, Poland, Portugal, Slovenia and Spain. Other Member States constitutional provisions have no direct effect (Greece, Hungary and Romania, for instance).

17 Romania, Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination (*Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), 31 August 2000 (Monitorul Oficial al României No. 431 of 2 September 2000), republished in 2014. See Articles 5-8, Article 10 and Article 11.

137/2000 and it has been interpreted by the National Council for Combating Discrimination (NCCD)¹⁸ and the domestic courts as being a protected ground of discrimination under that article.¹⁹

In circumstances where there is no prohibition of disability discrimination in either the national constitution or in national laws in the EU Member States, or alternatively where there are prohibitions of disability discrimination in some (but not all) of the fields covered by the 2008 proposal, the adoption of the 2008 proposal for a new equality directive, and the ratification of the CRPD, can potentially have great significance in extending protection for disabled persons beyond existing fields of protection.

Legislation on the integration of persons with disabilities (not covering discrimination) that falls within the scope of the 2008 proposal

Section 4 of the report addresses legislation regarding the integration of persons with disabilities (not covering discrimination) that falls within the scope of the 2008 proposal. Beyond non-discrimination legislation, two principal types of legislation relating to the integration of persons with disabilities were identified, namely legislation relating to accessibility measures and legislation on education. Such legislation overlaps to a great extent with the material scope of the Commission's 2008 proposal and with the reasonable accommodation duty itself.

Section 4 of the report highlights the fact that in 12 EU Member States there is a general duty to provide accessibility by anticipation for persons with disabilities. In **Bulgaria, Cyprus, France, Germany, Hungary, Ireland, Lithuania, Malta, Slovenia, Spain** and the **United Kingdom**, the accessibility obligation is contained explicitly within national law. By way of contrast, the general duty to provide accessibility in **Slovakian** law is not explicit. Rather, it has arisen as a result of interpretation of the existing legislative provisions by the relevant authorities. In the remaining EU Member States, there is no general duty to provide accessibility. This does not exclude the possibility that the Member States' laws contain provisions requiring services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way. In spite of the wide-ranging provisions contained in Member States' laws, the achievement of accessibility in practice is still a significant challenge and many aspects of the environment and infrastructure remain inaccessible to people with disabilities.

In the context of education, the legislative provisions and policy documents in many EU Member States demonstrate a discernible trend towards integration and inclusion of persons with disabilities in mainstream education. The entry into force of the CRPD has influenced certain policies in the Member States but it has not had any great influence on the introduction of new legislative provisions, with some notable exceptions, such as the **Slovenian** Act on Equal Opportunities of People with Disabilities. There are also positive trends evident under **Dutch** law, among others. In August 2014, the Tailored Education Act on special education for intellectually and physically disabled students²⁰ came into force in the **Netherlands**. The Act imposes an obligation on mainstream schools to accept pupils with learning disabilities and to offer them an adapted learning programme/special assistance.²¹ Furthermore, in **Lithuania**, the state has the responsibility to ensure that children with disabilities are given appropriate assistance at all levels of the education system. In addition to the foregoing, a broad range of measures are foreseen under the

18 The official website of the National Council for Combating Discrimination (NCCD) is available at: <http://www.cncd.org.ro>.

19 See, for example, a recent case of the (*Curtea de Apel*) Bucharest, Court of Appeal (Decision 2547/2015 of 12 October 2015), in which the court quashed the prior decision of the national equality body instead and ruled that two taxi companies discriminated against the plaintiff (a person who used a wheelchair which could not be folded) in light of the fact that the plaintiff could not avail of their services. The companies were sanctioned with a fine of RON 10 000 each (€2 500). The decision is not final. See further Section 3 of this report.

20 Netherlands, Tailored Education Act (*Wet van 11 oktober 2012 tot wijziging van enkele onderwijswetten in verband met een herziening van de organisatie en financiering van de ondersteuning van leerlingen in het basisonderwijs, speciaal en voortgezet speciaal onderwijs, voortgezet onderwijs en beroepsonderwijs (Wet Passend Onderwijs)*), 11 October 2012, Staatsblad 2012, 533.

21 Netherlands, Tailored Education Act.

National Programme for Integration of Persons with Disabilities (2013–2019), which is partly based on the CRPD. Notwithstanding the positive trends evident in these, and other, EU Member States, children with disabilities continue to be excluded from the mainstream education environment, to some extent, throughout the EU.

Reasonable accommodation duties in the Member States

Subsection 5.1. of the report sets out the extent of reasonable accommodation duties contained in national legislation in areas outside employment in the 28 EU Member States. It provides an important backdrop to later sections of the report, in which reasonable accommodation obligations in the fields of social protection, education and access to, and supply of, goods and services are analysed in greater detail. Additionally, subsection 5.2. of the report covers the various justifications or defences contained in national legislation for failure to provide a reasonable accommodation. Finally, the remedies and sanctions available at the Member State level are also set out in subsection 5.3. of the report.

Overall, the information contained in subsection 5.1. of the report reveals a diversity of approaches throughout the EU Member States, both in terms of the fields in which the reasonable accommodation duty is applicable and the manner in which the duty is defined. A considerable number of Member States already have reasonable accommodation duties, as provided for in non-discrimination laws, covering all, or at least some, of the fields addressed in the Commission's 2008 proposal. In general, where reasonable accommodation duties are widespread in the Member States' laws, specific fields are listed as being covered by the duty. However the **Croatian, Cypriot** and **Spanish** legislative provisions are noteworthy for adopting a very broad approach, referring to accommodation duties in the context of participation in 'public and social life' (**Croatia**), 'human rights and fundamental freedoms' (**Cyprus**) and 'all human rights' (**Spain**). In those Member States which do not provide for explicit accommodation duties in their non-discrimination legislation, many Member States provide for what are *de facto* accommodation duties or duties similar to the reasonable accommodation obligation in specific fields under domestic legislation.

A significant number of Member States have adopted non-discrimination legislation addressing, to some extent, all three fields covered by the Commission's 2008 proposal. This is the case in **Austria, Belgium, Bulgaria, Croatia, Finland, Germany, Ireland, the Netherlands, Slovakia, Slovenia, Spain, Sweden** and the **United Kingdom**. The authors of this report also submit that this is the case to some degree in **Cyprus**. Some of those duties are partial duties only, applying to certain subsections of the fields covered by the 2008 proposal. That is the situation in **Belgium, Bulgaria, Cyprus, Finland, Germany, the Netherlands, Slovenia** and **Sweden**. In the **Czech Republic**, there is a reasonable accommodation duty in national non-discrimination legislation in relation to two fields of the 2008 Commission proposal (access to services and education) and a partial duty to accommodate in the field of healthcare. In **Luxembourg** and **Portugal**, there are reasonable accommodation duties in the sphere of education. In a handful of EU Member States (**Denmark, France, Greece, Hungary, Latvia, Malta** and **Romania**), there is what appears to be a *de facto* reasonable accommodation duty or duties similar to reasonable accommodation in general laws, covering some areas of the 2008 Commission proposal. A *de facto* duty is a duty that is not explicitly defined as reasonable accommodation and not necessarily linked to non-discrimination law but does require an individualised accommodation to meet the needs of a particular person with a disability in certain circumstances. In contrast, a similar duty has certain characteristics of a reasonable accommodation duty, but it is not identical. For example, a failure to comply with such a duty may be much easier to justify than in the case of an explicit reasonable accommodation duty. The labelling of such duties as *de facto* or similar duties in this report is not precise and, without further research, it is not possible to develop a strict classification or methodology in this respect.

In a minority of EU Member States (**Estonia, Italy, Lithuania** and **Poland**), there is no reasonable accommodation duty in existence outside the field of employment. However, it is notable that the

legislation in some of those countries contains limited provisions in the field of education to ensure the integration/inclusion of persons with disabilities in mainstream education.

The research conducted for this report reveals that EU Member States have quite extensive coverage of reasonable accommodation duties. Nonetheless, there are certainly many gaps remaining in some Member States with regard to the areas covered by the 2008 Commission proposal. Later sections of the report delve into the specificities of the reasonable accommodation duty contained in domestic legislation in the three areas covered by the proposal (social protection, education and access to goods and services).

National legislation setting out a duty to reasonably accommodate almost always provides for a defence or justification.²² The most common terminology used in this respect is that of a ‘disproportionate burden’.²³ Defences or justifications in respect of a failure to provide a reasonable accommodation are sometimes referred to in other terms, relating, for example to lack of reasonableness²⁴ or high cost²⁵ or other factors.²⁶ However, where legislation or accompanying documents give an indication of the factors to be considered in assessing the ‘disproportionateness’ or ‘unreasonableness’ of any accommodation, as is the case for example in **Austria, Belgium** and **Finland**, cost is rarely the only factor to be taken into account. Other factors mentioned are, for example, the level of public assistance available or organisational factors. The guidance contained in the legislation or accompanying documents in **Austria, Belgium** and **Finland** all refer to the impact of (a failure to make) the accommodation on the population of disabled persons in general (**Austria** and **Belgium**) or the needs of the person with a disability in question (**Finland**). This is reflected to some degree in the Commission’s 2008 proposal which refers, *inter alia*, to ‘the negative impact on the person with a disability of not providing the measure’. Such guidance on assessing the extent of the duty is both helpful in and of itself (since this is a complicated area) and valuable because it reveals the multi-natured assessment which must take place in the provision of reasonable accommodations. On the other hand, one **Bulgarian** statute and **Irish** legislation refer exclusively to cost in the context of justifications for a failure to make a reasonable accommodation. In most cases, once a disproportionate burden or lack of reasonableness has been established, it seems that the duty to accommodate is removed altogether. One interesting exception to this is the **Austrian** legislation which, in such a situation, still requires the duty bearer to improve the situation of the affected individual with a view to achieving equal treatment. This is in contrast to the ‘all or nothing’ approach which accommodation duties in other Member States seem to embody.

Sub-section 5.3 of the report also paints a picture of the various remedies and sanctions available in EU Member States in respect of a failure to accommodate the needs of disabled persons in spheres outside employment. The main remedies applicable at the national level in respect of a failure to reasonably accommodate comprise an award of compensatory damages and/or an order to provide the requested accommodation to the disabled individual in question. In some Member States, the domestic law does not provide for specific remedies in cases of a breach of the duty to make a reasonable accommodation. Notwithstanding this, disabled individuals can potentially access the general remedies available under the

22 In Slovakia, the law makes no reference to a justification test in the context of non-employment related reasonable accommodations. In a similar vein, no provision is made under Romanian law for any justifications or defences with regard to the obligations having similar effect to reasonable accommodation contained in national legislation in that jurisdiction. In France, Germany and Hungary, there is no legislative reference to a justification test specific to reasonable accommodation, but there is relevant case law which appears to refer implicitly to such a test. In Bulgaria, the accommodation duties in the context of education under IPDA are absolute. In other words, they are not subject to a disproportionate burden defence or any other type of justification.

23 This is the case in Austria, Belgium, Croatia, the Czech Republic, the Netherlands, Slovenia and Spain.

24 Under Finnish, Swedish and UK legislation, the applicable test is that of reasonableness. Some of the relevant statutes in those Member States elaborate on the various factors that might be taken into account in assessing reasonableness in the circumstances of a given case.

25 In Bulgaria (under PADA) and Ireland, cost appears to be the determining factor in the applicable justification test in the relevant areas outside employment. Under Cypriot legislation, a combined justification test appears to apply, based not only on cost, but also on the disproportionate burden test.

26 It is notable that in the Swedish School Act, there is reference to the notion of ‘substantial burden’. Furthermore, in Malta, the relevant legislation refers to a defence of ‘unjustifiable hardship’.

relevant non-discrimination or civil or administrative legislation. The primary sanctions available under domestic legislation are conditional fines (often imposed in the case of non-compliance with a judicial order) and, in very rare cases, imprisonment.

The way in which a breach of the duty to accommodate is classified can have consequences for the remedies available to the victim, and the sanctions that can be imposed. In several EU Member States, failure to accommodate the needs of a disabled person in areas outside employment is formulated explicitly as a breach of the non-discrimination legislation. This is the case in **Austria, Belgium, Croatia, the Czech Republic, Finland, Ireland, the Netherlands and Sweden**, among others. In many EU Member States, the particular form of discrimination is not specified (be that direct, indirect or *sui generis* discrimination). In other Member States' legislative provisions, failure to accommodate is not defined explicitly as constituting discrimination. Where a failure to accommodate is regarded as a form of discrimination, the (discrimination-specific) remedies and sanctions available in cases of discrimination are applicable. However, on occasions general remedies available in civil law are applicable.

In the vast majority of EU Member States, compensatory damages are applicable in instances of breach of the accommodation duty. This is the case in **Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, Germany, Hungary, Ireland, Latvia, Luxembourg, Portugal, Romania, the Netherlands, Slovakia, Slovenia, Spain, Sweden** and the **United Kingdom** (with the exception of education). In some instances, the compensatory damages are available under the applicable non-discrimination laws or specialised disability laws. In other instances, such as in **Hungary**, failure to accommodate (if regarded as discriminatory conduct by the relevant domestic authority) may be compensated through the civil courts based on a claim under the relevant Civil Code. In addition to compensatory damages, courts or semi-judicial bodies in many EU Member States can order the requested accommodation to be carried out. This is the situation in **Belgium, Croatia, the Czech Republic, Finland, Ireland, the Netherlands, Romania, Slovakia, Sweden** and the **United Kingdom**. Notably, entities cannot be forced to provide reasonable accommodations under **Austrian** law (in particular), even though compensatory damages are available. In some Member States remedies can only be sought through the court system, whilst in others, such as the **Netherlands** and **Romania**, equality or human rights commissions can also issue (non-binding) opinions or rulings in response to a complaint. This would seem to provide victims with greater choice in deciding whether, and how, to proceed with a claim based on a failure to provide an accommodation.

It is also worth noting that the legislation in several Member States does not use the language of 'reasonable accommodation', but instead refers to 'due and appropriate adjustments' (**Finland**), 'effective accommodation' (the **Netherlands**), or 'appropriate accommodation' (**Slovenia**). This terminology emphasises the goal which the accommodation or adjustment must achieve, and clearly separates the obligation to accommodate from the defence that to make such an accommodation would be 'unreasonable'. The **Dutch** approach to assessing the legitimacy of a claim for a reasonable accommodation is particularly useful, as it separates the assessment of the 'effectiveness' of any considered accommodation from the question of the existence of a 'disproportionate burden' on the duty bearer. This could mean that an accommodation may be regarded as 'effective' but nevertheless not required because it would lead to a 'disproportionate burden'. The two-stage test also allows for the consideration of various accommodation measures, and any accommodation which can be regarded as 'effective' can pass on to the second 'disproportionate burden' part of the test. Such a clear two-stage test is not set out in the legislation of other Member States, even though it facilitates and structures the analysis of the application of the accommodation duty. In many Member States, the legislative definition of a reasonable accommodation is closely interlinked with the defence, whereby a reasonable accommodation is defined as a measure which both accommodates the disabled individual and does not impose a disproportionate or undue burden on the entity concerned.

In addition to defences based on 'disproportionateness' and 'reasonableness', national legislation establishes links between the accommodation duty and accessibility obligations in certain cases. In

a number of instances, compliance with accessibility obligations cannot be raised as a defence to a duty to accommodate the needs of an individual. This is the case in the **Netherlands**, for example. However, in **Austria** the temporary immunity granted to public institutions in the context of indirect discrimination and lack of accessibility means that compliance with such requirements, and the adoption of an accessibility plan, can remove the accommodation duty up until the end of 2019. In general, a claim for an accommodation may be more likely to be regarded as disproportionate or unreasonable where accessibility provisions have already been met. In some jurisdictions the law explicitly provides that an accommodation claim which would have been met if other legal provisions (including accessibility-related provisions) had been complied with, can never be disproportionate or unreasonable. This is the case in **Austria**, and this evidences a constructive interaction between accessibility and reasonable accommodation obligations. However, in most jurisdictions this issue is not addressed explicitly.

Social protection

Section 6 of the report considers the duty to reasonably accommodate persons with disabilities in the field of social protection. The 2008 Commission proposal contains a duty to provide reasonable accommodations in the overall context of social protection and that duty is broken down into the areas of social security/disability benefits, social housing and healthcare.

An explicit legal obligation to provide reasonable accommodations for disabled individuals in the general field of social protection exists in **Austria, Belgium, Croatia, Finland, Germany, Ireland, Slovakia, Spain, Sweden** and the **United Kingdom**. In certain EU Member States (namely, **Bulgaria, Cyprus, the Netherlands** and **Slovenia**) a partial duty exists in one or two of the areas subsumed under the heading of social protection. In other Member States (**Denmark, France, Greece, Hungary, Latvia, Malta** and **Romania**) there is no explicit duty to provide a reasonable accommodation in the field of social protection. However, domestic laws provide for measures akin to reasonable accommodation duties in the field of social protection. In the remaining EU Member States (the **Czech Republic, Estonia, Italy, Lithuania, Luxembourg** and **Poland**), there is no duty at all to provide reasonable accommodations in the area of social protection.

The information contained in section 6 of the report reveals that national laws and policies related to social protection vary greatly between the 28 EU Member States. There is very little specific information available in the context of social security/disability benefits and social housing throughout the Member States, while information on healthcare is more readily available. With regard to social security and assistance benefits, there are not many examples of explicit reasonable accommodations in national legislation. However, there is relevant case law (notably, in **Latvia** and the **United Kingdom**), which elaborates on the duty to accommodate disabled persons in the context of accessing disability benefits. In a similar vein, there are very few examples of complete obligations to reasonably accommodate disabled persons in relation to social housing. In several EU Member States, there are priority measures (positive action measures) for disabled persons in terms of allocation of social housing. Finally, it is notable that Member States' laws and policies regarding healthcare have quite a wide coverage. In a handful of Member States, there is a complete duty to accommodate persons with disabilities in the context of healthcare. In other Member States, there is a partial duty only, related in particular to methods of communication or access to information. In several other Member States, there is no explicit reasonable accommodation duty but there are obligations having similar effect or relevant case law (in **Latvia**, among others).

Education

Section 7 of the report highlights the various legislative provisions and policy measures adopted in the field of education with regard to the duty to reasonably accommodate persons with disabilities.

The vast majority of EU Member States have adopted measures of reasonable accommodation in the context of education. It is noteworthy that the **German** obligation of reasonable accommodation in the educational context derives from the constitution. In a handful of other Member States, there are what might be termed *de facto* reasonable accommodation duties. This is the situation in the **Czech Republic, Denmark, France, Greece, Hungary**, as well as in **Malta** and **Romania**. Some Member States do not provide for any explicit reasonable accommodation duty in the field of education. However, the laws of such Member States contain measures which are very similar to the reasonable accommodation duty in nature and, as a result, the domestic authorities appear (in most instances) to be taking certain measures to promote integration of children with disabilities in mainstream education. That is the case in **Estonia, Italy, Latvia, Lithuania** and **Poland**.

The types of duties provided for in domestic laws (both non-discrimination laws and general education laws) are wide-ranging and can potentially result in a shift towards inclusive education, as mandated by the CRPD. The Convention appears to be having a discernible influence on the laws and policies of some EU Member States. For instance, the latest developments which have taken place in the **Czech Republic** demonstrate a clear shift towards the social model of disability underlying the Convention. In March 2015, the Czech Parliament adopted an amendment to the relevant education law (Section 16 of the Schools law),²⁷ which resulted in a new definition of pupils with special education needs. The new definition focuses on the provision of support measures to ensure equal educational opportunities for persons with disabilities. This results in a shift away from the medicalised or functional approach to disability, towards a social model of disability, in line with the CRPD. In addition, the courts in some EU Member States are referring to the CRPD in the context of the provision of reasonable accommodations to disabled students (most notably, in **Spain** and **Italy**). Nonetheless, there is a significant way to go in many Member States in terms of the actual provision of education to children with disabilities.

Goods and services

Section 8 of the report considers the obligation to provide reasonable accommodations to disabled persons in the context of access to, and supply of, goods and services available to the public.

The majority of Member States have explicit or *de facto* reasonable accommodation obligations covering elements of access to goods and services. Whilst accommodation obligations regarding access to services (including the service of selling goods) and housing are relatively common, accommodation obligations imposed on manufacturers or producers of goods are far less widespread and case law in this field is similarly rare. Only the laws in **Austria, Croatia, Hungary, Romania, Slovakia, Spain** and the **United Kingdom** contain reasonable accommodation obligations with regard to goods, services and housing, although on occasion this is a matter of interpretation rather than being explicitly stated in the legislation. Reasonable accommodation obligations covering services and housing apply in **Belgium, Cyprus**, the **Czech Republic, Finland, Ireland** and the **Netherlands**, although sometimes the coverage is limited to specific areas, such as the Netherlands where only public transport and housing are covered. *De facto* accommodation obligations only with regard to services exist in **France, Malta, Slovenia** and **Sweden**, whilst such obligations regarding only housing exist in **Bulgaria** and **Germany**. There are no accommodation obligations in this broad field in **Denmark, Estonia, Greece, Italy, Latvia, Lithuania, Luxembourg, Poland** and **Portugal**.

27 Czech Republic, Law on pre-school, primary, secondary and higher vocational and other education (Education Act) (*O předškolním, základním středním, vyšším odborném a jiném vzdělávání*).

There is a significant amount of diversity in how Member States address the duty to provide a reasonable accommodation with regard to goods, services and housing. As noted above, the duty to provide a reasonable accommodation is least likely to be imposed on manufacturers or producers of goods. This may reflect both the distance between the manufacturer and the purchaser, and the fact that goods on sale within the EU are manufactured throughout the world, as well as the impossibility of imposing such an obligation on manufacturers based outside the Member State in question under national law. Such an obligation may be regarded as imposing an extra burden on domestic manufacturers – however, this ‘problem’ would be significantly less if the duty existed throughout the EU. To some extent, the lack of a duty imposed on manufacturers can be remedied by imposing a duty on the sellers of goods (and services), and this duty exists in a number of Member States.

Reasonable accommodation duties in these fields, where they exist, can apply to different service providers. In some jurisdictions, the duty is confined to particular service providers, such as providers of public transport, whilst in many Member States the duty extends to all providers of services which are offered to the public. Moreover, as noted above, the duty can take different forms – this was particularly noticeable with regard to housing where, in the **Netherlands**, the duty does not extend to allowing reconstruction or building work. Furthermore, in **Germany**, property owners are under a duty to allow such reconstructions in certain cases and in **Bulgaria** the *de facto* accommodation duty explicitly applies to construction and renovation.

Conclusion

There are widespread reasonable accommodation duties applicable beyond the field of employment in the Member States of the EU. This is in spite of the absence of such a duty existing within current EU equality law. However, there is a great deal of variety concerning, in particular, the reach of the duty to accommodate in the various Member States. Some areas or fields which fall within the scope of the Commission’s 2008 proposal are more likely to be subjected to reasonable accommodation duties than others. In general the most comprehensive framework exists with regard to education, with legislation establishing reasonable accommodation duties or *de facto* or similar duties in the vast majority of Member States. In terms of social protection, reasonable accommodation duties seem to be more widespread with regard to healthcare than with regard to the other areas explicitly referred to in the Commission’s proposal (namely social security/disability benefits and social housing). Lastly, in the third field covered by the Commission’s 2008 proposal, namely access to goods and services, reasonable accommodation duties were most likely to exist with regard to access to services, including the sale of goods, and, to a slightly lesser extent, housing. The duty to accommodate was least likely to be imposed on manufacturers of goods, with this only happening in a small number of Member States, with case law being similarly rare. In spite of these accommodation duties, there remain significant problems on the ground in terms of achieving equality, equal opportunity and equal access for persons with disabilities across many fields, not least of all education.

The CRPD already establishes a broad duty on states parties to establish reasonable accommodation duties and to define a denial of an accommodation as a form of discrimination. The reach of the CRPD is more extensive than the Commission’s 2008 proposal, and the Convention has been ratified by 25 of the 28 EU Member States. In spite of this, the CRPD seems to have had relatively little impact on legislative reform in the Member States. However, there are some notable exceptions in this respect. Legislation or policy relating to discrimination, or the rights of persons with disabilities more broadly, has been revised in the **Czech Republic**, **Slovenia** and **Spain** on the basis of the Convention, and the report has also identified case law in **Italy**, **Latvia** and **Spain** in which courts have relied on the CRPD, amongst other sources, to obtain an equitable result in case law involving reasonable accommodation.

Résumé

Introduction

Le présent rapport analyse la situation des 28 États membres de l'UE en termes d'obligations de fournir un aménagement raisonnable en dehors du domaine de l'emploi. Il décrit plus précisément les obligations prévues par les lois et les politiques nationales en matière d'aménagement raisonnable dans les domaines couverts par la proposition de directive de la Commission européenne qui, publiée en 2008, vise à assurer une protection contre la discrimination fondée sur le handicap et sur plusieurs autres motifs (ci-après la proposition de 2008).¹ Cette proposition s'applique aux domaines de la protection sociale, y compris la sécurité sociale, les soins de santé et le logement social; de l'éducation; et de l'accès aux biens et autres services, et de la fourniture de ces biens et services, y compris en matière de logement.² Elle vise à interdire six types de discrimination parmi lesquels, en ce qui concerne le handicap, le refus injustifié de réaliser un aménagement raisonnable.³

La proposition de 2008 de la Commission complète une législation européenne antidiscrimination préexistante, à savoir la directive relative à l'égalité dans le domaine de l'emploi.⁴ Celle-ci exige l'adoption d'une législation nationale interdisant la discrimination et invite tous les États membres de l'Union à instaurer une obligation de fourniture d'aménagements raisonnables pour les personnes handicapées dans le cadre de l'emploi et de la formation professionnelle.⁵ Elle ne définit cependant pas expressément le non-respect de cette obligation comme une forme de discrimination et la proposition de 2008 constitue à cet égard une réorientation de l'approche par rapport à cette directive antérieure.⁶

L'UE a adhéré en 2010 à la convention des Nations unies relative aux droits des personnes handicapées⁷ (ci-après la Convention ou la CDPH).⁸ Il s'agit d'une convention progressiste en matière de droits de l'homme, qui vise à adapter les droits fondamentaux déjà en place⁹ à la situation des personnes handicapées et qui impose un large éventail d'obligations aux États parties. Elle couvre à la fois les droits civils et politiques, et les droits économiques, sociaux et culturels. La Convention est surtout axée sur l'interdiction de discrimination et sur le principe d'égalité. Il est intéressant de faire remarquer à cet égard que la CDPH définit la non-exécution injustifiée d'un aménagement raisonnable comme une forme de discrimination.¹⁰ La conclusion de la CDPH lie l'UE dans la mesure de ses compétences, y compris dans le domaine de la non-discrimination (un domaine de compétence partagée entre l'Union et ses États membres).

1 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, Bruxelles, 2 juillet 2008, COM(2008) 426 final. Dans le cadre du présent rapport, c'est la version de la proposition la plus récemment rendue publique, qui diffère à plusieurs égards de la proposition initiale de 2008, qui sert de référence. Voir la Note du Secrétariat général du Conseil du 11 décembre 2014 au Conseil (EPSCO), Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, Bruxelles, 8 décembre 2014, 15705/14, ADD 1 REV 2.

2 Article 3, proposition de 2008, version 15705/14 ADD 1 REV.

3 Article 2, proposition de 2008, version 15705/14 ADD 1 REV.

4 Directive 2000/78/CE du Conseil du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail (directive sur l'égalité en matière d'emploi), 2000, JO L 303, p.16.

5 Article 5, directive sur l'égalité en matière d'emploi.

6 Directive 2000/78/CE du Conseil du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail (directive sur l'égalité en matière d'emploi), 2000, JO L 303, p.16.

7 Nations unies (NU), convention relative aux droits des personnes handicapées (CDPH), 13 décembre 2006.

8 Voir la décision 2010/48/CE du Conseil du 26 novembre 2009 concernant la conclusion, par la Communauté européenne, de la convention des Nations unies relative aux droits des personnes handicapées, 2010, JO L 23, p.35.

9 Le pacte international relatif aux droits civils et politiques (PIDCP) et le pacte international relatif aux droits économiques, sociaux et culturels (PIDESC), adoptés tous deux le 16 décembre 1966, par exemple.

10 Article 2 et article 5 de la CDPH.

L'analyse de la situation en vigueur dans les États membres de l'UE pour ce qui concerne l'obligation de fourniture d'un aménagement raisonnable en dehors du domaine de l'emploi présentée dans le présent rapport s'articule en neuf grands chapitres. Le premier décrit l'approche actuelle de la discrimination fondée sur le handicap et de l'aménagement raisonnable en vertu du droit international et du droit de l'UE, y compris la proposition de 2008. Le rapport s'intéresse ensuite à la situation dans les 28 États membres en donnant un aperçu général de leur législation et de leur politique respectives aux chapitres 2, 3 et 4. Cette partie du rapport se concentre en conséquence sur les dispositions constitutionnelles pertinentes (chapitre 2), sur la législation interdisant la discrimination fondée sur le handicap (chapitre 3) et sur la législation et la politique générales liées au handicap, y compris les mesures en matière d'accessibilité (chapitre 4). Le rapport examine ensuite l'obligation d'aménagement raisonnable dans les trois domaines couverts par la proposition de 2008 de la Commission. Cette partie débute au chapitre 5, qui fait un bilan général de la mesure dans laquelle les États membres ont mis en place des obligations d'aménagement raisonnable dans les domaines visés. Les chapitres 6, 7 et 8 analysent ensuite les obligations d'aménagement raisonnable dans les domaines couverts par la proposition de 2008, à savoir respectivement la protection sociale, l'éducation, et l'accès et la fourniture de biens et de services. Ces chapitres forment la plus grande partie du rapport. Le neuvième et dernier chapitre contient la conclusion.

Le context législatif international et européen

Le premier chapitre du rapport définit le cadre international et européen. Étant donné que l'UE adhère à la CDPH, il analyse l'approche adoptée par cette convention vis-à-vis de la discrimination fondée sur le handicap avant de s'intéresser à la mesure et la manière dont la législation de l'UE interdit, et propose d'interdire, la discrimination liée à ce motif, en ce compris le non-respect de l'obligation d'aménagement raisonnable. Cette démarche permet de comparer plus aisément les similitudes et les différences entre le droit de l'UE et la CDPH. Elle permet également de recenser les domaines dans lesquels des disparités existent en termes de discrimination entre la directive sur l'égalité en matière d'emploi et la proposition de 2008 de la Commission, d'une part, et la CDPH, d'autre part.

La CDPH incarne le modèle social-contextuel du handicap,¹¹ que l'on peut opposer au modèle individuel ou médicalisé. Ce dernier soutient que le handicap est une conséquence directe d'une incapacité et de ses effets, alors que la CDPH fait valoir qu'il découle principalement d'une absence de réponse de l'environnement social aux besoins et aspirations des personnes présentant des incapacités. L'objet de la Convention est en outre extrêmement large.¹² La CDPH ne se contente pas d'interdire la discrimination fondée sur le handicap: elle adapte le principe d'égalité à la réalité vécue par les personnes présentant des incapacités, et elle couvre à la fois les droits civils et politiques et les droits économiques, sociaux et culturels. La non-discrimination et l'égalité sont les principes fondamentaux qui sous-tendent la Convention, et ils incluent l'obligation d'aménagement raisonnable en faveur des personnes handicapées. La CDPH crée un devoir général de grande envergure d'interdire la discrimination et d'assurer des aménagements raisonnables, lequel s'étend à l'ensemble des droits de l'homme. Il incombe aux États parties, en vertu de la CDPH, de veiller à ce qu'un large éventail d'acteurs sociaux, parmi lesquels des employeurs, des écoles, des prestataires de soins de santé et des prestataires de services, accueillent les personnes handicapées. En cas d'adoption, la proposition de 2008 de la Commission en faveur d'une nouvelle directive antidiscrimination contribuerait à combler les lacunes actuelles entre la législation de l'UE relative à l'égalité des personnes handicapées et la CDPH. Le champ d'application matériel de la CDPH n'en reste pas moins beaucoup plus vaste que celui de la proposition de 2008 et de la directive sur

11 La littérature consacrée aux modèles théoriques du handicap est abondante. Voir notamment Oliver, M. (2009), *Understanding Disability: From Theory to Practice* (2^e édition), Palgrave, et Priestley, M. (1998), «*Constructions and creations: idealism, materialism and disability theory*», *Disability and Society*, volume 13, n° 1, p. 75-94. Certaines parties de ce texte sur la CDPH s'inspirent de Waddington, L. (2011), «*Future Prospects for EU Equality Law. Lessons to be Learnt from the Proposed Equal Treatment Directive*», *European Law Review*, 2011, n° 2, p. 163-184.

12 La Convention reconnaît explicitement le fait que le handicap découle de l'interaction de personnes qui présentent des incapacités avec diverses barrières pouvant faire obstacle à leur pleine et effective participation à la société sur la base de l'égalité avec les autres (article 1 de la CDPH).

l'égalité en matière d'emploi, ce qui implique que les États membres de l'UE ayant ratifié la CDPH seront obligés d'interdire la discrimination fondée sur le handicap dans d'autres domaines que ceux visés par la législation européenne relative à l'égalité.¹³ Les États membres de l'UE ayant ratifié la CDPH auront donc d'importantes obligations en termes d'interdiction et de lutte contre la discrimination fondée sur le handicap – des obligations qui ne seront pas acquittées par la simple transposition de la directive sur l'égalité en matière d'emploi et d'une directive basée sur la proposition de 2008.

Aperçu de la législation nationale relative au handicap

Le deuxième chapitre du rapport examine les principes à la fois constitutionnels et généraux relatifs à la discrimination fondée sur le handicap, de même que les dispositions constitutionnelles touchant les questions de participation et d'intégration/inclusion et les questions de protection sociale/réadaptation dans les différents États membres de l'Union.

Il ressort des informations rassemblées dans le cadre de ce chapitre que les constitutions de l'**Allemagne**, de l'**Autriche**, de la **Finlande**, de la **Hongrie**, du **Portugal** et de **Slovénie** interdisent expressément la discrimination fondée sur le handicap. Cette interdiction n'existe pas dans plusieurs autres États membres de l'UE (la **Bulgarie**, le **Danemark**, la **Grèce**, l'**Irlande**, le **Luxembourg**, **Malte**, la **République tchèque** et la **Suède notamment**). Les constitutions des États membres restants n'interdisent pas la discrimination fondée sur le handicap de manière explicite. Ceci étant dit, les constitutions de plusieurs pays de l'UE contiennent une liste ouverte de motifs interdits de discrimination, lesquels ont souvent été interprétés, ou peuvent être potentiellement interprétés, comme incluant le handicap. Le **Royaume-Uni** n'a pas de constitution écrite et donc pas d'interdiction constitutionnelle de discrimination fondée sur le handicap.

Il est intéressant de noter qu'au-delà des interdictions de discrimination, plusieurs constitutions nationales contiennent des dispositions relatives à l'inclusion et la participation, d'une part, et à la protection sociale/réadaptation, d'autre part. Les constitutions de quelques États membres de l'UE visent à renforcer la participation et l'inclusion des personnes handicapées dans la société au moyen de dispositions diverses en rapport avec l'éducation et les aspects sociaux, économiques et politiques de la société.¹⁴ Les constitutions de plusieurs États membres adoptent pour leur part une approche fonctionnelle/médicalisée du handicap et se concentrent sur l'aide sociale, la protection et la réadaptation.¹⁵ Cette approche contraste fortement avec le modèle social-contextuel du handicap sur lequel repose la CDPH. Tout en étant essentielles pour

13 On peut citer à titre d'exemples de domaines dans lesquels la discrimination devrait être interdite en vertu de la CDPH mais qui ne sont pas couverts par la législation existante et proposée, l'accès à la justice (article 13 de la Convention) et la participation à la vie politique et à la vie publique (article 29). Ces deux articles n'établissent pas expressément d'obligation pour les États parties d'interdire la discrimination, mais exigent que les personnes handicapées aient accès à leurs droits ou en jouissent «sur la base de l'égalité avec les autres». Ces obligations doivent se comprendre en outre à la lumière des articles 3 et 4 de la CDPH.

14 La constitution hellénique est un exemple de constitution ayant opté pour une large approche en faveur de la participation des personnes handicapées à la société. Elle dispose en effet au sixième paragraphe de son article 21 que «les personnes infirmes ont le droit de bénéficier de mesures qui garantissent leur autonomie, leur insertion professionnelle et leur participation à la vie sociale, économique et politique du pays». L'article 71, paragraphe premier, de la constitution portugaise évoque pour sa part l'égalité des droits des citoyens handicapés en établissant que «les citoyens porteurs d'un handicap physique ou mental jouissent pleinement des droits figurant dans la Constitution et sont astreints aux devoirs qui y sont consignés, en exceptant l'exercice des droits et l'accomplissement des devoirs que leur état leur interdit».

15 Cette approche est assez clairement illustrée par l'article 21, paragraphe 3, de la constitution hellénique qui garantit que «l'État veille à la santé des citoyens et prend des mesures spéciales pour la protection de la jeunesse, de la vieillesse et des invalides». La constitution polonaise adopte également une approche du handicap axée sur l'aide sociale puisque son article 69 prévoit que «les pouvoirs publics accordent, en vertu de la loi, une aide aux personnes handicapées en matière de moyens d'existence, de formation professionnelle et de communication sociale». L'approche individuelle ou médicalisée du handicap transparaît de l'article 68, paragraphe 3, de la constitution polonaise, qui prévoit que les pouvoirs publics s'engagent à assurer une assistance médicale particulière aux «personnes handicapées», entre autres. L'approche médicalisée du handicap est également illustrée par la constitution espagnole, dont l'article 49 insiste sur la réhabilitation et la protection sociale en précisant que «les pouvoirs publics réalisent une politique de prévention, de traitement, de réhabilitation et d'intégration en faveur des handicapés physiques, sensoriels et mentaux».

assurer le bien-être général des personnes handicapées, les mesures axées sur la protection sociale/réadaptation doivent être conjuguées aux mesures nationales axées sur la participation et l'intégration/inclusion de ces personnes dans la société.

Plusieurs dispositions contenues dans les constitutions de pays de l'UE ont un effet direct vertical ou horizontal, voire les deux, mais tel n'est pas le cas dans tous les États membres.¹⁶ Les dispositions ayant un effet direct vertical (à l'encontre de l'État), qui permettent de contester individuellement la législation nationale parce qu'elle est constitutive d'une discrimination fondée sur le handicap et qu'elle enfreint la constitution, peuvent s'avérer importantes pour la protection des droits des personnes handicapées. Il ressort toutefois des informations communiquées par les experts nationaux du réseau européen d'experts juridiques dans le domaine de l'égalité des genres et de la non-discrimination que peu de cas de cette nature sont signalés. Les dispositions constitutionnelles en matière d'égalité qui ont un effet direct horizontal, et qui peuvent être invoquées à l'encontre de parties privées, sont elles aussi potentiellement importantes mais, ici encore, la jurisprudence est très peu abondante. De surcroît, ces dispositions constitutionnelles n'ont qu'un rôle limité dans la pratique lorsque des dispositions législatives de large portée interdisent la discrimination fondée sur le handicap. La ratification de la CDPH et l'adoption de la proposition 2008 en vue d'une nouvelle directive relative à l'égalité pourraient constituer des avancées majeures à cet égard.

Législation nationale interdisant la discrimination fondée sur le handicap et relevant du champ d'application de la proposition de 2008

Le troisième chapitre du rapport est consacré à la législation nationale qui proscriit la discrimination fondée sur le handicap et qui relève du champ d'application de la proposition de 2008. Telle qu'actuellement libellée, la législation de l'UE n'exige pas des États membres qu'ils interdisent la discrimination envers les personnes handicapées en dehors du domaine de l'emploi. Néanmoins, de nombreux États membres ont élargi leur législation de manière à y inclure la discrimination fondée sur le handicap hors du milieu professionnel. Compte tenu de cette situation, le présent chapitre du rapport regroupe les diverses lois nationales interdisant la discrimination fondée sur le handicap en fonction du nombre de domaines visés par la proposition 2008 qu'elles couvrent.

Dans beaucoup d'États membres de l'UE (à savoir l'**Allemagne**, l'**Autriche**, la **Belgique**, la **Bulgarie**, la **Croatie**, l'**Espagne**, la **Finlande**, la **France**, la **Hongrie**, l'**Italie**, le **Luxembourg**, le **Portugal**, la **République tchèque**, le **Royaume-Uni**, la **Slovaquie**, la **Slovénie** et la **Suède**), la discrimination fondée sur le handicap est régie par les lois nationales dans les trois domaines couverts par la proposition de 2008 de la Commission. Dans d'autres États membres, la législation nationale interdit uniquement la discrimination fondée sur le handicap dans deux des domaines visés par la proposition. Ainsi en **Irlande**, en **Lituanie** et à **Malte**, par exemple, une interdiction de discrimination fondée sur ce motif existe en ce qui concerne l'accès et la fourniture de biens et de services, ainsi que le domaine de l'éducation. Aux **Pays-Bas**, le champ d'application matériel de la législation nationale pertinente dépasse le domaine de l'emploi pour s'étendre à l'enseignement primaire et secondaire, au logement et aux transports publics (mais pas au domaine plus vaste de l'accès et de la fourniture de biens et de services). La législation interne de la **Lettonie** comporte une interdiction de discrimination fondée sur le handicap dans les domaines de la protection sociale et de l'accès et de la fourniture de biens et de services. À **Chypre**, la législation interdit uniquement cette discrimination en matière d'accès et de fourniture de biens et de services. Il est intéressant de noter qu'aucun État membre n'interdit la discrimination fondée sur le handicap dans le seul domaine de l'éducation ou de la protection sociale. Enfin, il n'existe aucune interdiction de discrimination

16 Il convient de signaler qu'en Autriche, en Belgique, en Lettonie, en Lituanie et en Slovaquie, les dispositions constitutionnelles nationales n'ont d'effet direct qu'en rapport avec l'État (effet direct vertical). Dans d'autres États membres, les dispositions constitutionnelles antidiscrimination peuvent être invoquées à la fois à l'encontre de l'État et à l'encontre d'acteurs privés (effet direct vertical et horizontal). Tel est le cas en Allemagne, en Croatie, à Chypre, en Espagne, en Estonie, en Finlande, en France, aux Pays-Bas, en Pologne, au Portugal et en Slovénie. Dans d'autres États membres encore, les dispositions constitutionnelles n'ont pas d'effet direct (Grèce, Hongrie et Roumanie, par exemple).

fondée sur le handicap en dehors du domaine de l'emploi au **Danemark**, en **Estonie** et en **Grèce**. En **Pologne**, bien que la loi relative à l'égalité de traitement ne comporte pas de dispositions directes, la Constitution permet de contester les situations constitutives d'une discrimination fondée sur le handicap. En **Roumanie**, le handicap ne figure pas en tant que tel dans la liste des motifs spécifiquement protégés par le décret n° 137/2000,¹⁷ mais il est mentionné dans l'interdiction générale de discrimination figurant à l'article 2, paragraphe premier, du même décret et a été interprété par le Conseil national de lutte contre la discrimination (NCCD)¹⁸ et les juridictions nationales comme étant un motif protégé de discrimination en vertu de cet article.¹⁹

Lorsqu'il n'y a d'interdiction de discrimination fondée le handicap ni dans la Constitution ni dans la législation nationale des États membres de l'UE ou, alternativement, lorsque l'interdiction de cette forme de discrimination existe uniquement dans certains domaines couverts par la proposition de 2008 (mais pas dans tous), l'adoption de cette proposition en vue d'une nouvelle directive en matière d'égalité et la ratification de la CDPH pourraient s'avérer l'une et l'autre très importantes pour étendre la protection des personnes handicapées au-delà des domaines qu'elle couvre aujourd'hui.

La législation relative à l'intégration des personnes handicapées (ne couvrant pas la discrimination) relevant du champ d'application de la proposition de 2008

Le quatrième chapitre du rapport est consacré à la législation relative à l'intégration des personnes handicapées (la discrimination n'étant pas couverte) qui relève du champ d'application de la proposition de 2008. Il recense, en dehors de la législation antidiscrimination, deux grands types de législation portant sur l'intégration de ces personnes, à savoir la législation instaurant des mesures en faveur de l'accessibilité et la législation en matière d'éducation. Ces dispositions législatives recoupent en grande partie le champ d'application matériel de la proposition de 2008 de la Commission ainsi que l'obligation d'aménagement raisonnable proprement dite.

Ce chapitre 4 montre qu'une obligation générale d'assurer par anticipation l'accessibilité en faveur des personnes handicapées existe dans douze États membres de l'UE. En **Allemagne**, en **Bulgarie**, à **Chypre**, en **Espagne**, en **France**, en **Hongrie**, en **Irlande**, en **Lituanie**, à **Malte**, au **Royaume-Uni** et en **Slovénie**, cette obligation figure expressément en droit national; elle n'est en revanche pas explicitement libellée en **Slovaquie**, où elle découle plutôt de l'interprétation par les autorités compétentes de dispositions législatives existantes. Dans les autres États membres de l'UE, il n'existe pas d'obligation générale d'assurer l'accessibilité – ce qui n'exclut pas que la législation de certains États membres puisse contenir des dispositions exigeant que des services mis à la disposition du public, des bâtiments et des infrastructures soient conçus et construits de manière à ce que des personnes handicapées puissent y accéder. Bien que les législations des États membres comportent des dispositions extrêmement larges en matière d'accessibilité, leur concrétisation continue de poser une difficulté majeure avec pour conséquence que beaucoup d'éléments de l'environnement et de l'infrastructure restent inaccessibles aux personnes handicapées.

17 Roumanie, décret n° 137/2000 relatif à la prévention et la répression de toutes les formes de discrimination (*Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*) du 31 août 2000 (Monitorul Oficial al României n° 431 du 2 septembre 2000), republié en 2014. Voir les articles 5 à 8, 10 et 11.

18 Le site officiel du Conseil national de lutte contre la discrimination (NCCD) peut être consulté sur: <http://www.cncd.org.ro/>.

19 Voir notamment une récente affaire devant la Cour d'appel (*Curtea de Apel*) de Bucarest (décision 2547/2015 du 12 octobre 2015) dans laquelle la Cour a cassé la décision antérieurement prononcée par l'organisme national pour l'égalité de traitement et déclaré que deux sociétés de taxis s'étaient rendues coupables de discrimination envers la partie requérante (une personne utilisant un fauteuil roulant qui ne peut être plié), étant donné que celle-ci n'a pu recourir à leurs services. Les sociétés ont été sanctionnées chacune d'une amende de 10 000 RON (2 500 euros). La décision n'est pas définitive. Voir le troisième chapitre du rapport pour plus de détails.

En ce qui concerne l'éducation, les dispositions législatives et les documents de politique de nombreux États membres attestent d'une tendance manifeste à l'intégration et l'inclusion des personnes handicapées dans le système d'enseignement général. Si l'entrée en vigueur de la CDPH a influencé certaines politiques au sein des États membres, elle n'a pas eu d'impact majeur en termes d'instauration de nouvelles dispositions législatives – avec quelques exceptions notoires telles que la loi sur l'égalité des chances des personnes handicapées adoptée par la **Slovénie**. Des évolutions positives sont également observées en droit néerlandais, entre autres. En août 2014, la loi sur l'éducation adaptée portant sur un enseignement spécial à l'intention des élèves intellectuellement et physiquement handicapés²⁰ est entrée en vigueur aux **Pays-Bas**: elle impose aux écoles ordinaires d'accepter des élèves ayant des difficultés d'apprentissage et de leur proposer un programme adapté/une assistance spéciale.²¹ En **Lituanie**, il incombe à l'État de veiller à ce que les enfants handicapés bénéficient d'une aide adéquate à tous les niveaux du système éducatif; toute une série de mesures sont prévues en outre dans le cadre du programme national pour l'intégration des personnes handicapées (2013–2019), lequel se fonde partiellement sur la CDPH. Les tendances positives observées dans ces États membres, ainsi que dans d'autres, n'empêchent pas que les enfants handicapés demeurent, dans une certaine mesure, exclus du cadre éducatif traditionnel dans l'ensemble de l'UE.

Les obligations d'aménagement raisonnable dans les États membres

Le sous-chapitre 5.1. du rapport expose l'ampleur des obligations d'aménagement raisonnable prévues en dehors du domaine de l'emploi dans la législation nationale des 28 États membres de l'UE. Il constitue la toile de fond des chapitres suivants, consacrés à l'analyse plus poussée des obligations d'aménagement raisonnable dans les domaines de la protection sociale, de l'éducation, et de l'accès et la fourniture de biens et de services. Le sous-chapitre 5.2 couvre pour sa part les diverses justifications ou moyens de défense prévus par la législation nationale pour la non-fourniture d'un aménagement raisonnable. Enfin, les recours et sanctions disponibles à l'échelon des États membres sont décrits au sous-chapitre 5.3 du rapport.

De façon générale, les informations présentées au sous-chapitre 5.1. font état d'une diversité d'approches entre États membres de l'UE à la fois en ce qui concerne les domaines auxquels l'obligation d'aménagement raisonnable s'applique et en ce qui concerne la manière dont cette obligation est définie. Un nombre important d'États membres se sont déjà dotés d'obligations d'aménagement raisonnable qui, prévues dans les lois antidiscrimination, couvrent l'ensemble, ou une partie du moins, des domaines visés par la proposition de 2008 de la Commission. Lorsque ces obligations sont courantes dans les lois des États membres, les domaines visés sont généralement spécifiés. Les dispositions législatives de la **Croatie**, de **Chypre** et d'**Espagne** se distinguent toutefois par leur approche extrêmement large puisqu'elles situent les obligations d'aménagement raisonnable dans le contexte de la participation à «la vie publique et sociale» (**Croatie**), des «droits de l'homme et des libertés fondamentales» (**Chypre**) et de «l'ensemble des droits de l'homme» (**Espagne**). Parmi les États membres ne prévoyant pas d'obligation expresse d'aménagement raisonnable dans leur législation antidiscrimination, nombreux sont ceux qui ont instauré dans leur législation nationale des obligations «de fait» dans ce domaine ou des obligations analogues dans des domaines particuliers.

Beaucoup d'États membres ont adopté une législation antidiscrimination visant, dans une certaine mesure, les trois domaines visés couverts par la proposition de 2008 de la Commission. Tel est le cas de l'**Allemagne**, de l'**Autriche**, de la **Belgique**, de la **Bulgarie**, de la **Croatie**, de l'**Espagne**, de la **Finlande**, de l'**Irlande**, des **Pays-Bas**, de la **Slovaquie**, de la **Slovénie**, du **Royaume-Uni** et de la

20 Pays-Bas, loi sur l'éducation adaptée (*Wet van 11 oktober 2012 tot wijziging van enkele onderwijswetten in verband met een herziening van de organisatie en financiering van de ondersteuning van leerlingen in het basisonderwijs, speciaal en voortgezet speciaal onderwijs, voortgezet onderwijs en beroepsonderwijs (Wet Passend Onderwijs)*), 11 octobre 2012, Staatsblad 2012, n° 533.

21 Pays-Bas, loi sur l'éducation adaptée (*Wet Passend Onderwijs*).

Suède. Les auteurs du présent rapport affirment que tel est le cas également, jusqu'à un certain point, de **Chypre**. Ces obligations sont parfois de nature partielle dans la mesure où elles s'appliquent à certains volets seulement des domaines visés par la proposition de 2008. Telle est la situation en **Allemagne**, en **Belgique**, en **Bulgarie**, à **Chypre**, en **Finlande**, aux **Pays-Bas**, en **Slovénie** et en **Suède**. En **République tchèque**, la législation antidiscrimination prévoit une obligation d'aménagement raisonnable dans deux domaines visés par la proposition de 2008 de la Commission (accès aux services et éducation) ainsi qu'une obligation partielle d'aménagement dans le domaine des soins de santé. Au **Luxembourg** et au **Portugal**, des obligations d'aménagement raisonnable existent dans le domaine de l'éducation. Quelques États membres de l'UE (**Danemark**, **France**, **Grèce**, **Hongrie**, **Lettonie**, **Malte** et **Roumanie**) se sont dotés dans des lois générales de ce que l'on pourrait appeler une obligation «de fait» d'aménagement raisonnable ou d'obligations analogues qui couvrent certains des aspects visés par la proposition de 2008 de la Commission. Une obligation «de fait» est une obligation qui n'est pas expressément définie comme un aménagement raisonnable et qui n'est pas nécessairement liée à la législation antidiscrimination, mais qui exige un aménagement individualisé pour répondre aux besoins d'une personne handicapée particulière dans certaines circonstances. Une obligation analogue présente pour sa part certaines des caractéristiques de l'obligation d'aménagement raisonnable, mais ne lui est pas identique. Ainsi par exemple, le non-respect d'une obligation de ce type est probablement beaucoup plus facile à justifier que s'il s'agissait d'une obligation expresse d'aménagement raisonnable. La désignation de ces obligations comme étant «de fait» ou analogues reste imprécise car, sans recherches plus poussées, il s'avère impossible d'élaborer une classification ou une méthodologie rigoureuse à cet égard.

Dans une minorité d'États membres (**Estonie**, **Italie**, **Lituanie** et **Pologne**), il n'existe aucune obligation d'aménagement raisonnable en dehors du domaine de l'emploi. Il convient de souligner cependant que la législation de certains de ces pays comporte dans le domaine de l'éducation des dispositions limitées garantissant l'intégration/inclusion des personnes handicapées dans le système d'enseignement=général.

Il ressort de l'analyse effectuée dans le cadre du présent rapport que les États membres de l'UE présentent une couverture assez étendue en matière d'obligations d'aménagement raisonnable. Il n'en reste pas moins que de nombreuses lacunes persistent dans certains d'entre eux par rapport aux domaines couverts par la proposition de 2008 de la Commission. Les prochains chapitres du rapport s'intéressent aux spécificités de l'obligation d'aménagement raisonnable prévue par la législation nationale dans les trois domaines visés par la proposition (protection sociale, éducation, et accès aux biens et aux services).

Une législation nationale établissant une obligation d'aménagement raisonnable prévoit quasiment toujours un moyen de défense ou une justification.²² La terminologie la plus fréquente à cet égard est la «charge disproportionnée».²³ Les moyens de défense ou justifications en rapport avec la non-fourniture d'un aménagement raisonnable sont parfois désignés par d'autres termes portant notamment sur le caractère déraisonnable,²⁴ le coût élevé²⁵ ou d'autres facteurs.²⁶ Cependant, lorsque la législation ou les

22 En Slovaquie, la loi ne mentionne pas de critère de justification pour ce qui concerne les aménagements raisonnables non liés à l'emploi. De même, la loi roumaine ne contient aucune disposition quant à une quelconque justification ou argumentation concernant les obligations contenues dans la législation nationale et ayant un effet analogue en termes d'aménagement raisonnable. En Allemagne, en France et en Hongrie, aucune référence législative n'est faite à un critère de justification propre à l'aménagement raisonnable, mais la jurisprudence pertinente semble s'y référer implicitement. En Bulgarie, la loi sur l'intégration des personnes handicapées dans l'éducation confère un caractère péremptoire aux obligations d'aménagement dans le cadre éducatif. En d'autres termes, une charge disproportionnée ne peut être invoquée comme argument de défense ou autre type de justification.

23 Tel est le cas en Autriche, en Belgique, en Croatie, en Espagne, aux Pays-Bas, en République tchèque et en Slovénie.

24 Dans la législation finlandaise, suédoise et britannique, le critère applicable est celui du caractère raisonnable. Certaines lois pertinentes de ces États membres précisent les divers facteurs qui peuvent être pris en compte lors de l'évaluation de ce caractère raisonnable dans le cas d'une affaire déterminée.

25 En Bulgarie (en vertu de la loi relative à la protection contre la discrimination) et en Irlande, c'est le coût qui semble le facteur déterminant en termes de critère de justification applicable aux domaines concernés en dehors de celui de l'emploi. La législation chypriote semble appliquer un critère combiné de justification fondé non seulement sur le coût mais également sur le critère de la charge disproportionnée.

26 Il convient de souligner que la loi scolaire suédoise fait référence à la notion de «charge importante». Quant à la législation pertinente maltaise, elle fait référence pour sa part à l'argument d'une charge injustifiée».

documents d'accompagnement fournissent une indication quant aux facteurs à considérer pour apprécier le caractère «disproportionné» ou «déraisonnable» d'un aménagement, comme c'est notamment le cas en **Autriche**, en **Belgique** et en **Finlande**, il est rare que le coût soit l'unique facteur à prendre en compte. On peut citer, parmi d'autres facteurs mentionnés, le degré d'assistance publique disponible ou des facteurs organisationnels. Les orientations contenues dans la législation ou les documents d'accompagnement en **Autriche**, en **Belgique** et en **Finlande** font tous référence à l'incidence (de la non-fourniture) d'un aménagement sur l'ensemble de la population handicapée (**Autriche** et **Belgique**) ou sur les besoins de la personne handicapée concernée (**Finlande**). La proposition de 2008 de la Commission reflète dans une certaine mesure cette approche en évoquant notamment «les répercussions négatives qu'aurait l'absence de mesures sur la personne handicapée». Ces orientations concernant l'évaluation de l'étendue de l'obligation sont à la fois utiles en soi (étant donné la complexité de la matière visée) et précieuses du fait qu'elles mettent en évidence le caractère multidimensionnel d'une évaluation portant sur la fourniture d'aménagements raisonnables. Par ailleurs, une loi **bulgare** et la législation **irlandaise** font exclusivement référence au coût dans le cadre des justifications à la non-fourniture de ces aménagements. Il semble que, le plus souvent, l'obligation d'aménagement soit intégralement levée à partir du moment où une charge disproportionnée ou un caractère déraisonnable a été établi(e). La législation **autrichienne** constitue une exception intéressante à cet égard puisqu'elle persiste dans un tel cas à exiger du titulaire de devoirs qu'il améliore la situation de la personne concernée dans une perspective d'égalité de traitement – une démarche qui contraste avec l'approche du «tout ou rien» dans laquelle semblent s'inscrire les obligations d'aménagement d'autres États membres.

Le sous-chapitre 5.3 du rapport brosse également le tableau des divers recours et sanctions disponibles dans les États membres en cas d'absence de réponse aux besoins des personnes handicapées dans d'autres domaines que celui de l'emploi. Les principaux recours applicables en la matière au niveau national portent sur l'octroi de dommages et intérêts compensatoires et/ou une ordonnance de fourniture de l'aménagement requis à la personne handicapée concernée. Dans certains États membres, la législation nationale ne prévoit pas de recours spécifiques en cas de non-respect d'une obligation d'aménagement raisonnable. Ceci étant dit, les personnes handicapées ont potentiellement accès aux voies de recours générales en vertu de la législation antidiscrimination ou civile ou administrative pertinente. Les principales sanctions mises à disposition par la législation nationale sont les amendes conditionnelles (souvent infligées en cas de non-respect d'une ordonnance judiciaire) et, très rarement, des peines d'emprisonnement.

La manière dont la violation du devoir d'aménagement est classée peut avoir des conséquences en termes de recours possibles pour la victime et de sanctions imposées. Dans plusieurs États membres de l'UE, le fait de ne pas répondre aux besoins d'aménagement en faveur d'une personne handicapée dans d'autres domaines que l'emploi est explicitement désigné comme une violation de la législation antidiscrimination. Tel est le cas en **Autriche**, en **Belgique**, en **Croatie**, en **Finlande**, en **Irlande**, aux **Pays-Bas**, en **République tchèque** et en **Suède**, entre autres. Dans de nombreux États membres, la forme spécifique de discrimination n'est pas précisée (directe, indirecte ou *sui generis*). Dans d'autres, les dispositions législatives ne stipulent pas expressément que l'absence d'aménagement est constitutive d'une discrimination. Lorsque le non-respect d'une obligation d'aménagement est considérée comme une forme de discrimination, les recours et sanctions disponibles en cas de discrimination (et propres à celle-ci) sont d'application. Des voies de recours générales relevant du droit civil peuvent néanmoins s'appliquer dans certains cas.

Dans la très grande majorité des États membres de l'UE, des dommages et intérêts compensatoires s'appliquent en cas de violation de l'obligation d'aménagement. Tel est le cas en **Allemagne**, en **Autriche**, en **Belgique**, en **Bulgarie**, en **Croatie**, à **Chypre**, en **Espagne**, en **Finlande**, en **Hongrie**, en **Irlande**, en **Lettonie**, au **Luxembourg**, aux **Pays-Bas**, au **Portugal**, en **République tchèque**, en **Roumanie**, au **Royaume-Uni** (à l'exception de l'éducation), en **Slovaquie**, en **Slovénie** et en **Suède**. Dans certains cas, les dommages et intérêts compensatoires peuvent être obtenus en vertu des lois antidiscrimination ou de lois spécialisées en matière de handicap; dans d'autres (en **Hongrie** notamment), le non-respect de

l'obligation d'aménagement (lorsqu'il est considéré comme un comportement discriminatoire par l'autorité nationale compétente) peut être indemnisé par les juridictions civiles sur la base d'un grief au titre du code civil. Outre l'octroi de dommages et intérêts compensatoires, les juridictions ou les organes semi-judiciaires de nombreux États membres de l'UE peuvent ordonner l'exécution de l'aménagement réclamé. Telle est la situation en **Belgique**, en **Croatie**, en **Finlande**, en **Irlande**, aux **Pays-Bas**, en **République tchèque**, en **Roumanie**, au **Royaume-Uni**, en **Slovaquie** et en **Suède**. Il convient de faire remarquer que certaines entités ne peuvent être forcées de fournir des aménagements raisonnables en vertu de la législation **autrichienne** (en particulier), même si des dommages et intérêts compensatoires sont prévus. Dans quelques États membres, les procédures de recours passent exclusivement par le système judiciaire, tandis que dans d'autres (**Pays-Bas** et **Roumanie** notamment) des commissions pour l'égalité de traitement ou pour les droits fondamentaux peuvent également formuler des avis ou des décisions (non contraignants) en réponse à une plainte. Il semblerait que cette approche offre davantage de choix à la victime tant en ce qui concerne sa décision de déposer plainte ou non par suite de la non-fourniture d'un aménagement qu'en ce qui concerne la manière de procéder.

Il est également intéressant de signaler que la législation de plusieurs États membres n'utilise pas l'expression «aménagement raisonnable» mais parle plutôt d'«adaptations appropriées» (**Finlande**), d'«aménagement efficace» (**Pays-Bas**) ou d'«aménagement approprié» (**Slovénie**). Cette terminologie met l'accent sur l'objectif à atteindre par l'aménagement ou l'adaptation, et établit clairement la distinction entre l'obligation d'aménager et l'argument selon lequel la réalisation de cet aménagement serait «déraisonnable». L'approche adoptée par les **Pays-Bas** pour apprécier la légitimité d'une demande d'aménagement raisonnable est particulièrement utile dans la mesure où elle sépare l'évaluation de «l'efficacité» de tout aménagement envisagé et la question de savoir s'il représente une «charge disproportionnée» pour le titulaire des devoirs. Cette approche pourrait impliquer que, tout en étant considéré comme «efficace», un aménagement pourrait ne pas être exigé parce qu'il engendrerait une «charge disproportionnée». Ce critère à deux volets permet également d'envisager diverses mesures d'aménagement – tout aménagement considéré comme «efficace» pouvant passer à la seconde partie du test, en l'occurrence la «charge disproportionnée». Un texte explicite en deux volets de ce type n'existe dans la législation d'aucun autre État membre, alors qu'il facilite et structure l'analyse de la mise en œuvre du devoir d'aménagement. Dans de nombreux États membres, la définition législative de l'aménagement raisonnable est étroitement liée au moyen de défense, l'aménagement raisonnable étant défini comme une mesure qui répond aux besoins d'une personne handicapée particulière tout en n'imposant pas de charge disproportionnée ou induite à l'entité concernée.

Outre des moyens de défense fondés sur le caractère «disproportionné» ou «déraisonnable», la législation nationale établit dans certains cas des liens entre l'obligation d'aménagement et des obligations d'accessibilité. Dans un certain nombre de situations en effet, la conformité aux obligations d'accessibilité ne peut être invoquée comme argument en réponse à une obligation de satisfaire les besoins d'une personne. Tel est le cas aux **Pays-Bas**, par exemple. En **Autriche**, en revanche, l'immunité temporaire accordée aux institutions publiques en ce qui concerne la discrimination indirecte et l'absence d'accessibilité a pour effet que la conformité à ces exigences, et l'adoption d'un plan d'accessibilité, peuvent lever l'obligation d'aménagement jusqu'à fin 2019. De façon générale, une requête d'aménagement est davantage susceptible d'être considérée comme disproportionnée ou déraisonnable lorsque les dispositions en matière d'accessibilité sont déjà respectées. Dans un certain nombre de juridictions, la loi prévoit expressément qu'une demande d'aménagement qui aurait été satisfaite si d'autres dispositions juridiques (y compris des dispositions en rapport avec l'accessibilité) avaient été respectées, ne peut jamais être disproportionnée ni déraisonnable. Tel est le cas en **Autriche**, et cette approche atteste d'une interaction constructive entre les obligations en matière d'accessibilité et en matière d'aménagement raisonnable. Cette question n'est cependant pas abordée de manière explicite dans la plupart des juridictions.

Protection sociale

Le sixième chapitre du rapport se penche sur l'obligation d'aménagement raisonnable en faveur des personnes handicapées dans le domaine de la protection sociale. La proposition de 2008 de la Commission prévoit que l'obligation s'applique à l'ensemble de ce domaine en précisant qu'elle couvre les prestations de sécurité sociale/d'invalidité, le logement social et les soins de santé.

Une obligation légale expresse de fournir un aménagement raisonnable en faveur des personnes handicapées dans le domaine général de la protection sociale existe en **Allemagne**, en **Autriche**, en **Belgique**, en **Croatie**, en **Espagne**, en **Finlande**, en **Irlande**, au **Royaume-Uni**, en **Slovaquie** et en **Suède**. Certains États membres de l'UE (à savoir la **Bulgarie**, **Chypre**, les **Pays-Bas** et la **Slovénie**) ont instauré une obligation partielle couvrant un ou deux des domaines repris sous l'intitulé «protection sociale». D'autres États membres (**Danemark**, **France**, **Grèce**, **Hongrie**, **Lettonie**, **Malte** et **Roumanie**) n'ont prévu aucune obligation expresse d'assurer un aménagement raisonnable en matière de protection sociale, mais des lois nationales prévoient des mesures pouvant être assimilées à une obligation dans ce domaine. Dans les États membres restants (**Estonie**, **Italie**, **Lituanie**, **Luxembourg**, **Pologne** et **République tchèque**), il n'existe absolument aucune obligation d'aménagement raisonnable dans le domaine de la protection sociale.

Il ressort des informations présentées au chapitre 6 que les lois et politiques nationales en matière de protection sociale varient fortement entre les 28 États membres de l'Union. Les données portant spécifiquement sur les prestations de sécurité sociale/d'invalidité et le logement social sont très peu abondantes; davantage de données sont disponibles en ce qui concerne les soins de santé. Les exemples d'aménagements raisonnables explicites dans la législation sont peu nombreux en matière de prestations de sécurité/d'aide sociale, mais une jurisprudence pertinente (en **Lettonie** et au **Royaume-Uni** notamment) précise l'obligation de prévoir des aménagements à l'intention des personnes handicapées dans le cadre de l'obtention de prestations d'invalidité. De même, rares sont les exemples d'obligations exhaustives d'aménagement raisonnable à l'intention des personnes handicapées en matière de logement. Plusieurs États membres ont adopté des mesures prioritaires (mesures d'action positive) en faveur des personnes handicapées pour ce qui concerne l'attribution de logements sociaux. Enfin, il convient de souligner que les lois et politiques des États membres en matière de santé offrent une couverture assez large: quelques-uns d'entre eux ont opté pour une obligation exhaustive d'aménagement en faveur des personnes handicapées dans ce domaine; d'autres ont opté pour une obligation partielle seulement, portant en particulier sur les méthodes de communication ou l'accès à l'information; plusieurs autres ne se sont pas dotés d'une obligation expresse d'aménagement raisonnable mais d'obligations ayant un effet similaire, ou possèdent une jurisprudence pertinente (**Lettonie**, entre autres).

Éducation

Le septième chapitre du rapport présente les diverses dispositions législatives et mesures stratégiques adoptées dans le domaine de l'éducation en rapport avec l'obligation d'aménagement raisonnable en faveur des personnes handicapées.

La grande majorité des États membres ont adopté des mesures d'aménagement raisonnable dans le domaine de l'éducation. Il est intéressant de signaler que l'obligation instituée en la matière par l'**Allemagne** découle de la Constitution. On trouve dans quelques autres États membres ce que l'on pourrait appeler des obligations «de fait» concernant les aménagements raisonnables: tel est le cas au **Danemark**, en **France**, en **Grèce**, en **Hongrie** et en **République tchèque** ainsi qu'à **Malte** et en **Roumanie**. Certains États membres ne prévoient pas expressément d'obligation d'aménagement raisonnable dans le domaine de l'éducation, mais leur législation contient des mesures de même nature et l'on pourrait considérer dès lors que les autorités nationales prennent (le plus souvent) des dispositions destinées à intégrer les

enfants handicapés dans le système d'enseignement général: l'**Estonie**, l'**Italie**, la **Lettonie**, la **Lituanie** et la **Pologne** sont dans ce cas.

Les différents types d'obligations prévues dans les législations nationales (qu'il s'agisse de lois antidiscrimination ou de lois générales en matière d'éducation) ont une portée très large et pourraient bien engendrer l'évolution vers un enseignement inclusif réclamée par la CDPH. La Convention semble avoir une influence sensible sur les lois et politiques adoptées par un certain nombre d'États membres de l'UE. C'est ainsi notamment que les développements les plus récents intervenus en **République tchèque** attestent d'un rapprochement manifeste avec le modèle du handicap qui sous-tend la Convention. Le parlement tchèque a adopté en mars 2015 un amendement de l'article 16 de la loi pertinente sur l'éducation,²⁷ lequel instaure une nouvelle définition des élèves ayant des besoins éducatifs spéciaux. La nouvelle définition est axée sur la mise en place de mesures de soutien en vue d'assurer aux personnes handicapées une égalité des chances en matière d'éducation. Elle se traduit par un abandon de l'approche médicalisée et fonctionnelle du handicap en faveur d'un modèle social de celui-ci, conformément à la CDPH. De surcroît, les juridictions de plusieurs États membres font référence à la CDPH dans des affaires relatives à la fourniture d'aménagements raisonnables à l'intention d'élèves handicapés (en **Espagne** et en **Italie** plus particulièrement). Il n'en reste pas moins que de nombreux États membres ont encore un long chemin à parcourir avant d'ouvrir effectivement l'enseignement aux enfants handicapés.

Biens et services

Le huitième chapitre du rapport est consacré à l'obligation d'aménagement raisonnable en faveur des personnes handicapées dans le cadre de l'accès et de la fourniture de biens et de services mis à la disposition du public.

La majorité des États membres ont instauré des obligations expresses ou «de fait» d'aménagement raisonnable couvrant certains aspects de l'accès aux biens et aux services. Si les obligations qui visent l'accès aux services (y compris le service de vente de biens) et le logement sont assez courantes, celles qui sont imposées aux fabricants ou producteurs de biens sont beaucoup moins répandues et la jurisprudence en la matière est également assez rare. Seules des lois adoptées en **Autriche**, en **Croatie**, en **Espagne**, en **Hongrie**, en **Roumanie**, au **Royaume-Uni** et en **Slovaquie** contiennent des obligations d'aménagement portant sur les biens, les services et le logement, même si ce point ne figure pas toujours de manière explicite dans la législation et relève davantage de l'interprétation. Des obligations d'aménagement raisonnable couvrant les services et le logement sont d'application en **Belgique**, à **Chypre**, en **Finlande**, en **Irlande**, aux **Pays-Bas** et en **République tchèque**, mais leur couverture se limite parfois à des domaines spécifiques (les transports publics et le logement dans le cas des Pays-Bas, par exemple). Des obligations «de fait» d'aménagement portant exclusivement sur les services existent en **France**, à **Malte**, en **Slovénie** et en **Suède**, et exclusivement sur le logement en **Allemagne** et en **Bulgarie**. Aucune obligation d'aménagement n'est prévue dans ce vaste domaine au **Danemark**, en **Estonie**, en **Grèce**, en **Italie**, en **Lettonie**, en **Lituanie**, au **Luxembourg**, en **Pologne** et au **Portugal**.

On observe une grande diversité dans la manière dont les États membres abordent l'obligation d'aménagement raisonnable en rapport avec les biens, les services et le logement. Comme signalé plus haut, c'est aux fabricants ou producteurs de biens qu'elle est le moins susceptible d'être imposée – ce qui pourrait refléter à la fois la distance entre le fabricant et l'acheteur, et le fait que les biens vendus au sein de l'UE sont fabriqués dans le monde entier, ainsi que l'impossibilité d'imposer ce type d'obligation en vertu d'une législation nationale à des fabricants basés en dehors de l'État membre concerné. Ce type d'obligation peut être par ailleurs envisagé comme faisant peser une charge supplémentaire sur les fabricants nationaux – un «problème» qui serait fortement atténué si l'obligation existait sur tout le

27 République tchèque, loi sur l'enseignement préscolaire, primaire, secondaire supérieur, professionnel et autre (loi sur l'éducation) (*O předškolním, základním středním, vyšším odborném a jiném vzdělávání*).

territoire de l'UE. L'absence d'obligation imposée aux fabricants peut être compensée par l'imposition d'une obligation aux vendeurs de biens (et de services), laquelle existe dans un certain nombre d'États membres.

Lorsque des obligations d'aménagement raisonnable sont en place dans ces domaines, elles peuvent s'appliquer à différents types de prestataires de services. Si, dans certaines juridictions, l'obligation se limite à des prestataires particuliers (le secteur des transports publics, par exemple), elle s'étend dans beaucoup d'États membres à l'ensemble des prestataires de services proposés au public. L'obligation peut en outre, comme indiqué plus haut, prendre diverses formes – ce qui apparaît plus particulièrement dans le domaine du logement où, aux **Pays-Bas**, l'obligation ne va pas jusqu'à faire autoriser des travaux de construction ou de reconstruction. En **Allemagne** par ailleurs, les propriétaires immobiliers sont tenus dans certains cas d'autoriser des travaux de reconstruction, tandis qu'en **Bulgarie** l'obligation «de fait» s'applique expressément aux travaux de construction et de rénovation.

Conclusion

L'obligation d'aménagement raisonnable en dehors du domaine de l'emploi est largement répandue dans les États membres de l'UE en dépit de l'absence de ce type d'obligation dans la législation européenne actuellement en vigueur en matière d'égalité. On observe néanmoins une grande diversité entre États membres en termes de portée de l'obligation en question – certains domaines relevant du champ d'application de la proposition de 2008 de la Commission étant davantage susceptibles que d'autres d'y être soumis. De façon générale, c'est en matière d'éducation que le cadre est le plus exhaustif puisqu'une législation instaure des obligations d'aménagement raisonnable ou des obligations «de fait» ou analogues à cet égard dans la grande majorité des États membres. En ce qui concerne la protection sociale, les obligations d'aménagement raisonnable semblent plus répandues en matière de soins de santé que dans les autres domaines expressément visés par la proposition de la Commission (à savoir les prestations de sécurité sociale/d'invalidité et le logement social). Enfin, en ce qui concerne le troisième domaine couvert par la proposition de 2008 de la Commission, à savoir l'accès aux biens et aux services, c'est en matière d'accès aux services, en ce compris la vente de biens, et, dans une moindre mesure, en matière de logement que des obligations d'aménagement raisonnable sont les plus fréquentes. Ce sont en revanche les fabricants de biens qui sont les moins susceptibles d'être tenus par une obligation d'aménagement puisque celle-ci n'existe à leur égard que dans quelques États membres seulement et que la jurisprudence reste tout aussi rare. L'existence de ces obligations d'aménagement n'empêche pas la persistance de difficultés majeures sur le terrain en termes de concrétisation de l'égalité, de l'égalité des chances et de l'égalité d'accès des personnes handicapées dans de nombreux domaines, et dans l'ensemble du système éducatif en particulier.

La CDPH crée d'ores et déjà pour les États parties le devoir d'instaurer des obligations d'aménagement raisonnable et de définir un refus d'aménagement raisonnable comme une forme de discrimination. La portée de la CDPH est plus vaste que celle de la proposition de 2008 de la Commission, et la Convention a été ratifiée par 25 des 28 États membres de l'UE. Or il semblerait que, malgré cela, la CDPH n'ait eu qu'une incidence relativement modeste sur les réformes législatives menées par les États membres. Il convient néanmoins de signaler quelques exceptions notoires à cet égard: la législation ou la politique relative à la discrimination, ou aux droits des personnes handicapées de façon plus générale, a été révisée en **Espagne**, en **République tchèque** et en **Slovénie** sur la base de la Convention, et le rapport recense en **Espagne**, en **Italie** et en **Lettonie** des cas de jurisprudence où les juridictions saisies ont invoqué, entre autres sources, la CDPH pour obtenir un résultat équitable dans des affaires liées à un aménagement raisonnable.

Zusammenfassung

Einleitung

Gegenstand dieses Berichts ist die Situation in den 28 EU-Mitgliedstaaten in Bezug auf Pflichten, jenseits des Beschäftigungsbereichs angemessene Vorkehrungen zu treffen. Der Bericht bietet einen Überblick über die in den Gesetzen und Politiken der Mitgliedstaaten enthaltenen Pflichten, angemessene Vorkehrungen in den Bereichen zu treffen, auf die sich der Vorschlag der Europäischen Kommission von 2008 für eine Richtlinie zum Schutz vor Diskriminierung aufgrund einer Behinderung sowie vor Diskriminierung aus einer Reihe anderer Gründe (im Folgenden "Vorschlag von 2008") erstreckt¹ und die da sind: Sozialschutz, einschließlich Sozialversicherung, Gesundheitsversorgung und Sozialwohnungen; Bildung; Zugang zu und Versorgung mit Gütern und Dienstleistungen, einschließlich Wohnraum.² Zweck des Vorschlags ist es, sechs Arten von Diskriminierung – darunter, im Zusammenhang mit Behinderung, auch die ungerechtfertigte Verweigerung angemessener Vorkehrungen – zu verbieten.³

Der Vorschlag der Kommission von 2008 ergänzt bereits bestehende EUNichtdiskriminierungsvorschriften in Form der Richtlinie zur Gleichbehandlung im Bereich der Beschäftigung (sogenannte "Rahmenrichtlinie Beschäftigung").⁴ Diese schrieb die Verabschiedung nationaler Rechtsvorschriften zum Verbot von Diskriminierung vor und verpflichtete alle EU-Mitgliedstaaten dazu, eine Pflicht zum Treffen angemessener Vorkehrungen für Menschen mit Behinderungen im Bereich der Beschäftigung und der Berufsbildung einzuführen.⁵ Ein Verstoß gegen die Pflicht, angemessene Vorkehrungen zu treffen, wurde jedoch nicht ausdrücklich als eine Form von Diskriminierung definiert. In dieser Hinsicht stellt der Vorschlag von 2008 einen veränderten Ansatz im Vergleich zur Rahmenrichtlinie Beschäftigung dar.⁶

2010 trat die EU dem Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen (*Convention on the Rights of Persons with Disabilities*,⁷ im Folgenden "das Übereinkommen" bzw. CRPD) bei.⁸ Das Übereinkommen ist ein fortschrittliches Menschenrechtsinstrument, das den Zweck verfolgt, bereits bestehende Menschenrechte⁹ der Situation von Menschen mit Behinderungen anzupassen, und den Vertragsstaaten weitreichende Verpflichtungen auferlegt. Es befasst sich sowohl mit bürgerlichen und politischen als auch mit wirtschaftlichen, sozialen und kulturellen Rechten. Ein Schwerpunkt des Übereinkommens liegt auf dem Verbot von Diskriminierung und auf der Gleichheitsregel. Wichtig ist in diesem Zusammenhang, dass das Übereinkommen das ungerechtfertigte Nichttreffen

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- 1 Vorschlag für eine Richtlinie des Rates zur Anwendung des Grundsatzes der Gleichbehandlung ungeachtet der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung, Brüssel, 2. Juli 2008, KOM(2008) 426 endgültig. Bezugspunkt für die Zwecke dieses Berichts ist die letzte öffentlich zugängliche Fassung des Vorschlags, die in einigen Punkten von dem ursprünglichen Vorschlag von 2008 abweicht. Siehe Vermerk des Generalsekretariats des Rates, 11. Dezember 2014, Rat (Beschäftigung, Sozialpolitik, Gesundheit und Verbraucherschutz), Vorschlag für eine Richtlinie des Rates zur Anwendung des Grundsatzes der Gleichbehandlung ungeachtet der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung, Brüssel, 8. Dezember 2014, 15705/14, ADD 1 REV 2.
 - 2 Art. 3, Vorschlag von 2008, Fassung 15705/14 ADD 1 REV.
 - 3 Art. 2, Vorschlag von 2008, Fassung 15705/14 ADD 1 REV.
 - 4 Richtlinie 2000/78/EG des Rates vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf (Rahmenrichtlinie Beschäftigung), [2000] ABl. L303/16.
 - 5 Artikel 5, Rahmenrichtlinie Beschäftigung.
 - 6 Richtlinie 2000/78/EG des Rates vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf (Rahmenrichtlinie Beschäftigung), [2000] ABl. L23/35.
 - 7 Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen, 13. Dezember 2006.
 - 8 Vgl. Beschluss des Rates vom 26. November 2009 über den Abschluss des Übereinkommens der Vereinten Nationen über die Rechte von Menschen mit Behinderungen durch die Europäische Gemeinschaft (2010/48/EG), [2010] ABl. L 303/16.
 - 9 Z. B. im Internationalen Pakt über bürgerliche und politische Rechte (UN-Zivilpakt), 16. Dezember 1966, und im Internationalen Pakt über wirtschaftliche, soziale und kulturelle Rechte (UN-Sozialpakt).

angemessener Vorkehrungen als eine Form von Diskriminierung betrachtet.¹⁰ Infolge der Unterzeichnung des Übereinkommens ist die EU – soweit ihre Zuständigkeiten, auch im Bereich der Nichtdiskriminierung (ein Bereich, in dem sie ihre Zuständigkeit mit den Mitgliedstaaten teilt), berührt sind – an das Übereinkommen gebunden.

Um die Situation in den EU-Mitgliedstaaten in Bezug auf die Pflicht zum Treffen angemessener Vorkehrungen jenseits des Beschäftigungsbereichs zu untersuchen, wurde der vorliegende Bericht in neun große Abschnitte unterteilt. Abschnitt 1 erläutert den Ansatz, der im internationalen Recht und im EU-Recht, einschließlich des Vorschlags von 2008, in Bezug auf Diskriminierung wegen Behinderung und angemessene Vorkehrungen derzeit gilt. Daran anschließend untersucht der Bericht die Situation in den 28 EUMitgliedstaaten. Die Abschnitte 2, 3 und 4 liefern einen allgemeinen Überblick über Recht und Politik der Mitgliedstaaten im Bereich Behinderung. Im Mittelpunkt dieses Teils des Berichts stehen daher einschlägige Verfassungsvorschriften (Abschnitt 2), Rechtsvorschriften über Nichtdiskriminierung wegen Behinderung (Abschnitt 3) sowie allgemein Recht und Politik im Bereich Behinderung, einschließlich Maßnahmen in Bezug auf Zugänglichkeit (Abschnitt 4). Gegenstand der folgenden Abschnitte des Berichts ist die Pflicht, in den drei Bereichen des Kommissionsvorschlags von 2008 angemessene Vorkehrungen zu treffen. Abschnitt 5 liefert zunächst einen Überblick darüber, in welchem Umfang die Mitgliedstaaten Pflichten zum Treffen angemessener Vorkehrungen in den betreffenden Bereichen etabliert haben. Im Anschluss daran untersuchen die Abschnitte 6, 7 und 8 Pflichten zum Treffen angemessener Vorkehrungen in den Bereichen, auf die sich der Vorschlag von 2008 bezieht, nämlich Sozialschutz, Bildung sowie Zugang zu und Versorgung mit Gütern und Dienstleistungen. Dies macht den größten Teil des Berichts aus. Abschnitt 9 des Berichts enthält die Schlussfolgerungen.

Der Kontext des internationalen Rechts und des Unionsrechts

Abschnitt 1 des Berichts geht auf den internationalen und europäischen Kontext ein. Angesichts der Tatsache, dass die EU Vertragspartei des Übereinkommens ist, geht dieser Abschnitt zunächst der Frage nach, welchen Ansatz das Übereinkommen in Bezug auf Diskriminierungen wegen Behinderung verfolgt, und untersucht dann die Frage, wie und in welchem Umfang das Unionsrecht Diskriminierungen wegen Behinderung, einschließlich des Nichttreffens angemessener Vorkehrungen, verbietet bzw. zu verbieten vorschlägt. Ausgehend davon ist es leichter möglich, Unionsrecht und Übereinkommen auf Gemeinsamkeiten und Unterschiede hin zu vergleichen. Es ist auch möglich, die Bereiche zu identifizieren, in denen – in Bezug auf Diskriminierung – Unterschiede zwischen der Rahmenrichtlinie Beschäftigung und dem Kommissionsvorschlag von 2008 einerseits und dem Übereinkommen andererseits bestehen.

Das Übereinkommen stützt sich auf das sozial-kontextuelle Behinderungsmodell,¹¹ das dem individuellen oder medizinischen Modell von Behinderung gegenübergestellt werden kann. Letzteres sieht Behinderung als unmittelbare Folge einer Beeinträchtigung und als Resultat eines Unvermögens, das durch eine Beeinträchtigung verursacht wird. Demgegenüber geht das Übereinkommen davon aus, dass Behinderung in erster Linie darauf beruht, dass die soziale Umwelt den Bedürfnissen und Wünschen von Menschen mit Behinderungen nicht gerecht wird. Zudem ist der Geltungsbereich des Übereinkommens äußerst weit gefasst.¹² Das Übereinkommen verbietet Diskriminierung aufgrund von Behinderung nicht einfach. Es passt die Gleichheitsnorm vielmehr der gelebten Realität von Menschen mit Behinderungen an und bezieht sowohl bürgerliche und politische als auch wirtschaftliche, soziale und kulturelle Rechte mit ein.

¹⁰ Art. 2 und Art. 5 CRPD.

¹¹ Es existiert eine Fülle von Literatur zu theoretischen Modellen von Behinderung. Vgl. z. B. Oliver, M. (2009), *Understanding Disability: From Theory to Practice*, 2. Aufl., Palgrave, sowie Priestley, M. (1998), "Constructions and creations: idealism, materialism and disability theory" 13(1) *Disability and Society*, 7594. Teile dieses Textes über das Übereinkommen der Vereinten Nationen stützen sich auf: Waddington, L. (2011), "Future Prospects for EU Equality Law. Lessons to be Learnt from the Proposed Equal Treatment Directive", *European Law Review*, 2011. Nr. 2, 163-184.

¹² Das Übereinkommen trägt ausdrücklich der Tatsache Rechnung, dass "Behinderung aus der Wechselwirkung zwischen Menschen mit Beeinträchtigungen und einstellungs- und umweltbedingten Barrieren entsteht, die sie an der vollen, wirksamen und gleichberechtigten Teilhabe an der Gesellschaft hindern." Art. 1, CRPD.

Nichtdiskriminierung und Gleichheit sind zentrale Grundsätze, auf denen das Übereinkommen basiert, und beinhalten die Pflicht, angemessene Vorkehrungen für Menschen mit Behinderungen zu treffen. Durch das Übereinkommen wird eine umfassende und weitreichende Pflicht geschaffen, Diskriminierung zu verbieten und angemessene Vorkehrungen zu treffen, die sämtliche Menschenrechte umfasst. Nach dem Übereinkommen ist es Aufgabe der Vertragsstaaten, dafür zu sorgen, dass eine Vielzahl unterschiedlicher sozialer Akteurinnen und Akteure – einschließlich Arbeitgeberinnen und Arbeitgeber, Schulen, Leistungserbringende im Gesundheitswesen und Dienstleistungserbringende – angemessene Vorkehrungen für Menschen mit Behinderungen treffen. Sollte der Kommissionsvorschlag von 2008 für eine neue Gleichbehandlungsrichtlinie verabschiedet werden, würde er dazu beitragen, die bestehende Lücke zwischen dem Behindertengleichstellungsrecht der Union und dem Übereinkommen zu füllen. Der sachliche Geltungsbereich des Übereinkommens bleibt jedoch weitaus umfassender als der des Vorschlags von 2008 und der Rahmenrichtlinie Beschäftigung, was dazu führt, dass die EU-Mitgliedstaaten, die das Übereinkommen ratifiziert haben, verpflichtet sind, Diskriminierung aufgrund von Behinderung in Bereichen zu verbieten, die über die vom EU-Gleichstellungsrecht erfassten hinausgehen.¹³ Diejenigen EU-Mitgliedstaaten, die das Übereinkommen ratifiziert haben, sind daher erheblichen Pflichten hinsichtlich des Verbots und der Bekämpfung von Diskriminierungen aufgrund von Behinderung unterworfen. Diese Pflichten können nicht einfach durch Umsetzung der Rahmenrichtlinie Beschäftigung und einer auf dem Vorschlag von 2008 basierenden Richtlinie erfüllt werden.

Nationale Rechtsvorschriften im Bereich Behinderung – ein Überblick

Abschnitt 2 des Berichts geht sowohl auf verfassungsrechtliche und allgemeine Grundsätze ein, die Diskriminierung aufgrund von Behinderung betreffen, als auch auf Bestimmungen der nationalen Verfassungen, die sich mit Fragen der Teilhabe und Integration/Inklusion sowie mit Fragen der sozialen Fürsorge/Rehabilitation befassen.

Aus den in Abschnitt 2 des Berichts zusammengetragenen Informationen geht hervor, dass die Verfassungen von **Deutschland, Finnland, Österreich, Portugal, Slowenien** und **Ungarn** Diskriminierung aufgrund von Behinderung ausdrücklich verbieten. In verschiedenen anderen EU-Mitgliedstaaten (insbesondere **Bulgarien, Dänemark, Griechenland, Irland, Luxemburg, Malta, Schweden** und die **Tschechische Republik**) gibt es kein Verbot von Diskriminierung wegen Behinderung. Die Verfassungen der übrigen EU-Mitgliedstaaten verbieten Diskriminierung aufgrund von Behinderung nicht ausdrücklich. In mehreren EU-Mitgliedstaaten enthält die jeweilige Verfassung jedoch eine nicht abschließende Liste unzulässiger Diskriminierungsgründe. In vielen Fällen wurden diese Gründe so ausgelegt (oder können potenziell so ausgelegt werden), dass sie Behinderung mit einbeziehen. Das **Vereinigte Königreich** hat keine geschriebene Verfassung und somit auf Verfassungsebene auch kein Verbot von Diskriminierung wegen Behinderung.

Jenseits von Diskriminierungsverboten ist festzustellen, dass mehrere nationale Verfassungen Bestimmungen enthalten, die zum einen Inklusion und Teilhabe, zum anderen soziale Fürsorge/Rehabilitation zum Gegenstand haben. Die Verfassungen einer Handvoll EU-Mitgliedstaaten haben zum Ziel, die gesellschaftliche Teilhabe und Inklusion von Menschen mit Behinderungen mithilfe verschiedener Vorschriften zu verbessern, die Bildung sowie soziale, wirtschaftliche und politische Aspekte der

13 Beispiele für Bereiche, in denen Diskriminierung nach dem Übereinkommen verboten sein sollte, die jedoch weder im bestehenden Unionsrecht noch in Gesetzesvorschlägen der Union behandelt werden, sind unter anderem der Zugang zur Justiz (Art. 13 CRPD) und die Teilnahme am politischen und öffentlichen Leben (Art. 29 CRPD). Diese beiden Artikel enthalten keine ausdrückliche Verpflichtung der Vertragsstaaten, Diskriminierung zu verbieten, verlangen von diesen jedoch zu gewährleisten, dass Menschen mit Behinderungen "gleichberechtigt mit anderen" Zugang haben und ihre Rechte genießen können. Die genannten Pflichten sind außerdem im Lichte von Art. 3 und Art. 4 CRPD zu verstehen.

Gesellschaft zum Gegenstand haben.¹⁴ Mehrere andere Mitgliedstaaten wenden in ihren Verfassungen in Bezug auf Behinderung einen funktionalen/medizinischen Ansatz an, der den Schwerpunkt auf soziale Fürsorge, Schutz und Rehabilitation legt.¹⁵ Dies steht in scharfem Widerspruch zu dem sozial-kontextuellen Behinderungsmodell, auf dem das Übereinkommen basiert. Maßnahmen im Bereich Fürsorge/Rehabilitation sind von großer Bedeutung, um das allgemeine Wohlbefinden von Menschen mit Behinderungen zu gewährleisten. Sie müssen jedoch mit nationalen Maßnahmen kombiniert werden, die auf die gesellschaftliche Teilhabe und Integration/Inklusion dieser Menschen abzielen.

Mehrere Verfassungsvorschriften der EU-Mitgliedstaaten haben vertikale oder horizontale Direktwirkung oder auch beides; dies ist jedoch nicht in allen Mitgliedstaaten der Fall.¹⁶ Vorschriften mit vertikaler Direktwirkung (gegenüber dem Staat), die es Betroffenen ermöglichen, gegen innerstaatliche Regelungen vorzugehen, weil sie Menschen mit Behinderungen diskriminieren und gegen die Verfassung verstoßen, sind für den Schutz der Rechte von Menschen mit Behinderungen potenziell von großer Bedeutung. Aus den von den Mitgliedern des Europäischen Netzwerks von Rechtsexpertinnen und Rechtsexperten für Geschlechtergleichstellung und Nichtdiskriminierung vorgelegten Länderinformationen geht jedoch hervor, dass relativ wenige Fälle dieser Art verzeichnet wurden. Verfassungsrechtliche Gleichstellungsvorschriften mit horizontaler Direktwirkung, die gegenüber Privatparteien durchgesetzt werden können, sind potenziell ebenfalls von großer Bedeutung. Auch in diesem Bereich existiert jedoch nur wenig Rechtsprechung. In der Praxis ist die Bedeutung dieser Vorschriften außerdem beschränkt, wenn Gesetzesvorschriften Diskriminierung aufgrund von Behinderung verbieten und ein breites Feld abdecken. In dieser Hinsicht sind sowohl die Ratifizierung des Übereinkommens als auch die Verabschiedung des Vorschlags von 2008 für eine neue Gleichbehandlungsrichtlinie potenziell wichtige Entwicklungen.

Nationale Rechtsvorschriften, die Diskriminierung aufgrund von Behinderung, die in den Geltungsbereich des Vorschlags von 2008 fällt, verbieten

Abschnitt 3 des Berichts befasst sich mit nationalen Rechtsvorschriften, die Diskriminierung aufgrund von Behinderung, die in den Geltungsbereich des Vorschlags von 2008 fällt, verbieten. In seiner derzeitigen Form verlangt das Unionsrecht von den Mitgliedstaaten nicht, die Diskriminierung von Menschen mit Behinderungen außerhalb des Beschäftigungsbereichs zu verbieten. Dessen ungeachtet haben viele

- 14 Die griechische Verfassung ist ein Beispiel für eine Verfassung, die bei der Gewährleistung gesellschaftlicher Teilhabe von Menschen mit Behinderungen einen breiten Ansatz verfolgt. Nach Art. (21)6 haben Menschen mit Behinderungen "Anspruch auf Maßnahmen, die ihre Eigenständigkeit, berufliche Integration und Teilhabe am sozialen, wirtschaftlichen und politischen Leben des Landes gewährleisten." Art. 71 Abs. 1 der portugiesischen Verfassung weist außerdem auf die Gleichberechtigung von Menschen mit Behinderungen hin. Konkret heißt es dort: "Bürgerinnen und Bürger mit körperlichen oder geistigen Behinderungen genießen in vollem Umfang die in dieser Verfassung verankerten Rechte und unterliegen den in ihr verankerten Pflichten, mit Ausnahme derjenigen, zu deren Ausübung bzw. Erfüllung sie aufgrund ihres Zustands nicht in der Lage sind".
- 15 Ein klares Beispiel dafür ist Art. 21 Abs. 3 der griechischen Verfassung, in dem es heißt, dass der Staat für die Gesundheit der Bürgerinnen und Bürger Sorge trägt und spezielle Maßnahmen ergreift, um, neben anderen gesellschaftlichen Gruppen, Menschen mit Behinderungen zu schützen. Auch die polnische Verfassung verfolgt in Bezug auf Behinderung einen Fürsorgeansatz. Gemäß Art. 69 der polnischen Verfassung "leistet der Staat behinderten Menschen, in Einklang mit den gesetzlichen Vorschriften, Hilfe bei der Sicherung ihres Lebensunterhalts, ihrer beruflichen Integration und sozialen Kommunikation". Das individuelle oder medizinische Behinderungsmodell wird in Art. 68 Abs. 3 der polnischen Verfassung deutlich, dem zufolge der Staat verpflichtet ist, neben anderen Personengruppen auch Menschen mit Behinderungen einen besonderen Schutz ihrer Gesundheit zu gewährleisten. Das medizinische Modell kommt auch in der spanischen Verfassung zum Ausdruck, wo in Art. 49 der Schwerpunkt weiterhin auf Rehabilitation und sozialer Fürsorge liegt. Diesem Artikel zufolge ist der Staat verpflichtet, gegenüber Menschen mit Behinderungen eine Politik der Prävention, Behandlung, Rehabilitation und Integration zu verfolgen.
- 16 In Belgien, Lettland, Litauen, Österreich und der Slowakei sind die nationalen Verfassungsbestimmungen nur gegenüber dem Staat unmittelbar wirksam (vertikale Direktwirkung). In anderen Mitgliedstaaten können die in der Verfassung verankerten Nichtdiskriminierungsvorschriften sowohl gegenüber dem Staat als auch gegenüber privaten Parteien geltend gemacht werden (vertikale und horizontale Direktwirkung). Dies trifft auf Deutschland, Estland, Finnland, Frankreich, Kroatien, die Niederlande, Polen, Portugal, Slowenien, Spanien und Zypern zu. In anderen Mitgliedstaaten (z. B. Griechenland, Rumänien und Ungarn) haben Verfassungsbestimmungen keine Direktwirkung.

Mitgliedstaaten ihre Rechtsvorschriften erweitert, so dass Diskriminierung aufgrund von Behinderung auch jenseits des Beschäftigungsbereichs erfasst wird. Die unterschiedlichen nationalen Rechtsvorschriften, die Diskriminierung aufgrund von Behinderung verbieten, werden in diesem Abschnitt des Berichts danach eingestuft, wie viele Bereiche des Vorschlags von 2008 sie abdecken.

In zahlreichen EU-Mitgliedstaaten (genauer gesagt in **Belgien, Bulgarien, Deutschland, Finnland, Frankreich, Italien, Kroatien, Luxemburg, Österreich, Portugal, Schweden**, der **Slowakei, Slowenien, Spanien**, der **Tschechischen Republik, Ungarn** und im **Vereinigten Königreich**) wird Diskriminierung aufgrund von Behinderung im nationalen Recht in allen drei Bereichen des Kommissionsvorschlags von 2008 erfasst. In anderen Mitgliedstaaten gilt das Verbot von Diskriminierung aufgrund von Behinderung im innerstaatlichen Recht nur für zwei der Bereiche, auf die sich der Vorschlag bezieht. In **Irland, Litauen** und **Malta** ist Diskriminierung aufgrund von Behinderung zum Beispiel beim Zugang zu und bei der Versorgung mit Gütern und Dienstleistungen sowie im Bildungsbereich verboten. In den **Niederlanden** wurde der sachliche Geltungsbereich der einschlägigen nationalen Rechtsvorschriften über den Beschäftigungsbereich hinaus auf die Bereiche Grund- und Sekundarschulbildung, Wohnraum und öffentliches Verkehrswesen (nicht jedoch auf den umfassenderen Bereich des Zugangs zu und der Versorgung mit Gütern und Dienstleistungen) ausgeweitet. Im nationalen Recht **Lettlands** ist Diskriminierung aufgrund von Behinderung in den Bereichen Sozialschutz sowie Zugang zu und Versorgung mit Gütern und Dienstleistungen verboten. In **Zypern** verbieten die Rechtsvorschriften Diskriminierung nur im Bereich des Zugangs zu und der Versorgung mit Gütern und Dienstleistungen. Bemerkenswerterweise verbietet kein Mitgliedstaat Diskriminierung aufgrund von Behinderung einzig im Bereich der Bildung oder des sozialen Schutzes. In **Dänemark, Estland** und **Griechenland** schließlich gibt es außerhalb des Beschäftigungsbereichs kein Verbot von Diskriminierung aufgrund von Behinderung. Im **polnischen** Gleichbehandlungsgesetz fehlen direkte Bestimmungen zwar, es ist aber möglich, auf der Grundlage der polnischen Verfassung gegen Diskriminierungen aufgrund von Behinderung vorzugehen. In **Rumänien** ist Behinderung in der Liste unzulässiger Diskriminierungsgründe gemäß Regierungsverordnung Nr. 137/2000 nicht als geschütztes Merkmal aufgeführt.¹⁷ In dem in Artikel 2 Absatz 1 der genannten Regierungsverordnung verankerten allgemeinen Diskriminierungsverbot wird Behinderung jedoch erwähnt, und sowohl der Nationale Rat zur Bekämpfung von Diskriminierung (CNCD)¹⁸ als auch die nationalen Gerichte gehen davon aus, dass Behinderung ein im Rahmen dieses Artikels geschütztes Merkmal ist.¹⁹

In Fällen, in denen Diskriminierung aufgrund von Behinderung weder in der nationalen Verfassung noch in den nationalen Rechtsvorschriften eines EU-Mitgliedstaats verboten ist oder in denen Diskriminierung aufgrund von Behinderung in einigen (nicht jedoch in allen) der im Vorschlag von 2008 erfassten Bereiche verboten ist, sind die Verabschiedung des Vorschlags von 2008 für eine neue Gleichbehandlungsrichtlinie und die Ratifizierung des Übereinkommens der Vereinten Nationen für die Ausweitung des Schutzes behinderter Menschen über die bereits bestehenden Schutzbereiche hinaus potenziell von großer Bedeutung.

17 Rumänien, Regierungsverordnung Nr. 137/2000 zur Verhinderung und Sanktionierung aller Formen von Diskriminierung (*Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), 31. August 2000 (*Monitorul Oficial al României* Nr. 431 vom 2. September 2000), neu veröffentlicht 2014. Siehe Art. 5 bis Art. 8, Art. 10 und Art. 11.

18 Offizielle Webseite des Nationalen Rats zur Bekämpfung von Diskriminierung (CNCD) unter: <http://www.cncd.org.ro>.

19 Siehe zum Beispiel eine kürzlich vor dem Berufungsgericht (*Curtea de Apel*) Bukarest verhandelte Rechtssache (Entscheidung Nr. 2547/2015 vom 12. Oktober 2015), in der das Gericht die vorangegangene Entscheidung der nationalen Gleichbehandlungsstelle aufhob und entschied, dass zwei Taxiunternehmen die beschwerdeführende Person (die einen Rollstuhl benutzte, der nicht faltbar war) diskriminiert hatten, da die betreffende Person ihre Dienste nicht in Anspruch nehmen konnte. Die Unternehmen wurden zu einer Geldbuße von jeweils 10 000 RON (2500 €) verurteilt. Das Urteil ist nicht rechtskräftig. Siehe dazu Abschnitt 3 des Berichts.

Rechtsvorschriften über die Integration von Menschen mit Behinderungen (ohne Einbeziehung von Diskriminierung), die in den Geltungsbereich des Vorschlags von 2008 fallen

Abschnitt 4 des Berichts befasst sich mit Rechtsvorschriften über die Integration von Menschen mit Behinderungen (ohne Einbeziehung von Diskriminierung), die in den Geltungsbereich des Vorschlags von 2008 fallen. Abgesehen von Nichtdiskriminierungsvorschriften wurden zwei hauptsächliche Arten von Rechtsvorschriften identifiziert, die sich auf die Integration von Menschen mit Behinderungen beziehen: Rechtsvorschriften über Maßnahmen zur Verbesserung der Zugänglichkeit und Rechtsvorschriften zum Thema Bildung. Besagte Rechtsvorschriften überschneiden sich weitgehend mit dem sachlichen Geltungsbereich des Kommissionsvorschlags von 2008 und mit der Pflicht zum Treffen angemessener Vorkehrungen als solcher.

Abschnitt 4 des Berichts unterstreicht die Tatsache, dass in zwölf EU-Mitgliedstaaten eine allgemeine Pflicht besteht, Zugänglichkeit für Menschen mit Behinderungen im Voraus zu gewährleisten. In **Bulgarien, Deutschland, Frankreich, Irland, Litauen, Malta, Slowenien, Spanien, Ungarn, im Vereinigten Königreich** und in **Zypern** ist die Pflicht, Zugänglichkeit zu gewährleisten, im nationalen Recht ausdrücklich verankert. Im **slowakischen** Recht ist die allgemeine Pflicht, Zugänglichkeit zu gewährleisten, hingegen nicht ausdrücklich enthalten; sie ist vielmehr das Ergebnis der Auslegung der bestehenden Rechtsvorschriften seitens der zuständigen Behörden. In den übrigen EUMitgliedstaaten besteht keine generelle Pflicht, Zugänglichkeit zu gewährleisten. Dies schließt jedoch die Möglichkeit nicht aus, dass die Rechtsvorschriften der Mitgliedstaaten Bestimmungen enthalten, denen zufolge Dienstleistungen, die der Öffentlichkeit zur Verfügung stehen, Gebäude und Infrastrukturen so konzipiert bzw. gebaut werden müssen, dass sie behindertengerecht sind. Trotz der weitreichenden, in den Gesetzen der Mitgliedstaaten verankerten Bestimmungen stellt die Verwirklichung von Zugänglichkeit in der Praxis noch immer eine große Herausforderung dar und sind viele Bereiche der Umwelt und Infrastruktur für Menschen mit Behinderungen nach wie vor nicht zugänglich.

Im Bildungsbereich belegen die gesetzlichen Vorschriften und politischen Dokumente in vielen EU-Mitgliedstaaten einen erkennbaren Trend zur Integration und Inklusion von Menschen mit Behinderungen in das Regelschulsystem. Das Inkrafttreten des Übereinkommens hat bestimmte Politiken in den Mitgliedstaaten beeinflusst; auf die Einführung neuer Rechtsvorschriften hat es – mit einigen bemerkenswerten Ausnahmen, zum Beispiel dem **slowenischen** Gesetz über die Chancengleichheit von Menschen mit Behinderungen – jedoch keinen großen Einfluss gehabt. Es sind aber auch positive Entwicklungen festzustellen, unter anderem im niederländischen Recht. Im August 2014 trat in den **Niederlanden** das Gesetz über die bedarfsgerechte Beschulung geistig und körperlich behinderter Schülerinnen und Schüler²⁰ in Kraft. Diesem Gesetz zufolge sind die Regelschulen verpflichtet, Schülerinnen und Schüler mit Lernbehinderungen aufzunehmen und ihnen bedürfnisgerechte Unterrichtsprogramme/ Sonderförderung anzubieten.²¹ In **Litauen** ist der Staat verpflichtet, dafür zu sorgen, dass Kinder mit Behinderungen auf allen Ebenen des Bildungssystems eine angemessene Förderung erhalten. Im Rahmen des Nationalen Programms für die Integration von Menschen mit Behinderungen (2013–2019), das zum Teil auf dem Übereinkommen basiert, sind darüber hinaus weitere zahlreiche Maßnahmen vorgesehen. Ungeachtet der positiven Entwicklungen, die in diesen – und anderen – EU-Mitgliedstaaten verzeichnet werden, sind Kinder mit Behinderungen überall in der EU nach wie vor bis zu einem gewissen Grad vom Regelschulsystem ausgeschlossen.

20 Niederlande, Gesetz über bedarfsgerechte Beschulung (*Wet van 11 oktober 2012 tot wijziging van enkele onderwijswetten in verband met een herziening van de organisatie en financiering van de ondersteuning van leerlingen in het basisonderwijs, speciaal en voortgezet speciaal onderwijs, voortgezet onderwijs en beroepsonderwijs (Wet Passend Onderwijs)*), 11. Oktober 2012, Staatsblad 2012, 533.

21 Niederlande, Gesetz über bedarfsgerechte Beschulung.

Pflichten zum Treffen angemessener Vorkehrungen in den Mitgliedstaaten

Abschnitt 5.1 des Berichts untersucht, in welchem Umfang die innerstaatlichen Rechtsvorschriften der 28 EU-Mitgliedstaaten Pflichten zum Treffen angemessener Vorkehrungen außerhalb des Beschäftigungsbereichs enthalten. Er liefert damit wichtige Hintergrundinformationen für spätere Abschnitte des Berichts, in denen die Pflichten zum Treffen angemessener Vorkehrungen in den Bereichen Sozialschutz, Bildung und Zugang zu bzw. Versorgung mit Gütern und Dienstleistungen genauer untersucht werden. Abschnitt 5.2 des Berichts geht auf die verschiedenen Rechtfertigungsgründe und Einwendungen ein, die die nationalen Rechtsvorschriften für den Fall des Nichttreffens angemessener Vorkehrungen vorsehen. Abschnitt 5.3 des Berichts beleuchtet schließlich die Mittel der Rechtsdurchsetzung und die Sanktionen, die auf der Ebene der Mitgliedstaaten zur Verfügung stehen.

Insgesamt wird aus den Informationen in Abschnitt 5.1 des Berichts deutlich, dass – sowohl was die Bereiche betrifft, in denen die Pflicht, angemessene Vorkehrungen zu treffen, gilt, als auch was die Definition dieser Pflicht betrifft – in den EU-Mitgliedstaaten viele unterschiedliche Ansätze existieren. Zahlreiche Mitgliedstaaten verfügen in ihren Nichtdiskriminierungsvorschriften bereits über Pflichten zum Treffen angemessener Vorkehrungen, die alle – oder zumindest einige – im Kommissionsvorschlag von 2008 enthaltenen Bereiche abdecken. In der Regel werden dort, wo Pflichten zum Treffen angemessener Vorkehrungen in den Rechtsvorschriften der Mitgliedstaaten häufig sind, konkrete Bereiche aufgelistet, für die die Pflicht gilt. Besonders erwähnenswert sind jedoch die **kroatischen, zyprischen und spanischen** Rechtsvorschriften, da sie einen sehr breiten Ansatz repräsentieren und Vorkehrungspflichten in den Kontext der Teilhabe am “öffentlichen und sozialen Leben” (**Kroatien**), der “Menschenrechte und Grundfreiheiten” (**Zypern**) bzw. “aller Menschenrechte” (**Spanien**) stellen. Unter denjenigen Mitgliedstaaten, deren Nichtdiskriminierungsvorschriften keine ausdrücklichen Vorkehrungspflichten enthalten, sind viele, deren innerstaatliches Recht in bestimmten Bereichen Pflichten vorsieht, die *de facto* Vorkehrungspflichten oder mit diesen vergleichbar sind.

Eine erhebliche Zahl von Mitgliedstaaten hat Nichtdiskriminierungsvorschriften beschlossen, die in gewissem Maße alle drei Bereiche des Kommissionsvorschlags von 2008 abdecken. Dies ist der Fall in **Belgien, Bulgarien, Deutschland, Finnland, Irland, Kroatien, den Niederlanden, Österreich, Schweden, der Slowakei, Slowenien, Spanien** und im **Vereinigten Königreich**. Nach Ansicht der Verfasserinnen und Verfasser dieses Berichts ist dies auch in **Zypern** bis zu einem gewissen Grad der Fall. Bei manchen dieser Pflichten handelt es sich um partielle Pflichten, die nur für bestimmte Teile der im Vorschlag von 2008 erfassten Bereiche gelten. Dies gilt für **Belgien, Bulgarien, Deutschland, Finnland, die Niederlande, Schweden, Slowenien und Zypern**. Die Nichtdiskriminierungsvorschriften der **Tschechischen Republik** enthalten eine Vorkehrungspflicht, die zwei Bereiche des Kommissionsvorschlags von 2008 (Zugang zu Dienstleistungen sowie Bildung) abdeckt, sowie eine partielle Vorkehrungspflicht im Bereich der Gesundheitsversorgung. In **Luxemburg und Portugal** gibt es eine Pflicht zum Treffen angemessener Vorkehrungen im Bildungsbereich. In einer Handvoll EU-Mitgliedstaaten (**Dänemark, Frankreich, Griechenland, Lettland, Malta, Rumänien und Ungarn**) existieren allgemeine Rechtsvorschriften, die *de facto* Vorkehrungspflichten oder mit diesen vergleichbar sind und die manche Bereiche des Kommissionsvorschlags von 2008 abdecken. Eine Defacto-Pflicht ist eine Pflicht, die nicht ausdrücklich als Pflicht zum Treffen angemessener Vorkehrungen definiert und nicht zwangsläufig an das Nichtdiskriminierungsrecht gebunden ist, die jedoch individuelle Vorkehrungen vorschreibt, um den Bedürfnissen einer bestimmten Person mit Behinderung unter bestimmten Umständen gerecht zu werden. Eine “vergleichbare” Pflicht weist gewisse Merkmale einer Vorkehrungspflicht auf, ist jedoch nicht identisch. Wird einer solchen Pflicht nicht nachgekommen, so kann dies zum Beispiel viel leichter zu rechtfertigen sein, als wenn es sich um eine ausdrückliche Pflicht handelt, angemessene Vorkehrungen zu treffen. Die in diesem Bericht gewählte Bezeichnung dieser Pflichten als “De-facto-Pflichten” oder “vergleichbare Pflichten” ist unpräzise, und ohne weitere Recherchen ist es nicht möglich, diesbezüglich eine genaue Klassifizierung oder Methodik zu entwickeln.

In wenigen EU-Mitgliedstaaten (**Estland, Italien, Litauen** und **Polen**) existiert außerhalb des Beschäftigungsbereichs keine Pflicht zum Treffen angemessener Vorkehrungen. In ein paar dieser Länder gibt es jedoch eingeschränkte Bestimmungen im Bildungsbereich, um die Integration/Inklusion von Menschen mit Behinderungen in das Regelschulsystem zu gewährleisten.

Die Recherchen für diesen Bericht haben ergeben, dass die EU-Mitgliedstaaten ziemlich umfassende Pflichten zum Treffen angemessener Vorkehrungen etabliert haben. Nichtsdestotrotz bestehen, was die Bereiche des Kommissionsvorschlags von 2008 betrifft, in einigen Mitgliedstaaten zweifellos noch viele Lücken. In nachfolgenden Abschnitten befasst sich der Bericht mit den Besonderheiten der in den nationalen Rechtsvorschriften enthaltenen Pflichten zum Treffen angemessener Vorkehrungen in den drei Bereichen des Kommissionsvorschlag (Sozialschutz, Bildung sowie Zugang zu Gütern und Dienstleistungen).

Nationale Vorschriften, die eine Pflicht zum Treffen angemessener Vorkehrungen enthalten, sehen fast immer Einwendungen oder Rechtfertigungsgründe vor.²² Der in dieser Hinsicht am häufigsten verwendete Terminus ist der der "übermäßigen Belastung".²³ Zuweilen werden Einwendungen oder Rechtfertigungsgründe für das Nichttreffen angemessener Vorkehrungen auch mit anderen Bezeichnungen belegt, die sich zum Beispiel auf mangelnde Zumutbarkeit,²⁴ hohe Kosten²⁵ oder andere Faktoren²⁶ beziehen. Wo Gesetzgebung oder begleitende Dokumente Aufschluss über die Faktoren geben, die bei der Beurteilung der mit einer Vorkehrung verbundenen "übermäßigen Belastung" oder "Unzumutbarkeit" in Betracht zu ziehen sind (wie dies zum Beispiel in **Belgien, Finnland** und Österreich der Fall ist), sind Kosten jedoch selten der einzige zu berücksichtigende Faktor. Andere Faktoren, die erwähnt werden, sind zum Beispiel die Höhe der zur Verfügung stehenden staatlichen Hilfen und organisatorische Aspekte. In **Belgien, Finnland** und Österreich verweisen die in den Rechtsvorschriften oder begleitenden Dokumenten enthaltenen Orientierungshilfen allesamt auf die Auswirkungen, die die Vorkehrungen (bzw. das Nichttreffen von Vorkehrungen) auf die Bevölkerung mit Behinderungen im Allgemeinen (**Belgien** und Österreich) oder auf die Bedürfnisse der betreffenden behinderten Person (**Finnland**) haben. Dies schlägt sich in gewissem Maße auch im Kommissionsvorschlag von 2008 nieder, dem zufolge unter anderem "die negativen Auswirkungen auf Menschen mit Behinderungen, sollten die Maßnahmen nicht durchgeführt werden", zu berücksichtigen sind. Orientierungshilfen, um die Reichweite einer Pflicht zu beurteilen, sind *per se* hilfreich (da es sich um ein kompliziertes Thema handelt); ihr Wert liegt aber auch darin, dass sie verdeutlichen, wie vielgestaltig die Faktoren sind, die bei der Prüfung angemessener Vorkehrungen berücksichtigt werden müssen. In einem **bulgarischen** Gesetz und in den **irischen** Rechtsvorschriften werden als Rechtfertigungsgründe für das Nichttreffen angemessener Vorkehrungen hingegen ausschließlich Kosten genannt. Wird eine übermäßige Belastung oder mangelnde Zumutbarkeit festgestellt, so führt dies in den meisten Fällen dazu, dass die Vorkehrungspflicht vollständig entfällt. Eine interessante Ausnahme bildet die österreichische Regelung, nach der die verpflichtete Person auch unter diesen Umständen noch dafür sorgen muss, die Situation des oder der Betroffenen zu verbessern, um Gleichbehandlung zu erreichen.

22 In der Slowakei sehen die Rechtsvorschriften im Zusammenhang mit angemessenen Vorkehrungen außerhalb des Beschäftigungsbereichs keine Prüfung von Rechtfertigungsgründen vor. Auch das rumänische Recht enthält keinerlei Bestimmungen über Rechtfertigungsgründe oder Einwendungen im Zusammenhang mit den im nationalen Recht vorgesehenen "vergleichbaren" Pflichten. In Deutschland, Frankreich und Ungarn sieht das Gesetz keine "Rechtfertigungsprüfung" speziell für angemessene Vorkehrungen vor; es existieren jedoch einschlägige Gerichtsurteile, die implizit auf eine solche Prüfung Bezug nehmen. In Bulgarien haben die nach dem Gesetz über die Integration von Menschen mit Behinderungen im Bildungsbereich bestehenden Vorkehrungspflichten absolute Gültigkeit; in anderen Worten: Gegen sie kann weder das Argument einer "übermäßigen Belastung" noch irgendein anderer Rechtfertigungsgrund vorgebracht werden.

23 Dies trifft auf Belgien, Kroatien, die Niederlande, Österreich, Slowenien, Spanien und die Tschechische Republik zu.

24 In Finnland, Schweden und im Vereinigten Königreich gilt das Kriterium der Zumutbarkeit. Einige einschlägige Rechtsvorschriften dieser Mitgliedstaaten führen näher aus, welche Faktoren zu berücksichtigen sind, um die Zumutbarkeit unter den konkreten Umständen des jeweiligen Falls zu beurteilen.

25 In Bulgarien (nach dem Antidiskriminierungsgesetz) und in Irland sind Kosten offenbar der entscheidende Faktor bei der "Rechtfertigungsprüfung", die in den einschlägigen Bereichen außerhalb der Beschäftigung zur Anwendung kommt. Die zypriotischen Rechtsvorschriften sehen eine kombinierte Rechtfertigungsprüfung vor, bei der nicht nur das Kriterium der Kosten, sondern auch das der übermäßigen Belastung herangezogen wird.

26 Im schwedischen Schulgesetz wird der Ausdruck "erhebliche Belastung" verwendet. In Malta sehen die einschlägigen Vorschriften eine Einwendung wegen "unvertretbarer Härte" vor.

Dies steht im Gegensatz zu dem Ansatz des “Alles oder Nichts”, den die Vorkehrungspflichten in anderen Mitgliedstaaten verfolgen.

Abschnitt 5.3 des Berichts liefert einen Überblick über die verschiedenen Mittel der Rechtsdurchsetzung und die Sanktionen, die in den Mitgliedstaaten der Union bei Verstößen gegen die Pflicht, den Bedürfnissen von Menschen mit Behinderungen in Bereichen außerhalb der Beschäftigung Rechnung zu tragen, zur Verfügung stehen. Die wichtigsten Maßnahmen, die bei einem Verstoß gegen die Vorkehrungspflicht auf nationaler Ebene zum Einsatz kommen, sind die Gewährung von Schadensersatz und/oder eine Anordnung, der betreffenden behinderten Person die geforderten Vorkehrungen zukommen zu lassen. In einigen Mitgliedstaaten sieht das nationale Recht im Falle eines Verstoßes gegen die Vorkehrungspflicht keine speziellen Mittel der Rechtsdurchsetzung vor. Menschen mit Behinderungen können jedoch auf die in den entsprechenden Nichtdiskriminierungs-, Zivil- oder Verwaltungsvorschriften vorgesehenen, allgemeinen Mittel zurückgreifen. Die wichtigsten im nationalen Recht vorgesehenen Sanktionen sind auflagegebundene Geldbußen (häufig verhängt bei Verstößen gegen richterliche Anordnungen) und, in sehr seltenen Fällen, Freiheitsstrafen.

Wie ein Verstoß gegen die Vorkehrungspflicht eingestuft wird, kann Auswirkungen darauf haben, welche rechtlichen Mittel der betroffenen Person zur Verfügung stehen und welche Sanktionen verhängt werden können. In mehreren EU-Mitgliedstaaten gilt das Versäumnis, den Bedürfnissen einer Person mit Behinderungen außerhalb des Beschäftigungsbereichs Rechnung zu tragen, ausdrücklich als Verstoß gegen die Nichtdiskriminierungsvorschriften. Dies gilt unter anderem für **Belgien, Finnland, Irland, die Niederlande, Österreich, Schweden und die Tschechische Republik**. In vielen EU-Mitgliedstaaten wird die spezifische Art von Diskriminierung (unmittelbare oder mittelbare Diskriminierung bzw. Diskriminierung *sui generis*) nicht präzisiert. In den Rechtsvorschriften anderer Mitgliedstaaten ist das Versäumnis, Vorkehrungen zu treffen, nicht ausdrücklich als Diskriminierung definiert. Gilt das Versäumnis, Vorkehrungen zu treffen, als eine Form von Diskriminierung, so kommen die (diskriminierungsspezifischen) Mittel der Rechtsdurchsetzung und Sanktionen zur Anwendung, die in Diskriminierungsfällen zur Verfügung stehen. Gelegentlich kommen jedoch auch allgemeine zivilrechtliche Mittel zur Anwendung.

In der überwiegenden Mehrzahl der EU-Mitgliedstaaten ist bei Verstößen gegen die Vorkehrungspflicht Schadensersatz vorgesehen. Dies gilt für **Belgien, Bulgarien, Deutschland, Finnland, Irland, Kroatien, Lettland, Luxemburg, die Niederlande, Österreich, Portugal, Rumänien, Schweden, die Slowakei, Slowenien, Spanien, die Tschechische Republik, Ungarn, das Vereinigte Königreich** (außer im Bildungsbereich) und **Zypern**. In manchen Fällen ist der Anspruch auf Schadenersatz in den einschlägigen Nichtdiskriminierungsvorschriften oder im Behindertenrecht geregelt. In anderen Fällen, zum Beispiel in **Ungarn**, kann bei Verstößen gegen die Vorkehrungspflicht (sofern diese von den zuständigen nationalen Behörden als diskriminierendes Verhalten eingestuft werden) im Rahmen einer Zivilklage Schadensersatz gefordert und von den Zivilgerichten zugesprochen werden. Neben der Zuerkennung von Schadensersatz können Gerichte oder quasi-gerichtliche Stellen in vielen EU-Mitgliedstaaten anordnen, dass die geforderten Vorkehrungen durchgeführt werden. Dies gilt für **Belgien, Finnland, Irland, Kroatien, die Niederlande, Rumänien, Schweden, die Slowakei, die Tschechischen Republik und das Vereinigte Königreich**. Bemerkenswerterweise besteht (insbesondere) nach österreichischem Recht keine Möglichkeit, die Durchführung angemessener Vorkehrungen zu erzwingen; es kann jedoch Schadenersatz zugesprochen werden. In manchen Mitgliedstaaten können Ansprüche nur auf dem Gerichtsweg geltend gemacht werden, in anderen – z. B. in den **Niederlanden** und in **Rumänien** – können auch Gleichstellungs- und Menschenrechtskommissionen auf entsprechende Beschwerden hin (rechtlich nicht bindende) Gutachten erstellen oder Entscheidungen fällen. Betroffene haben dadurch mehr Wahlmöglichkeiten bei der Entscheidung, ob und wie sie Ansprüche aus einem Verstoß gegen die Vorkehrungspflicht geltend machen wollen.

Erwähnenswert ist auch, dass die Gesetzgebung in mehreren Mitgliedstaaten nicht den Ausdruck “angemessene Vorkehrungen” verwendet, sondern von “erforderlichen und zweckmäßigen Anpassungen” (**Finnland**), “effektiven Vorkehrungen” (**Niederlande**) oder “zweckmäßigen Vorkehrungen” (**Slowenien**)

spricht. Diese Ausdrücke betonen das Ziel, das mit den Vorkehrungen oder Anpassungen erreicht werden soll, und machen eine klare Trennung zwischen der Pflicht, Vorkehrungen zu treffen, und der Einwendung, das Treffen dieser Vorkehrungen sei „unangemessen“. Zur Beurteilung der Frage, ob ein Anspruch auf angemessene Vorkehrungen berechtigt ist, erweist sich der **niederländische** Ansatz als besonders nützlich, da er die Frage nach der „Effektivität“ der jeweiligen Vorkehrung von der Frage nach dem Bestehen einer „unverhältnismäßigen Belastung“ der verpflichteten Person trennt. Dies kann dazu führen, dass Vorkehrungen als „effektiv“ eingestuft, trotzdem aber nicht eingefordert werden, da sie zu einer „unverhältnismäßigen Belastung“ führen würden. Das zweistufige Vorgehen ermöglicht es außerdem, mehrere Vorkehrungen zu prüfen: Eine Vorkehrung, die als „effektiv“ eingestuft wird, kommt danach in die zweite Prüfungsphase der „unverhältnismäßigen Belastung“. In den Rechtsvorschriften anderer Mitgliedstaaten ist solch eine klare, zweistufige Prüfung nicht vorgesehen, obwohl sie die Überprüfung der Umsetzung der Vorkehrungspflicht erleichtert und strukturiert. In vielen Mitgliedstaaten ist die rechtliche Definition des Ausdrucks „angemessene Vorkehrungen“ eng mit der Einwendung verknüpft, wonach „angemessene Vorkehrungen“ als Maßnahmen definiert sind, die sowohl der behinderten Person Rechnung tragen als auch für die Betroffenen keine unverhältnismäßige oder unzumutbare Belastung darstellen.

Neben Einwendungen wegen „Unverhältnismäßigkeit“ oder „Unzumutbarkeit“ stellen innerstaatliche Rechtsvorschriften in bestimmten Fällen einen Zusammenhang zwischen der Pflicht, Vorkehrungen zu treffen, und der Pflicht, Zugänglichkeit zu gewährleisten, her. In einer Reihe von Fällen kann die Einhaltung der Zugänglichkeitspflicht nicht als Einwendung gegen die Pflicht, den Bedürfnissen einer Person durch entsprechende Vorkehrungen Rechnung zu tragen, benutzt werden. Dies gilt zum Beispiel für die Niederlande. Andererseits führt in Österreich die zeitweilige Immunität, die öffentlichen Einrichtungen in Bezug auf mittelbare Diskriminierung und mangelnde Zugänglichkeit gewährt wurde, dazu, dass die Vorkehrungspflicht bis Ende 2019 durch Erfüllung der entsprechenden Anforderungen, und die Erstellung eines Zugänglichkeitsplans, umgangen werden kann. Im Allgemeinen ist die Wahrscheinlichkeit, dass ein Anspruch auf Vorkehrungen als unverhältnismäßig oder unzumutbar angesehen wird, größer, wenn Zugänglichkeitsbestimmungen bereits eingehalten werden. In manchen Ländern ist im Gesetz ausdrücklich festgelegt, dass ein Anspruch auf Vorkehrungen, der als erfüllt gegolten hätte, wenn andere gesetzliche Bestimmungen (darunter auch Bestimmungen, die sich auf Zugänglichkeit beziehen) eingehalten worden wären, keinesfalls unverhältnismäßig oder unzumutbar sein kann. Dies trifft auf Österreich zu und zeugt von einer konstruktiven Wechselwirkung zwischen der Pflicht, Zugänglichkeit zu gewährleisten, und der Pflicht, angemessene Vorkehrungen zu treffen. In den meisten Ländern wird dieser Punkt jedoch nicht ausdrücklich thematisiert.

Sozialschutz

Abschnitt 6 des Berichts befasst sich mit der Pflicht, angemessene Vorkehrungen für Menschen mit Behinderungen im Bereich des Sozialschutzes zu treffen. Der Kommissionsvorschlag von 2008 enthält eine Pflicht, angemessene Vorkehrungen im Gesamtbereich des Sozialschutzes zu treffen, und gliedert diese Pflicht in die Bereiche Sozialversicherung/Leistungen für Menschen mit Behinderungen, Sozialwohnungen und Gesundheitsversorgung.

Eine ausdrückliche gesetzliche Pflicht, angemessene Vorkehrungen für Menschen mit Behinderungen im Bereich des Sozialschutzes zu treffen, existiert in **Belgien, Deutschland, Finnland, Irland, Kroatien, Österreich, Schweden, der Slowakei, Spanien** und im **Vereinigten Königreich**. In einigen EU-Mitgliedstaaten (**Bulgarien, die Niederlande, Slowenien** und **Zypern**) besteht eine partielle Pflicht in einem oder zwei der unter „Sozialschutz“ fallenden Bereiche. In anderen Mitgliedstaaten (**Dänemark, Frankreich, Griechenland, Lettland, Malta, Rumänien** und **Ungarn**) existiert keine ausdrückliche Pflicht, angemessene Vorkehrungen im Bereich des Sozialschutzes zu treffen. Das jeweilige nationale Recht sieht jedoch Maßnahmen vor, die der Pflicht zum Treffen angemessener Vorkehrungen im Bereich des Sozialschutzes ähneln. In den übrigen EU-Mitgliedstaaten (**Estland, Italien, Litauen, Luxemburg,**

Polen und Tschechische Republik) existiert überhaupt keine Pflicht, angemessene Vorkehrungen im Bereich des Sozialschutzes zu treffen.

Die Informationen in Abschnitt 6 des Berichts zeigen, dass, was nationale Gesetze und Politiken im Bereich des Sozialschutzes betrifft, große Unterschiede zwischen den 28 EUMitgliedstaaten bestehen. Genauere Informationen zu Sozialversicherung/Leistungen für Menschen mit Behinderungen und Sozialwohnungen stehen in den Mitgliedstaaten nur sehr beschränkt zur Verfügung, Informationen zur Gesundheitsversorgung dagegen eher. Was Sozialversicherung und Sozialleistungen betrifft, so finden sich in den nationalen Rechtsvorschriften nur wenige Beispiele für ausdrückliche Pflichten, angemessene Vorkehrungen zu treffen. Es gibt jedoch einschlägige Urteile (vor allem in **Lettland** und im **Vereinigten Königreich**), in denen auf die Pflicht eingegangen wird, den Bedürfnissen von Menschen mit Behinderungen beim Zugang zu entsprechenden Leistungen Rechnung zu tragen. Sehr wenige Beispiele gibt es auch für vollumfängliche Pflichten, angemessene Vorkehrungen für Menschen mit Behinderungen im Zusammenhang mit Sozialwohnungen zu treffen. Mehrere EUMitgliedstaaten haben im Hinblick auf die Vergabe von Sozialwohnungen Vorrangregelungen (positive Maßnahmen) für Menschen mit Behinderungen. Bemerkenswert ist schließlich, dass die Gesetze und Politiken der Mitgliedstaaten im Bereich der Gesundheitsversorgung ziemlich weitreichend sind. In einer Handvoll Mitgliedstaaten existiert eine vollumfängliche Pflicht, Menschen mit Behinderungen im Bereich der Gesundheitsversorgung Rechnung zu tragen. In anderen Mitgliedstaaten existiert nur eine partielle Pflicht, die vor allem Kommunikationsmethoden und den Zugang zu Informationen betrifft. In verschiedenen anderen Mitgliedstaaten gibt es keine ausdrückliche Vorkehrungspflicht, es gibt aber Pflichten mit vergleichbarer Wirkung und einschlägige Urteile (u. a. in **Lettland**).

Bildung

Abschnitt 7 des Berichts beleuchtet die Rechtsvorschriften und Politikmaßnahmen, die im Zusammenhang mit der Pflicht, angemessene Vorkehrungen für Menschen mit Behinderungen zu treffen, im Bildungsbereich beschlossen wurden.

Die überwiegende Mehrzahl der EU-Mitgliedstaaten hat Maßnahmen für angemessene Vorkehrungen im Bildungsbereich getroffen. Die Tatsache, dass sich die **deutsche** Pflicht, im Bildungsbereich angemessene Vorkehrungen zu treffen, aus der Verfassung herleitet, verdient besondere Aufmerksamkeit. In einer Handvoll anderer Mitgliedstaaten existieren Pflichten, die *de facto* als Pflichten zum Treffen angemessener Vorkehrungen gelten können. Dies trifft auf **Dänemark, Frankreich, Griechenland, Malta, Rumänien, die Tschechische Republik und Ungarn** zu. Einige Mitgliedstaaten sehen keinerlei ausdrückliche Pflicht zum Treffen angemessener Vorkehrungen im Bildungsbereich vor, verfügen jedoch über Rechtsvorschriften, die mit der Pflicht zum Treffen angemessener Vorkehrungen sehr vergleichbar sind; als Folge davon werden seitens der nationalen Behörden (in den meisten Fällen) offensichtlich Maßnahmen getroffen, um die Integration von Kindern mit Behinderungen in das Regelschulsystem zu fördern. Dies ist der Fall in **Estland, Italien, Lettland, Litauen und Polen**.

Die in den nationalen Gesetzen (sowohl den Nichtdiskriminierungsgesetzen als auch den allgemeinen Bildungsgesetzen) vorgesehenen Pflichten sind breit gefächert und können potenziell eine Verschiebung hin zu inklusiver Bildung, wie im Übereinkommen vorgeschrieben, bewirken. Das Übereinkommen scheint einen erkennbaren Einfluss auf die Gesetze und Politiken einiger EU-Mitgliedstaaten zu haben. Die neuesten Entwicklungen in der **Tschechischen Republik** belegen zum Beispiel eine deutliche Verschiebung hin zu dem sozialen Behinderungsmodell, das dem Übereinkommen zugrunde liegt. Im März 2015 verabschiedete das tschechische Parlament eine Änderung des einschlägigen Bildungsrechts (Paragraph 16 des Schulgesetzes),²⁷ in deren Zuge neu definiert wurde, was Schülerinnen und Schüler mit

27 Tschechische Republik, Gesetz über die vorschulische Bildung, die Primar- und Sekundarbildung, die höhere berufliche und die sonstige Bildung (Bildungsgesetz) (*O předškolním, základním středním, vyšším odborném a jiném vzdělávání*).

pädagogischem Förderbedarf sind. Die neue Definition legt das Hauptaugenmerk auf die Bereitstellung von Fördermaßnahmen, um gleiche Bildungschancen für Menschen mit Behinderungen zu gewährleisten. Daraus ergibt sich eine Verlagerung weg von dem medizinischen bzw. funktionellen Behinderungsmodell, hin zu einem sozialen Behinderungsmodell im Sinne des Übereinkommens. Im Zusammenhang mit der Bereitstellung angemessener Vorkehrungen für behinderte Schüler/Schülerinnen und Studierende beziehen sich auch die Gerichte einiger EU-Mitgliedstaaten auf das Übereinkommen (vor allem in **Italien** und **Spanien**). Nichtsdestotrotz bleibt, was den realen Zugang von Kindern mit Behinderungen zu Bildung betrifft, in vielen Mitgliedstaaten noch einiges zu tun.

Güter und Dienstleistungen

Abschnitt 8 des Berichts befasst sich mit der Pflicht, im Zusammenhang mit dem Zugang zu und der Versorgung mit Gütern und Dienstleistungen, die der Öffentlichkeit zur Verfügung stehen, angemessene Vorkehrungen für Menschen mit Behinderungen zu treffen.

Die meisten Mitgliedstaaten haben ausdrückliche oder faktische Pflichten zum Treffen angemessener Vorkehrungen, die sich auf Elemente des Zugangs zu Gütern und Dienstleistungen erstrecken. Während Vorkehrungspflichten im Zusammenhang mit dem Zugang zu Dienstleistungen (einschließlich der Dienstleistung des Warenverkaufs) und der Wohnraumversorgung relativ häufig sind, sind Vorkehrungspflichten, die den Herstellern oder Erzeugern von Waren auferlegt werden, weitaus weniger verbreitet; ähnlich spärlich ist die Rechtsprechung in diesem Bereich. Nur in **Kroatien**, Österreich, **Rumänien**, der **Slowakei**, **Spanien**, **Ungarn** und im **Vereinigten Königreich** gibt es gesetzliche Pflichten zum Treffen angemessener Vorkehrungen in Bezug auf Güter, Dienstleistungen und Wohnraum, auch wenn dies manchmal eher eine Frage der Interpretation als eine ausdrückliche gesetzliche Vorschrift ist. Vorkehrungspflichten für die Bereiche Dienstleistungen und Wohnraum existieren in **Belgien**, **Finnland**, **Irland**, den **Niederlanden**, der **Tschechischen Republik** und in **Zypern**. Manchmal gelten diese Pflichten jedoch nur für bestimmte Teilbereiche, so zum Beispiel in den Niederlanden, wo sich die Pflicht nur auf öffentliche Verkehrsmittel und Wohnraum erstreckt. Faktische Vorkehrungspflichten nur in Bezug auf Dienstleistungen existieren in **Frankreich**, **Malta**, **Schweden** und **Slowenien**; in **Bulgarien** und **Deutschland** hingegen gibt es faktische Vorkehrungspflichten nur in Bezug auf Wohnraum. Keinerlei Vorkehrungspflichten gibt es auf diesem umfangreichen Gebiet in **Dänemark**, **Estland**, **Griechenland**, **Italien**, **Lettland**, **Litauen**, **Luxemburg**, **Polen** und **Portugal**.

Was den Umgang der Mitgliedstaaten mit der Pflicht betrifft, angemessene Vorkehrungen in Bezug auf Güter, Dienstleistungen und Wohnraum zu gewährleisten, so sind vielfältige Ansätze festzustellen. Wie bereits erwähnt, ist es am wenigsten wahrscheinlich, dass Herstellern oder Erzeugern von Waren eine Pflicht auferlegt wird, angemessene Vorkehrungen zu treffen. Grund dafür ist möglicherweise sowohl die Entfernung zwischen Herstellern und Abnehmern – und die Tatsache, dass Waren, die in der EU zum Verkauf angeboten werden, in der ganzen Welt hergestellt werden – als auch die Unmöglichkeit, Herstellern, deren Sitz außerhalb des betreffenden Mitgliedstaats liegt, eine solche Pflicht nach nationalem Recht aufzuerlegen. Eine solche Pflicht kann als zusätzliche Belastung der inländischen Hersteller gelten – ein „Problem“, das deutlich kleiner wäre, wenn die Pflicht in der gesamten EU bestünde. Die fehlende Verpflichtung der Hersteller kann bis zu einem gewissen Grad dadurch ausgeglichen werden, dass den Verkäufern von Waren (und Dienstleistungen) eine Pflicht auferlegt wird; in einer Reihe von Mitgliedstaaten existiert diese Pflicht.

Vorkehrungspflichten in den genannten Bereichen können, sofern es sie gibt, für unterschiedliche Dienstleistungserbringer gelten. Während die Pflicht in manchen Ländern auf bestimmte Dienstleistungserbringer, etwa auf die Betreiber öffentlicher Verkehrsmittel, beschränkt ist, erstreckt sie sich in vielen Mitgliedstaaten auf alle Erbringer von Dienstleistungen, die der Öffentlichkeit angeboten werden. Wie bereits erwähnt, kann die Vorkehrungspflicht auch unterschiedliche Formen annehmen. Besonders deutlich zeigt sich dies im Zusammenhang mit Wohnraum: In den **Niederlanden**

bezieht sich die Pflicht nicht auf die Genehmigung von Umbau- oder Bauarbeiten, in **Deutschland** sind Eigentümerinnen und Eigentümer von Immobilien verpflichtet, Umbauarbeiten unter bestimmten Voraussetzungen zuzulassen, und in **Bulgarien** bezieht sich die faktische Vorkehrungspflicht ausdrücklich auf Bau- und Renovierungsarbeiten.

Schlussfolgerungen

In den Mitgliedstaaten der Union existieren zahlreiche Pflichten zum Treffen angemessener Vorkehrungen jenseits des Beschäftigungsbereichs – und dies, obwohl eine solche Pflicht im geltenden EU-Gleichstellungsrecht nicht vorgesehen ist. Allerdings sind, insbesondere was den Geltungsbereich der Vorkehrungspflicht in den verschiedenen Mitgliedstaaten betrifft, viele Unterschiede festzustellen. Bei manchen Bereichen oder Gebieten, auf die sich der Kommissionsvorschlag von 2008 bezieht, ist es wahrscheinlicher, dass eine Pflicht zum Treffen angemessener Vorkehrungen besteht, bei anderen weniger. Die umfassendsten Regelungen sind im Allgemeinen im Bildungsbereich zu finden: In den allermeisten Mitgliedstaaten enthalten die entsprechenden Rechtsvorschriften Pflichten zum Treffen angemessener Vorkehrungen bzw. Pflichten, die diesen faktisch entsprechen oder mit diesen vergleichbar sind. Was den sozialen Schutz betrifft, so scheinen Pflichten zum Treffen angemessener Vorkehrungen im Bereich der Gesundheitsversorgung weiter verbreitet zu sein als in den anderen im Vorschlag der Kommission ausdrücklich genannten Bereichen (Sozialversicherung/Leistungen für Menschen mit Behinderungen und Sozialwohnungen). Im dritten vom Kommissionsvorschlag von 2008 erfassten Bereich, dem Zugang zu Gütern und Dienstleistungen, schließlich waren Vorkehrungspflichten am ehesten dort anzutreffen, wo es um den Zugang zu Dienstleistungen, einschließlich des Verkaufs von Waren, und – in etwas geringerem Maße – um Wohnraum ging. Am wenigsten wahrscheinlich war es, dass Herstellern von Waren eine Vorkehrungspflicht auferlegt wurde; tatsächlich war dies nur in wenigen Mitgliedstaaten der Fall; die Rechtsprechung in diesem Bereich war ähnlich spärlich. Trotz dieser bestehenden Vorkehrungspflichten gibt es in der Praxis in vielen Bereichen, nicht zuletzt in der Bildung, noch immer erhebliche Probleme, wenn es darum geht, Gleichstellung, Chancengleichheit und gleichen Zugang für Menschen mit Behinderungen zu gewährleisten.

Das Übereinkommen verpflichtet die Vertragsstaaten bereits auf breiter Ebene, Pflichten zum Treffen angemessener Vorkehrungen zu etablieren und die Versagung solcher Vorkehrungen als eine Form von Diskriminierung zu betrachten. Der Geltungsbereich des Übereinkommens ist weitreichender als der des Kommissionsvorschlags von 2008, und das Übereinkommen wurde von 25 der 28 EU-Mitgliedstaaten ratifiziert. Dennoch scheint das Übereinkommen relativ wenige Auswirkungen auf Gesetzesreformen in den Mitgliedstaaten gehabt zu haben. Einige bemerkenswerte Ausnahmen gibt es in diesem Zusammenhang jedoch: **Slowenien**, **Spanien** und die **Tschechische Republik** haben ihre Gesetzgebung und Politik im Bereich Diskriminierung, oder allgemeiner im Bereich der Rechte von Menschen mit Behinderungen, auf der Grundlage des Übereinkommens überarbeitet; der Bericht weist darüber hinaus auf Urteile in **Italien**, **Lettland** und **Spanien** hin, in denen die Gerichte, neben anderen Quellen, auch das Übereinkommen herangezogen haben, um in der Rechtsprechung über angemessene Vorkehrungen zu gerechten Entscheidungen zu kommen.

Introduction

In order to analyse the situation existing in the EU Member States with regard to the duty to provide reasonable accommodation outside the field of employment, the present report is divided into nine main parts. Section 1 sets out the current approach to disability discrimination and reasonable accommodation under international and EU law, including in the 2008 proposal. The report then moves on to look at the situation in the 28 EU Member States. Since reasonable accommodation duties cannot be considered in isolation, the report provides a general overview of disability law and policy in the Member States in Section 2. This section of the report therefore focuses on relevant constitutional provisions, disability non-discrimination law, and general disability law and policy, including measures relating to accessibility. The next sections of the report explore the duty to make a reasonable accommodation in the three covered fields. Section 3 covers national disability non-discrimination legislation, while section 4 examines national legislation on the integration of persons with disabilities. Section 5 of the report contains a general overview of the extent to which there are reasonable accommodation duties in the Member States. Sections 3, 4 and 5 all cover the fields addressed by the 2008 Commission proposal. Sections 6, 7 and 8 of the report then analyse reasonable accommodation duties in the specific areas covered by the 2008 proposal, namely social protection, education and access to, and supply of, goods and services, respectively. This makes up the bulk of the report. Section 9 of the report contains the conclusion.

In 2008 the Commission proposed a directive to protect people from discrimination on the ground of disability, as well as discrimination on a number of other grounds (henceforth 2008 proposal).¹ The 2008 proposal addresses the fields of social protection, including healthcare; education; and access to goods and services, including housing,² and seeks to prohibit six kinds of discrimination including, in the context of disability, an unjustified denial of a reasonable accommodation.³ The 2008 proposal complements pre-existing EU non-discrimination legislation in the form of the Employment Equality Directive.⁴ This earlier directive, which was adopted in 2000, addresses the same grounds as the 2008 proposal, and prohibits discrimination with regard to employment and vocational training. Amongst other things, the Directive required all Member States to introduce an obligation to make a reasonable accommodation in favour of disabled individuals in the context of employment and vocational training, subject to the requirement that this did not result in a disproportionate burden.⁵ However, the failure to meet this duty was not explicitly defined as a form of discrimination. In this respect the 2008 proposal represents a shift in approach in comparison with the 2000 Employment Equality Directive.

Whilst the Employment Equality Directive only required the adoption of national legislation prohibiting discrimination related to employment and training, a number of EU Member States went further and extended their newly adopted legislation to cover disability discrimination in fields beyond employment.⁶ In addition, some Member States explicitly defined an unjustified failure to make a reasonable

1 Proposal for Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Brussels, 2 July 2008, COM (2008) 426 final. For the purposes of this report, the most recent publicly available version of the proposal (Version 15705/14 ADD 1 REV 2), which differs in a number of respects from the original 2008 proposal, is taken as the reference point. See Note from General Secretariat of the Council, 11 December 2014, Council (EPSCO), Proposal for Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Brussels, 8 December 2014, 15705/14, ADD 1 REV 2. See: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015705%202014%20ADD%201%20REV%201>.

2 Article 3, 2008 Proposal.

3 Article 2, 2008 Proposal.

4 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive), [2000] OJ L303/16.

5 Article 5, Employment Equality Directive.

6 For further information see the latest version of the country reports on non-discrimination of the European network of gender experts in gender equality and non-discrimination, available via: <http://www.equalitylaw.eu/>.

accommodation as a form of discrimination.⁷ However, neither the extension of the material scope of non-discrimination law beyond employment, nor the explicit linkage between reasonable accommodation and discrimination, were requirements under EU law and these initiatives did not occur in all Member States. The adoption of the 2008 proposal would, however, result in such requirements.

A significant development which has implications for EU disability non-discrimination law occurred in the period subsequent to both the adoption of the Employment Equality Directive and the proposal of a new Equality Directive in 2008. In 2010 the EU concluded, or became a party to, the United Nations Convention on the Rights of Persons with Disabilities⁸ (henceforth Convention or CRPD).⁹ The CRPD is a broad human rights convention which seeks to tailor already existing human rights¹⁰ to the situation of people with disabilities. The Convention addresses both civil and political rights, and economic, social and cultural rights, and pays specific attention to the prohibition of discrimination. It also defines an unjustified failure to make a reasonable accommodation as a form of discrimination.¹¹ Following the conclusion of the CRPD, the EU is bound by the Convention to the extent of its competences, and this naturally applies to the field of non-discrimination. However, since combatting disability discrimination is a competence which is shared by both the EU and its Member States,¹² this does not imply that the EU is bound to implement in full all Convention provisions relating to discrimination – instead the EU and its Member States which have ratified the CRPD are, in combination, bound to take such implementation measures. However neither EU law nor the CRPD specifies which level is mandated to act. Where the EU does decide to act, it is bound to ensure that any action is fully compliant with the CRPD. Interestingly the original 2008 proposal, which was published prior to the EU becoming a party to the Convention, has been amended in certain aspects to bring it more fully into line with the CRPD.¹³

As noted above, the Employment Equality Directive, the 2008 proposal for a new Equality Directive and the CRPD all pay attention to the necessity for reasonable accommodations to meet the needs of individuals with disabilities. The obligation to make a reasonable accommodation is now frequently found in national disability non-discrimination laws in Europe and beyond. The duty to reasonably accommodate acknowledges that a disabled person can be faced with a barrier that prevents him or her from benefitting from an opportunity, such as education or using a certain good or service, that is open to others who do not have that disability. By requiring, for instance, that employers, education establishments or service providers accommodate that individual, a situation of equal opportunities can be created. The reasonable accommodation duty therefore prohibits a covered party from denying a person with a disability an opportunity by failing to take account of the individual's impairment, when taking account of it – in terms of changing the physical environment or some other adaptation – would enable the individual equal access to others. A key element of the reasonable accommodation duty is that it is an individualised response to the needs of a particular person with a disability. In general, the duty to accommodate is not anticipatory and is only triggered when a disabled individual indicates that he/she is facing a barrier and needs some sort of adaption or accommodation.¹⁴ However, unlike the prohibition of, for example, direct discrimination, the obligation to accommodate is not absolute. The duty to accommodate is subject to the requirement that the accommodation should not impose a disproportionate or undue burden on

7 For further information see the latest version of the country reports on non-discrimination of the European network of gender experts in gender equality and non-discrimination, available via: <http://www.equalitylaw.eu/>.

8 United Nations (UN), Convention on the Rights of Persons with Disabilities (CRPD), 13 December 2006.

9 See Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC), [2010] OJ L 303/16.

10 In, for example, the International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, and the International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966.

11 Articles 2 and 5 CRPD.

12 Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC), [2010] OJ L 303/16, Annex II Declaration concerning the Competence of the European Community with Regard to Matters Governed by the United Nations Convention on the Rights of Persons with Disabilities, 2.

13 For a discussion on this see, Waddington, L. (2011), 'Future Prospects for EU Equality Law. Lessons to be Learnt from the Proposed Equal Treatment Directive', *European Law Review*, 2011. Issue 2, pp. 163-184.

14 However, see the discussion of the duty found in the introduction to section 5 of this report.

the covered party. A covered party is therefore required to make an accommodation for an individual with a disability to ensure equal opportunities unless that party can demonstrate that making such an accommodation would result in a disproportionate or undue burden, and there is no less burdensome accommodation that would achieve the same result.

Reasonable accommodation should be distinguished from legal obligations to achieve accessibility in general. The latter duties are always anticipatory – meaning that they are not triggered by an individual request. Accessibility measures usually require compliance with certain set standards, e.g. installing ramps or providing certain information in Braille or large print. Compliance with such requirements should lead to a more accessible environment in general; however, given the very diverse and, in some cases, specialised needs of persons with disabilities, compliance with accessibility standards cannot eliminate the need for reasonable accommodation in all cases. Compliance with accessibility standards and the provision of reasonable accommodation should therefore be seen as complimentary. It is interesting to note that both the 2008 proposal and the CRPD incorporate provisions relating to both accessibility and reasonable accommodation.

Much of this report consists of an overview and analysis of the legal provisions concerning non-discrimination, reasonable accommodation and disability policy in the EU Member States. The information on individual countries is largely based on responses to a questionnaire/template and country reports completed by the non-discrimination national experts from the European network of legal experts in gender equality and non-discrimination. The authors of the present report are indebted to the national experts in that respect. On numerous occasions, extracts from the country reports have been reproduced in this report. In addition, further desk research was carried out to supplement the information provided by the national experts.

1 The international and EU law context

This part of the report considers the relevant international and EU legal framework within which EU Member States operate. As noted above, the EU is a party to the CRPD. Before reflecting on the scope and manner in which EU law prohibits, and proposes to prohibit, disability discrimination, this report reflects on the approach taken under the CRPD. This will facilitate a comparison between EU law and the CRPD, and will allow for an identification of the areas where gaps exist between the Employment Equality Directive and the Commission's 2008 proposal, on the one hand, and the CRPD, on the other hand, in the context of discrimination, subsections 1.1 and 1.2 of the report provide an overview of the UN Convention on the Rights of Persons with Disabilities (CRPD), focusing particularly on the duty to provide for a reasonable accommodation. Subsection 1.3 then considers briefly the duty to accommodate found in the EU Employment Equality Directive, whilst subsection 1.4 explores the duty to accommodate, and the obligation to ensure accessibility, as set out in the Commission's 2008 proposal. The conclusion for this section of the report is contained in subsection 1.5.

1.1 The UN Convention on the Rights of Persons with Disabilities – an introduction

The CRPD strongly reflects the social-contextual model of disability.¹⁵ The Convention explicitly recognises that 'disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.¹⁶ The CRPD therefore recognises that disability stems primarily from the failure of the social environment to meet the needs and aspirations of people with impairments. Moreover, the scope of the Convention is extremely broad.¹⁷ The CRPD does not simply prohibit disability discrimination, nor does it cover only civil and political rights, or economic, cultural or social rights. Instead the Convention is underpinned by the principles of non-discrimination and equality, which include the right to a reasonable accommodation, and these are linked to a broad group of rights. These rights are both civil and political, such as the right to liberty,¹⁸ as well as economic, social and cultural, such as the right to education.¹⁹ The principles of equality and non-discrimination find their anchor in Article 3, which Gerard Quinn has described as providing the 'moral compass for change'²⁰ which the Convention embraces. This article refers not only to non-discrimination and equality of opportunity, but a series of other principles which 'animate' the Convention, including dignity; individual autonomy; full and active participation and inclusion; respect for difference; and accessibility. The principles of non-discrimination and equality find repeated reference elsewhere in the Convention. In light of this, Article 2, which elaborates on key terms used in the Convention, contains a broad definition of 'discrimination on the basis of disability', and specifies that such discrimination includes the denial of a reasonable accommodation. The principles of equality and non-discrimination also receive specific attention in Article 5. That article embraces both a formal approach to equality (in its mandate of equality before and under the law);²¹ and a more substantive

15 The social (-contextual) model of disability can be contrasted with the individual or medical model of disability. The latter argues that a disability is a direct consequence of an impairment, and is the result of an incapacity caused by an impairment. There is a wealth of literature addressing theoretical models of disability. See, e.g. Oliver, M. (2009), *Understanding Disability: From Theory to Practice* (2nd edition), Palgrave; and, Priestley, M. (1998), 'Constructions and creations: idealism, materialism and disability theory' 13 *Disability and Society* 1, pp. 75-94. Parts of this text on the CRPD draw on: Waddington, L. (2011), 'Future Prospects for EU Equality Law. Lessons to be Learnt from the Proposed Equal Treatment Directive', *European Law Review*, 2011. Issue 2, pp. 163-184.

16 Preamble, recital (e) and Article 1, CRPD.

17 Quinn, G. (2007), 'The UN Convention on the Human Rights of Persons with Disabilities', 10 June 2007 (unpublished), paper on file with author, p. 9; and, Melish, T. J. (2007), 'Perspectives on the UN Convention on the Rights of Persons with Disabilities: The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify', 14 *Human Rights Brief*, p. 37 at footnote 11, who describes the Convention as adopting a 'hybrid approach'.

18 Article 14 CRPD, which covers liberty and security of the person.

19 Article 24 CRPD.

20 Quinn, G. (2007), 'The UN Convention on the Human Rights of Persons with Disabilities', 10 June 2007 (unpublished), paper on file with authors, p. 3.

21 Article 5(1) CRPD.

approach (in the prohibition of discrimination on the basis of disability;²² the provision of reasonable accommodation;²³ and positive action measures).²⁴ States parties to the CRPD are under an obligation to recognise and ensure protection of these rights.

1.2 The UN Convention on the Rights of Persons with Disabilities and non-discrimination²⁵

Article 2 CRPD defines ‘discrimination on the basis of disability’ and includes within that definition the denial of reasonable accommodation.²⁶ Article 2 reads as follows:

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

Article 5(3) of the CRPD links the equality and non-discrimination norms with the duty to accommodate.²⁷ Article 5(3) provides that: ‘In order to promote equality and eliminate discrimination, states parties shall take all appropriate steps to ensure that reasonable accommodation is provided’. Article 5(3) should be read together with the definition of reasonable accommodation in Article 2, which provides as follows:

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

Based on the foregoing definition, taken in conjunction with Article 5(3) of the CRPD, one can summarise the key features of the duty to accommodate as follows:

- the identification and removal of barriers that impact on the enjoyment of human rights for persons with disabilities;
- the ‘necessity and appropriateness’ of modifications or adjustments to address barriers specific to a particular individual;
- the adoption of modifications or adjustments that do not impose a disproportionate or undue burden on the duty-bearer;
- the requirement to find a response or solution which is tailored to the individual circumstances of the person with a disability; and
- the promotion of equality and the elimination of discrimination, by means of the enjoyment of all human rights by persons with disabilities on an equal basis with others.

The duty to accommodate imposes a positive obligation of result on States, which will require that States oversee the implementation of the duty to accommodate by public and private entities.

22 Article 5(2) CRPD.

23 Article 5(3) CRPD.

24 The CRPD does not refer to positive action, but instead speaks of ‘Specific measures which are necessary to accelerate or achieve de facto equality’, Article 5(4).

25 Parts of this subsection draw on text in: Broderick A. (2015), *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities*, Intersentia.

26 Article 2 CRPD: ‘Any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation’.

27 Article 5(3) CRPD.

1.3 The duty to accommodate under the Employment Equality Directive

The Employment Equality Directive covers the broad field of employment and occupation. The Directive prohibits direct and indirect discrimination and discrimination in the form of harassment or an instruction to discriminate,²⁸ and requires that reasonable accommodation is provided for disabled persons in the covered fields. With regard to the latter requirement, the Directive provides as follows:

‘[...] In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer [...]’.²⁹

Whilst the Employment Equality Directive may meet the CRPD obligations concerning non-discrimination and employment, it cannot meet the obligations set out in the CRPD concerning the prohibition of discrimination beyond the fields of employment and occupation. As noted above, the CRPD creates a broad and far-reaching duty to prohibit discrimination and to provide reasonable accommodations, which spans all human rights. Under the CRPD, it falls on states parties to ensure that a wide array of social actors, including employers, schools, healthcare providers and suppliers of services, accommodate persons with disabilities.

1.4 The prohibition of discrimination and the duty to accommodate beyond employment – the CRPD and the 2008 proposal

1.4.1 *The material scope*

Whilst the CRPD requires the prohibition of discrimination and the provision of reasonable accommodation with regard ‘to all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’;³⁰ the Commission’s 2008 proposal for a non-discrimination covers a somewhat more limited area. The latest (December 2014) version of the proposal covers the following fields:

- Access to social protection, including social security, social assistance, social housing and healthcare. Access under this point shall include the process of seeking information, applying, registration and similar activities as well as the actual provision of social protection measures.
- Access to education. Access under this point shall include the process of seeking information, applying, registration and similar activities as well as the actual admission to and participation in educational activities.
- Access to and supply of goods and services, including housing, which are available to the public and which are offered outside the context of private and family life. Access under this point shall include the process of seeking information, applying, registration, ordering, booking, renting, purchasing and similar activities, as well as the actual provision and enjoyment of the goods and services in question.³¹

These fields are also, for the most part, addressed in the CRPD, although not necessarily under the same headings or titles. Access to social protection, including social security, social assistance and social housing and healthcare are arguably covered, to some degree, by Article 19 (living independently and being included in the community), Article 20 (personal mobility), Article 25 (health), and Article 28 (adequate standard of living and social protection) of the Convention. Article 28 of the CRPD provides, for example, that ‘States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that

28 Article 2 Employment Equality Directive.

29 Article 5 Employment Equality Directive.

30 Article 2 CRPD.

31 Article 3(1)(a)(c) and (d), 2008 proposal, Version 15705/14 ADD 1 REV 2.

right without discrimination on the basis of disability'³² and requires states parties to 'ensure access by persons with disabilities to public housing programmes'.³³ The 2008 proposal, if adopted, could therefore be seen as complying with the CRPD requirement to prohibit disability discrimination with regard to these human rights. However, it should be noted that the proposal does not cover:

'The organisation of the Member States' social protection systems, including decisions on the setting up, financing and management of such systems and related institutions as well as on the substance and delivery of benefits and services and on conditions of eligibility for these benefits and services, such as decisions related to the setting of age limits'.³⁴

Article 24 of the CRPD addresses education and requires states parties to recognise the right of persons with disabilities to inclusive education without discrimination and on the basis of equal opportunity.³⁵ In order to realise this right, states parties must ensure, *inter alia*, that persons with disabilities are not excluded from the general education system on the basis of disability; that they can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live; and that reasonable accommodation of the individual's requirements is provided.³⁶

Whilst the 2008 proposal seeks to prohibit disability discrimination with regard to access to education, it is doubtful that it goes as far as is required by Article 24 of the CRPD. Article 3(2) of the 2008 proposal specifies that the Directive will not apply to a number of areas, including:

'The content of teaching and of educational activities, and the organisation and funding of the Member States' educational systems, including decisions on the setting up and management of education institutions, the development of curricula and other educational activities, the definition of examination processes, and conditions of eligibility, such as decisions setting age limits'.³⁷

Lastly, whilst access to goods is not mentioned explicitly as a right in the CRPD, Article 9 of the CRPD does address accessibility, and provides that:

'States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public'.³⁸

This clearly addresses services, and, in some contexts, could also cover access to goods. Whilst Article 9 goes on to set out various obligations for states parties, these do not include a duty to prohibit discrimination, although this obligation arguably results from Article 3 CRPD (general principles) and Article 4 (general obligations), which both refer to non-discrimination or eliminating discrimination. Other CRPD articles, such as Article 30 on participation in cultural life, recreation, leisure and sport are also relevant under this heading.

In short, the 2008 proposal certainly covers some of the fields mentioned in the CRPD, and seeks to prohibit discrimination in these areas. However, the material scope of the CRPD remains much broader than the scope of the 2008 proposal and the Employment Equality Directive. Examples of fields where

32 Article 28(2) CRPD.

33 Article 28(d) CRPD.

34 Article 3(2)(b), 2008 proposal, Version 15705/14 ADD 1 REV 2.

35 Article 24(1) CRPD.

36 Article 24(2)(a), (b), (c) CRPD.

37 Article 3(2)(d), 2008 proposal, Version 15705/14 ADD 1 REV 2.

38 Article 9(1) CRPD.

discrimination should be prohibited under the CRPD, but which are not addressed by current and proposed EU law, include access to justice (Article 13) and participation in political and public life (Article 29 CRPD).³⁹

1.4.2 The definition of discrimination and the obligation to make reasonable accommodation

The CRPD requires states parties to 'prohibit all discrimination on the basis of disability'. However, other than specifying that a denial of reasonable accommodation is a form of discrimination,⁴⁰ the CRPD does not provide further information on the kinds of discrimination which should be addressed. In contrast, the 2008 proposal defines and seeks to prohibit six kinds of discrimination: direct discrimination; indirect discrimination; harassment; direct discrimination and harassment by association; denial of reasonable accommodation for persons with disabilities; and instruction to discriminate.⁴¹ This seemingly meets the CRPD's requirement that 'all forms of discrimination' be prohibited.

Article 4a(2) of the 2008 proposal sets out a definition of reasonable accommodation:

'necessary and appropriate modification and adjustments not imposing a disproportionate burden, where needed in a particular case, to accommodate the needs of a person with a disability so as to allow that person access on an equal basis with others to the specific social protection measure, educational activity, good or service concerned'.

In general this definition seems to be in line with the definition of reasonable accommodation found in Article 2 of the CRPD. Indeed, part of the definition in the 2008 proposal has been taken word for word from Article 2 of the CRPD. This explains the difference between the definition of reasonable accommodation found in the 2008 proposal and the definition of the same term in the Employment Equality Directive. The scope of the definition – relating as it does, only to access to social protection measures, educational activities, and goods and services – is naturally narrower than the scope found in the definition of reasonable accommodation in the CRPD, which relates to the 'enjoyment or exercise of all human rights and fundamental freedoms'.

The issue of disproportionate burden is addressed in Article 4b of the 2008 proposal. This article contains a list of factors which are to be taken into account in determining the existence of a disproportionate burden:

- the size, resources and nature of the organisation or enterprise;
- the negative impact on the person with a disability of not providing the measure;
- the estimated cost;
- the estimated benefit for persons with disabilities generally, taking into account the frequency and duration of use of the relevant goods and services and the frequency and the duration of the relationship with the seller or provider;
- the life span of infrastructure and objects which are used to provide a service;
- the historical, cultural, artistic or architectural value of the movable or immovable property in question; and
- the safety and practicability of the measures in question.

Notably, the burden shall not be deemed disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

39 These two articles do not explicitly set out an obligation on states parties to prohibit discrimination, but require that persons with disabilities should have access or enjoy their rights 'on an equal basis with others'. Moreover these obligations should be understood in light of Article 3 and 4 CRPD.

40 Article 2 CRPD.

41 Article 2(1)(i)-(vi), 2008 proposal, Version 15705/14 ADD 1 REV 2.

In contrast to the Commission's 2008 proposal, the CRPD does not contain any information on the factors to be taken into account in assessing whether an accommodation would result in a disproportionate or undue burden. Nevertheless, one can conclude that the list of factors referred to in the 2008 proposal, is compliant with the CRPD.

1.4.3 Accessibility

Lastly, it is worth noting that both the CRPD and the 2008 proposal address the need to provide accessibility. Accessibility is a general principle identified in Article 3(f) of the CRPD. It is also the subject of a stand-alone article. Under Article 9 of the CRPD, states parties are under an obligation to identify and eliminate 'obstacles and barriers to accessibility'.⁴² This obligation applies, *inter alia*, to: buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces; and to information, communications and other services, including electronic services and emergency services.⁴³ Article 9 sets out a number of other obligations relating, for instance, to the development, promulgation and monitoring of the implementation of minimum standards and guidelines,⁴⁴ and requiring that private entities which offer facilities or services to the public take into account accessibility.⁴⁵

The Commission's 2008 proposal also addresses accessibility in some detail. Article 4, on Accessibility for persons with disabilities, provides that:

- Member States shall take the necessary and appropriate measures to ensure accessibility for persons with disabilities, on an equal basis with others, within the areas set out in Article 3 [*i.e. access to social protection, access to education, and access to and supply of goods and other services LW/AB*].⁴⁶ These measures should not impose a disproportionate burden.
- (1a) Accessibility includes general anticipatory measures to ensure the effective implementation of the principle of equal treatment for persons with disabilities in the areas set out in Article 3; *and that*
- Such measures shall comprise the identification and elimination of obstacles and barriers to accessibility, as well as the prevention of new obstacles and barriers in the areas covered in this Directive.

The factors to be taken into account in determining whether providing accessibility would amount to a disproportionate burden are the same as apply in the case of provision of reasonable accommodations.⁴⁷ The requirement to provide accessibility was not addressed in the earlier Employment Equality Directive.

1.5 Conclusion

If adopted, the Commission's 2008 proposal for a new non-discrimination directive will some way fill the existing gaps between EU disability equality law, which is currently confined to the Employment Equality Directive, and the CRPD. However, the scope of the CRPD extends beyond that of the 2008 proposal, and even if the proposal is adopted, EU Member States which have ratified the CRPD will still be subject to further obligations in terms of prohibiting and combatting discrimination on the ground of disability.

⁴² Article 9(1) CRPD.

⁴³ Article 9(1)(a) and (b) CRPD.

⁴⁴ Article 9(2)(a) CRPD.

⁴⁵ Article 9(2)(b) CRPD.

⁴⁶ Text in italics added by authors.

⁴⁷ As set out in Article 4b, 2008 proposal, Version 15705/14 ADD 1 REV 2.

2 National legislation relating to disability – an overview

This section of the report analyses constitutional and general principles addressing disability discrimination. In sub-section 2.1 the extent to which national constitutions address disability discrimination (either explicitly or through interpretation/implication) is outlined. In sub-section 2.2, a focus is maintained on constitutional provisions addressing issues related to integration/inclusion and/or participation of persons with disabilities. In that sub-section, attention is also paid to constitutional provisions addressing welfare and rehabilitation of disabled people. Sub-section 2.3 contains an overview of the extent to which equality provisions in national constitutions have direct effect, while sub-section 2.4 considers whether national legal systems incorporate human rights charters and/or other statutory instruments seeking to embed rights for persons with disabilities. Finally, sub-section 2.5 contains a conclusion reviewing the main findings of this section of the report as a whole.

2.1 Constitutional and general principles addressing disability discrimination

2.1.1 Constitutional non-discrimination/equality clauses addressing disability

National constitutions represent the highest or ‘basic’ law of a state, and must be respected by legislators in all their actions. Constitutions set out the key values of a state and, in some cases, can be relied upon by individuals seeking to enforce their rights. For these reasons, the inclusion in the constitution of a non-discrimination or equality clause, which includes within its scope the prohibition of discrimination on the ground of disability, can be highly significant in terms of both setting the approach which the legislator adopts and embodying the values of the state.

The constitutions of **Austria, Finland, Germany, Hungary, Portugal and Slovenia** prohibit disability discrimination explicitly. In several other EU Member States (**Bulgaria, the Czech Republic, Greece, Ireland, Luxembourg, Malta and Sweden**), there is no prohibition of disability discrimination. The constitutions of the remaining EU Member States do not prohibit disability discrimination explicitly, however disability has either been read into the non-discrimination/equality clause by the respective constitutional courts, or the national experts from the European network of legal experts in gender equality and non-discrimination argue that the open-ended clauses could be interpreted as including disability. Notably, in **Denmark** there is a complete absence of a general equality clause at the constitutional level and there is no prohibition of disability-based discrimination in the Danish Constitution. The **United Kingdom** has neither a written constitution nor an entrenched constitutional bill of rights.

2.1.2 Explicit prohibitions of disability-based discrimination

Disability is protected explicitly as a ground of discrimination in **Austria** (Article 7 of the Federal-Constitutional Act),⁴⁸ **Finland** (Section 6(2) of the constitution)⁴⁹ and **Slovenia** (Article 14(1) of the constitution).⁵⁰ In **Hungary**, the constitution contains a general equality clause, with an open-ended list of protected grounds. Article XV of the Fundamental Law⁵¹ (the Constitution) of **Hungary** includes disability

48 Austria, Federal-Constitutional Act (*Bundes-Verfassungsgesetz* - B-VG) BGBl. No. 1/1930.

49 Finland, Constitution of Finland (*Perustuslaki*), (731/1999), Section 6(2) defines the prohibition of discrimination and the protected grounds: ‘No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person.’

50 Slovenia, Constitution of the Republic of Slovenia (*Ustava Republike Slovenije*), 23 December 1991 (Official Journal RS Nos. 33/1991-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13), Article 14 states that ‘everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political or other conviction, material standing, birth, education, social status or any other personal circumstance. All are equal before the law.’

51 Hungary, Fundamental Law of Hungary (*Magyarország Alaptörvénye*), 25 April 2011 last amended 1 October 2013.

within the list of protected grounds.⁵² In **Germany**, Article 3(3) of the Basic Law⁵³ (the Constitution) prohibits discrimination on the ground of disability by providing that ‘no person shall be disfavoured because of disability’. The Federal Constitutional Court in **Germany** has ruled that persons with disabilities are not only discriminated against if there is unequal treatment, but also when a particular disadvantage results from failure to adopt appropriate measures to accommodate the needs of the disabled person.⁵⁴ This ruling concerned integrated schooling but it applies as a constitutional principle to other spheres of life as well. Finally, it is notable that the **Portuguese** Constitution⁵⁵ prohibits disability discrimination pursuant to Article 13 of the Constitution (which contains a non-exhaustive list of suspected discrimination grounds) and explicitly under Article 71(1) of the Constitution.

2.1.3 Prohibition of disability-based discrimination through interpretation or by implication

The constitutions of many EU Member States do not contain a direct prohibition of disability-based discrimination. However, several equality clauses in national constitutions have been interpreted by the respective constitutional courts as applying to disability. This is the case in **Cyprus, France, Lithuania, Poland, Romania** and **Spain**. In **Poland**, the Constitution has direct effect, but in practice claims would not be based exclusively on constitutional provisions. In contrast, in other jurisdictions the relevant constitutional provision has not been the subject of a ruling by a national constitutional court, but national equality experts from the European network of legal experts in gender equality and non-discrimination argue that the provision should be interpreted as covering disability. This is the case in **Belgium, Croatia, Estonia, Italy, Latvia**, the **Netherlands** and **Slovakia**.

- Interpretation of constitutional provisions by constitutional courts

None of the constitutions of the Member States covered in this sub-section contain an equality clause which explicitly covers disability, but the equality clauses in the constitutions can be interpreted as covering disability.

The **Cypriot** Constitution⁵⁶ contains a far-reaching equality provision which purports to prohibit discrimination on any ground whatsoever⁵⁷ (including disability implicitly). To date, however, restrictive judicial practice in **Cyprus** has hindered the wide application of this provision.⁵⁸

52 Hungary, Fundamental Law of Hungary, Article XV reads as follows:

(1) Every person shall be equal before the law. Every human being shall have legal capacity.
(2) Hungary shall ensure fundamental rights to every person without any discrimination on the grounds of race, colour, gender, disability, language, religion, political or other opinion, national or social origin, property, birth or on any other ground.

(3) Women and men shall have equal rights.

(4) Hungary shall take special measures promote the realisation of equal opportunities.

(5) Hungary shall take special measures to protect children, women, the elderly, and persons with disabilities

53 Germany, Basic Law for the Federal Republic of Germany (*Grundgesetz - GG*), Law of 23 May 1949 (BGBl. 1949, 1), last amended on 23 December 2014 (BGBl. I, 2438).

54 Germany, Federal Constitutional Court (*Bundesverfassungsgericht*) BVerfGE 96, 288, 8 October 1997. This judgment is not limited to severely disabled people.

55 Portugal, Constitution of the Portuguese Republic (*Constituição da República Portuguesa*), Seventh Revision [2005].

56 Cyprus, Constitution of the Republic of Cyprus (*To Σύνταγμα της Κυπριακής Δημοκρατίας*), 11 February 1959, Article 28.

57 Cyprus, Constitution of the Republic of Cyprus, Article 28(2) provides that: ‘Every person shall enjoy all the rights and liberties provided for in this Constitution without any direct or indirect discrimination against any person on the ground of his community, race, religion, language, sex, political or other convictions, national or social descent, birth, colour, wealth, social class, or on any ground whatsoever, unless there is express provision to the contrary in this Constitution.’

58 Court decisions in that jurisdiction have introduced concepts which may be perceived as violating the equality *acquis*, by for example, finding that discrimination which is ‘reasonable’ is allowed, or by ruling that the equality provision cannot be applied to unequal things. The latter judicial construct was in fact used by the Supreme Court in order to allow the payment of lower pensions to disabled athletes when compared with that received by non-disabled athletes. Cyprus, Supreme Court (*Ανώτατο Δικαστήριο*), *Cyprus Athletics Organisation v. Andreas Potamitis* (*Κυπριακός Οργανισμός Αθλητισμού v. Ανδρέα Ποταμίτη*), No. 111/2007, 18 June 2010.

In **France**, the Constitutional Council (*Conseil Constitutionnel*) has interpreted⁵⁹ the duty to respect the equality principle in articles 10 and 11 of the Preamble to the French Constitution of 1946⁶⁰ (which forms part of the Constitution of 1958⁶¹ by reference) as protecting equal treatment of disabled persons.

The Constitution of the Republic of **Lithuania**⁶² does not prohibit disability discrimination explicitly.⁶³ Nonetheless, the Constitutional Court has held in many of its rulings⁶⁴ that the provisions of the Lithuanian Constitution are interrelated and constitute a single and harmonious system, which cannot be interpreted in a literal sense. Therefore, although disability is not mentioned explicitly in the text of the Constitution, this does not necessarily imply that rights may be restricted on the basis of disability.

In **Poland**, the constitution⁶⁵ contains the following general non-discrimination clause:

‘(1) All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities. (2) No-one shall be discriminated against in political, social or economic life for any reason whatsoever’.⁶⁶

The **Polish** Constitutional Tribunal has held that ‘this means that the creators of the Constitution gave the principle of equality a universal dimension, referring to all forms of distinction which may arise in political, social or economic life, regardless of the characteristic (criterion) according to which a distinction may occur’.⁶⁷

The **Romanian** Constitution⁶⁸ fails to mention disability in Article 4 on unity of the people and equality of citizens⁶⁹ or in Article 16 on equality of rights. However, the Romanian courts have interpreted disability as a protected ground under the constitution.⁷⁰

Disability is also not included expressly in the general non-discrimination clause in Article 14 of the **Spanish** Constitution.⁷¹ Notwithstanding this, the Spanish Constitutional Court has ruled⁷² that disability is included under the open-ended phrase ‘any other personal or social circumstance’.

59 France, Constitutional Council (*Conseil Constitutionnel*), DC N° 2011-639, 28 July 2011.

60 France, Preamble to the Constitution of 27 October 1946 (*Préambule de la Constitution du 27 Octobre 1946*), 27 October 1946.

61 France, Constitution of 4 October 1958 (*Constitution du 4 Octobre 1958*), JORF n° 0238 du 5 Octobre 1958, p. 9121.

62 Lithuania, Constitution of the Republic of Lithuania (*Lietuvos Respublikos Konstitucija*), 25 October 1992.

63 Lithuania, Constitution of the Republic of Lithuania, Article 29 declares that: ‘All persons shall be equal before the law, the courts, and other State institutions and officials. A person’s rights may not be restricted, nor may he be granted any privileges, on the ground of gender, race, nationality, language, origin, social status, belief, convictions, or views’.

64 Lithuania, Constitutional Court (*Lietuvos Respublikos Konstitucinis Teismas*), Case No. 21/2008, 28 September 2011. Available in English at: <http://lrkt.lt/en/court-acts/rulings-conclusions-decisions/171/y2011>.

65 Poland, Constitution of the Republic of Poland (*Konstytucja Rzeczypospolitej Polskiej*), 2 April 1997, (*Dziennik Ustaw* No. 78, Item 483), Article 32.

66 Poland, Constitution of the Republic of Poland, Article 32.

67 Poland, Constitutional Tribunal (*Trybunał Konstytucyjny*) Judgment K. 8/97, 16 December 1997.

68 Romania, Constitution of Romania (*Constituția României*), 1991 amended by the Law 429/2003 on the revision of the Constitution of Romania, 29 October 2003.

69 Romania, Constitution of Romania, Article 4 (1) provides that: ‘The State foundation is laid on the unity of the Romanian people and the solidarity of its citizens.’ Article 4(2) provides that ‘Romania is the common and indivisible homeland of all its citizens, without any discrimination on account of race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property or social origin.’ A draft for constitutional revision includes disability as a protected ground in Article 4. There is no progress on further adopting the draft however.

70 Whilst there is no case in which the Constitutional Court (*Curtea Constituțională*) has referred to Article 44 of the Romanian Constitution in order to add disability to the list of protected grounds, there are several decisions in which the Court applied the equality principle found in Article 16 to persons with disabilities. For example, in 2014, in decision 681 of 13 November 2014, the Court found that the provisions of the Fiscal Code were unconstitutional if understood approach to mean that only persons with disabilities who have a labour contract are exempted from taxes. The Court indicated that the tax exemption should apply to all persons with disabilities, including those with income from freelance activities.

71 Spain, Constitution of Spain (*Constitución Española*) 6 December 1978 (BOE, 29 December 1978), Article 14.

72 Spain, Constitutional Court (*Tribunal Constitucional*), Decision 269/1994, 3 October 1994.

- Open-ended non-discrimination clauses which could be interpreted as covering disability⁷³

In **Belgium**, there is no restriction pertaining to the grounds on which discrimination is prohibited and therefore a prohibition on disability discrimination can be implied under Articles 10 and 11 of the Constitution.⁷⁴

In **Croatia**, Article 14 of the Constitution⁷⁵ contains an open list of grounds of discrimination. It provides for a general protection against discrimination of all rights and freedoms. Arguably, disability discrimination can be deemed to fall within the meaning of ‘other characteristic’.

A prohibition of disability discrimination can similarly be read into Article 1 of the **Dutch** Constitution,⁷⁶ whose personal and material scope is open.⁷⁷ Accordingly, the constitutional provision applies to everybody in the state, including disabled individuals. Furthermore, the provision appears to apply to all fields of social and economic life.

This is also the situation under Article 12 of the **Estonian** Constitution,⁷⁸ which provides for equality before the law and prohibits discrimination on any ground in all spheres of activities regulated by law.⁷⁹

Article 3 of the **Italian** Constitution⁸⁰ contains a general equality clause⁸¹ but does not prohibit disability discrimination specifically. However the list of grounds of discrimination contained in the Italian Constitution has been interpreted as being non-exhaustive, so it could potentially include disability.⁸²

In **Latvia**, the principle of non-discrimination is enshrined in Article 91 of the Constitution.⁸³ That article addresses ‘discrimination of any kind’ without specifying the grounds and arguably covers all possible grounds.

In **Slovakia**, the list of prohibited discrimination grounds in the Constitution⁸⁴ is also open-ended. Article 12(2) prohibits discrimination on a variety of grounds including ‘other status’. Arguably this means disability can be deemed to be a constitutionally protected ground of discrimination.⁸⁵ This argumentation is strengthened by the fact that another article of the Slovakian Constitution (Article 38) stipulates special

73 Information in this subsection reflects the views of the relevant national experts within the European network of legal experts in gender equality and non-discrimination.

74 Belgium, Constitution of Belgium (*La Constitution Belge/ De Belgische Grondwet*), Coordinated Constitution, 17 February 1994.

75 Croatia, Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*), Official Gazette No. 56/1990.

76 Netherlands, Constitution of the Kingdom of the Netherlands (*Grondwet voor het Koninkrijk der Nederlanden*), 2008.

77 Article 1 of the Dutch Constitution reads as follows: ‘All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted’.

78 Estonia, Constitution of the Republic of Estonia (*Eesti Vabariigi põhiseadus*), RT 1992, 26, 349.

79 Estonia, Constitution of the Republic of Estonia, Article 12 provides that: ‘Everyone is equal before the law. No one shall be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds [...]’.

80 Italy, Constitution of the Republic of Italy (*Costituzione della Repubblica Italiana*), 22 December 1947 (GU n.298 del 27-12-1947).

81 Italy, Constitution of the Republic of Italy, Article 3 provides that: ‘All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country’.

82 Italy, Constitutional Court (*Corte Costituzionale*), Decision No., Judgment 167/1991, 24 April 1991.,

83 Latvia, Constitution of the Republic of Latvia, Article 91 provides that: ‘All human beings in Latvia shall be equal before the law and the courts. Human rights shall be realised without discrimination of any kind’.

84 Slovakia, Constitution of the Slovak Republic - No. 460/1992 Coll. (*Ústava Slovenskej republiky*), 1 September 1992, as amended.

85 The Constitutional Court has, for example, confirmed that sexual orientation is a constitutionally prohibited ground of discrimination (see Slovakia, Constitutional Court (*Ústavný súd*), No. PL. ÚS 8/04-202, 18 October 2005). The Constitutional Court has also stated that the fact of being a minister of a certain church constitutes just such ‘other status’ and hence no advantage or disadvantage is permitted on that ground (see Slovakia, Constitutional Court (*Ústavný súd*), No. III. ÚS 64/00-65, 31 January 2001).

work-related protection for women, minors and persons with disabilities. Disability is therefore already a constitutionally protected characteristic.

2.1.4 Absence of a constitutional prohibition of disability-based discrimination

In several EU Member States, there is no constitutional prohibition on disability discrimination. In **Bulgaria**, for instance, the constitution⁸⁶ contains a general equality clause in Article 6(2) but does not prohibit disability discrimination.⁸⁷ In a similar vein, the Constitution of the **Czech Republic**⁸⁸ does not embody a prohibition of disability discrimination. The **Greek** Constitution⁸⁹ also does not explicitly prohibit disability discrimination. Whilst the **Irish** Constitution⁹⁰ contains a general equality clause in Article 40(1),⁹¹ it does not contain a specific prohibition on disability discrimination. To date the Irish Supreme Court has not been inclined to enforce rigorously the constitutional equality provision and it is unclear how the Irish courts perceive the application of the equality clause to disability. In *Draper v. Attorney General*,⁹² for instance, the Irish Supreme Court held that the failure of the legislature to make it possible for disabled people to vote physically in general elections did not constitute an infringement of Article 40(1) of the Irish Constitution. Article 11 of the Constitution of **Luxembourg**⁹³ contains a general legal principle, which states that all Luxembourgers are equal before the law. However, there is no explicit prohibition of disability discrimination contained in the Constitution of Luxembourg and no information is available as to whether this open-ended provision has been interpreted to include disability. The Constitution of **Malta**⁹⁴ does not make specific reference to disability and a reference to disability cannot be implied from the grounds covered under Article 45 of the Maltese Constitution.⁹⁵ Likewise, the **Swedish** Instrument of Government⁹⁶ (the Constitution of Sweden) does not provide for a legally enforceable prohibition of discrimination on grounds of disability.

2.1.5 Absence of a constitutional equality clause

In **Denmark** there is a complete absence of a general equality clause at the constitutional level.⁹⁷

2.1.6 Absence of a written constitution

The **United Kingdom** is a parliamentary democracy, which has neither a written constitution nor an entrenched constitutional bill of rights. In light of the fact that the British Constitution is unwritten, by definition it contains no articles addressing non-discrimination.

86 Bulgaria, Constitution of the Republic of Bulgaria (Конституцията на Република България), SG 56/13 Jul 1991.

87 Bulgaria, Constitution of the Republic of Bulgaria, Article 6(2) covers race, nationality, ethnic identity, sex, origin, religion, education, convictions, political affiliation, personal and social status, or property status.

88 Czech Republic, Constitution of the Czech Republic (*Ustava České Republiky*), 1/1993 SB.

89 Greece, Constitution of Greece (*Σύνταγμα της Ελλάδας*), as revised by the parliamentary resolution of May 27th 2008 of the VIIIth Revisionary Parliament.

90 Ireland, Constitution of Ireland (*Bunreacht na hEireann*), 1 July 1937.

91 Ireland, Constitution of Ireland, Article 40(1) provides that 'All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.'

92 Ireland, Supreme Court, *Draper v. Attorney General* [1984] IR 277, 1984.

93 Luxembourg, Constitution of the Grand Duchy of Luxembourg (*Constitution du Grand-Duché de Luxembourg*), 1 January 1858 last update 1 August 2013.

94 Malta, Constitution of Malta, 21 September 1964.

95 Article 45 of the Constitution of Malta relates to the protection from discrimination on the basis of race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity.

96 Sweden, Instrument of Government (Constitution of Sweden) (*Kungörelse (1974:152) om beslutad ny regeringsform* *Svensk författningssamling*), (1974:152) reprinted (2014:1385).

97 Denmark, Constitutional Act of Denmark (*Danmarks Riges Grundlov*), Lov No. 169 of 5 June 1953.

2.2 Provisions in national constitutions on participation and integration/inclusion and social welfare/rehabilitation issues

The sub-sections below contain an overview of provisions in national constitutions related to integration/inclusion and participation, on the one hand, and, on the other hand, social welfare and rehabilitation for persons with disabilities. As noted in the introduction to this report, the CRPD embraces the social-contextual model of disability, which can be contrasted with the individual or medical model of disability. According to the social-contextual model, disability is viewed as the result of an interaction between persons with impairments and pervasive societal barriers. By way of contrast, the individual or medical model of disability perceives the inability of disabled people to participate in society as an inevitable result of their own impairment, rather than as a consequence of any discriminatory barriers in society.⁹⁸ The welfare approach to disability is related to the individual or medical model as it focuses on rehabilitation and prevention issues. Under the welfare approach, little attention is paid to factors external to the person which hinder the participation of persons with disabilities in mainstream society. This is not to say that rehabilitation and welfare issues are not of importance to persons with disabilities. They are vital in ensuring the overall wellbeing of individuals with disabilities. Nonetheless, rehabilitation and welfare concerns must be combined with wider issues related to integration and inclusion of disabled persons in society in order to ensure the full and effective participation of disabled citizens on an equal basis with others.

Beyond prohibitions of discrimination, it is notable that the national constitutions of some EU Member States contain provisions related to inclusion and participation, on the one hand, and social welfare/rehabilitation, on the other hand. A handful of Member States' constitutions aim to increase participation and inclusion of persons with disabilities in society by means of various provisions pertaining to education and social, economic and political aspects of society. Other constitutions focus on issues related to rehabilitation and welfare, in accordance with the individual or medical model of disability. This is in sharp contrast with the social model, on which the CRPD is based. Some national constitutions also adopt medicalised language when referring to the rights of persons with disabilities. The constitutions of Greece and Portugal contain different provisions reflecting, on the one hand, a participation/inclusion approach and, on the other, a welfare/rehabilitation approach. The two approaches are not necessarily inconsistent.

2.2.1 Constitutional provisions on participation and integration/inclusion

Several Member States' constitutions contain provisions seeking to ensure increased participation and integration, or ultimately, inclusion of persons with disabilities in society. Prior to the advent of the CRPD, the language used in disability discourse was that of 'integration' and 'mainstreaming'. The CRPD, on the other hand, mandates 'full and effective participation and inclusion for persons with disabilities in society'.⁹⁹ Inclusion requires the adaptation of existing societal structures and a universal design approach that accepts diversity and difference. By way of contrast, integration requires that the individual with differential characteristics adapts to the so-called 'norm'. Reasonable accommodations can be deemed to fall under an integrationist approach as they seek to ensure that existing practices and structures are modified to allow disabled people to fit in with mainstream structures. Inclusion, on the other hand, insists on equal structures and takes account of differential characteristics in refashioning what may be deemed 'normal'.¹⁰⁰ This is reflected, for instance, in accessibility measures.

The **Greek** Constitution is an example of a constitution which adopts a broad approach towards ensuring participation of persons with disabilities in society. Paragraph 6 of article 21 thereof stipulates that disabled persons shall:

98 Part of this sub-section draws on text in: Broderick, A. (2015), *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities*, Intersentia.

99 General Principle 3(c) CRPD.

100 Part of this sub-section draws on text in: Broderick, A. (2015), *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities*, Intersentia.

‘Have the right to benefit from measures ensuring their self-sufficiency, professional integration and participation in the social, economic and political life of the Country’.

Article 71(1) of the **Portuguese** Constitution refers to the equal rights of disabled citizens. It establishes that:

‘Citizens with physical or mental disabilities shall fully enjoy the rights and shall be subject to the duties enshrined in this Constitution, save the exercise or fulfilment of those for which their condition renders them unfit’.

Furthermore, Article 74 of the Portuguese Constitution emphasises the importance of participation of persons with disabilities with regard to access to education. It states that:

‘Everyone shall possess the right to education, and the right to equal opportunities and to access to and success in schooling shall be guaranteed’.

In **Slovakia**, neither the Constitutional Court nor the Supreme Court have provided an explicit or comprehensive interpretative framework in relation to the concept of disability. Notwithstanding this, in a case concerning an individual with psychosocial and intellectual disabilities,¹⁰¹ the Constitutional Court included an *obiter dictum* which, while not defining disability, provided some insight into the Court’s perception of the legal definition of disability as a social construction. In particular, the Constitutional Court stated as follows:

‘Today, disability is not only understood within a medical (individual) framework but the meanings of the social and legal framework are also increasing – which, when compared to the past, integrate the values that represent the substrate of human rights, such as respect and the protection of dignity (...)’.¹⁰²

2.2.2 Provisions on social welfare and rehabilitation

In contrast with the provisions outlined above, several Member States’ constitutions (also) adopt a functional/medicalised approach to disability, focusing on social welfare, protection and rehabilitation. The first notable example of a constitution which adopts such a protective approach to persons with disabilities is the **Greek** Constitution.¹⁰³ Article 21(3) of the **Greek** Constitution guarantees that the state ‘shall care for the health of citizens and shall adopt special measures for the protection’ of persons with disabilities, among other groups in society’. The **Polish** constitution also adopts a welfare approach to disability. According to Article 69 of the **Polish** Constitution,¹⁰⁴ ‘public authorities shall provide, in accordance with statute, aid to disabled persons to ensure their subsistence, adaptation to work and social communication’. In relation to social security and healthcare, and pursuant to Article 67 of the **Polish** Constitution, ‘a citizen shall have the right to social security whenever incapacitated for work by reason of sickness or invalidism [...]’. Article 68(3) of the **Polish** Constitution further provides that public authorities shall ensure special healthcare to, among others, ‘handicapped people’. This demonstrates the individual or medical approach to disability in terms of the wording of the relevant constitutional provisions. Nonetheless, the types of measures outlined above are integral to ensuring the overall

101 However, the actual disability of the complainant concerned was not clear from the decision – the Constitutional Court did not deal with the particular type of disability and the courts of first and second instance used disability terminology confusingly, randomly and interchangeably (in a literal translation, the courts of first and second instance used the terms ‘psychiatric disorder’ and ‘mental disability’). The expert opinions issued during the proceedings, and to which the courts of first and second instance referred, used the terms (in a literal translation) ‘psychiatric disorder’ and ‘mental retardation.’

102 Slovakia, Constitutional Court (Ústavný súd), No. I. ÚS 313/2012-52, 28 November 2012, Para. 34.

103 Greece, Constitution of Greece.

104 Poland, Constitution of the Republic of Poland.

wellbeing of persons with disabilities and can be combined with the types of measures outlined in the preceding sub-section of this report.

The **Portuguese** Constitution also adopts a welfare and functional/medicalised approach to disability in Article 71(2). That article provides that the state is obliged to put a national policy in place to prevent the causes of disability and to have a national policy related to treatment, integration, and rehabilitation of citizens with disabilities. The aforementioned national policy must also ensure the provision of support to the families of disabled citizens. Likewise, Article 50 of the **Romanian** Constitution¹⁰⁵ focuses on the functional impairments of disabled individuals rather than on the social-contextual model of disability. It outlines that the state is responsible for a national policy of equal opportunities, disability prevention and treatment. The medicalised approach to disability is evidenced again under the **Spanish** Constitution, where a focus on rehabilitation and welfare is maintained in Article 49 of the constitution. That article provides that the public authorities shall carry out a policy of preventive care, treatment, rehabilitation and integration of disabled persons.

2.3 Direct effect of national constitutional provisions

The principle of direct effect enables individuals to invoke constitutional provisions before a national court. In most EU Member States, the constitutional non-discrimination provisions have direct effect, either against the State itself, against private actors or both. In some states, the provisions have vertical direct effect only. This means that individuals can only invoke a constitutional provision in relation to the state. Horizontal direct effect, on the other hand, means that an individual can invoke a constitutional provision in relation to another individual or private party, such as a company.

In many Member States, constitutional equality provisions have direct effect either in horizontal or vertical relations or both. However, as noted in sub-section 2.2 above, not all constitutional equality clauses contain an explicit or implicit prohibition of discrimination on the ground of disability.

2.3.1 Vertical and horizontal direct effect

The **Croatian** constitutional non-discrimination provisions can be enforced against both the state and private actors through a special procedure. Individuals may file a constitutional complaint with the Constitutional Court if they consider that an act of judicial or administrative power has violated rights guaranteed by the Constitution.¹⁰⁶ Therefore, judicial decisions, including those adopted in disputes between private actors, can be challenged before the Constitutional Court, which applies the constitution directly.

In **Cyprus**, constitutional rights can be enforced not only against the state but also against private actors and can be relied upon in order to claim compensation.¹⁰⁷

In a similar vein, the **Estonian** constitutional provisions have direct effect and can protect against discrimination by both public and private actors.

In **Finland**, the constitutional non-discrimination provisions have direct effect and Section 6 of the Constitution has been invoked in the **Finnish** courts.¹⁰⁸ The primary thrust of section 6 is to ensure equal

¹⁰⁵ Romania, Constitution of Romania, Article 50.

¹⁰⁶ Croatia, Constitutional Law on the Constitutional Court (*Ustavni zakon o ustavnom sudu republike hrvatske*), Official Gazette 49/2002, Article 62(1).

¹⁰⁷ Cyprus, Supreme Court (Ανώτατο Δικαστήριο), *Yiallourou v. Evgenios Nicolaou* (Τάκη Γιάλλουρου v. Ευγένιου Νικολάου), No. 9331, 08 May 2001.

¹⁰⁸ See e.g. Hallberg P. in Hallberg, P., Karapuu, H., Schein, M., Tuori, K., Viljanen, V-P. (1999), *Perusoikeudet* (Basic Rights), WSOY pp. 704, 717, 719; Kortteinen, J. – Makkonen, T. (2000), *Justice to the Victims of Racism and Discrimination – a Manual Against Ethnic Discrimination* (*Oikeutta rasmin ja syrjinnän uhreille – Etnisen syrjinnän vastainen käsikirja*), Ihmisoikeusliitto.

treatment in the use of public powers; however section 6 may have a bearing on relationships between private parties in certain circumstances and can be enforced against private actors.¹⁰⁹

In **France**, the constitutional anti-discrimination provisions have direct effect and can be enforced against private actors, in addition to the State.

The prohibition of discrimination in Article 3(3) of the **German** Basic Law has indirect horizontal effect and is buttressed by a strong constitutional review system.

In the **Netherlands**, the constitutional non-discrimination provision is directly applicable in vertical relations,¹¹⁰ as well as horizontal relations, (at least theoretically, as courts are very reluctant in that regard). This means that the constitutional non-discrimination provision can be enforced against private actors.¹¹¹ However, since it is an 'open clause' it is unclear what the non-discrimination norm entails in concrete situations and how this norm should be balanced against other constitutional rights (such as freedom of speech/opinion or freedom of belief/religion).

The **Polish** Constitution stipulates that its provisions have direct effect unless the Constitution itself states otherwise.¹¹² There is therefore a presumption in favour of direct effect for the Polish constitutional provisions. However, there is little precedent for invoking constitutional provisions directly.

In **Portugal**, the constitutional equality clauses can, in some circumstances, be enforced against private actors. The **Portuguese** Constitution makes a formal division between rights, freedoms and guarantees (civil and political rights) and economic, social and cultural rights. The former appear to have binding effect on private actors. By way of contrast, in circumstances where economic, social and cultural rights are concerned, the situation is generally assessed on a case-by-case basis.¹¹³

Lastly, in **Slovenia** and **Spain**, the constitutional anti-discrimination provisions have direct effect and can be enforced against the State and private actors.

2.3.2 Vertical direct effect

In **Austria**, the constitution has direct effect only in relation to the state. The state is therefore bound by the constitution and the related fundamental rights in all its activities (such as, for instance, when legislating or acting as an employer). Complainants may file a case within the Constitutional Court with respect to discriminatory legal provisions, while decisions of law enforcement and administrative agencies can be appealed by invoking the constitutional equality clause.

Provisions of the constitution also have vertical direct effect in **Belgium**. Legal action can be taken before the Constitutional Court by every individual or organisation. The situation is uncertain with regard to the horizontal direct effect of fundamental rights in the constitution. However, in practice this is largely a moot

109 Mostly this effect takes place through statutory law which implements the constitutional principle of equal treatment, although in some situations section 6 may be more 'directly applicable,' e.g. as a grounds for claiming damages or as a grounds for determining that a specific clause of an agreement is to be considered 'unjust.' Scheinin, M. (1999), Equality and the Prohibition of Discrimination (*Yhdenvertaisuus ja syrjinnän kielto*) in: Hallberg, P., Karapuu, H., Schein, M., Tuori, K., Viljanen, V-P, *Perusoikeudet* (Basic Rights), WSOY 1999, p. 260; Makkonen T. (2003) *Syrjinnän vastainen käsikirja*. IOM Helsinki, p. 101.

110 There is a limitation to this, namely the fact that formal statutory Acts (adopted by the Government in co-operation with Parliament) may, according to Article 120 of the Dutch Constitution, not be subjected to Constitutional review by the courts, and thus also not to a Constitutional 'equality' review. However, Dutch courts do have the power to strike down legislation that violates any directly applicable provision of international law (under Articles 93 and 94 of the Constitution).

111 See, for instance, Netherlands, Supreme Court (*Hoge Raad*), NJ 2005/117 (*Van Pelt/Martinair and KLM/ Vereniging van Verkeersvliegers*), ECLI:NL:HR:2004:AP0425, 8 October 2004.

112 Poland, Constitution of the Republic of Poland, Article 8.2.

113 Portugal, Constitution of the Portuguese Republic Article 18 (1) *a contrario*.

question, since most cases of ‘private’ disability discrimination will fall under national non-discrimination laws, including the general anti-discrimination law, which clearly has horizontal effect.

The **Latvian** Constitution has vertical direct effect. This means that there is no constitutional prohibition of discrimination in the private sphere, although specific laws can provide for this.

In **Lithuania**, the general equality clause embodied in Chapter 2 of the Constitution has only been interpreted as applying to the relationship between the individual and the state and not as governing the relationship between individuals.¹¹⁴ Hence, it is doubtful whether it could be enforced against private persons.

In **Slovakia**, the provisions of the Constitution related to non-discrimination only have direct effect at the vertical level. The **Slovakian** Constitutional Court has not ruled on whether Articles 12(1) and 12(2) of the Constitution have horizontal direct effect or not.¹¹⁵

2.3.3 No direct effect of constitutional provisions

In **Greece**, the fundamental rights of persons with disabilities constitute social rights, and not individual rights, and therefore cannot be relied upon by an individual before a court in the absence of specific implementing legislation. In **Hungary**, the constitutional non-discrimination provisions do not have direct effect, although recently there have been some judicial decisions related to other rights (e.g. the freedom of assembly versus the right to dignity), in which the courts have applied constitutional provisions directly. In **Romania**, the constitutional provisions related to equality do not have direct effect.

2.4 Human rights charters and other statutory instruments seeking to embed rights

In addition to national constitutions, national human rights charters or other statutory instruments can address disability discrimination. The most notable examples of human rights charters embedding rights for disabled people are the Charter of Fundamental Rights and Freedoms in the **Czech Republic** and the **United Kingdom** Human Rights Act.

2.4.1 The relevance of the European Convention on Human Rights to the EU

The European Convention on Human Rights (ECHR) is an international treaty which has been signed and ratified by the 47 Member States of the Council of Europe, including all EU Member States. It embeds basic human rights and fundamental freedoms within the jurisdiction of Member States of the Council of Europe. The prohibition on discrimination in the ECHR is contained in Article 14, as well as in Protocol No. 12.¹¹⁶ Article 14 ECHR provides as follows:

‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or *other status*’.¹¹⁷ [emphasis added]

Article 14 of the ECHR does not have an autonomous character. In other words, it can only be applied in conjunction with one of the substantive rights in the ECHR. The ECHR does not contain any specific rights

¹¹⁴ Lithuania, Constitutional Court (*Lietuvos Respublikos Konstitucinis Teismas*), No. KT20-N13/2015, Case No. 26/2014-4/2015, 9 July 2015. Available in Lithuanian at: <http://lrkt.lt/lt/teismo-aktai/paieska/135/ta1474/content>.

¹¹⁵ See Slovakia, Constitutional Court (*Ústavný súd*), No. PL. ÚS 8/04-202, 18 October 2005.

¹¹⁶ The prohibition of discrimination in Protocol 12 is not limited to the enjoyment of the rights set forth in the ECHR, unlike Article 14 ECHR.

¹¹⁷ Article 14 ECHR.

for the protection of disabled people,¹¹⁸ nor does it mention disability as a ground of discrimination. In spite of the fact that disability is not mentioned explicitly in Article 14, the list of grounds of discrimination in Article 14 ECHR is clearly not exhaustive and it is noteworthy that, in 2009, disability was recognised by the Court as coming within the term 'other status' in Article 14 in the case of *Glor v. Switzerland*.¹¹⁹ The ECHR has influenced the protection of human rights at the national level.

2.4.2 Statutory protection of human rights and the ECHR

The Constitution of the **Czech Republic** does not embody a prohibition of disability discrimination. Nevertheless, the Czech Charter of Fundamental Rights and Freedoms¹²⁰ states in Article 3(1) that:

'Everyone is guaranteed the enjoyment of their fundamental rights and basic freedoms without regard to gender, race, colour of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status'.

According to case law¹²¹ disability discrimination falls within the scope of the provision 'other status'. However, the right to equal treatment can only be claimed in connection with another right or freedom guaranteed in the Charter, not autonomously. The Czech Charter is a 'constitutional act', forming part of the 'constitutional order' (pursuant to Article 3 of the Constitution itself).

Finally, while there is no written constitution in the **United Kingdom**, the Human Rights Act (1998)¹²² partially incorporates the ECHR into domestic law. This results in Article 14 of the ECHR having *quasi*-constitutional force in the **United Kingdom**. Public authorities may only act contrary to that provision if required by Acts of Parliament (rather than subordinate legislation) to do so, and the courts are bound to interpret legislation in conformity with the Convention. Private bodies are not directly regulated by the Human Rights Act. Nonetheless, courts must interpret domestic legislation compatibly with the ECHR wherever possible, which provides a measure of horizontal application.

2.4.3 No statutory protection of human rights

In general, unless mentioned here, EU Member States provide no additional protection from disability discrimination through a human rights charter or specialised statute. However, a few provisions are worth mentioning in this context. In **Austria**, Article 14 of the ECHR is embedded as a part of the Austrian constitution.¹²³ In **Cyprus**, the Constitution contains an extensive section on fundamental rights and freedoms that replicates, to a large extent, the provisions of the ECHR. Lastly, in **Italy**, Article 117(1) of the Constitution gives a form of constitutional protection to international conventions. In other words, laws infringing international conventions that are binding on **Italy**, including the CRPD and the ECHR, are deemed unconstitutional.

118 With the exception of Article 5(1)(e) ECHR which refers (in outdated terminology) to 'persons of unsound mind.'

119 European Court of Human Rights (ECtHR), *Glor v. Switzerland*, application No.13444/04, 30 April 2009.

120 Czech Republic, Resolution of the Czech National Council on the Declaration of the Charter of Fundamental Rights and Freedoms (*Usnesení předsednictva České národní rady o vyhlášení Listiny základních práv a svobod součástí ústavního pořádku České republiky*), No. 2/1993 SB.

121 See, for example, Czech Republic, Constitutional Court (Ústavní soud), Decision No. Pl. ÚS 55/13, 12 May 2015, para. 77.

122 United Kingdom, Human Rights Act 1998.

123 Austria, Federal Constitution amendment concerning treaties (*Bundes-Verfassungsgesetz-Novelle betreffend Staatsverträge*) BGBl. No. 59/1964.

2.5 Conclusion on constitutional and general principles addressing disability discrimination

A large number of Member States have national constitutions, or other provisions addressing fundamental rights, which either explicitly prohibit discrimination on the ground of disability or which contain an open-ended list of grounds on which discrimination is prohibited which have been interpreted as, or can be interpreted as, including disability. Other constitutional provisions address inclusion and participation or welfare and health-related issues. Many of these constitutional provisions have vertical and horizontal direct effect or simply vertical direct effect, although this is not the case in all Member States. Provisions having vertical direct effect, and which allow for individual challenges to national legislation on the ground that it discriminates on the basis of disability and breaches the constitution, are potentially significant in terms of protecting the rights of persons with disabilities. Nevertheless, relatively few cases of this nature were reported by the national experts from the European network of legal experts in gender equality and non-discrimination. Constitutional equality provisions which have horizontal direct effect, and which can be enforced against private parties, are also potentially significant. However, once again, little case law was reported in this field. Moreover, in practice the importance of such provisions is limited where statute law prohibits discrimination on the ground of disability and covers a broad field.

In this respect, the ratification of the CRPD and the adoption of the 2008 proposal are both potentially significant developments. The foregoing instruments, and in particular the CRPD, generally provide for a wider protection from disability discrimination than national laws and are more specific than broad constitutional provisions. Whilst provisions in national constitutions, or other provisions addressing fundamental rights, can bolster disability rights protection at the national level, a new EU directive on equality law and the CRPD could serve to enhance the protection of disability rights at the national level. In particular, it is envisaged that the adoption and national transposition of a new directive and the national ratification of the CRPD will encourage or require national authorities to strengthen provisions of domestic law addressing disability rights. Furthermore such action may encourage the invocation of equality arguments in disability rights cases, based either on the constitution or other provisions contained in domestic laws. Both the Commission's proposal for a new equality directive and the the CRPD¹²⁴ place a particular emphasis on discrimination by private parties, and this should also strengthen the horizontal application of national laws. This may help to remedy the relative paucity of reported cases to date invoking vertical or horizontal direct effect

¹²⁴ See, for instance, Article 4(1) of the CRPD which requires States Parties to undertake to 'ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability'. Under Article 4(1)(e) of the Convention, 'States Parties undertake to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise.'

3 National legislation prohibiting disability discrimination that falls within the scope of the 2008 proposal

This section of the report highlights national legislation prohibiting disability discrimination falling within the scope of the 2008 proposal. It is recalled that the 2008 proposal addresses the fields of social protection, including healthcare; education; and access to goods and services, including housing.¹²⁵ This section of the report does not address reasonable accommodation measures, as such measures are dealt with in later sections of the report.¹²⁶

As it currently stands, EU law does not require Member States to prohibit discrimination against persons with disabilities outside the field of employment. Notwithstanding this, many Member States have extended their legislation to cover disability discrimination in fields beyond employment. In light of the foregoing, this section of the report categorises the diverse national disability non-discrimination laws on the basis of how many areas of the 2008 proposal they cover. In sub-section 3.1, national non-discrimination laws prohibiting disability discrimination in all three fields of the 2008 proposal are outlined. In sub-section 3.2, Member States' laws prohibiting disability discrimination in two fields are outlined and, in sub-section 3.3, domestic laws prohibiting disability discrimination in only one field of the 2008 proposal are highlighted. In sub-section 3.4, attention is drawn to those Member States' laws that contain no prohibition of discrimination beyond the field of employment, while in sub-section 3.5 instances where no prohibition of discrimination exists for persons with disabilities beyond the field of employment are highlighted, but where there is judicial interpretation to the effect that such discrimination is outlawed. This categorisation will act as a backdrop to later sections of this report which will address the areas in which EU Member States' laws establish reasonable accommodation requirements outside the field of employment. Sub-section 3.6 concludes this section of the report as a whole.

In a large number of Member States (namely, in **Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Finland, France, Germany, Hungary, Italy, Luxembourg, Portugal, Slovakia, Slovenia, Spain, Sweden** and the **United Kingdom**), disability discrimination is regulated by national laws in all three fields covered by the 2008 Commission proposal. In other Member States, there is a prohibition of disability discrimination in domestic law only in relation to two covered grounds contained in the proposal. In **Ireland** and **Lithuania**, there is a prohibition of disability discrimination in the spheres of access to, and supply of, goods and services and education. In **Malta**, the Equal Opportunities (Persons with Disability) Act 2000 prohibits discrimination on the ground of disability in the provision of goods, facilities and services, in the education sector, access to property and with regard to the provision of accommodation. Furthermore, the material scope of **Dutch** law has been extended beyond employment to the fields of primary and secondary education, housing and public transport (but not to the wider field of access to, and supply of, goods and services). Domestic law in **Latvia** contains a prohibition of disability discrimination in the fields of social protection and access to, and supply of, goods and services. In **Cyprus**, legislation prohibits discrimination only in the field of access to, and supply of, goods and services. No Member State prohibits disability discrimination in the sole area of education or social protection. Finally, in **Denmark, Estonia** and **Greece**, there is no prohibition of disability discrimination outside the field of employment. Although there is a lack of direct provisions in the **Polish** ETA, it is possible to challenge instances of disability discrimination under the **Polish** Constitution. In **Romania**, disability is mentioned in the general prohibition of discrimination contained in Article 2(1) of the Governmental Ordinance 137/2000 and there is judicial interpretation to the effect that disability discrimination is prohibited in the spheres of educational provision and access to public services.

125 Article 3, 2008 proposal, Version 15705/14 ADD 1 REV 2.

126 See sections 7-10 of this report.

3.1 National non-discrimination law that prohibits disability discrimination in the fields of social protection, including healthcare; education; and access to goods and services, including housing

In **Austria**, the Federal Disability Equality Act¹²⁷ sets out a general duty of non-discrimination on the ground of disability.¹²⁸ Article 2(2) prohibits discrimination with regard to goods and services as well as Federal education. In addition legislation at the provincial level (with the exception of the province of Lower Austria) provides that organs of the state (such as, for instance, civil servants and publicly-contracted workers) must refrain from any form of discrimination in the sphere of education. The Federal Disability Equality Act¹²⁹ provides for protection against direct and indirect discrimination (which includes inaccessibility as a possible means of discrimination) with regard to the administration of the Federation¹³⁰ and access to, and supply of, goods and services which are available to the public to the extent that the matter falls under Federal competences.¹³¹ Finally, the Austrian government has adopted a National Action Plan on Disability,¹³² which contains a broad range of policy measures designed to enhance the situation of people with disabilities. The CRPD was a decisive trigger with regard to this development.

In **Belgium**, the material scope of the 2008 proposal is entirely covered by legislation, with the exception of the Region Brussels-Capital, where disability discrimination in relation to goods and services is not covered under any non-discrimination provision, apart from social housing.¹³³ In the field of social protection, including social security and healthcare, there are many domestic laws prohibiting disability discrimination.¹³⁴ Education is a competence of the Communities in Belgium.¹³⁵ The various Belgian communities have adopted legislation prohibiting discrimination.¹³⁶ Disability discrimination is also regulated with regard to access to, and supply of, goods¹³⁷ and services¹³⁸ which are available to the

127 Austria, Federal Disability Equality Act (*Bundes-Behindertengleichstellungsgesetz*) BGBl. I No. 82/2005.

128 However, many of these areas are within the competence of the provinces for the most part and the provinces have mainly (except the province of Lower Austria) chosen to list these areas explicitly and protect all grounds against discrimination.

129 Austria, Federal Disability Equality Act.

130 Austria, Federal Disability Equality Act, Article 2(1).

131 Austria, Federal Disability Equality Act, Article 2(2).

132 Austria, Federal Ministry of Labour, Social Affairs and Consumer Protection (2012), *National action plan on disability, 2012-2020* (*Nationaler aktionsplan behinderung 2012 – 2020*).

133 There is, however, an important qualification to the above-stated information. Anti-discrimination statutory Acts in Belgium provide that a difference in treatment stipulated by another law cannot be considered as discrimination. This is known as the 'safeguard provision'. The result of this restriction is that the Anti-discrimination law is not applicable in certain cases. See Interfederal Centre for Equal Opportunities and Opposition to Racism (2014) *Parallel Report on the first periodic report from Belgium in the context of the implementation of the United Nations Convention on the Rights of Persons with Disabilities*, Brussels, 2014 p. 6 (Article 5).

134 Belgium, Federal Act pertaining to the fight against certain forms of discrimination (*Loi tendant à lutter contre certaines formes de discrimination/ Wet ter bestrijding van bepaalde vormen van discriminatie*), 10 May 2007, Article 5, § 1, 2°; Decree establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy (Flemish Community/Region) (*Decreet houdende een kader voor het Vlaamse gelijkheidskansen- en gelijkebehandelingsbeleid*), 10 July 2008, Article 20, 4°, 6° & 8°.

135 Belgium, Constitution of Belgium, Article 127, § 1, al. 1, 2°.

136 Belgium, Decree establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy (Flemish Community/Region), Article 20, 5°; Decree on the fight against certain forms of discrimination (French Community) (*Décret relatif à la lutte contre certaines formes de discrimination*), 12 December 2008, Article 4, 2°; Belgium, Decree aimed at fighting certain forms of discrimination (German-speaking Community) (*Dekret zur bekämpfung bestimmter formen von diskriminierung*), 19 March 2012, Articles 3, 12°; 4, 2°; Decree on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment (Commission communautaire française (Cocof)) (*Décret relatif à la lutte contre certaines formes de discrimination et à la mise en oeuvre du principe de l'égalité de traitement*), 9 July 2010, Article 4, § 1, 1°.

137 Belgium, Federal Act pertaining to the fight against certain forms of discrimination, Article 5, § 1, 1°; Decree establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy (Flemish Community/Region), Article 20, 6°; Decree on the fight against certain forms of discrimination (French Community), Article 4, 6°; Decree on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training (Walloon Region), Article 5, § 1, 9°. Decree aimed at fighting certain forms of discrimination (German-speaking Community); Article 4, 7°. Decree on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment (Commission communautaire française (Cocof)), Article 4, § 1, 7°.

138 Belgium, Federal Act pertaining to the fight against certain forms of discrimination, Article 5, § 1, 1°; Decree establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy (Flemish Community/Region), Article 20, 6°. Decree on the fight against certain forms of discrimination (French Community), Article 4, 6°. Decree on the fight

public and with regard to housing.¹³⁹ To date, none of the Belgian statutory acts prohibiting discrimination in the covered fields have been amended in light of the CRPD.

In **Bulgaria**, the main legislative provisions regulating disability discrimination are contained in two acts, namely The Protection Against Discrimination Act (PADA)¹⁴⁰ and the Integration of Persons with Disabilities Act (IPDA).¹⁴¹ Article 6(1) of PADA prohibits disability discrimination with regard to each of the covered fields of the 2008 proposal. Notably, Article 5 of PADA states expressly that building and maintaining a public architectural environment that hinders the access of persons with disabilities constitutes discrimination. Disability discrimination on account of lack of accessibility has been found in many cases brought under PADA before the Protection Against Discrimination Commission (the specialised equality body).¹⁴²

In **Croatia**, the Anti-discrimination Act (ADA)¹⁴³ prohibits disability discrimination (among other grounds). Article 8 of the ADA applies to all areas of the 2008 proposal without any limitation.¹⁴⁴ In addition to the ADA, the Social Care Act¹⁴⁵ contains a provision on the principle of non-discrimination.¹⁴⁶ Moreover, the Health Care Act¹⁴⁷ guarantees the right of equality¹⁴⁸ for persons with disabilities.

National legislation in the **Czech Republic** also prohibits discrimination in each of the three fields covered by the 2008 proposal. Under Section 1(1)(f) and Section 1(1)(h) of Anti-discrimination Law 198/2009,¹⁴⁹ discrimination is prohibited in respect of social protection, including social security and healthcare. Section 1(1)(i) of the aforementioned law prohibits discrimination with regard to education and Section 1(1)(j) prohibits discrimination with regard to access to, and supply of, goods and services which are available to the public.

In **Finland**, disability discrimination is prohibited with regard to all three covered fields of the 2008 proposal, pursuant to Section 2 of the amended Non-Discrimination Act (1325/2014).¹⁵⁰ The new Non-Discrimination Act came into force on 1 January 2015. Interestingly, the Helsinki Appeal Court has made a finding of discrimination¹⁵¹ under the Penal Code, in circumstances where a shop owner denied entry to a customer using a wheelchair.

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- against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training (Walloon Region), Article 5, § 1, 9°; Decree aimed at fighting certain forms of discrimination (German-speaking Community), Article 4, 7°; Decree on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment (*Commission communautaire française (Cocof)*), Article 4, § 1, 7.
- 139 Belgium, Decree establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy (Flemish Community/Region), Article 20, 6°; Decree on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training (Walloon Region), Article 5, § 1, 9°; Decree aimed at fighting certain forms of discrimination (German-speaking Community), Article 4, 7°; Ordinance modifying the Ordinance of 17 July 2003 creating the Brussels housing Code (Region of Brussels-Capital), Article 184.
- 140 Bulgaria, Protection Against Discrimination Act (*закон за защита от дискриминация*), SG 86/30 September 2003.
- 141 Bulgaria, Integration of Persons with Disabilities Act (*Закон За Интеграция На Хората С Увреждания*) SG 81/17 September 2004.
- 142 For a recent example of a case, see Bulgaria, Supreme Administrative Court (*Върховен административен съд*), Decision No. 158 of 8 January 2015 in case No. 7092/2014, 8 January 2015. The Court held that there had been discrimination because the ramps installed did not afford independent access and additionally because access had been limited and was dependent on assistance being provided; the fact that the ramps were immovable and could not be adjusted to different wheelchair types. The Court confirmed PADC's instruction for correctional measures: to "take the necessary action for constructing access for persons with disabilities to and inside the building".
- 143 Croatia, Anti-discrimination Act (*Zakon o suzbijanju diskriminacije*), Official Gazette No. 85/2008.
- 144 Croatia, Anti-discrimination Act covers social protection, including social security and healthcare under Articles 8(3) and 8(4). Access to goods and services and their provision is covered under Article 8(8). Education is covered explicitly pursuant to Article 8(2).
- 145 Croatia, Social Care Act (*Zakon o socijalnoj skrbi*), Official Gazette No. 157/2013 and 152/2014.
- 146 Croatia, Social Care Act, Article 15. Furthermore, Article 4(9) defines person with disability as 'a long-term physical, mental, intellectual or sensory impairment, which in interaction with various barriers may hinder a person's full and effective participation in society on an equal basis with others.'
- 147 Croatia, Health Care Act (*Zakona o zdravstvenoj zaštiti*), Official Gazette No.150/2008
- 148 Croatia, Health Care Act, Article 22(1)(1).
- 149 Czech Republic, Anti-discrimination law (*Antidiskriminací zákon*), No. 198/2009 SB.
- 150 Finland, Non-discrimination Act (*Yhdenvertaisuuslaki*), (1325/2014).
- 151 Finland, Court of Appeal of Helsinki (*Helsingin hovioikeus*), *Ounila v. Hamdan*, 486/28.2.2014, R13/1506, 28 February 2014.

French legislation also contains a prohibition of disability discrimination in relation to all three fields of the 2008 proposal. With regard to access to social protection, including healthcare, discrimination is prohibited pursuant to Articles 11 to 18 of Title III of the Law 2005-102 of 11 February 2005 (the Law on Disability).¹⁵² In addition, the Code of Public Health¹⁵³ prohibits discrimination in access to healthcare under Article L1110-3 thereof. With regard to education, Articles 11 and 19 to 22 of Law 2005-102¹⁵⁴ prohibit disability discrimination.¹⁵⁵ It is interesting to note that in September 2005, the Administrative Tribunal of Lyon ruled that the failure by the state to provide access to a school for a disabled child (on account of insufficient adapted facilities) gave rise to liability on the part of the state in damages.¹⁵⁶ The Administrative Supreme Court essentially ruled that there was an obligation of result resting upon all authorities of the state to provide the necessary resources.¹⁵⁷ Finally, it is important to note that the **French** prohibition of discrimination on the ground of disability in access to goods and services (including housing), contained in Articles 225-1 and 225-2 of the Penal Code, has been interpreted by the French courts as imposing a duty to comply with accessibility obligations.¹⁵⁸ The courts have held that the burden of establishing a defence of disproportionate burden when installing accessible equipment falls upon the defendant in each case.¹⁵⁹ A judgment of the Court of Appeal in Paris¹⁶⁰ found discrimination in a case concerning three passengers who were denied access to an airplane on grounds of safety requirements, by reason of the fact that they were unaccompanied wheelchair users. A finding of discrimination on the ground of disability was made (inter alia) against the air transport company, *easyJet*, which was prosecuted for refusal to provide access to goods and services, pursuant to Articles 225-1 and 225-2 of the Penal Code. It is also noteworthy that inaccessibility can give rise to non-discrimination claims in access to housing, based on Law 2002-73.¹⁶¹

In **Germany**, Section 2¹⁶² of the General Act on Equal Treatment of 14 August 2006 (hereafter the AGG)¹⁶³ is applicable to all areas covered by the 2008 proposal. Section 19(1) of the AGG covers contract law and regulates the provision of all goods and services available to the public. Article 3(3) of the Basic Law, as a directly applicable constitutional norm, extends the prohibition of disability discrimination to any public law norm including the social system, public employment, public education and any other form of action by the state authorities. To date, the CRPD has not led to changes in this area in **Germany**. After its ratification by **Germany**, the CRPD is now in force as federal law.

In **Hungary**, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (ETA)¹⁶⁴ provides comprehensive protection against discrimination. It has a wide material scope and includes

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- 152 France, Equality of Rights and Opportunities, Participation and Citizenship of People with Disabilities Law (*Loi n° 2005-102 du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées* (1)), Law No. 2005-102 of 11 February 2005, Articles L112-1 – 112-5 (transposed into the Code of Education (*Code de l'éducation*)).
- 153 France, Code of Public Health (*Code de la santé publique*).
- 154 France, Equality of Rights and Opportunities, Participation and Citizenship of People with Disabilities Law.
- 155 In addition, disability discrimination in education is prohibited under the Law on the reform of the Penal Code relating to the punishment of crimes against the nation, the state and the public peace (*Loi n° 92-686 du 22 juillet 1992 portant réforme des dispositions du code pénal relatives à la répression des crimes et délits contre la nation, l'Etat et la paix publique*), Law No. 92-686 of 22 July 1992 adopting the new Penal Code (France, Penal Code (*Code Pénal*)), pursuant to Articles 225-1 and 225-2 and 432-7 Penal Code.
- 156 France, Administrative Tribunal of Lyon (*Tribunal administrative de Lyon*), No. 0403829, M. & Mme Hebri, AJDA, 2005, 1874, 29 September 2005.
- 157 France, Council of State (*Conseil d'Etat*), N° 31850, *Annie Beaufrils*, 16 May 2011.
- 158 France, Court of Cassation, Criminal Chamber (*Cour de cassation chambre criminelle*) N° 05-85888, 20 June 2006.
- 159 France, Court of Appeal, Poitiers (*Cour d'appel de Poitiers*), *Association des paralysés de France v. Société Hellucha*, N° 419/05, 1 September 2005. This case is discussed further in section 8.2.
- 160 France, Court of Appeal, Paris (*Cour d'appel de Paris*), *Easy Jet vs. Ms G. and others*, N° 12/05062, 11 February 2014.
- 161 France, Social Modernisation Law (*Loi n° 2002-73 du 17 janvier 2002 de modernisation sociale* (1)), Law No. 2002-73 of 17 January 2002.
- 162 Germany, General Act on Equal Treatment (*Allgemeine Gleichbehandlungsgesetz - AGG*), Law of 14 August 2006 (BGBl. I, 1897), last amended on 3 April 2013 (BGBl. I, 610), Section 2, see paras. 5-8.
- 163 Germany, General Act on Equal Treatment.
- 164 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról), 28 December 2003, last amended 19 June 2015.

disability as a protected ground of discrimination.¹⁶⁵ The Act does not enumerate the specific fields which fall under its material scope, but provides that the entities enumerated in Article 4 of the Act (very widely defined public sector entities) shall respect the requirement of equal treatment in their actions and practices, regardless of the sectors in which they operate, with regard to all persons falling within the personal scope of the Act. Notably, according to the **Hungarian** Equal Treatment Authority, the failure to make a public building accessible qualifies as direct discrimination.¹⁶⁶

The **Italian** Act 67/2006¹⁶⁷ prohibits disability discrimination in all fields covered by the 2008 proposal. With regard to the prohibition of disability discrimination in education, the **Italian** Supreme Court handed down a ruling, in *X v. Italian Ministry of Education and the School of X*,¹⁶⁸ regarding the fundamental nature of the right to education and the instrumental role which support teachers play in ensuring the effective implementation of the right to education for persons with disabilities without discrimination. The case was brought as a result of a reduction in support hours to a child with a disability. In the course of its judgment, the **Italian** Supreme Court recalled the relevant international sources, such as the CRPD (ratified by **Italy**), as well as the provisions on equality and non-discrimination in the EU Treaties and in the EU Charter of Fundamental Rights. According to the Court, the individual education plans agreed by the competent local committee could not be disregarded or changed by the schools on the basis of costs. As such, the reduction made by the school in support teaching hours for the disabled child in question was held to be indirect discrimination on the ground of disability.

In **Luxembourg**, according to Article 2(1)(e) of the Equal Treatment Act of 28 November 2006,¹⁶⁹ discrimination on the basis of disability is prohibited with regard to social protection, including social security and healthcare. Disability discrimination in education is prohibited pursuant to Article 2(1)(g) and disability discrimination in the field of access to, and supply of, goods and services, including housing, is prohibited under Article 2(1)h.

In **Portugal**, disability discrimination with regard to social protection, including social security and healthcare is regulated by Article 7 of Law 4/2007.¹⁷⁰ Disability discrimination in the fields of education and access to goods and services, including housing, is prohibited by Article 4 of Law 46/2006.¹⁷¹ Notably, Articles 4(h) and 4(i) of Law 46/2006 classify as discriminatory practices the denial or limitation of access to education for persons with disabilities.

165 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, Articles 24 and 25 cover social protection and healthcare; education is covered under Articles 4 and 27 and access to, and supply of, goods and services under Articles 5 and 30, including housing under Articles 4, 5, and 26.

166 Hungary, Equal Treatment Authority (Egyenlő Bánásmód Hatóság), Case 13/2006.

167 Italy, Law No. 67/2006, Measures for the judicial protection of persons with disabilities who are victims of discrimination (*Legge 1 marzo 2006, n. 67 Misure per la tutela giudiziaria delle persone con disabilità vittime di discriminazioni*), 1 March 2006 (GU n.54 del 6-3-2006).

168 Italy, Supreme Court of Court of Cassation (*Corte Suprema di Cassazione*), *X. v. Italian Ministry of Education and the School of X*, Decision No. 25011, 25 November 2014.

169 Luxembourg, Equal Treatment Act (1. transposition of Directive 2000/43 / EC of 29 June 2000 on the implementation of the principle of equal treatment between persons irrespective of racial or ethnic origin; 2. transposition of Directive 2000/78 / EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; 3. amendment to the Labour Code and to introduce in Book II of a new Title V on equal treatment in employment and occupation; 4. amendment of Articles 454 and 455 of the Penal Code; 5. modification of the Law of 12 September 2003 on persons with disabilities), (*Loi du 28 novembre 2006 portant 1. transposition de la directive 2000/43/CE du Conseil du 29 juin 2000 relative à la mise en oeuvre du principe de l'égalité de traitement entre les personnes sans distinction de race ou d'origine ethnique; 2. transposition de la directive 2000/78/CE du Conseil du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail; 3. modification du Code du travail et portant introduction dans le Livre II d'un nouveau titre V relatif à l'égalité de traitement en matière d'emploi et de travail; 4. modification des articles 454 et 455 du Code pénal; 5. modification de la loi du 12 septembre 2003 relative aux personnes handicapées*), Law of 28 November 2006 (No. 207 of 06 December 2006).

170 Portugal, Law 4/2007 of 16 January 2007 (*Lei Nº 4/2007 de 16 de Janeiro 2007*), Diário da República Nº 11/2007, Série I de 2007-01-16, which is the basic law on the social security system.

171 Portugal, Law 46/2006 of 28 August 2006 (*Lei Nº 46/2006 de 28 de Agosto*), Diário da República Nº 165/2006, Série I de 2006-08-28, which prohibits and punishes discrimination based on disability and on a pre-existing risk to health (*risco agravado para a saúde*).

The **Slovakian** Anti-discrimination Act¹⁷² stipulates the duty to observe the equal treatment principle on a number of grounds, enumerated in an open-ended list, which includes disability explicitly.¹⁷³ The duty to refrain from disability discrimination applies, among others, to the fields of social security (which, for the purposes of the Anti-discrimination Act, includes social protection¹⁷⁴ and social advantages),¹⁷⁵ healthcare, provision of goods and services including housing,¹⁷⁶ and education.¹⁷⁷

In **Slovenia**, disability discrimination is prohibited in relation to all three fields of the 2008 proposal under Article 2 of the Act Implementing the Principle of Equal Treatment,¹⁷⁸ read together with Article 3(1) of the same act. In addition, the 2010 Act on Equal Opportunities for People with Disabilities¹⁷⁹ prohibits discrimination on the basis of disability and sets out obligations concerning reasonable accommodation (termed 'appropriate accommodation' in the Act). The material scope of the Act relates to the public sector, access to goods and services available to the public, accessibility of public buildings, education and healthcare, among others.

In **Spain**, sectoral laws contain express disability non-discrimination clauses. Article 2 of Law 1/1994 on Social Security¹⁸⁰ regulates disability discrimination with regard to the field of social protection, including social security, social assistance and healthcare. General Law on health services 14/1986¹⁸¹ covers disability discrimination regarding healthcare in Article 10. Moreover, Organic Law 2/2006¹⁸² regulates disability discrimination in education under articles 1 and 74, while disability discrimination regarding access to, and supply of, goods and services is prohibited under Article 5 of General Law on the Rights of Persons with Disabilities and their Social Inclusion.¹⁸³

The **Swedish** Discrimination Act¹⁸⁴ prohibits discrimination in all fields covered by the 2008 proposal.¹⁸⁵ Notably, from the 1 January 2015 failure to provide reasonable accommodation has been renamed 'inadequate accessibility' and is defined as a separate form of discrimination in Chapter 1, Section 4(3) of the Discrimination Act.

Finally, disability discrimination is regulated in both **Great Britain** and **Northern Ireland** by the Equality Act (2010)¹⁸⁶ (hereafter EqA) and the Disability Discrimination Act (1995)¹⁸⁷ (hereafter DDA), respectively.

172 Slovakia, Anti-discrimination Act - Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act). (*zákon č. 365/2004 Z. z. o rovnakom zaobchádzaní v niektorých oblastiach a o ochrane pred diskrimináciou a o zmene a doplnení niektorých zákonov (antidiskriminačný zákon)*), 20 May 2004.

173 Slovakia, Anti-discrimination Act, Section 2(1).

174 Slovakia, Anti-discrimination Act, Sections 5(2)(a) and 5(2)(b), in conjunction with Section 5(1).

175 Slovakia, Anti-discrimination Act, Section 5(2)(a).

176 Slovakia, Anti-discrimination Act, Section 5(2)(d), in conjunction with Section 5(1).

177 Slovakia, Anti-discrimination Act, See Section 3(1) and 5.

178 Slovenia, Act Implementing the Principle of Equal Treatment (*Zakon o uresničevanju načela enakega obravnavanja – uradno prečiščeno besedilo*), 22 April 2004 (Official Journal RS, No. 93/07).

179 Slovenia, Act on Equal Opportunities for People with Disabilities – AEOPD (*Zakon o izenačevanju možnosti invalidov*), 16 November 2010 (Official Journal RS, No. 94/10 and 50/14).

180 Spain, General Social Security Act (*Real Decreto Legislativo 1/1994, de 20 de junio, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social*), Legislative Royal Decree 1/1994 of 20 June 1994 (BOE, 29 June 1004).

181 Spain, General Law on Healthcare (*Ley 14/1986, de 25 de abril, General de Sanidad*) Law 14/1986 of 25 April 1986 (BOE, 29 April 1986).

182 Spain, Organic Law on Education (*Ley Orgánica 2/2006, de 3 de mayo, de Educación*), Law 2/2006 of 3 May 2006, (BOE, 4 May 2006).

183 Spain, General Law on the rights of Persons with Disability and their Social Inclusion (*Real Decreto Legislativo 1/2013, de 29 de noviembre, por el que se aprueba el Texto Refundido de la Ley General de derechos de las personas con discapacidad y de su inclusión social*) Royal Legislative Decree 1/2013 of 29 November 2013 (BOE, 3 December 2012).

184 Sweden, Discrimination Act (*Diskrimineringslag*) (2008:567).

185 Sweden, Discrimination Act. Education is covered under Chapter 2, Articles 5-8 and Chapter 1, Section 4. Social protection is covered under Chapter 2, Articles 13 -14 and access to, and supply of, goods and services (including housing) is covered under Chapter 2, Articles 12-12 c, as well as Chapter 1, Section 4.

186 United Kingdom, Equality Act 2010 (Great Britain).

187 United Kingdom, Disability Discrimination Act 1995 (Northern Ireland).

Both acts prohibit disability discrimination in all three areas of the 2008 proposal.¹⁸⁸ Law in the **United Kingdom's** imposes anticipatory duties to provide reasonable accommodation in connection with access to goods, services¹⁸⁹ and facilities, the functions of public authorities, and access to education. In Northern Ireland, anticipatory duties apply only in relation to access to goods, facilities and services and public functions.¹⁹⁰ The duties are enforceable only by an individual disabled person who is placed at a disadvantage by the failure to make the anticipatory adjustments. These duties are discussed in a later section of this report.¹⁹¹ In addition, the public sector equality duty¹⁹² requires that public authorities pay due regard to the need to eliminate disability discrimination and to promote equality for disabled people in all areas.

3.2 National non-discrimination law that prohibits discrimination in two fields of the 2008 proposal

Certain EU Member States regulate disability discrimination in relation to two areas of the 2008 proposal only. The relevant legislative and policy initiatives pertaining to those Member States are outlined below.

3.2.1 *Prohibition of disability discrimination in the fields of access to, and supply of, goods and services and education*

In **Ireland**, disability discrimination is prohibited explicitly under the Equal Status Acts (2000–2012)¹⁹³ (hereafter ESA) in two of the covered fields of the 2008 proposal, namely education¹⁹⁴ and access to, and supply of, goods and services available to the public,¹⁹⁵ including housing.¹⁹⁶ Judicial interpretation of Articles 2(1) and 14 of the ESA is required in order to determine whether disability discrimination is prohibited in the field of social protection in Ireland, as there has been no relevant case law on that issue to date.

In **Lithuania**, the Law on Equal Treatment¹⁹⁷ prohibits disability discrimination explicitly in the fields of education¹⁹⁸ and access to goods and services.¹⁹⁹

The **Maltese** Equal Opportunities (Persons with Disability) Act of 2000²⁰⁰ prohibits disability discrimination in education under Article 11 thereof. In addition, Article 13 of the Act applies to the provision of goods, facilities and services to the public and includes (among others): (a) access to, and use of, any place which members of the public or a section of the public are permitted to enter; (b) the provision of property rights and of housing; and (c) facilities for education. Furthermore, Article 12 of the Act provides that it shall be unlawful for any person to discriminate against another person on the ground of the disability of such other person or the disability of any of his/her family members by, *inter alia*, failing to make necessary

188 Disability discrimination in the area of social protection is regulated by Section 29 of the Equality Act 2010 (Great Britain) and Sections 19 and 21(b) of the Disability Discrimination Act 1995 (Northern Ireland). Disability discrimination in the field of education is regulated both in Great Britain and Northern Ireland, by Sections 84-99 of the EqA and Sections 28(a) to 31(c) of the DDA, respectively. Finally, disability discrimination in access to, and supply of, goods and services is prohibited under Section 29 of the EqA and section 19 of the DDA, including housing pursuant to Sections 32-35 of the EqA and Sections 22-24M of the DDA.

189 United Kingdom, Equality Act 2010 (Great Britain), Section 20, read with Schedule 2 (services and public functions) and Section 29.

190 United Kingdom, Disability Discrimination Act 1995, Sections 19, 20, 21D & 21E.

191 See section 5.1.1 below.

192 United Kingdom. See Section 149 of the Equality Act 2010 (Great Britain) and Section 75 Northern Ireland Act 1998.

193 Ireland, Equal Status Acts (2000-2012), Act No. 8 of 2000 to Act No. 41 of 2012.

194 Ireland, Equal Status Acts (2000-2012), Section 7.

195 Ireland, Equal Status Acts (2000-2012), Section 5(1).

196 Ireland, Equal Status Acts (2000-2012), Section 6(1).

197 Lithuania, Law on Equal Treatment (*Lietuvos Respublikos Lygių galimybių įstatymas*), 2003, No. 114-5115.

198 Lithuania, Law on Equal Treatment, Article 6.

199 Lithuania, Law on Equal Treatment, Article 8.

200 Malta, Equal Opportunities (Persons with Disability) Act (2000), 10 February 2000, latest amendments: Act XXIV of 2012.

alterations to property²⁰¹ or facilities in order to make access to such property or facilities possible (unless alteration of the property or facilities would be unreasonable in the circumstances).

Disability discrimination in the **Netherlands** is prohibited by the Act on Equal Treatment on the Ground of Disability or Chronic Illness²⁰² (hereafter referred to as the AET). The scope of the AET was initially restricted to the fields of employment and vocational training. However, in 2009 its material scope was extended to the fields of primary and secondary education (Article 5b of the AET) and to housing (Articles 6a, 6b and 6c of the AET).²⁰³ As of 2012, public transport also falls within the scope of the AET. However, the Decree that gives effect to this provision contains a complicated schedule of gradual implementation.²⁰⁴ Moreover, the wider field of access to, and supply of, goods and services is not regulated under **Dutch** law, from the perspective of disability discrimination.

3.2.2 *Prohibition of disability discrimination in the fields of social protection and access to, and supply of, goods and services*

In **Latvia**, discrimination on the basis of disability is prohibited explicitly in two of the fields covered by the 2008 proposal, namely in the field of social protection, including social security and healthcare, and in the field of access to, and supply of, goods and services which are available to the public. Section 2 of the Law on Social Security²⁰⁵ mandates that social services shall be provided without discrimination on the basis of disability or health condition, where they are provided by state or municipal institutions. Furthermore, Section 3(2) of the Law on the Rights of Patients prescribes the rights of patients in healthcare and also prohibits differential treatment based on disability.²⁰⁶ Section 3 of the Law on Consumer Rights Protection²⁰⁷ prohibits disability discrimination in access to goods and services. The Law on Housing does not contain a non-discrimination clause, but that sphere is covered by the Consumer Rights Protection law. Notably, the Law on Education²⁰⁸ applies to both the public and private spheres of education and contains a closed-list non-discrimination clause, which does not include disability explicitly.²⁰⁹ Notwithstanding this, disability could be subsumed under the ground of 'health condition,' which is listed in the law, although judicial interpretation would be required to establish that fact. On 19 November 2013, the **Latvian** government approved the Guidelines for the implementation of the United Nations Convention on the

201 Malta, Article 2, Equal Opportunities (Persons with Disability) Act (2000). Property is defined as 'all existing and new buildings and outdoor areas such as streets, pavements, public paths, beaches and gardens.'

202 Netherlands, Act of 3 April 2003 regarding the establishment of the Act on Equal Treatment on the grounds of disability or chronic disease (*Wet van 3 april 2003 tot vaststelling van de Wet Gelijke Behandeling op grond van Handicap of Chronische Ziekte*), 3 April 2003, Staatsblad 2003, 206.

203 Netherlands, Amendment of 29 January 2009 to the Act on Equal Treatment concerning the extension to primary and secondary education and housing (*Wijziging van de Wet gelijke behandeling op grond van handicap of chronische ziekte in verband met de uitbreiding met onderwijs als bedoeld in de Wet op het primair onderwijs en de Wet op het voortgezet onderwijs en met wonen*), 29 January 2009, Staatsblad 2009, 101.

204 Netherlands, Decree of 19 April 2012, Staatsblad 2012, 199 Concerning the establishment of a date of the entering into force of Articles 7 and 8 of the Act on Equal Treatment on the Grounds of Disability or Chronic Disease and the entering into force of the Decree accessibility public transport (*Houdende het tijdstip van inwerkingtreding van de artikelen 7 en 8 van de Wet gelijke behandeling op grond van handicap of chronische ziekte en inwerkingtreding van het Besluit toegankelijkheid van het openbaar vervoer*).

205 Latvia, Law on Social Security (*Likums par sociālo drošību*), 7 September 1995, Section 2.

206 Latvia, Law on the Rights of Patients (*Pacientu tiesību likums*), 17 December 2009, Section 3 (2).

207 Latvia, Law on Consumer Rights Protection (*Patērētāju tiesību aizsardzības likums*), 18 March 1999, Article 3.

208 Latvia, Law on Education (*Izglītības likums*), 29 October 1998.

209 Latvia, Law on Education, Section 3(1) provides: 'Every citizen of the Republic of Latvia and every person who has the right to a non-citizen passport issued by Latvia, or person to whom a permanent residence permit has been issued, as well as citizens of the European Union states to whom temporary residence permits have been issued and their children have equal rights to receive education independently from property and social status, race, ethnicity, gender, religious or political opinions, health condition, occupation and place of residence.' <http://likumi.lv/doc.php?id=50759> [translation of the country expert for the European network of legal experts in gender equality and non-discrimination, Country report 2014 on the non-discrimination directives, Latvia, reporting period 1 January 2014 – 31 December 2014. Expert: Anhelita Kamenska].

Rights of Persons with Disabilities (2014-2020).²¹⁰ The Guidelines envisage priority action in the areas of education, employment, social protection and awareness-raising.

3.3 National non-discrimination law that prohibits discrimination in one field of the 2008 proposal

In **Cyprus**, discrimination is prohibited with regard to access to, and supply of, goods and services pursuant to Article 6(1) of Law 127(I)/2000 on Persons with Disability (as amended).²¹¹ Judicial interpretation is required to determine whether the prohibition of discrimination pertaining to access to services also includes housing.

3.4 No prohibition of discrimination beyond the field of employment

In **Denmark**, there is no prohibition of discrimination on the grounds of disability beyond the field of employment and no changes have been made in that regard in light of the entry into force of the CRPD. Except for general provisions in the **Estonian** constitution, no specific domestic provisions tackle disability discrimination in the areas covered by the 2008 proposal and ratification of the CRPD did not lead to any changes in national legislation in that respect. In **Greece**, there is also no prohibition of disability discrimination in anti-discrimination law beyond the field of employment.

3.5 No prohibition of discrimination beyond the field of employment (but judicial interpretation to that effect)

In **Poland**, there is no prohibition of disability discrimination in anti-discrimination law beyond the field of employment. However, instances of disability discrimination can be challenged under the **Polish** Constitution, and a number of cases have been successful regarding access of persons with disabilities to services. In **Romania**, disability is not referred to as a protected ground in the list of specific grounds on which discrimination is prohibited under Governmental Ordinance 137/2000 (hereafter referred to as GO 137/2000).²¹² However, disability is mentioned in the general prohibition of discrimination contained in Article 2(1) and it has been interpreted by the National Council for Combating Discrimination (NCCD)²¹³ and the domestic courts as being a protected ground of discrimination under that article.²¹⁴ In a 2009 decision, the NCCD ruled that there had been discrimination affecting the right to education, in circumstances where a teacher petitioned to exclude a pupil from the class on account of the student's disability.²¹⁵ Moreover, in a 2013 decision, the NCCD found that discrimination had been perpetrated by a school against a child with Asperger's syndrome when school authorities put pressure on the parents

210 Latvia, Cabinet of Ministers (*Ministru kabinets*), *The Guidelines for the Implementation of the United Nations Convention on the Rights of Persons with Disabilities 2014-2020* (*Apvienoto Nāciju Organizācijas Konvencijas par personu ar invaliditāti tiesībām īstenošanas pamatnostādnes 2014.-2020.gadam*), 19 November 2013.

211 Cyprus, Law on Persons with Disability (*Ο Περί Ατόμων με Αναπηρίες Νόμος*), No. 127(I)/2000. The law on persons with disabilities (amendment) N. 57(I)/2004 was adopted on 31 March 2004 and entered into force on 1 May 2004, amending the existing legislation on disability (N. 127(I)/2000). The amending legislation transposed the disability component of the Employment Equality Directive (2000/78/EC) by introducing the directive's prohibition of discrimination in employment. The law was amended in 2014 (through Law 63(I)/2014) to extend its reasonable accommodation provisions to fields beyond employment and in 2015 (through Law 22(I)/2015) to provide for preferential parking for persons with disability.

212 Romania, Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination (*Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), 31 August 2000 (*Monitorul Oficial al României* No. 431 of 2 September 2000), republished in 2014. See Articles 5-8, Article 10 and Article 11.

213 The official website of the National Council for Combating Discrimination (NCCD) is available at: <http://www.cncd.org.ro>.

214 See, for example, a recent case of the (*Curtea de Apel*) Bucharest, Court of Appeal (Decision 2547/2015 of 12 October 2015), in which the court quashed the prior decision of the national equality body instead and ruled that two taxi companies discriminated against the plaintiff (a person who used a wheelchair which could not be folded) in light of the fact that the plaintiff could not avail of their services. The companies were sanctioned with a fine of RON 10,000 each (€2,500). The decision is not final.

215 Romania, National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*), Decision 101, 17 February 2009.

of the child to transfer him to a different class.²¹⁶ With regard to accessibility, the NCCD ruled, in a 2010 decision,²¹⁷ that discrimination occurred in circumstances where a bank made the opening of an account conditional on appointing a proxy or signing a statement assuming liability for all the consequences of transactions. This case concerned an individual with a visual impairment. Lastly, in a decision from 2014,²¹⁸ the NCCD found that failure to ensure access to public transportation for persons with disabilities amounted to direct discrimination (and, furthermore, to an infringement of the right to dignity).

3.6 Conclusion on national legislation prohibiting disability discrimination that falls within the scope of the 2008 proposal

In this section of the report we have drawn attention to the various national legislative provisions prohibiting discrimination on the basis of disability. This complements the previous section of this report, in which constitutional prohibitions of disability discrimination were highlighted. For those Member States in which there is no prohibition of disability discrimination in either the national constitution or in domestic laws, or alternatively where there are prohibitions of disability discrimination in some (but not all) of the fields covered by the 2008 proposal, the adoption of the 2008 proposal for a new equality directive would have great significance in extending protection for disabled persons beyond existing fields of protection.

216 Romania, National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*), Decision 6444, 30 October 2013.

217 Romania, National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*), *R.V. v. Banca Transilvania and Agentia Grand Constanta*. Decision, 6 May 2010. This is discussed further in section 8.2.

218 Romania, National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*), Decision 251, 30 April 2014, ex officio case against 39 mayors and the National Agency for Payments and Social Inspection.

4 Legislation on the integration of persons with disabilities (not covering discrimination) that falls within the scope of the 2008 proposal

Other than non-discrimination legislation, two principal types of legislation relating to the integration of persons with disabilities have been identified by the members of the European network of legal experts in gender equality and non-discrimination: legislation relating to accessibility measures and legislation on education. Such legislation overlaps to a great extent with the material scope of the Commission's 2008 proposal. Accessibility legislation, by its very nature, can be linked to the obligation to reasonably accommodate. Accessibility measures have a generalised group-based dimension, whereas the duty to accommodate is individualised and contextual in nature. Nonetheless, Anna Lawson notes that there is a 'strong and mutually reinforcing relationship'²¹⁹ between the duty to accommodate and accessibility measures. The more accessible the environment and information technologies etc. become, the less reasonable accommodations will be required. That is not to say that reasonable accommodations will become redundant once accessibility has been ensured – indeed certain persons with disabilities may still need individualised accommodation measures even when the environment is accessible. The flip side of the relationship between the two types of measures is that the duty to accommodate sometimes contributes to improving access beyond the case of one particular disabled individual.²²⁰ Furthermore, legislative measures on integration in education are clearly linked to the material scope of the 2008 proposal, as well as being linked to Article 24 of the CRPD. This section of the report considers general legislative and policy measures adopted by EU Member States on accessibility and also those undertaken to ensure integration of persons with disabilities in education. Sub-section 4.1 covers accessibility, whilst sub-section 4.2 addresses education.

4.1 Legislation, policies and latest developments on accessibility at Member State level

In this sub-section of the report, the various legislative enactments and policy documents in the field of accessibility for persons with disabilities are outlined. In addition to the individualised duty to reasonably accommodate disabled persons set forth in Articles 2 and 5 of the CRPD, Article 9 of the Convention lays down the obligation to provide accessibility by anticipation for persons with disabilities.

It is important to draw a clear distinction between the concepts 'accessibility of' and 'access to' in the disability context. Many Member State laws contain obligations to ensure both accessibility generally and access to certain facilities. Guaranteeing accessibility enables people with disabilities to physically use a certain facility; and contributes to ensuring access to, as well as substantive enjoyment of, rights for persons with disabilities on an equal basis with others. However, it must be noted that while ensuring access to facilities for persons with disabilities includes the implementation of accessibility obligations, it is not limited to this. Beyond the adoption of accessibility measures, ensuring access to facilities, and therefore enjoyment of rights, is also concerned with the provision of reasonable accommodations and other individualised measures. At its most basic it prevents a party from excluding a person with a disability from entering a building or using a service. The sub-section which follows focuses solely on accessibility obligations.

219 Lawson, A. (2010), 'Reasonable Accommodation and Accessibility Obligations: Towards a More Unified European Approach', 11 *European Anti-Discrimination Law Review* 11, p. 21.

220 For instance, widening the entrance to a workplace upon request by a wheelchair-user may result in increased access not only for the disabled person in question but also for people with comparable disabilities and non-disabled people, such as older people or parents with buggies. Part of this subsection draws on text in: Broderick, A. (2015), *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities*, Intersentia.

In 12 EU Member States, there is a general duty to provide accessibility by anticipation for persons with disabilities. In **Bulgaria, Cyprus, France, Germany, Hungary, Ireland, Lithuania, Malta, Slovenia, Spain** and the **United Kingdom**, the accessibility obligation is contained explicitly within national law. By way of contrast, the general duty to provide accessibility in **Slovakian** law is not explicit. Rather, it has arisen as a result of interpretation by the relevant authorities of the existing legislative provisions. In the remaining Member States, there is no general duty to provide accessibility. However, many Member States' laws contain provisions requiring services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way. In spite of such legislative provisions, the achievement of accessibility in practice is still a significant challenge and many elements of the environment and infrastructure remain inaccessible to people with disabilities.

4.1.1 Accessibility obligations under Member States' laws

In **Bulgaria**, both the PADA and the IPDA provide for a general anticipatory duty to provide accessibility for persons with disabilities. As noted in the previous section of this report,²²¹ failure to comply with this obligation amounts to discrimination under Article 5 of PADA. The statutory duties are absolute and this is reflected in case law at the domestic level.²²²

Cypriot legislation provides that persons with disabilities shall enjoy equal treatment as other citizens in the provision of goods, facilities and services. The failure to carry out alterations to services or facilities which renders their use by a person with a disability unjustifiably difficult constitutes unequal treatment and is therefore prohibited by law.²²³ **Cypriot** law also provides for the right to accessibility of housing, buildings, streets and generally the natural environment and accessibility of public transport.²²⁴ None of these rights are absolute however.²²⁵

French legislation contains a general duty to provide accessibility by anticipation for people with disabilities. Law 2005-102 of 11 February 2005 for equal opportunities and integration of disabled persons, (hereafter the Law on Disability), provided for an ambitious plan to provide accessibility throughout the **French** territory by 2015. However, that plan has not been successful and, as a result, the **French** government has confirmed the postponement of the 2015 deadline for implementing accessibility of buildings open to the public and public transportation. This has essentially resulted in the postponement of prosecutions and issuance of sanctions envisaged by the law of 2005 beyond 1 January 2015.²²⁶ In addition, the **French** Administrative Supreme Court has held²²⁷ that Article 45 of the Law on Disability, which provides for complete accessibility of public transportation, except in case of manifest technical impossibility, requires that such impossibility is evaluated on a case-by-case basis.

221 See section 3.1 above.

222 The civil court of last instance, the Supreme Court of Cassation, as well as the Supreme Administrative Court, have produced a strong line of consistent decisions since 2008 holding the Government, local councils and private parties liable for discrimination against people with physical disabilities by hindering their access to the urban environment and transportation. See Bulgaria, Supreme Court of Cassation (*Върховен касационен съд*) Decision No. 1301 in civil case No. 5117/2007; Decision No. 556 in civil case No. 1514/2007; Decision No. 589 in civil case No. 1728/2007; Decision No. 1158 in civil case No. 5162/2007; and, Decision No. 1286 in civil case No.3371/2007. For a more recent example, see Bulgaria, Supreme Administrative Court (*Върховен административен съд*), Decision No. 158 of 8 January 2015 in case No. 7092/2014, 8 January 2015.

223 Cyprus, Law on Persons with Disability, Article 6(2)(d)(ii).

224 Cyprus, Law on Persons with Disability, Article 4(2)(c).

225 Rather, they are intended to be implemented through suitable measures ensuring reasonable accommodation to the maximum of available resources. Cyprus, Law amending the Law on Persons with Disabilities (Νόμος Που Τροποποιεί Τον Πери Ατομων Με Αναπηριες Νομο) No. 63(I)/2014.

226 In exchange, operators of public places and those operating transport (i.e. private and public managers, mayors and public transporters) formally undertook to abide by a schedule of deadlines for each type of accessibility works, ranging from between three months to 9 years (according to the type of works involved).

227 France, *Conseil d'Etat*, 22 June 2012, *Communauté d'agglomération du pays de Voironnais*.

German law contains a general duty to provide accessibility by anticipation for people with disabilities.²²⁸

In **Hungary**, the law establishes accessibility obligations in certain fields and prescribes various measures aimed at the creation of equal opportunities for disabled persons. The rights of people with disabilities are regulated in detail by Act XXVI of 1998 on the Rights of Persons with Disabilities (the RPD Act).²²⁹ As noted in the previous section of this report,²³⁰ the failure to make a public building accessible qualifies as direct discrimination under the ETA.²³¹ It must be pointed out however that, in its June 2013 decision²³² on the accessibility of a newly constructed bus terminal, the *Curia* (Hungary's Supreme court) accepted financial difficulties as a legitimate defence in relation to the failure to provide accessibility.²³³

Domestic law in **Ireland** contains a generalised duty to provide accessibility by anticipation for people with disabilities. Part 3 of the Disability Act (2005)²³⁴ mandates accessibility²³⁵ for persons with disabilities to public buildings²³⁶ and accessibility of services provided to a public body.²³⁷ The Ombudsman, who is charged with the enforcement of the Act, has stated that the wording of the Act may not be robust enough to ensure that public bodies take sufficient steps to improve access for persons with disabilities to buildings and services.²³⁸ In addition to the foregoing obligations under the Disability Act, public buildings (including new residential dwellings) must be accessible for people with disabilities pursuant to Part M of the Building Regulations (1997–2005).²³⁹

In **Italy**, there is a general regulation covering all work carried out on buildings and commercial activities (Law 104/1992).²⁴⁰ In addition, there are specific regulations for private buildings (Law 13/1989),²⁴¹ as well as the related accessibility standard regulated by Ministerial Decree 236/1989.²⁴² These standards regulate accessibility of buildings and urban pathways for private and public buildings and places.²⁴³

228 Germany, Equal Opportunities for Disabled People Act (*Behindertengleichstellungsgesetz – BGG*), Law of 27 April 2002 (BGBl. I, S. 1467, 1468) last amended on 19 December 2007 (BGBl. I, 3024), Section 4. According to the definition in Section 4, buildings, transportation, technical implements, acoustic and visual sources of information and means of communication, as well as other aspects of life are deemed to be accessible when disabled people have access to them and can make use of them ordinarily, without particular difficulty and generally unassisted (i.e. independently of third parties). According to Section 10 of the Act, individuals with visual impairments (blind or partially sighted) may request from the public authorities, at no extra cost, any documents needed in an accessible format, such as in Braille.

229 Hungary, Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities (1998. évi XXVI. törvény a fogyatékos személyek jogairól és esélyegyenlőségük biztosításáról), 1 April 1998, last amended 1 April 2015.

230 See section 3.1 above.

231 Hungary, Equal Treatment Authority (*Egyenlő Bánásmód Hatóság*), Case 13/2006, March 2006.

232 Hungary, Curia of Hungary (*Kúria*), No. Pfv.IV.20.104/2013/4, 22 April 2015.

233 See Hungary, Curia of Hungary (*Kúria*), No. Pfv.IV.20.104/2013/4, 22 April 2015.

234 Ireland, Disability Act (2005), Act No. 14 of 2005.

235 Ireland, Disability Act (2005), Part 3 also requires access to services (Section 26) and access to information (Section 28).

236 Ireland, Disability Act (2005), Section 25.

237 Ireland, Disability Act (2005), Section 27.

238 Irish Times (2005), 'O'Reilly warns of Flaws in Disability Legislation', 30 November 2005.

239 Ireland, Building Regulations (1997 – 2010), S.I. No. 497/1997 to S.I. No. 513/2010.

240 Italy, Law No. 104/1992 Framework Law for the assistance, social integration and rights of disabled people (*Legge-quadro per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate*) 5 February 1992 (GU n.39 del 17-2-1992 - Suppl. Ordinario n. 30).

241 Italy, Law No. 13/1989 Measures to overcome architectural barriers and to remove architectural barriers in private buildings (*Disposizioni per favorire il superamento e l'eliminazione delle barriere architettoniche negli edifici privati*), 9 January 1989 (GU n.21 del 26-1-1989).

242 Italy, Ministerial Decree No. 236/1989 on The technical requirements necessary to ensure accessibility, adaptability and visitability of private buildings and public housing subsidized and facilitated for the purpose of overcoming and removal of architectural barriers (Prescrizioni tecniche necessarie a garantire l'accessibilità, l'adattabilità e la visitabilità degli edifici privati e di edilizia residenziale pubblica sovvenzionata e agevolata, ai fini del superamento e dell'eliminazione delle barriere architettoniche) 14 June 1989 (GU n.145 del 23-6-1989 - Suppl. Ordinario n. 47) – [p. 40].

243 Information taken from, Griffo, G., Benedetti M, and Micangeli, A. (2012) *ANED, Task 4 - National Accessibility Report*, Academic Network of European Disability Experts (ANED). With regard to the regulation of public buildings, see also Italy, Presidential Decree No. 503/1996 on regulations for the elimination of architectural barriers in public buildings, public spaces and services (*Regolamento recante norme per l'eliminazione delle barriere architettoniche negli edifici, spazi e servizi pubblici*) 24 July 1996 (GU n.227 del 27-9-1996 - Suppl. Ordinario n. 160).

The **Lithuanian** Law on the Social Integration of Persons with Disabilities²⁴⁴ includes a general duty to provide accessibility in a wide range of fields, such as employment, goods and services, transport, housing and education, among others. The Law on Construction,²⁴⁵ as well as the related order from the Ministry of the Environment, set out accessibility standards in respect of buildings and infrastructure.²⁴⁶ However, these requirements are only applicable in the case of newly built infrastructure or major renovations. In one of its annual activity reports, the relevant Ombudsperson has emphasised the fact that ensuring accessibility of public buildings for people with disabilities is a long-term process, proposing that the government should prioritise accessibility of health-care and educational institutions.²⁴⁷ In 2010, the Ombudsperson investigated a complaint regarding lack of accessibility at one of the public clinics in the city of Vilnius and found that the building was not accessible for wheelchair users. In response, the Ombudsman issued a recommendation, suggesting that Vilnius city municipality should allocate other premises for the clinic, which should be accessible.²⁴⁸

In **Malta**, national law contains a general duty to provide accessibility by anticipation for people with disabilities under Article 12 of the Equal Opportunities (Persons with Disability) Act (2000).

The general duty to provide accessibility by anticipation for people with disabilities in **Slovakian** law is not explicit. Rather, it is a result of interpretation of the existing legislative provisions.²⁴⁹

In **Slovenia**, the duty to make public buildings accessible for people with disabilities is enshrined in Article 9 of the 2010 Act on Equal Opportunities of People with Disabilities.²⁵⁰ Failure to provide accessibility can only be justified if the burden on the responsible entity would be unreasonable. It remains to be seen whether failure to comply with such a duty can be invoked in a discrimination claim.

In **Spain**, Article 2(k) of the General Law on the Rights of Persons with Disabilities and their social inclusion (RDL 1/2013)²⁵¹ aims to provide for accessibility by anticipation in fields such as access to, and supply of, goods and services that are available to the public, including housing and public spaces and infrastructure.

4.1.2 Obligations to Design and Build in a Disability-Accessible Manner

In this sub-section of the report, national legislation which contains some form of duty to design and build services or infrastructure in a disability-accessible manner is addressed. However, the legislation outlined in this sub-section does not contain a general obligation to provide accessibility to disabled persons or to take anticipatory measures. This subsection is concerned primarily with accessibility standards related to legislation on building and construction. Breach of the provisions identified below does not constitute a form of discrimination.

244 Lithuania, Law on the Social Integration of Persons with Disabilities (*Lietuvos Respublikos Neįgalųjų socialinės integracijos įstatymas*), 2004, No. 83-2983.

245 Lithuania, Law on Construction (*Lietuvos Respublikos Statybos įstatymas*), 1996, No. 32-788.

246 Lithuania, Order of the Minister of Environment (*Lietuvos Respublikos Aplinkos ministro 2001-06-14 įsakymas Dėl STR 2.03.01:2001 "Statiniai ir teritorijos. Reikalavimai žmonių su negalia reikmėms" patvirtinimo*), (2001, No. 53-1898).

247 See Lithuania, Equal Opportunities Ombudsperson (2012) *Annual Report 2012 (lygių galimybių kontrolieriaus tarnybos veiklos 2012 m. Ataskaita)*, Vilnius 2013.

248 See Lithuania, Equal Opportunities Ombudsperson (2012) *Annual Report 2012 (lygių galimybių kontrolieriaus tarnybos veiklos 2012 m. Ataskaita)*, Vilnius 2013.

249 Slovakia, Anti-discrimination Act - Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act). In all of the fields covered by the Anti-discrimination Act (employment and occupation, social security, education, healthcare, provision of goods and services, including housing), account must be taken of the general duty to adopt measures aimed at the prevention of discrimination which is enshrined in Section 2(3) of the Anti-discrimination Act.

250 Slovenia, Act on Equal Opportunities for People with Disabilities.

251 Spain, General Law on the rights of Persons with Disability and their Social Inclusion.

In **Belgium**, the Framework Act of 17 July 1975²⁵² first introduced the requirement for buildings open to the public to be accessible to persons with disabilities. Since 1980, legislation connected with construction is a competence of the Regions.²⁵³

In **Croatia**, the obligation to design and construct buildings and infrastructure in a disability-accessible manner is contained in the Regulations on Accessibility of Buildings to Persons with Disabilities.²⁵⁴

Similarly, in the **Czech Republic**, accessibility standards have been introduced into legislation on building and construction, such as the Law on spatial planning and construction²⁵⁵ and the Decree on general technical requirements securing general accessibility of buildings.²⁵⁶

Notwithstanding the absence of national legislation in the field of disability accessibility, **Danish** building laws²⁵⁷ include a number of requirements relating to physical accessibility that must be respected when building new infrastructure.²⁵⁸ A 2004 Regulation²⁵⁹ covers all publicly accessible buildings and commercial buildings used for providing services and by the public administration.

In **Estonia**, Article 3(9) of the Law on Building requires buildings and infrastructure to be designed and built in a disability-accessible manner.²⁶⁰

There is a similar requirement contained in Section 117(3) of the **Finnish** Land Use and Building Act.²⁶¹

In **Greece**, Article 28 of Law 2831/2000²⁶² establishes detailed technical accessibility standards. Planning permission for any new building is conditional on compliance with these standards.

In **Latvia**, Chapter 4 of the Construction Law,²⁶³ which came into effect on 1 October 2014, requires that buildings and infrastructure meant for public use be designed in a manner that enables access of persons with disabilities.²⁶⁴

252 Belgium, Framework Act on the access of persons with disabilities to buildings accessible to the public (*Loi du 17 Juillet 1975, sur l'accès des personnes handicapées aux bâtiments accessibles au public*), 17 July 1975.

253 However, the Federal Government is still competent with regard to the rules on traffic on public roads. See, for example, the Ministerial circular of 3 April 2001 on reserved parking for persons with disabilities (*Ministeriële omzendbrief betreffende het voorbehouden van parkeerplaatsen voor personen met een handicap*), 3 April 2001, as amended on 25 April 2003.

254 Croatia, Regulations on Accessibility of Buildings to Persons with Disabilities (*Pravilnik o osiguranju pristupačnosti građevina osobama s invaliditetom i smanjene pokretljivosti*), Official Gazette No. 78/2013, 153/2013.

255 Czech Republic, Law on spatial planning and construction (*O územním plánování a stavebním řádu*), No. 183/2006 Coll, 14 March 2006.

256 Czech Republic, Decree on general technical requirements securing general accessibility of buildings (*O obecných technických požadavcích zabezpečujících bezbariérové užívání staveb*), No. 398/2009 Coll, 5 May 2009.

257 Denmark, Building Regulations 2010 (*Bygningsreglement 2010*), BEK 810 of 28 June 2010.

258 Denmark, Building Regulations 2010; Denmark, Danish Enterprise and Construction Authority (2008), *Guidance to local authorities on building matters of accessibility provisions* (*Erhvervs- og Byggestyrelsen, Vejledning til kommunerne om byggesagsbehandling af tilgængelighedsbestemmelser*). See, Sørensen, S. and Justesen, P (2013), *Tilgængelighed til Offentligt Nybyggeri*, Institut for Menneskerettigheder (Danish Human Rights Institute).

259 Denmark, Order on accessibility measures relating to the refurbishment of existing buildings (*Bekendtgørelse om tilgængelighedsforanstaltninger i forbindelse med ombygninger i eksisterende byggeri*), BEK nr 1250 of 13 December 2004.

260 Estonia, Law on Building (*Ehitusseadus*), RT I 2002, 47, 297.

261 Finland, Land Use and Building Act (*Maankäyttö- ja rakennuslaki*), (132/1999), Section 117(3); Finland, Land Use Building Decree (*Maankäyttö- ja rakennusasetus*), (895/1999), Section 53.

262 Greece, Law 2831/2000 Amendment of the provisions of Law 1577/85 related to the applicable Building Contractor Regulations (Τροποποίηση των διατάξεων του ν. 1577/85 «Γενικός Οικοδομικός Κανονισμός» και άλλες πολεοδομικές διατάξεις), (OJ 140 A /13 June 2000).

263 Latvia, Construction Law (*Būvniecības likums*), 7 September 2013 (in force from 1 October 2014).

264 Latvia, Cabinet of Ministers Regulations of 29 January 2009 'Regulations on Mandatory Requirements for Health Care Facilities', including those of physical access, came into effect on 1 January 2014.

In **Luxembourg**, the Law of 29 March 2001²⁶⁵ on accessibility of spaces open to the public, obliges the public administrative institutions to allow access for disabled persons by ensuring that newly built or refurbished buildings are adapted to the needs of people with disabilities.

In the **Netherlands**, the Dutch Ministry for Infrastructure and the Environment has issued a decree (the so-called '*Bouwbesluit*'), which stipulates certain accessibility requirements relating to public buildings.²⁶⁶ A similar decree exists in relation to the construction of buses and trains.²⁶⁷ The Dutch Ministry for Education has also issued detailed instructions on the construction of schools, as did the Ministry of Health in relation to hospitals and medical service centres.²⁶⁸

In **Poland**, the general Construction Act requires that public buildings and multi-family residences should be planned and constructed to be useable by persons with disabilities.²⁶⁹ There is not, however, an obligation to renovate existing properties. In addition, the foregoing obligation may be waived, if justified.

In **Portugal**, Decree-Law 163/2006²⁷⁰ mandates that services available to the public must be designed and built in an accessible manner. It applies to facilities and the surrounding spaces of the central, regional and local administration, in addition to public institutions related to the provision of personalised services or public funds.²⁷¹ The Decree-law also applies to a wide range of buildings and public facilities.²⁷²

The **Swedish** Planning and Building Act imposes certain obligations on the relevant authorities to design and build in a disability-accessible manner.²⁷³ With respect to public authorities, there is a general duty to conduct an assessment of accessibility in all their activities and to develop accessibility plans to that end.²⁷⁴ The new discrimination ground of inadequate accessibility does not apply to private residences, nor does it apply to buildings where goods are sold or services are provided.

Lastly, in the **United Kingdom**, domestic building regulations²⁷⁵ provide specifications according to which buildings must be designed, built and (where relevant) renovated. Those specifications were drafted with a view to providing a degree of accessibility to persons with disabilities but they do not impose on-going obligations to maintain accessibility with regard to existing buildings.

265 Luxembourg, Law of 29 March 2001 on accessibility of spaces open to the public (*Loi 29 mars 2001 portant sur l'accessibilité des lieux ouverts au public*) 29 March 2001 (n° 43 du 17 April 2001).

266 Netherlands, Decree of 29 August 2011, concerning the determination of rules regarding the construction, utilisation and demolition of buildings (Building decree 2012) (*Besluit van 29 augustus 2011 houdende vaststelling van voorschriften met betrekking tot het bouwen, gebruiken en slopen van bouwwerken (Bouwbesluit 2012)*) 27 September 2011, Staatsblad 2011, 416. See Articles 6:48 and 6:49.

267 Netherlands, Decree of 31 March 2011, concerning rules regarding the accessibility of public transport and the adaptations to be carried out thereto (*Besluit van 31 maart 2011 houdende regels betreffende de toegankelijkheid van het openbaar vervoer en de daartoe te verrichten aanpassingen*) 31 March 2011, Staatsblad 2011, 225.

268 These are included in Netherlands, Decree of 29 August 2011, concerning the determination of rules regarding the construction, utilisation and demolition of buildings (Building decree 2012) (*Besluit van 29 augustus 2011 houdende vaststelling van voorschriften met betrekking tot het bouwen, gebruiken en slopen van bouwwerken (Bouwbesluit 2012)*) 27 September 2011, Staatsblad 2011, 416.

269 Poland, Construction Act - Act of 7 July 1994 on Construction (*Ustawa z 7 lipca 1994 Prawo budowlane*), 7 July 1994 (Dziennik Ustaw No. 89, Item 414), Article 5.1 point 4.

270 Portugal, Decree-Law 163/2006 of 8 August 2006 (*Decreto-Lei Nº 163/2006 de 8 de Agosto*), Diário da República Nº 152/2006, Série I de 2006-08-08, Articles 2 and 9.

271 Portugal, Decree-Law 163/2006 of 8 August 2006, Article 2 (1).

272 Portugal, Decree-Law 163/2006 of 8 August 2006, applies to public buildings and facilities related to health, education, social services, goods and services, transport, parking, housing, churches, museums, theatres, cinema, prisons, sport facilities, gardens, beaches, discos, hotels, etc.

273 Sweden, Planning and Building Act (*Plan- och bygglag*), (2010:900).

274 Sweden, Ordinance on the Responsibility of Public Agencies to Effectuate the Governments Disability Policy (*Förordning om de statliga myndigheternas ansvar för genomförande av funktionshinderspolitiken*), (2001:526)

275 United Kingdom, Department for Communities and Local Government (2015), *Approved Document M (Access to and Use of Building)*, March 2015.

4.1.3 Challenges regarding the achievement of accessibility at Member State level

In spite of the positive developments highlighted in this section of the report, the achievement of widespread disability accessibility remains a challenge and there is ample evidence from EU Member States that accessibility is not being achieved across all targeted areas. This sub-section of the report briefly identifies a few instances in which accessibility has not been achieved.

A setback to achieving progress on accessibility occurred in **Austria** in 2010 when it was decided that the Federal Government and some federal institutions were to be granted immunity relating to physical barriers until 2020.²⁷⁶

In **Hungary**, the individual communication brought before the CRPD Committee by Hungarian citizens Szilvia Nyusti and Péter Takács²⁷⁷ demonstrates the fact that, in spite of the gradually improving legal framework and the ratification of the CRPD, there is still much room for improvement. In that communication, the Committee found that **Hungary** had failed to comply with its obligations under Article 9(2)(b) of the CRPD, to ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities.

Other challenges result from Member States' legislation and practice. For instance, while the **Lithuanian** Law on the Social Integration of Persons with Disabilities includes a general duty to provide accessibility in a wide range of fields, the law does not establish a monitoring mechanism and does not provide any details as to how these principles should be implemented in practice. Meanwhile, in **Malta**, the latest report of the Maltese National Commission Persons with Disability (NCPD)²⁷⁸ reveals that there are five pending court cases on accessibility to public buildings.

This sub-section of the report has provided a general overview of the types of issues arising at Member State level on accessibility. However, it is certainly not an exhaustive list. In general, one can expect challenges to the achievement of accessibility to arise in all Member States, and the examples provided here are merely illustrative.

4.2 Legislative and policy developments on education (not covering discrimination) at Member State level

Access to education is one of the three areas covered by the 2008 Commission proposal. In addition, and more broadly, Article 24 of the CRPD mandates an inclusive approach to education for persons with disabilities, requiring non-discriminatory access to educational institutions and content, reasonable accommodation measures and other forms of individualised support, as well as appropriate forms of communication, training for teachers and lifelong learning. The objective of this sub-section of the report is to delineate the various legislative and policy enactments in the EU Member States, as well as the latest developments in educational practice, relating to integration or inclusion of persons with disabilities. This acts as a backdrop for later sections of this report, in which reasonable accommodation measures for persons with disabilities in education are considered.

276 See Austria, Budget Implementation Act 2011 (*Budgetbegleitgesetz 2011*) BGBl. I No. 111/2010, Article 105. In return for immunity all federal ministries, the presidents of the Constitutional Court, the Administrative High Court, the Court of Auditors, the National Council, the Federal Council (*Bundesrat*) as well as the National Ombudsman Institution have to publish their plans for improvement of accessibility on their respective websites. Once the plan has been published, indirect discrimination resulting from physical barriers in buildings utilized by the Federation will only be deemed to occur, when the removal of these barriers is scheduled in that plan and when this has not been implemented by 31 December 2019.

277 UN Committee on the Rights of Persons with Disabilities, Individual Communication taken by Szilvia Nyusti and Péter Takács, Communication No. 1/2010, views adopted by the Committee at its ninth session (15-19 April 2013).

278 Malta, Maltese National Commission for Persons with Disabilities (NCPD) Report. Available at: <http://www.knpd.org>.

The legislative provisions and policy documents in almost all EU Member States demonstrate a trend towards integration of persons with disabilities in education. Significant legislative and policy improvements have been made in recent times with regard to ensuring the possibility of mainstream educational provision for disabled persons. The entry into force of the CRPD has influenced certain policies in the Member States but it has not had any great influence on the introduction of new legislative provisions, with some notable exceptions, such as the **Slovenian** Act on Equal Opportunities of People with Disabilities. Notwithstanding the positive trends highlighted below, many children with disabilities continue to be excluded from the mainstream education environment throughout the EU.

4.2.1 A shift towards integrated education at Member State level

In **Austria**, the last decade has brought a clear shift away from segregation towards inclusion of persons with disabilities in the mainstream education system. On 24 July 2012, the 'National Action Plan regarding Disability'²⁷⁹ was adopted by the Council of Ministers. That plan establishes, *inter alia*, a clear commitment for the further development of inclusive schooling rather than segregated or 'special' schooling.

Education is an exclusive competence of the Communities in the **Belgian** federal system.²⁸⁰ The Flemish Government has adopted a Decree to promote the integration into the mainstream educational system of children with intellectual disabilities. The Decree provides for pedagogical support and supplementary hours in schools, among other measures.²⁸¹ Similarly, a Cooperation Agreement (approved by a Decree of 31 March 2004) between the French Community and the Commission communautaire française seeks to support schools (in either the mainstream or the special educational system), which welcome children with disabilities.²⁸²

In **Bulgaria**, the National Programme on Developing School Education and Preschool Instruction and Preparation (2006–2015) calls for accessible physical environments, individualised curricula, as well as the provision of special textbooks, learning materials and training of teachers. In addition to other legislation (which is discussed in a later section of this report),²⁸³ IPDA provides for accommodation duties at school and university level.²⁸⁴ Pursuant to Article 17(2) of IPDA, the Minister of Education and Science has an absolute duty to provide disabled children with a supportive environment conducive to ensuring integrated education. Under secondary legislation,²⁸⁵ children with disabilities are to benefit from individual educational programmes provided within the generally applicable curricula,²⁸⁶ and a supportive environment.²⁸⁷

279 Austria, Federal Ministry of Labour, Social Affairs and Consumer Protection (2012), *National action plan on disability, 2012–2020* (*Nationaler aktionsplan behinderung 2012 – 2020*).

280 Belgium, Constitution of Belgium, Article 127, § 1, al. 1, 2°.

281 Belgium, Executive Regulation of the Flemish Government on the integration of children with a moderate or severe intellectual disability in primary and secondary education (*Besluit van de Vlaamse regering betreffende de inclusie van leerlingen met een verstandelijke beperking in het gewoon lager en secundair onderwijs*), 2 March 2004.

282 Belgium, Decree approving the cooperation agreement between the French Community and the Commission communautaire française (Cocof), in supporting inclusive education for youth with disabilities (French Community) (*Décret portant assentiment de l'Accord de coopération entre la Communauté française et la Commission communautaire française, en matière de soutien à l'intégration scolaire pour les jeunes en situation de handicap*), 31 March 2004.

283 See section 7 of this report.

284 Bulgaria, Integration of Persons with Disabilities Act, Article 17 and Article 20.

285 Bulgaria, Ordinance No. 1 of 23 January 2009 on the Education of Children and Pupils with Special Educational Needs and/or Chronic Ailments (*наредба № 1 от 23 януари 2009 г. За обучението на деца и ученици със специални образователни потребности и/или с хронични заболявания*), SG 11/10 February 2009.

286 Bulgaria, Ordinance No. 1 of 23 January 2009 on the Education of Children and Pupils with Special Educational Needs and/or Chronic Ailments, Article 5.

287 See Bulgaria, Integration of Persons with Disabilities Act, Article 7, Article 13 (2), Article 14, Article 26 (2.6–11), Article 31 (2) and Article 32.

The **Croatian** Act on Primary and Secondary Education²⁸⁸ provides that primary and secondary education is based on the principle of equal educational opportunities for all students (in accordance with their abilities).²⁸⁹ **Croatian** policy documents recognise expressly the need to integrate people with disabilities into the mainstream education system. Such documents include the National Strategy for Persons with Disabilities (2003–2006),²⁹⁰ the further National Strategy for Persons with Disabilities (2007–2015),²⁹¹ and the Parliamentary Declaration on the Rights of People with Disabilities.²⁹²

From September 2001, the Ministry of Education in **Cyprus** has applied the Training and Education of Children with Special Needs Law of 1999²⁹³ and Regulations on the Mechanism for the Timely Diagnosis of Children with Special Needs of 2001.²⁹⁴ According to the foregoing legislation, assistance shall be provided to children with special needs in all fields of education, where this is possible.

In March 2015, the **Czech** Parliament adopted an amendment to Law 561/2004²⁹⁵ (the Education Act) to provide for support measures²⁹⁶ for students with special educational needs/disabled persons. Moreover, on 27 August 2014, the **Czech** Government approved an amendment to the Schools law, which includes a new categorisation of pupils with special educational needs (based not on diagnosis, but on the degree of support required) and control mechanisms against the placement of pupils in special schools'.²⁹⁷

In **Denmark**, the Act on State School²⁹⁸ has recently been amended with the aim of including more students with special needs in mainstream education.²⁹⁹ Amendments to the Danish Education Act were adopted in 2012 with the same aim.³⁰⁰

Schools for students with special educational needs are regulated under Article 2(4) of the **Estonian** Law on Basic School and Upper Secondary School.³⁰¹ The general understanding among the relevant authorities in **Estonia** is that disabled pupils should study in mainstream classes/schools, whenever possible. However, education in segregated special schools is also available.

In **Finland**, according to Section 6 of the new Non-Discrimination Act, educational authorities must take necessary action to foster equality. This implies that schools must draft an equality plan, taking into consideration all discrimination grounds and measures to improve equality for all students. Educational policy in **Finland** has been based on the principle of community schooling since the early 1980s,³⁰² according to which all students should be able to attend school in their own residential area.

288 Croatia, Act on Primary and Secondary Education (*Zakon o odgoju i obrazovanju u osnovnoj i srednjoj školi*) Official Gazette No. 87/2008, 86/2009, 92/2010, 105/2010, 90/2011, 5/2012, 16/2012, 86/2012, 94/2013, 152/2014.

289 Croatia, Act on Primary and Secondary Education, Article 4(2)(2).

290 Croatia, National Strategy for Persons with Disabilities (2003–2006) (*Nacionalna strategija jedinstvene politike za osobe s invaliditetom od 2003. Do 2006. Godine*), Official Gazette No. 13/2003.

291 Croatia, National Strategy for Persons with Disabilities (2007–2015) (*Nacionalna strategija izjednačavanja mogućnosti za osobe s invaliditetom od 2007. Do 2015. Godine*) Official Gazette No. 63/2007.

292 Croatia, Parliamentary Declaration on the Rights of People with Disabilities (*Deklaraciju o pravima osoba s invaliditetom*) Official Gazette 47/2005.

293 Cyprus, Law on training and education of children with special needs of 1999 (ο περί Αγωγής και Εκπαίδευσης Παιδιών με Ειδικές Ανάγκες Νόμος του 1999) N.113(I)/1999 as amended.

294 Cyprus, Regulations on the Mechanism for the Timely Diagnosis of Children with Special Needs of 2001, No. 185(I)/2001.

295 Czech Republic, Law on pre-school, primary, secondary and higher vocational and other education (Education Act) (*O předškolním, základním středním, vyšším odborném a jiném vzdělávání*), No. 561/2004 Coll.

296 See generally Czech Republic, Law on pre-school, primary, secondary and higher vocational and other education (Education Act), Section 16.

297 Zahumenský, D., European network of legal experts in gender equality and non-discrimination (2014), *Country report 2014 on the non-discrimination directives Reporting period 1 January 2014 – 31 December 2014, Czech Republic*, European Community Programme for Employment and Social Solidarity, at p. 34.

298 Denmark, Act on State School (*Folkeskoleloven*) LBK No. 665 of 20 June 2014.

299 Denmark, Act on State School, Section 3(a) and 5(5).

300 Information can be found on the website of the Danish Ministry of Education, available at: <https://www.uvm.dk/Uddannelser/Folkeskolen/Laering-og-laeringsmiljoe/Inklusion/Regler-om-inklusion?allowCookies=on>.

301 Estonia, Law on Basic School and Upper Secondary School (*Põhikooli- ja gümnaasiumiseadus*), RT I 2010, 41, 240.

302 Finland, Ministry of Social Affairs and Health (2010) *Disability Policy Programme VAMPO 2010–2015* (Suomen vammaispoliittinen ohjelma VAMPO 2010–2015), p. 78. Available at: http://www.vane.to/images/stories/vampo_verkko.pdf.

In **France**, Article 11 of the Law on Disability³⁰³ affirms a right of access to local mainstream schools and the right to a personalised educational programme.³⁰⁴ Furthermore, a right to access mainstream schools is conferred by Article L112-1 of the Code of Education. In a landmark case in 2011,³⁰⁵ the *Conseil d'Etat* went quite far in delineating the obligations of the state with regard to the personalised education programme for disabled students, when it ruled that the duty on the state was an obligation of result to be implemented without delay, regardless of budgetary and logistical considerations.

In **Germany**, the focus of legislation is to educate pupils with disabilities in integrated schooling.³⁰⁶ In a leading case, a general ban on integrated education was held to be unconstitutional.³⁰⁷

In accordance with Law 2817/2000,³⁰⁸ the general rule in **Greece** is integration in mainstream education, with the exception (in very special cases) being segregated education. The above legislative framework has been complemented by Law 3699/2008.³⁰⁹ The goal of this law is to guarantee all children with disabilities the right to education, and social and professional integration, along with equal opportunities for full participation in mainstream society.

The rights of people with disabilities in **Hungary** are regulated in detail by the RPD Act. Pursuant to Article 13(1) of that Act, persons with disabilities have the right to participate in early development and care, nursery education, school education, developmental preparation, vocational training, adult training and tertiary education.

In **Ireland**, the Education for Persons with Special Educational Needs Act (EPSEN)³¹⁰ of 2004 clearly favours inclusive education. The EPSEN Act has as one of its primary objectives 'to provide that people with special educational needs shall have the same right to avail of, and benefit from, appropriate education as do their peers who do not have such needs.'³¹¹

The **Italian** Law No. 104/1992³¹² supports the integration of persons with disabilities in society generally. In addition, the law of 9 January 2004 on measures to favour the access of persons with disability to informatics devices is relevant.³¹³ The approach of the Italian government is based on integrated education, with individualised supports.

In **Latvia**, Regulation 710 of 2012 on the Provision of General Basic Education and General Secondary Education Institutions According to Special Needs³¹⁴ provides that a student with a disability may be integrated either in a mainstream classroom or in a special class for students with special needs within a mainstream school and outlines necessary 'provisions'³¹⁵ or adaptations for such students.

303 France, Equality of Rights and Opportunities, Participation and Citizenship of People with Disabilities Law.

304 With regard to access to facilities, education and support for persons with autism, a national plan was initiated in 2004 to provide resources at the regional level, followed by a plan for 2005-2006 (*Plan Autisme 2005-2006*) to provide resources at the local level. Available at: <http://www.psydoc-france.fr/Professi/Autisme/Plans/PlanAutisme2005-2006.pdf>.

305 France, Council of State (*Conseil d'Etat*), N° 345442, Inédit au recueil Lebon, 20 April 2011.

306 Section 4.3 SGB IX. The school laws of the Länder contain detailed regulations on the matter.

307 See Germany, Federal Constitutional Court (*Bundesverfassungsgericht*) BVerfGE 96, 288, 8 October 1997.

308 Greece, Law 2817/2000 on the education of persons with special educational needs and other provisions (Εκπαίδευση των ατόμων με ειδικές εκπαιδευτικές ανάγκες), (OJ 78 A /14 March 2000).

309 Greece, Law 3699/2008 on special education of individuals with disability or special educational needs (Ειδική Αγωγή και Εκπαίδευση ατόμων με αναπηρία ή με ειδικές εκπαιδευτικές ανάγκες), (OJ 199 A /02 October 2008).

310 Ireland, Education for Persons with Special Educational Needs Act (2004), Act No. 30 of 2004.

311 Ireland, Education for Persons with Special Educational Needs Act (2004), Preamble.

312 Italy, Law No. 104/1992 Framework Law for the assistance, social integration and rights of disabled people.

313 Italy, Law No. 4/2004 on Measures to favour the access of persons with disability to informatics devices (*Disposizioni per favorire l'accesso dei soggetti disabili agli strumenti informatici*), 9 January 2004 (GU n.13 del 17-1-2004).

314 Latvia, Regulation 710 on the Provision of General Basic Education and General Secondary Education Institutions According to Special Needs (*Noteikumi par vispārējās pamatizglītības un vispārējās vidējās izglītības iestāžu nodrošinājumu atbilstoši izglītojamo speciālajām vajadzībām*), 16 October 2012. Special needs is used in respect to education and, apart from children with disabilities, also include children who do not have disability as defined by the Law on Disability.

315 The word used in the relevant legislation is 'nodrošinājums'.

In **Lithuania**, the education of persons with disabilities is governed primarily by the Law on Social Integration of Persons with Disabilities³¹⁶ and by the Law on Education.³¹⁷ The aforementioned laws support partial or full integration of children with disabilities in mainstream education. According to Article 14 of the Law on Education, the state has the responsibility to ensure that children with disabilities are given appropriate assistance at all levels of the education system. In addition to the foregoing, a broad range of measures are foreseen under the National Programme for Integration of Persons with Disabilities (2013–2019), which is partly based on the CRPD.

In **Luxembourg**, the Law of 15 July 2011³¹⁸ and the Law of 28 June 1994³¹⁹ set out a variety of measures to facilitate the integration of persons with disabilities in mainstream education, including reasonable accommodations.³²⁰

The **Maltese** Equal Opportunities (Persons with Disability) Act (2000) enshrines the right of persons with a disability to equal opportunities in all fields, including in education.

Several provisions of **Dutch** law are designed to facilitate integrated education for children with disabilities. In August 2014, the Tailored Education Act on special education for intellectually and physically disabled students³²¹ came into force. The Act imposes an obligation on mainstream schools to accept pupils with learning disabilities and to offer them an adapted learning programme/special assistance.³²²

In **Portugal**, according to Decree-Law 3/2008,³²³ children with disabilities should be integrated in mainstream education whenever possible (including placement in special classes in mainstream schools, where appropriate).

In **Romania**, Article 15 of Law 448/2006 guarantees the right to education of disabled children in the form chosen by the child, his parents or guardians.³²⁴ Additionally, Law 272/2004 on the protection of the rights of the child provides for integration, adapted to the needs of the child.³²⁵

316 Lithuania, Law on the Social Integration of Persons with Disabilities

317 Lithuania, Law on Education (*Lietuvos Respublikos Švietimo įstatymas*), 1991, No. 23-593.

318 Luxembourg, Law of 15 July 2011 on 2011 on access to school and professional qualifications of pupils with special educational needs (*Loi du 15 juillet 2011 visant l'accès aux qualifications scolaires et professionnelles des élèves à besoins éducatifs particuliers*), 15 July 2011 (No. 150 of 22 July 2001).

319 Luxembourg, Law of 28 June 1994; Law of 28 June 1994 amending and supplementing: a) the amended law of 10 August 1912 concerning the organisation of primary education; b) the amended Law of 14 March 1973 on the establishment of institutes and differentiated education services; for the participation of children with a disability in regular education and their school integration (*Loi du 28 juin 1994 modifiant et complétant a) la loi modifiée du 10 août 1912 concernant l'organisation de l'enseignement primaire; b) la loi modifiée du 14 mars 1973 portant création d'instituts et de services d'éducation différenciée; en faveur de la participation d'enfants affectés d'un handicap à l'enseignement ordinaire et de leur intégration scolaire*) 28 June 1994 (No. 68 of 27 July 1994).

320 Luxembourg, Law of 15 July 2011 on 2011 on access to school and professional qualifications of pupils with special educational needs, Articles 2-5 provide for reasonable accommodations in school,

321 Netherlands, Tailored Education Act (*Wet van 11 oktober 2012 tot wijziging van enkele onderwijswetten in verband met een herziening van de organisatie en financiering van de ondersteuning van leerlingen in het basisonderwijs, speciaal en voortgezet speciaal onderwijs, voortgezet onderwijs en beroepsonderwijs (Wet Passend Onderwijs)*), 11 October 2012, Staatsblad 2012, 533.

322 Netherlands, Tailored Education Act.

323 Portugal, Decree-Law 3/2008 of 7 January 2008 (*Decreto-Lei N° 3/2008 de 7 de Janeiro*), Diário da República N° 4/2008, Série I de 2008-01-07.

324 Romania, Law 448/2006 on protection and promotion of rights of persons with a handicap (*Lege privind protecția și promovarea drepturilor persoanelor cu handicap, legea nr. 448/2006*), 6 December 2006 (Monitorul Oficial al României No. 1006 of 18 December 2006), republished in 2008, Article 17.

325 Romania, Law 272/2004 on the Protection and Promotion of the Rights of the Child (*Legea 272/2004 privind protecția și promovarea drepturilor copilului*), 21 June 2004 (Monitorul Oficial al României, Part I No. 557 of 23 June 2004), republished in 2014, Article 46.2.

In **Slovakia**, the Schools Act³²⁶ contains provisions³²⁷ designed to accommodate the needs of children and pupils with disabilities. Article 94 of the Act provides that the education of pupils with 'health disadvantage' (which includes pupils with disabilities according to Section 2(k) of the Act) should take place in either special schools, or alternatively in mainstream education (in special classes or in classes together with other pupils, in which case the student can have an individual educational programme).

Recently there has been an important legislative initiative in **Slovenia**, influenced by the entry into force of the CRPD. According to Section 11 of the 2010 Act on Equal Opportunities of People with Disabilities, there is a duty to ensure to people with disabilities inclusion into educational programmes at all levels.³²⁸

In a similar vein, the general goal of the **Spanish** education system is to educate pupils with disabilities in integrated settings. In that regard, Article 74 of the Organic Law on Education provides that schooling for pupils with special educational needs, including those resulting from disability, shall be governed by the principle of integration and shall guarantee non-discrimination and effective equality in access to, and continuance in, the (mainstream) education system.³²⁹

According to the **Swedish** School Act,³³⁰ a pupil may only be denied a place at the nearest local school, or the school of choice, if entering the school would cause a substantial organisational or financial burden on the school.³³¹

In the **United Kingdom**, there is a system of 'statementing' in place, in addition to the prohibition of disability discrimination in education³³². Under this 'statementing' system, children with severe special educational needs are entitled to have those needs documented. The educational resources required to meet the stipulated needs must then be funded by the state. This system is currently undergoing significant change. In September 2014, a new Special Educational Needs and Disability (SEND) Code of Practice³³³ came into force, according to which Education Health and Care Plans will gradually replace the 'statementing' system.

4.2.2 Challenges to the provision of inclusive or integrated education

In spite of the positive developments highlighted in this section of the report, the achievement of inclusive or integrated education for children with disabilities remains a challenge and there is ample evidence from EU Member States that disabled children continue to be excluded from mainstream education in many cases. This sub-section of the report briefly identifies a handful of issues which have arisen within the Member States in that regard.

The CRPD Committee has expressed great concern about inclusive education in its Concluding Observations to a number of Member States. For instance, its observations addressed to **Austria** (issued in September 2013)³³⁴ noted 'that progress towards inclusive education in **Austria** appears to have stagnated' and 'that the number of children in special schools is on the increase and that insufficient effort has been

326 Slovakia, Schools Act - Act No. 245/2008 Coll. on Education (Schools Act) (*zákon č. 245/2008 Z. z. o v ýchove a vzdelávaní (školský zákon)*) a o zmene a doplnení niektorých zákonov), 22 May 2008.

327 Slovakia, Schools Act, Sections 94-102.

328 However, Article 11 of the Slovenian Act on Equal Opportunities for People with Disabilities further stipulates that placement in special schools with adjusted programmes does not constitute discrimination.

329 Spain, Organic Law on Education.

330 Sweden, School Act (*Skollag*), (2010:800).

331 Sweden, School Act, Chapter 10, Section 30.

332 United Kingdom, Equality Act 2010 (Great Britain) Sections 84-99; Disability Discrimination Act 1995 (Northern Ireland), Sections 28A-31C.

333 United Kingdom, Department for Education and Department of Health (2015), *Special educational needs and disability code of practice: 0 to 25 years, Statutory guidance for organisations which work with and support children and young people who have special educational needs or disabilities* – this code applies only to England.

334 United Nations (UN), Committee on the Rights of Persons with Disabilities (CRPD) (2013), *Concluding observations on the initial report of Austria*, UN Doc. CRPD/C/AUT/CO/1 adopted at the 10th session, 2–13 September 2013.

made to support the inclusive education of children with disabilities'.³³⁵ Similar observations were made by the CRPD Committee in respect of **Belgian** progress in ensuring effective education for persons with disabilities.³³⁶ Furthermore, the 2010 shadow report prepared for the CRPD Committee by the **Hungarian** Disability Caucus strongly criticises the provision of education for disabled students in **Hungary**.³³⁷

In **Cyprus**, the Ombudsman and the Commissioner for the Rights of the Child³³⁸ have both maintained a focus on integrated education in recent years and have criticised the inadequate structures and the support provided to children with disabilities.³³⁹ The fragmentation in support services for both children with disabilities and their parents has in fact resulted in a trend towards special education.³⁴⁰ Moreover, in **Romania**, case law and NGO reports indicate that fundamental problems remain with the implementation of the legal framework in order to ensure inclusive education.³⁴¹

In general, one can expect challenges in respect of the realisation of inclusive or integrated education for children with disabilities in all Member States, and the examples provided here are merely illustrative of the kinds of issues and barriers which arise in that respect.

4.2.3 Conclusion on legislative and policy developments on education (not covering discrimination) at Member State level

This sub-section of the report has outlined the most relevant national legislative provisions and the latest policy developments in the various EU Member States relating to accessibility and education. This analysis serves as a backdrop to the next few sections of the report, which will focus on reasonable accommodation obligations in the various EU Member States in the areas covered by the 2008 proposal. As outlined above, several Member States have already enacted a general duty to provide accessibility by anticipation for persons with disabilities and many Member States demonstrate positive trends in the provision of education for persons with disabilities. On the other hand, there is much room for improvement in the majority of EU Member States with regard to accessibility and education laws and practices.

335 United Nations (UN), Committee on the Rights of Persons with Disabilities (CRPD) (2013), *Concluding observations on the initial report of Austria*, UN Doc. CRPD/C/AUT/CO/1 adopted at the 10th session, 2–13 September 2013, para. 40.

336 United Nations (UN), Committee on the Rights of Persons with Disabilities (CRPD) (2014), *Concluding observations on the initial report of Belgium*, UN Doc. CRPD/C/BEL/CO/1 adopted at the 12th session, 15 September – 3 October 2014.

337 Hungarian Disability Caucus (2010), *Disability Rights or Disabling Rights? CRPD Alternative Report*, SINDOZ, MDAC and FESZT, August 2003, p. 153.

338 The economic crisis, the budget cuts and staff shortages at schools are impeding any efforts to improve inclusive education. Cyprus, Commissioner for the Rights of the Child (2011), *Position regarding training and education of children with disabilities: Result of public consultation* (Θέση Επιτρόπου Προστασίας των Δικαιωμάτων του Παιδιού για την Αγωγή και Εκπαίδευση Παιδιών με Αναπηρίες: Αποτέλεσμα Δημόσιας Διαβούλευσης) Nicosia, December 2011.

339 For a critique on the absence of a single registry of all children with disabilities see Playbell S. (2010), 'Children's Rights for All: Monitoring the Implementation of the UN Convention on the Rights of the Child for Children with Intellectual Disabilities, National Report of Cyprus', December 2010.

340 Demetriou, C., Milieu (2014), *Country Report on Cyprus for the Study on Member States policies for children with disabilities*, European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' rights and constitutional affairs, Civil Liberties, Justice and Home Affairs.

341 See European Centre for the Rights of Children With Disability (2015), *Isolated among us – dimensions of participation of children with special needs in education (IZOLAȚI PRINTRE NOI – Dimensiuni ale participării copiilor cu cerințe educaționale speciale în sistemul de educație românesc)*. This report clearly shows that children with disabilities are educated in segregated settings or not enrolled in schools at all. See: <http://www.cedcd.ro/100-milioane-euroan-costul-izolarii-copiilor-cu-dizabilitati/>.

5 Reasonable accommodation duties in the Member States

In this section of the report we outline the extent to which there are reasonable accommodation duties extending beyond employment in the 28 EU Member States in the various fields covered by the Commission's 2008 proposal. In addition, we explore the nature of the duty to accommodate as outlined in legislation and associated explanatory documents. In many instances, the relevant legislation provides cursory information regarding the reasonable accommodation duty and related case law is also scarce. However, in some cases, legislation or explanatory documents provide a deeper insight into the duty, and the manner in which it is to be assessed. We have endeavoured to pay particular attention to such provisions.

The obligation to reasonably accommodate persons with disabilities is an individualised one, which can be described as requiring duty-bearers 'to take positive steps to remove the disadvantage which a particular disabled person would otherwise experience because of some aspect of the duty-bearer's operations or structure'.³⁴² The duty to accommodate can encompass either reactive or anticipatory obligations. In the majority of cases, the reasonable accommodation duty entails an obligation to respond to the individualised circumstances and needs of a particular disabled person and is therefore reactive. In that regard, entities are obliged to take effective measures in order to remove or reduce the disadvantage experienced by the disabled individual in question. By way of contrast with the more widespread reactive reasonable accommodation duties, a minority of EU Member States have anticipatory reasonable accommodation duties in their domestic laws. **United Kingdom** legislation contains anticipatory reasonable adjustment/accommodation duties, and these duties operate in all areas, apart from housing and employment. Furthermore, Article 7 of the (now-repealed) **Spanish** Law on Equal Opportunities,³⁴³ which imposed reasonable accommodation duties outside the field of employment, appeared to encompass a duty which required 'the removal of group-based disadvantage on an anticipatory basis'.³⁴⁴ The General Law on the Rights of Persons with Disabilities and their social inclusion (RDL 1/2013), which replaced the foregoing law, appears to enact a similar anticipatory accommodation duty.

In the context of anticipatory reasonable accommodation duties, Lisa Waddington and Anna Lawson note that 'requirements or guidelines relating to accessibility (provided e.g. by building regulations or the World Wide Web Consortium) play a role of obvious importance'. The authors state that compliance with such norms will generally provide duty-bearers 'with a means of proving that they had indeed taken the appropriate steps to remove access-related barriers'.³⁴⁵

Accommodation duties are generally not absolute and are subject to a justification or defence. In many EU Member States, the duty to accommodate, and the justification for a failure to accommodate, is the same for both employment and non-employment fields, where the latter are covered. However, in a small number of cases the duty to accommodate, where it exists, is less far reaching, or a failure to accommodate is easier to justify, for non-employment fields. This is the case, for example, in **Ireland** where the employment-related duty is subject to the defence that making an accommodation would result in a 'disproportionate burden', whilst failure to make a non-employment related accommodation is subject to the defence that it would give rise to more than a nominal cost. The latter is clearly an easier test to satisfy. Moreover, there is also scope for the potential beneficiaries of an accommodation

342 Waddington, L. and Lawson, A. (2009) *Disability and non-discrimination law in the European Union: An analysis of disability discrimination law within and beyond the employment field European Network of Legal Experts in the non-discrimination field*, Luxembourg, Publications office of the European Union, p. 52.

343 Spain, Law on Equal Opportunities (*Ley de igualdad de oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad*) Law 51/2003 of 2 December 2003 (BOE, 3 December 2003).

344 Waddington, L. and Lawson, A. (2009) *Disability and non-discrimination law in the European Union: An analysis of disability discrimination law within and beyond the employment field European Network of Legal Experts in the non-discrimination field*, Luxembourg, Publications office of the European Union, p. 52.

345 Waddington, L. and Lawson, A. (2009) *Disability and non-discrimination law in the European Union: An analysis of disability discrimination law within and beyond the employment field European Network of Legal Experts in the non-discrimination field*, Luxembourg, Publications office of the European Union, pp. 53, 54.

to be defined differently with regard to non-employment related accommodations in comparison with employment-related accommodations. A detailed comparison of employment and non-employment related accommodation duties falls outside the scope of this report.

The structure of this section of the report is as follows: In subsection 5.1, we introduce the various reasonable accommodation duties found in national legislation, outside the field of employment. Subsection 5.1 sets the scene for sections 6, 7 and 8 of the report, which cover the fields of social protection, education and access to, and supply of, goods and services, respectively. An equivalent introductory section is therefore not included in the latter sections of this report. In subsection 5.1.1 below we consider those Member States in which there is a broadly framed disability or multi-ground non-discrimination act setting out a duty to provide for a reasonable accommodation with regard to all three fields of the 2008 Commission proposal and we discuss the nature of that obligation. Subsection 5.1.2 highlights those Member States that have a duty to accommodate in only two fields covered by the 2008 proposal. Subsection 5.1.3 outlines reasonable accommodation duties in national legislation in one field of the 2008 Commission proposal, namely in the field of education, while subsection 5.1.4 considers those jurisdictions which have not incorporated any reasonable accommodation duty at all in their non-discrimination legislation outside the field of employment. Subsection 5.1.5 considers the various legal obligations contained in general laws, which are *de facto* reasonable accommodation duties or which have a similar effect to reasonable accommodation duties. Finally, subsection 5.1.6 contains a brief summary and evaluation of this section of the report.

In subsection 5.2 below, we consider the possible justifications existing in national legislation for failure to provide reasonable accommodations to persons with disabilities. In subsection 5.3, we outline the remedies and sanctions pertaining to a breach of reasonable accommodation duties in national legislation.

5.1 Reasonable accommodation duties in national legislation, outside the field of employment

In the sub-sections below, we highlight the various reasonable accommodation duties contained in national legislation, outside the sphere of employment, and we draw attention to the areas to which such duties apply, whether social protection, education and/or access to, and supply of, goods and services. We also deliberate on the nature of the reasonable accommodation duties in national legislation, paying particular attention to the language that is used in the relevant statute and case law, where relevant. Finally, we consider whether the CRPD has impacted on disability non-discrimination laws and reasonable accommodation duties in the Member States, and whether those duties have been subject to a recent assessment or evaluation.

It is evident that a significant number of EU Member States have adopted non-discrimination legislation addressing, to some extent, all three fields covered by the Commission's 2008 proposal. This is the case in **Austria, Belgium, Bulgaria, Croatia, Finland, Germany, Ireland, the Netherlands, Slovakia, Slovenia, Spain, Sweden** and the **United Kingdom**. The authors of this report also submit that this is the case to some degree in **Cyprus**. Some of the duties in the Member States are partial duties only and the extent of the relevant duty will be highlighted below in sub-section 5.1.1. In the **Czech Republic**, there is a reasonable accommodation duty in national non-discrimination legislation covering access to services and education and a very limited partial duty to reasonably accommodate disabled persons with regard to communication in the context of healthcare. In **Luxembourg** and **Portugal**, the duty to reasonably accommodate persons with disabilities applies in the context of education only.

In a minority of EU Member States (**Estonia, Italy, Lithuania** and **Poland**), there is no reasonable accommodation duty in existence outside the field of employment. Notwithstanding this, the laws in some of those countries contain limited provisions in the field of education to ensure the integration/inclusion of persons with disabilities in mainstream education. Finally, in a handful of EU Member States, there are

what appear to be *de facto* reasonable accommodation duties, or duties that are similar to the reasonable accommodation obligation, contained within general laws. This is the case in **Denmark, France, Greece, Hungary, Latvia, Malta and Romania**.

While some EU Member States have quite extensive coverage of reasonable accommodation duties, there are certainly many gaps remaining in other Member States with regard to the areas covered by the 2008 Commission proposal. Later sections of this report will delve into the specificities of the reasonable accommodation duty contained in domestic legislation in the three areas covered by the proposal.

5.1.1 Reasonable accommodation duties in the fields of social protection; education; and access to, and supply of, goods and services

A significant number of Member States have adopted reasonable accommodation obligations which address, to some extent, all three fields covered by the Commission's 2008 proposal. This does not mean that the material scope of the relevant national provision is identical to that found in the proposal, but there is at least some considerable overlap.

– Complete Reasonable Accommodation Duties in all Fields Covered by the 2008 Proposal

Under **Austrian** law there is a duty to provide reasonable accommodation for people with disabilities in all three fields covered by the Commission's proposal. The Federal Disability Equality Act³⁴⁶ prohibits direct and indirect discrimination with regard to the administration of the Federation³⁴⁷ and access to, and supply of, goods and services which are available to the public, to the extent that the matter falls under Federal competences.³⁴⁸ Failure to comply with the duty to provide a reasonable accommodation is regarded as a form of indirect discrimination under the law.³⁴⁹ The Act covers the competences of the Federation in its entirety with regard to the services which the Federation provides. A failure to provide a reasonable accommodation is regarded as a form of indirect discrimination.³⁵⁰ The duty applies to the areas of social security and healthcare, education, access to and supply of goods and services which are available to the public, housing, public spaces and infrastructure. The outcome of some confidentially concluded disputes under resolution processes seem to show that the federation accepts this wide scope of protection. There is a duty to reasonably accommodate persons with disabilities in the area of social housing in some regions in **Austria**. Social housing is not referred to explicitly in the Federal Disability Equality Act, but it is covered by the general anti-discrimination norm at the federal level and, with the exception of Lower Austria, it is mentioned in most provincial non-discrimination acts.

A specific issue that arises in **Austria** relates to the federal structure of the legal order, whereby competences in the areas of social security and healthcare, education and infrastructure are split between the federation and the provinces. In all provinces, except Lower Austria, discrimination (including failure to provide reasonable accommodation) is regulated with regard to social protection, education and access to goods and services. This means, for instance, that in primary schools in the province of Lower Austria, no protection against disability-based discrimination exists and, furthermore, there is no duty to provide reasonable accommodations in the field of education, whilst in primary schools in the other provinces, disability-based discrimination is fully regulated. This has the potential to cause incoherencies in all fields covered by the 2008 Commission proposal, as the provinces are important operators of pre-school educational institutions, schools, hospitals and infrastructure and are largely competent for social security. No particular changes have been introduced, or are planned in **Austria** in light of the CRPD. However, the Federal Monitoring Board (*Monitoringausschuss*) has prepared a report³⁵¹ addressed to the

346 Austria, Federal Disability Equality Act.

347 Austria, Federal Disability Equality Act, Article 2(1).

348 Austria, Federal Disability Equality Act, Article 2(2).

349 Austria, Federal Disability Equality Act, Article 6.

350 Austria, Federal-Constitutional Act, Article 5(2).

351 Available at: http://monitoringausschuss.at/download/berichte/MA_Report_to_UN_Committee.pdf (accessed 30 June 2015).

CRPD Committee outlining several changes to the Austrian legal system, which the Board regards as necessary to comply with the Convention.

The **Croatian** Anti-discrimination Act contains an implicit duty to provide reasonable accommodation for people with disabilities outside the field of employment in all three fields addressed in the 2008 Commission proposal. The Act defines a failure to provide reasonable accommodation as:

‘A failure to enable disabled persons to use publicly available resources, to participate in public and social life and to have access to the workplace and appropriate working conditions in line with their specific needs by adapting infrastructure and premises and by using equipment and other means which do not present an unreasonable burden for the person obliged to provide it.’³⁵²

It is unclear what exactly falls under the scope of the ‘use of publicly available resources’. Furthermore, the notion of ‘participation in public and social life’ is left to the courts to interpret. However, it would seem to cover all areas of the 2008 Commission proposal. There is no case law on reasonable accommodation in **Croatia**. Furthermore, there have been no changes introduced, or planned, in light of the CRPD. However, various assessments have been made as to the effectiveness of reasonable accommodation measures in areas outside employment, particularly in the area of education. These assessments will be elaborated upon in later sections of this report.³⁵³

In **Ireland**, there is an (explicit or implicit) duty to accommodate in all three fields of the 2008 Commission proposal. The broad obligation to provide reasonable accommodation is found in Article 4(1)³⁵⁴ of the Equal Status Acts (2000–2012)³⁵⁵ (ESA). Whilst the ESA do not identify specifically what services are provided by the state and, therefore, subject to reasonable accommodation duties, it is implied that, to the extent that state authorities provide a service within the meaning of the ESA, the state is obliged to provide reasonable accommodations. The area of social protection (including social security, healthcare etc.) has been deemed to fall under the duty to reasonably accommodate in case law³⁵⁶ (subject to exceptions).³⁵⁷ However, it is not possible to say definitively whether state services are covered in all instances pending further judicial interpretation of the various statutory provisions. The obligation to provide reasonable accommodations under Section 4(1) of the ESA applies to the field of education under Section 7 of the ESA, which prohibits educational establishments from discriminating in relation to several aspects of the provision of education. Lastly, disability discrimination in the context of the disposal of goods and the provision of services is dealt with specifically under Section 5 of the ESA. No changes have been introduced in light of the CRPD and there is no information on any changes planned in that regard. Nor has any assessment been made of the effectiveness of measures adopted in the Irish context. **Ireland** has not yet ratified the CRPD.

There is an implicit duty to provide reasonable accommodations in all of the fields covered by the 2008 proposal under **Slovakian** Anti-discrimination Act.³⁵⁸ The Act establishes a legally enforceable duty to adopt measures to prevent discrimination in all of the fields covered and in relation to all of the grounds falling under the Act.³⁵⁹ Thus, the duty to provide reasonable accommodation for people with disabilities outside employment can be regarded as being covered implicitly by this generally framed legal duty to

352 Croatia, Anti-discrimination Act, Article 4(2).

353 See section 7 of this report.

354 Article 4(1) of the ESA provides that: ‘For the purposes of this Act discrimination includes a refusal or failure by the provider of a service to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, if without such special treatment or facilities it would be impossible or unduly difficult for the person to avail himself or herself of the service.’

355 Ireland, Equal Status Acts (2000–2012).

356 Ireland, Equality Tribunal, *Donovan v. Donnellan*, DEC-S2001-011, 17 October 2001.

357 The main exception is that any act or action required by another statute is exempted from the Equal Status provisions, ESA Section 14.

358 Slovakia, Anti-discrimination Act - Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act), Section 2(3).

359 The prohibited grounds of discrimination are listed in Section 2(1) of the Anti-discrimination Act and include disability.

prevent discrimination, including disability-based discrimination. The Anti-discrimination Act³⁶⁰ applies to the fields of employment and occupation, social security (which, for the purposes of the Act, includes social assistance, social insurance, old-age pension savings, supplementary pension savings, state social support, and social advantages),³⁶¹ healthcare, provision of goods and services (including housing), and education.³⁶² While the Anti-discrimination Act stipulates the duty to provide reasonable accommodation for people with disabilities in the context of the provision of goods, it is not unequivocally clear whether this only applies to sales to consumers, or whether it also applies to the production of goods.

In 2014, the **Slovakian** government adopted the *National Programme of the Development of Living Conditions of Persons with Disabilities* (2014-2020).³⁶³ The National Programme contains a variety of policy and legislative measures to be adopted in various fields, including social protection, accessibility and housing. There has not yet been a thorough assessment of reasonable accommodation measures for people with disabilities outside the field of employment. In March 2015, the Slovak Ombudswoman defined as her priority for 2015 the accessibility of buildings of public administration.³⁶⁴

In **Spain**, the General Law on the Rights of Persons with Disabilities and their social inclusion (RDL 1/2013) sets out the duty to provide reasonable accommodation for persons with disabilities³⁶⁵ in Article 2(m).³⁶⁶ That law was partly influenced by the entry into force of the CRPD and provides for reasonable accommodation obligations with regard to healthcare, social housing, and disability benefits/social security. A failure to provide reasonable accommodation is regarded as a form of discrimination.³⁶⁷ Moreover, RDL 1/2013 outlines a reasonable accommodation obligation in the field of education in Article 16. Reasonable accommodation duties in **Spain** also exist in the context of education under Organic Law 2/2006 on education.³⁶⁸ RDL 1/2013 also establishes reasonable accommodation duties in access to, and supply of, goods and services which are available to the public.³⁶⁹ In 2011, **Spain** incorporated other aspects of the CRPD norms into its domestic legislation, with the adoption of Law 26/2011.³⁷⁰ Furthermore, it updated the legal definition of 'persons with disabilities' to bring it into line with the definition contained in the Convention.

Finally, in the **United Kingdom**, the EqA and the DDA provide for reasonable adjustments in relation to the exercise of functions by public authorities and the provision of services and facilities, which includes the broad field of social protection.³⁷¹ In the context of access to goods and services, there is an obligation

360 Slovakia, Anti-discrimination Act - Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act).

361 Slovakia, Anti-discrimination Act - Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act), Section 5(2)(a).

362 Slovakia, Anti-discrimination Act - Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act). See Section 3(1) and 5.

363 Slovakia, *National Programme of the Development of Living Conditions of Persons with Disabilities* (2014-2020) (*Národný program rozvoja životných podmienok osôb so zdravotným postihnutím na roky 2014-2020*).

364 For further information, see the Slovak Ombudswoman's website, under the title "*Verejná ochrankyňa práv Jana Dubovcová na základe svojej doterajšej činnosti a zistení zadefinovala aktuálne odborné otázky a priority pre svoju činnosť na rok 2015*". See: <http://www.vop.gov.sk/spravy-z-prieskumov-a-priority-za-rok-2015> (accessed 3 July 2015).

365 Spain, General Law on the rights of Persons with Disability and their Social Inclusion, Articles 2.m and 63.

366 Spain, Article 2(m) of General Law on the Rights of Persons with Disabilities and their social inclusion defines reasonable accommodations as: Necessary and appropriate modifications and adaptations of the physical, social and attitudinal environment to the specific needs of persons with disabilities not imposing a disproportionate or undue burden, where needed in a particular case effectively and practice, to facilitate accessibility and participation and to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others, of all human rights.

367 Spain, General Law on the rights of Persons with Disability and their Social Inclusion, Article 63.

368 Spain, Organic Law on Education.

369 Spain, General Law on the rights of Persons with Disability and their Social Inclusion, Article 29(1).

370 Spain, Law on the normative adaptation to the International Convention on the Rights of Persons with Disabilities (*Ley de adaptación normativa a la Convención Internacional sobre los Derechos de las Personas con Discapacidad*), Law 26/2011, of 1 August (BOE, 2 August 2011).

371 See the United Kingdom, Equality Act 2010 (Great Britain), Sections 20, 29 and 32-35; See also the United Kingdom, Disability Discrimination Act 1995 (Northern Ireland), Sections 19, 20B, 21B and 22-24M.

on service providers³⁷² and producers of goods³⁷³ to reasonably accommodate disabled persons. In Great Britain, the EqA also imposes reasonable adjustment obligations in the context of the provision of education.³⁷⁴ Limited duties of reasonable adjustment also apply in the sphere of education in Northern Ireland under the Special Educational Needs and Disability Order 2005 (SENDO).³⁷⁵ There have been no significant changes to law and policy in the **United Kingdom** on foot of the entry into force of the CRPD. Furthermore, there have been no noteworthy assessments of the measures adopted in non-employment fields. The accommodation duty in the **United Kingdom** is an anticipatory one. As Lisa Waddington and Anna Lawson point out:

‘The duty therefore requires providers of education, healthcare, transport, accommodation, public functions and other goods and services to monitor the accessibility of their services on a continual basis. Once triggered, the duty requires duty-bearers to take reasonable steps to remove the disadvantage [...]’.³⁷⁶

– Partial Reasonable Accommodation Duties

At the federal level in **Belgium**, the duty to provide reasonable accommodation for persons with disabilities extends to all of the fields falling under the Federal General Anti-discrimination Act. That Act goes far beyond the field of employment to cover all of the areas contained in the 2008 Commission proposal. The duty to reasonably accommodate which falls on the state and other service providers in the field of social protection is also contained in various domestic laws.³⁷⁷ Similarly, in the context of education, the duty to accommodate is spread across various domestic laws.³⁷⁸ In the field of access to, and supply of goods and services, there is also a duty to accommodate contained in a variety of laws (with the exception of the Region of Brussels-Capital).³⁷⁹ Notably, however, there is no reasonable accommodation duty imposed on producers of goods under Belgian law. In light of the fact that the duty to provide reasonable accommodations appears in various legislative enactments in **Belgium**, the Federal Government, the Regions and the Communities have sought to reach a common understanding of the concept of reasonable accommodation, in order to ensure its uniform implementation throughout Belgium. In that regard, a Cooperation Agreement was adopted in 2008 seeking to clarify the meaning of

372 See sections 20, 21 and 29 United Kingdom, Equality Act 2010 (Great Britain); See also Sections 19 and 20 Disability Discrimination Act 1995 (Northern Ireland).

373 See Sections 20 and 21 United Kingdom, Equality Act 2010 (Great Britain); and Section 20 Disability Discrimination Act 1995 (Northern Ireland), which define a failure to make reasonable adjustments as an act of discrimination.

374 See United Kingdom, Equality Act 2010 (Great Britain), Sections 20, 21 and 85.

375 United Kingdom, Special Education and Disability Needs (Northern Ireland) Order 2005, see Articles 14 and 15.

376 Waddington, L. and Lawson, A. (2009) *Disability and non-discrimination law in the European Union: An analysis of disability discrimination law within and beyond the employment field*, European Network of Legal Experts in the non-discrimination field, Luxembourg, Publications office of the European Union, p. 53.

377 Belgium, Federal Act pertaining to fight against certain forms of discrimination Article 4, 12° and Article 14; Decree establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy (Flemish Community/Region) Article 15, 6° and Article 19; Decree on the fight against certain forms of discrimination (French Community) Article 3, 9° and Article 5, 4° Decree on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training (Walloon Region) Article 13 and Article 15, 6°; Decree aimed at fighting certain forms of discrimination (German-speaking Community), Article 3, 9° and Article 5, 5°; Ordinance of the Region of Brussels-Capital modifying the Ordinance of 17 July 2003 creating the Brussels housing Code of 19 March 2009, Article 177, 8°, Article 181 (DI); Decree on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment (*Commission communautaire française* (Cocof)), Article 5, 8° and Article 9.

378 Decree establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy (Flemish Community/Region), Article 15, 6° and Article 19; Decree on the fight against certain forms of discrimination (French Community), Article 3, 9° and Article 5, 4°; and Decree aimed at fighting certain forms of discrimination (German-speaking Community), Article 3, 9° and Article 5, 5°.

379 Federal Act pertaining to fight against certain forms of discrimination, Article 4, 12° and Article 14; Decree establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy (Flemish Community/Region), Article 15, 6° and Article 19; Decree on the fight against certain forms of discrimination (French Community), Article 3, 9° and Article 5, 4°; Decree on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training (Walloon Region), Article 13 and Article 15, 6°; Decree aimed at fighting certain forms of discrimination (German-speaking Community), Article 3, 9° and Article 5, 5°; Decree on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment (*Commission communautaire française* (Cocof)), Article 5, 8° and Article 9.

the concept of 'reasonable accommodation' under Belgian law.³⁸⁰ Pursuant to the Agreement, the notion of 'reasonable accommodation' is deemed to be built around the concept of participation, which should: (1) be effective; (2) enhance autonomy; (3) ensure substantive equality; and (4) foster security. The agreement also puts in place a monitoring mechanism, requiring that each authority collates information on reasonable accommodation and sets out examples of best practice. There have been no changes introduced in the above fields, and no changes are planned, in light of the CRPD. The parallel report of the Disability Department of the Inter-federal Centre for Equal Opportunities, pertaining to the first periodic report presented by Belgium in 2014 in the context of the implementation of the CRPD, does not contain any information regarding assessments undertaken on the foregoing measures.

While the national non-discrimination laws (PADA³⁸¹ and IPDA)³⁸² in **Bulgaria** do not provide for reasonable accommodations in the fields of social protection generally or access to, and supply of, goods and services, there is a reasonable accommodation duty applicable in the field of education.³⁸³ There is also a *de facto* duty to provide reasonable accommodations through accessible housing when constructing or renovating housing, including social housing, under Ordinance No. 4 of 1 July 2009.³⁸⁴ There is no information publicly available in Bulgaria regarding any planned changes in light of the CRPD. Nor has any assessment been made of the effectiveness of reasonable accommodation measures adopted in non-employment fields.

As of 2014 the **Cypriot** Law on Persons with Disabilities law appears to contain a duty to accommodate in the fields of access to, and supply of, goods and services. There is a partial accommodation duty in the field of social protection, related to healthcare. The legislation defines reasonable accommodations as 'necessary and suitable amendments and adjustments'³⁸⁵ to ensure exercise and enjoyment of rights. The fields covered by this provision are:

- Basic rights (right to independent living, diagnosis and prevention of disability, personal support with assistive equipment, services etc, accessibility to housing, buildings, streets, the environment, public means of transport, etc, education, information and communication through special means, services for social and economic integration, vocational training, employment in the open market, etc),³⁸⁶
- Employment, including access to working conditions, training etc;³⁸⁷
- Supply of goods and services, including the facilitation of accessibility for safe and comfortable use of such services, etc;³⁸⁸ transport;³⁸⁹ and telecommunications.

No changes have been introduced in Cyprus, and none are planned, in the fields covered by the 2008 Commission proposal in the wake of the CRPD.

380 Belgium, Protocol between the Federal State, the Flemish Community, the French Community, the German-speaking Community, the Walloon Region, the Brussels- Capital Region, the Joint Community Commission, the French Community Commission in favor of people experiencing disability (*Protocole du 19 juillet 2007 entre l'État fédéral, la Communauté flamande, la Communauté française, la Communauté germanophone, la Région wallonne, la Région de Bruxelles-Capitale, la Commission communautaire commune, la Commission communautaire française en faveur des personnes en situation de handicap*), 19 July 2007.

381 Bulgaria, Protection Against Discrimination Act.

382 Bulgaria, Integration of Persons with Disabilities Act (*Закон За Интеграция На Хората С Увреждания*).

383 Bulgaria, Protection Against Discrimination Act, Article 32. This duty is not as explicit as the duty to provide reasonable accommodation in the field of employment under PADA and has not yet been interpreted by the courts. In addition there is a *de facto* accommodation duty applicable with respect to the construction and renovation of housing. See Section 8 below.

384 Bulgaria, Ordinance No. 4 of 1 July 2009 on designing, implementing and maintaining of constructions in accordance with the requirements for an accessible environment for the population, including persons with disabilities (*Наредба № 4 от 2009 г. за проектиране, изпълнение и поддържане на строежите в съответствие с изискванията за достъпна среда за населението, включително за хората с увреждания*).

385 Cyprus, Law amending the Law on Persons with Disabilities.

386 Cyprus, Law on persons with disabilities, Article 4. The Law provides a general and vague right to integrated education, but does not link this explicitly to reasonable accommodation and does not provide a mechanism for implementation.

387 Cyprus, Law on persons with disabilities, Article 5.

388 Cyprus, Law on persons with disabilities, Article 6.

389 Cyprus, Law on persons with disabilities, Article 7.

In **Finland**, Section 15(1) of the Non-Discrimination Act³⁹⁰ (which entered into force on 1 February 2004 and was renewed in 2014, coming into force on 1 January 2015) sets out a broad duty to accommodate, covering all three fields of the 2008 Commission proposal.³⁹¹ However, there is no legal requirement to provide reasonable accommodation imposed on producers of goods available to the public. The Non-Discrimination Act refers to 'due and appropriate adjustments' rather than using the term 'reasonable' accommodation or adjustments. Notably, amendments to the Non-Discrimination Act³⁹² were viewed in **Finland** as a requirement for ratification of the CRPD in that jurisdiction. However, **Finland** has not yet ratified the Convention.

In **Germany**, reasonable accommodation duties result from, *inter alia*, the constitution. The Federal Constitutional Court has ruled that disabled people are not only discriminated against if there is unequal treatment, but also in circumstances where a disadvantage results from the lack of adoption of appropriate measures to accommodate the needs of the disabled individual.³⁹³ This principle was developed in the context of integrated schooling but applies as a constitutional principle to other spheres as well. It is notable that in the context of access to, and supply of goods and services, there is only a legal requirement to provide reasonable accommodation in the area of housing. In other words, there is no legal requirement to reasonably accommodate disabled persons imposed on service providers or producers of goods available to the public. While the CRPD has been ratified, and is binding as federal law in **Germany**, no changes have been introduced in this context based on the Convention and no assessment of the effectiveness of measures has been carried out in that jurisdiction.

Under **Dutch** law there is a partial duty to accommodate under the DDA³⁹⁴ in the three fields covered by the 2008 Commission proposal, namely in the areas of (social) housing, public transport and education. The prohibition of disability discrimination applies to the fields of primary and secondary education (Article 5b DDA), housing (Article 6a, 6b and 6c DDA) and public transport (Articles 7 and 8 DDA).³⁹⁵ However, there is no broader duty to accommodate with regard to social protection in general, healthcare or disability benefits/social security, as these fields are not addressed in the DDA. The term 'effective accommodation' is used in the DDA in preference to the term 'reasonable accommodation'.³⁹⁶ In the Government's view, the former term reflects the fact that an accommodation must have the desired effect.³⁹⁷ The notion of reasonableness is reflected in the second part of the definition, in the sense that there is no obligation to accommodate a disabled person, if doing so would constitute a disproportionate burden (i.e. would not be reasonable). This is explored in more detail below.³⁹⁸ No assessment has been made of the effectiveness of accommodation measures adopted outside the field of employment in the **Netherlands** in light of the CRPD. The **Netherlands** has not yet ratified the Convention.

In **Slovenia**, pursuant to the Act on Equal Opportunities of People with Disabilities (2010), there is a duty to provide reasonable accommodations for people with disabilities in the field of education and a partial duty to reasonably accommodate disabled people in access to, and supply of, goods and services (the duty does not cover housing). There is also a partial duty to reasonably accommodate persons with

390 Finland, Non-discrimination Act.

391 Section 15(1) of the Act reads as follows: An authority, education provider, employer or provider of goods and services has to make due and appropriate adjustments necessary in each situation for a person with disabilities to be able, equally with others, to deal with the authorities and gain access to education, work and generally available goods and services [...].

392 Finland (2014), *Government Proposal on Non-Discrimination Act 19/2014 (Hallituksen esitys yhdenvertaisuuslaiksi 19/2014 vp)*, HE 19/2014 vp, p. 33.

393 Germany, Federal Constitutional Court (*Bundesverfassungsgericht*) BVerfGE 96, 288, 8 October 1997. This judgment is not limited to severely disabled people.

394 Netherlands, Act of 3 April 2003 regarding the establishment of the Act on Equal Treatment on the grounds of disability or chronic disease.

395 Netherlands, Act of 3 April 2003 regarding the establishment of the Act on Equal Treatment on the grounds of disability or chronic disease.

396 Netherlands, Act of 3 April 2003 regarding the establishment of the Act on Equal Treatment on the grounds of disability or chronic disease, Article 2.

397 Netherlands, Explanatory Memorandum to the Act on Equal treatment on grounds of disability or chronic illness (*Gelijke behandeling op grond van handicap of chronische ziekte, memorie van toelichting*), Tweede Kamer, 2001-2002, 28 169, No. 3, p. 25.

398 See section 5.2.1 below.

disabilities in the field of social protection. In the context of social security and healthcare, there is no general reasonable accommodation duty. Nevertheless, under Article 14 of the Act, specific reasonable accommodation duties apply in the context of access to information. There is also a duty to accommodate under Slovenian law in the area of social housing. The Act does not refer to 'reasonable accommodation', but instead uses the term 'appropriate accommodation' in Article 3(3) of the Act. Notably, the CRPD influenced the adoption of the Act. Notwithstanding this, there has not been any assessment to date with regard to measures to ensure reasonable accommodation outside the field of employment.

In **Sweden**, there is a duty to provide reasonable accommodation for people with disabilities pursuant to the Discrimination Act 2015.³⁹⁹ As of 1 January 2015, a duty to accommodate arises in most of the areas where the Discrimination Act applies.⁴⁰⁰ The term 'reasonable accommodation' is not used in the amended Act. Rather the duty to accommodate is viewed in light of the obligation to provide accessibility. Refusing to provide accessibility through making an accommodation is defined as a form of discrimination. The Act specifies:

'Inadequate accessibility: that a person with disability is disadvantaged through a failure to take such measures for accessibility to enable the person to come into a situation comparable with that of persons without this disability where such measures are reasonable on the basis of accessibility requirements in laws and other statutes ...'.⁴⁰¹

The reasonable accommodation duty applies to all three fields covered by the 2008 Commission proposal (with the exception of the production of goods and housing, including social housing). In the context of education, the Swedish School Act⁴⁰² contains a duty, in Chapter 10, Section 30 thereof, to make education available through reasonable accommodation. It is notable that there have been no significant changes introduced in Swedish law and policy following the entry into force of the CRPD, nor have there been any major assessments of the measures adopted in non-employment fields.

5.1.2 Reasonable accommodation duties in access to services and education

In the **Czech Republic**, the duty to accommodate applies in the context of services provided to the public under Section 3(2) of the Anti-discrimination law. The Anti-discrimination law does not include an obligation on producers of goods to provide a reasonable accommodation.⁴⁰³ The duty to provide reasonable accommodation in the field of access to services available to the public has been interpreted in a broad manner by the **Czech** Ombudsman, covering also access to public parking places and access to higher education. According to Section 1(1)(j), the Anti-discrimination law applies to 'access to services, including housing, to the extent as they are offered to the public'. Thus, housing falls within the scope of services available to the public and therefore within the reasonable accommodation duty.⁴⁰⁴ The forgoing law does not include healthcare and education (with the exception of higher education) within the meaning of the term 'service'. The **Czech** Schools law⁴⁰⁵ does not contain any explicit provision to reasonably

399 Sweden, Act on the amendment to the Discrimination Act (2008:567) (*Lag om ändring i diskrimineringslagen (2008:567)*), (2014:958); Sweden, Proposed amendments to the Discrimination Act (2008:567) (*förslag till ändringar i diskrimineringslagen, lag 2008:567*), Government Bill 2013/14:198.

400 Sweden, Under the Discrimination Act, Chapter 2 Section 12(c) the prohibition of discrimination in the form of lack of reasonable accommodation (inadequate accessibility) does not apply to housing, private persons offering services or goods to the general population, services and goods sold by companies with less than 10 employees (the same exception applies in the healthcare area too according to Section 13 c), and if the measure in question regards goods and services and concerns the buildings where it is offered and the plaintiff wants actions which goes beyond what was required when the building was made.

401 Sweden, Discrimination Act, Chapter 1, Section 4(3).

402 Sweden, School Act.

403 Czech Republic, Commentary to the Anti-discrimination law (*Komentář k zákonu č. 198/2009 Sb. o rovném zacházení a právních prostředcích ochrany před diskriminací*), 2010 p. 167.

404 Czech Republic, Commentary to the Anti-discrimination law (*Komentář k zákonu č. 198/2009 Sb. o rovném zacházení a právních prostředcích ochrany před diskriminací*), 2010 p. 167.

405 Czech Republic, Law on pre-school, primary, secondary and higher vocational and other education (Education Act).

accommodate disabled students. Notwithstanding this, Section 16 of the Schools law contains several provisions which are similar to, or might be considered as, *de facto* reasonable accommodations.⁴⁰⁶ There is no general duty to accommodate in the field of social protection under non-discrimination legislation in the **Czech Republic** but there is a very limited duty to accommodate in the field of healthcare (in the context of communication only).⁴⁰⁷ In 2015, the **Czech** Government approved the sixth National Plan for the Creation of Equal Opportunities for Persons with Disabilities (2015–2020),⁴⁰⁸ which aims to implement the provisions of the CRPD, particularly in the areas of inclusive education, transparent funding of social security services, healthcare, independent living, personal mobility and accessibility. No assessment has been made on the effectiveness of the foregoing measures in the **Czech Republic**.

5.1.3 Reasonable accommodation duties in national legislation in one field of the 2008 Commission proposal: Education

In **Luxembourg**, there are reasonable accommodation obligations in national legislation in the field of education.⁴⁰⁹ Disabled children who are able to follow the normal course of study, but who experience obstacles related to their disability, can ask for reasonable accommodations.

Under **Portuguese** law there is a duty to reasonably accommodate in the field of education pursuant to Law 46/2006 of 28 August 2006 (which prohibits discrimination based on disability and on a pre-existing risk to health).

5.1.4 No reasonable accommodation duty in non-discrimination legislation outside the field of employment

In **Estonia, Italy, Lithuania** and **Poland**, there is no explicit obligation in non-discrimination legislation to provide reasonable accommodations outside the field of employment. However, it is notable that the legislation in some of those countries contains limited provisions in the field of education to ensure the integration/inclusion of persons with disabilities in mainstream education.

5.1.5 Legal obligations in non-discrimination or general laws, which are *de facto* or similar to the reasonable accommodation duty

In several EU Member States, the relevant non-discrimination statute does not contain a duty to provide reasonable accommodation beyond employment. Nonetheless, other statutes addressing broad or specific fields contain obligations, which seem to be *de facto* accommodation duties, or have a similar effect to a reasonable accommodation duty. This is the case in **Denmark, France, Greece, Hungary, Latvia, Malta** and **Romania**. A *de facto* duty is not explicitly defined as reasonable accommodation and not necessarily linked to non-discrimination law, but does require an individualised accommodation to meet the needs of a particular person with a disability in certain circumstances. A duty similar to a reasonable accommodation duty has certain characteristics of a reasonable accommodation obligation, but is not identical. For example, a failure to comply with such a duty may be much easier to justify than in the case of an explicit reasonable accommodation duty. The labelling of such duties as *de facto* or similar duties in this report is not precise and, without further research, it is not possible to develop a strict classification or methodology in this respect.

406 See section 7 of this report.

407 Czech Republic, Law on healthcare services (o zdravotních službách a podmínkách jejich poskytování (zákon o zdravotních službách), No. 372/2011 Coll, Article 30. Information taken from Waddington, L. (2014), *Access to Healthcare by People with Disabilities in Europe – A Comparative Study of Legal Frameworks and Instruments*, Synthesis Report for the Academic Network of European Disability experts, December 2014, p. 31.

408 Czech Republic, *National Plan for the Creation of Equal Opportunities for Persons with Disabilities 2015-2020 (Národní plán vytváření rovných příležitostí pro osoby se zdravotním postižením na období 2015-2020)*, 25 May 2015.

409 See section 7 of this report.

In **Denmark** and in **France**, several legal obligations contained in general laws have a similar effect to reasonable accommodation duties, although the particular measures are not termed explicitly as such in domestic legislation. In **Greece**, there are various and sporadic references throughout national laws to obligations which are similar in effect to reasonable accommodations. The applicable duties are detailed in later sections of this report.⁴¹⁰

Similarly, in **Hungary**, while the RPD Act does not use the term ‘reasonable accommodation’ expressly, it does set forth certain obligations that can be regarded as manifestations of the duty to accommodate, in the field of social protection, for instance.⁴¹¹ In the context of access to, and supply of, goods and services, there is no express accommodation obligation. However, in the case law of the Equal Treatment Authority and the domestic courts, the failure to provide reasonable accommodation has sometimes been regarded as a form of discrimination.⁴¹² In the context of education, there are also *de facto* reasonable accommodation duties in existence.⁴¹³ These duties are not explicitly defined as reasonable accommodation duties, but they oblige educational institutions to accommodate specific needs of disabled individuals. It is noteworthy that on 23 November 2009, the Equal Treatment Advisory Board adopted a resolution (No. 6/2009) relating to the need to amend **Hungarian** legislation in the field of employment and beyond in connection with reasonable accommodation duties. On 10 March 2010, the Minister of Justice and Law Enforcement replied that the question was not timely, as the process of drafting the new anti-discrimination directive was uncertain. Notwithstanding this, it is interesting to note that in case law brought before the Equal Treatment Authority,⁴¹⁴ the failure to provide reasonable accommodation has been regarded as a form of discrimination.

Notwithstanding the absence of an explicit reasonable accommodation duty in **Latvian** legislation in fields outside employment, there are various provisions in general domestic legislation creating similar obligations to reasonable accommodation duties, as well as relevant case law relating to *de facto* reasonable accommodation duties, both of which are discussed in later sections of this report.⁴¹⁵

In **Malta**, the Equal Opportunities (Persons with Disability) Act of 2000 prohibits discrimination on the basis of disability in the provision of goods, facilities and services in the education sector, in the provision of accommodation and in the employment sector. However, the Act does not provide for an explicit duty to reasonably accommodate in the various fields covered by the 2008 Commission proposal. Nevertheless, the duties set out in the **Maltese** statute with regard to education appear to have a similar effect to a reasonable accommodation duty. In other words, it seems that an accommodation duty can be implied under the provisions of the Equal Opportunities Act in respect of education.⁴¹⁶ Similarly, a *de facto* accommodation duty can be presupposed under Article 13 of the Equal Opportunities (Persons with Disability) Act of 2000 in relation to access to, and supply of, goods and services. This is discussed further below in section 8 of this report. Upon Malta’s ratification of the CRPD a report⁴¹⁷ was drawn up by the National Commission for Persons with Disabilities. That report analyses the scope of the Convention and outlines the various measures that will be required, at the legislative and policy level, in order to implement the Convention. The aforementioned report also makes provision for measures in all fields covered by the 2008 proposal.

410 See subsections 6.2 and 7.1 of this report.

411 See section 6.3 of this report.

412 See subsection 8.2 on Reasonable Accommodation and Services.

413 See section 7 of this report on education.

414 See, for instance, Hungary, Equal Treatment Authority (*Egyenlő Bánásmód Hatóság*) Case 17/2006, July 2006. See also Hungary, Equal Treatment Authority (*Egyenlő Bánásmód Hatóság*) Case 804/2010. For information on these cases, see section 5.2.3 of this report.

415 See generally sections 8, 9 and 10 of this report.

416 See, in particular, Malta, Equal Opportunities (Persons with Disability) Act (2000), Section 11.

417 Malta, National Commission Persons with Disability (NCPD) - Malta (2013) *Working towards the implementation of the United Nations Convention on the Rights of Persons with Disability*, St. Venera, March 2013.

In **Romania**, there is no explicit duty to provide reasonable accommodation for people with disabilities outside the employment field under the Anti-discrimination Law. However, Law 448/2006⁴¹⁸ imposes an obligation on public authorities to take special measures in support of persons with disabilities in relation to healthcare, education, legal assistance, social services, including social indemnities and social housing, as well as transport and culture. The law does not mention the term 'reasonable accommodation' explicitly as an individual measure in the foregoing fields but specifies general measures which need to be carried out by responsible authorities, some of which can have an individualised impact. Such provisions could be invoked by individuals as part of a *de facto* reasonable accommodation claim. Nonetheless, it is noteworthy that there are limited mechanisms of enforcement available in that regard. No changes have been introduced in **Romania**, following the ratification of the CRPD in order to further harmonise legislation with the Convention.

5.1.6 Conclusion on reasonable accommodation duties in national legislation, outside the field of employment

The overview contained in this section of the report has revealed a diversity of approaches amongst the EU Member States, both in terms of the fields to which the reasonable accommodation duty applies and the manner in which the duty is defined. A considerable number of Member States already have reasonable accommodation duties, as provided for in non-discrimination laws, covering all, or at least some, of the fields addressed in the Commission's 2008 proposal. In general, where the duty to reasonably accommodate is contained in national legislation, specific fields are listed as being covered by the duty. However, the **Croatian**, **Cypriot** and **Spanish** legislative provisions are noteworthy for adopting a very broad approach in their legislation, referring to reasonable accommodation duties in the context of participation in 'public and social life' (**Croatia**), 'human rights and fundamental freedoms' (**Cyprus**) and 'all human rights' (**Spain**). The reference to human rights in **Cypriot** legislation and in the **Spanish** General Law on the Rights of Persons with Disabilities and their social inclusion (RDL 1/2013) is reminiscent of the reasonable accommodation obligation found in the CRPD, which refers to the duty to accommodate 'to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.⁴¹⁹ Even in the absence of explicit accommodation duties in non-discrimination law, many Member States provide for what are *de facto* accommodation duties or duties similar to the reasonable accommodation obligation in specific fields under domestic legislation.

It is also noteworthy that the legislation in several Member States does not use the language of 'reasonable accommodation', but instead refers to 'due and appropriate adjustments' (**Finland**), 'effective accommodation' (the **Netherlands**), or 'appropriate accommodation' (**Slovenia**). Moreover, some definitions of 'reasonable accommodation' in national law also highlight the suitability of the accommodation measure. For example, the **Cypriot** law defines an accommodation as 'necessary and suitable amendments and adjustments', whilst the **Spanish** law refers to 'necessary and appropriate modification and adaptations'. This terminology emphasises the goal which the accommodation or adjustment must achieve, and clearly separates the obligation to accommodate from the defence that to make such an accommodation would be 'unreasonable'. However, in many cases the definition of a reasonable accommodation is closely interlinked with the defence, whereby a reasonable accommodation is defined as a measure which both accommodates the disabled individual and does not impose a disproportionate or undue burden. Defences or justifications for a failure to make a reasonable accommodation are explored further below in section 5.2 of this report.

One last point to note is that the existence of a federal system, such as in **Austria** and **Belgium**, can lead to complexity when both federal and regional/provincial authorities have the competence to set reasonable accommodation duties in various fields. The Belgian Cooperation Agreement, whereby a common understanding of the reasonable accommodation duty and various monitoring obligations are set out, is an example of good practice in this respect.

418 Romania, Law 448/2006 on protection and promotion of rights of persons with a handicap.

419 Article 2 CRPD.

5.2 Justifications for a failure to provide reasonable accommodation

In general, the duty to make a reasonable accommodation is not absolute. The accommodation duty is normally delimited by the requirement or defence that making an accommodation would amount to a disproportionate or undue burden, or that making the accommodation is 'unreasonable' in some other way. This is reflected in both the Commission's 2008 proposal for a non-discrimination directive, which refers to a 'disproportionate burden'⁴²⁰ and the CRPD, which refers to a 'disproportionate or undue burden'.⁴²¹ Article 4b of the Commission's 2008 proposal sets out a list of factors, which should be taken into account in deciding whether a disproportionate burden would be imposed as a result of making an accommodation or providing accessibility.⁴²² The proposal also specifies that the burden 'shall not be deemed disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned'.⁴²³

In addition to the concept of 'disproportionate burden', the notion of 'reasonableness' can also be used to set a limit on the duty to accommodate. In that respect it is worth noting⁴²⁴ that confusion has arisen at the EU level with regard to the concept of 'reasonableness' in the employment context,⁴²⁵ on account of the fact that divergent meanings have been attributed to the word 'reasonable' in several European countries. Lisa Waddington has summarised the various meanings, placing them into three categories.⁴²⁶ Waddington has observed that, in certain European jurisdictions, the term 'reasonable' is taken to mean an accommodation which does not result in excessive difficulties or costs for the employer. This is separate and distinct from the defence of disproportionate burden. Waddington states that this approach implies that 'an accommodation can be regarded as *prima facie* "unreasonable," and therefore not required, in which case the stricter disproportionate burden test will not be considered at all'.⁴²⁷ Waddington categorises the second approach as encompassing situations in which 'an accommodation will be regarded as 'reasonable' if it is effective in allowing the individual in question to carry out the necessary (employment-related) tasks'.⁴²⁸ The final approach described by Waddington is one which defines the term 'reasonable' as conveying both the requirement that 'the accommodation must be effective and that it must not impose significant inconvenience or cost on the employer or covered party'.⁴²⁹

In the context of the CRPD, it is worth noting⁴³⁰ that, according to the drafting history of the Convention, it was not intended that the term 'reasonable' should act as a qualifier to the duty to accommodate in and of itself, so as to modify or weaken the provision of accommodations.⁴³¹ The drafting history also reveals that the term 'reasonable accommodation' is a single and unitary concept.⁴³² The limitation on the duty to accommodate under the CRPD relates to the 'disproportionate' or 'undue burden' that would result from making the accommodation. However, there is little guidance contained in the *travaux préparatoires* on

420 See in particular Article 4a(2) of the 2008 proposal Version 15705/14 ADD 1 REV 2. This is discussed further above in section 1.4 of this report.

421 See the definition of reasonable accommodation found in Article 2 CRPD.

422 See section 1.4. of this report for elaboration on the relevant factors contained in Article 4b of the Commission's 2008 proposal Version 15705/14 ADD 1 REV 2.

423 Article 4b, 2008. Proposal Version 15705/14 ADD 1 REV 2.

424 This paragraph draws on: Broderick, A. (2015), *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities*, Intersentia.

425 In terms of implementing the duty in Article 5 of the Employment Equality Directive.

426 See Waddington, L. (2007), 'Reasonable Accommodation' in Schiek, D., Waddington, L., and Bell, M. (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Oxford, Hart Publishing, p. 635.

427 Waddington, L. (2007), 'Reasonable Accommodation' in Schiek, D., Waddington, L., and Bell, M. (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Oxford, Hart Publishing, pp. 669, 670.

428 Waddington, L. (2007), 'Reasonable Accommodation' in Schiek, D., Waddington, L., and Bell, M. (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Oxford, Hart Publishing, p. 669.

429 Waddington, L. (2007), 'Reasonable Accommodation' in Schiek, D., Waddington, L., and Bell, M. (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Oxford, Hart Publishing, p. 670.

430 This paragraph draws on: Broderick, A. (2015), *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities*, Intersentia.

431 Fourth Session of the Ad Hoc Committee, Volume 5(10), 3 September 2004, available at: <http://www.un.org/esa/socdev/enable/rights/ahc4sumart07.htm> (last accessed 12 April 2014).

432 Fourth Session of the Ad Hoc Committee, Volume 5(10), 3 September 2004.

the meaning of the foregoing terms. During the drafting sessions leading up to adoption of the CRPD, it was clear that most states parties to the Convention associated the notion of disproportionate burden with the resource implications of the duty to accommodate.⁴³³ The European Disability Forum stated that the duty to accommodate ‘needs to be qualified by type of entity, size of entity, financial capacity and the cost of the reasonable accommodation’.⁴³⁴ While none of the foregoing criteria made it into the final text of the CRPD, it would appear that cost will be the primary factor to be taken into account in determining what amounts to a disproportionate or undue burden under the Convention. There was general agreement among delegates that the availability of state funding should limit the use of disproportionate burden as a reason for entities not to provide reasonable accommodations.⁴³⁵

In this section of the report, we outline the justifications or defences contained within national legislation pertaining to a failure to reasonably accommodate the needs of persons with disabilities outside the field of employment. In subsection 5.2.1, we highlight the various non-discrimination laws containing a defence to the duty to accommodate, breaking those down according to type of justification or defence. In subsection 5.2.2 we outline those national laws containing absolute reasonable accommodation duties (with no justification/defence). In subsection 5.2.3, we delineate the justifications available in circumstances where there is no accommodation duty in national legislation, but where there are obligations having similar effect. Finally, subsection 5.2.4 below contains the conclusion.

Non-discrimination legislation in several EU Member States refers to the existence of a disproportionate burden as a defence to a claim of reasonable accommodation. This is the case in **Austria, Belgium, Croatia, Czech Republic, the Netherlands, Portugal, Slovenia and Spain**. In **Ireland**, cost appears to be the determining factor in the applicable justification test. This is also true in **Bulgaria** with regard to reasonable accommodation duties concerning education under PADA. On the other hand, reasonable accommodation duties in the field of education under IPDA are absolute. In other words, they are not subject to a disproportionate burden defence or any other type of justification. Under **Cypriot** legislation, a combined justification test appears to apply, based not only on cost, but also on a disproportionate burden test. Under **Finnish, Swedish and UK** legislation, the applicable test is that of reasonableness. Some of those statutes elaborate on the various factors that might be taken into account in assessing reasonableness in the circumstances of a given case. In the **Swedish** School Act, there is also a reference to the notion of ‘substantial burden’. In **Luxembourg and Slovakia**, the law makes no reference to a justification test in the context of non-employment related reasonable accommodations. In a similar vein, no provision is made under **Romanian** law for any justifications or defences with regard to the obligations having similar effect to reasonable accommodation contained in national legislation in those jurisdictions. In **France, Germany** (apart from Section 554a BGB) and **Hungary**, there is no legislative reference to a justification test, but there is relevant case law which appears to refer implicitly to such a test. Finally, in **Malta**, the relevant legislation refers to a defence of ‘unjustifiable hardship’.

5.2.1 Non-discrimination laws containing a defence to the duty to accommodate

As noted above, the duty to accommodate is generally not absolute and is subject to some kind of defence or justification, which is set out in legislation. Whilst EU Member States most frequently refer to a defence or justification based on the notion of ‘disproportionate burden’, an examination of legislation reveals that other terms, such as ‘reasonable/unreasonable’, can also serve this purpose. This section of the report classifies the various approaches found in the legislation of the Member States, focussing on the terminology used.

433 Fourth Session of the Ad Hoc Committee, Volume 5(10), 3 September 2004.

434 Third Session of the Ad Hoc Committee, volume 4(2), 25 May 2004, available at: <http://www.un.org/esa/socdev/enable/rights/ahc3sum7.htm>, (last accessed 12 October 2014).

435 Report of the Working Group to the Ad Hoc Committee, Footnotes to Annex I: Draft articles for a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, available at: <http://www.un.org/esa/socdev/enable/rights/ahc4sumart07.htm> (last accessed 12 April 2014).

– Disproportionate Burden

Non-discrimination legislation in a variety of EU Member States refers to the existence of a disproportionate burden as a defence to a claim of reasonable accommodation. Where such a burden exists, the duty to accommodate is removed. In some instances, the legislation or accompanying explanatory documents provide guidance on how to assess the 'disproportionateness' of any burden, although this is not always the case.

Austrian non-discrimination legislation defines an unjustified failure to make a reasonable accommodation as a form of indirect discrimination. Section 6 of the **Austrian** Federal Disability Equality Act provides, with regard to indirect discrimination, that:

It shall not be deemed indirect discrimination if the removal of conditions which constitute the disadvantage, especially of barriers,⁴³⁶ would be illegal or would pose a disproportionate burden on the employer.

When assessing whether a burden is disproportionate, Section 6 specifies that the following criteria must be taken into account in particular:

- the efforts made to eliminate the conditions constituting the disadvantage;
- the economic capacity of the entity;
- the public financial assistance available for the necessary improvements;
- the time span between the coming into force of the Act and the alleged discrimination; and
- the effect of the disadvantage in relation to the general interests of the individuals protected by the Act.⁴³⁷

Furthermore, Section 6(2) of the Act provides that, in cases where elimination of the disadvantage would result in a disproportionate burden, an action shall still be deemed discriminatory if the entity fails to improve the situation of the affected individual in a considerable manner with a view to achieving equal treatment. Section 6(3) of the Act then provides that when assessing whether certain circumstances constitute indirect discrimination, one must take into account whether relevant legislation exists in the context of accessibility, and the extent to which that legislation has been complied with. Section 6(4) of the Federal Disability Equality Act refers to compliance with other relevant norms relating to the removal of barriers as a factor to be considered when deciding whether a measure constitutes a disproportionate burden or not. In essence, if an entity is under a duty to comply with other provisions relating, for example, to accessibility which would remove the need for an individualised reasonable accommodation, and has not met that duty, that entity cannot claim that providing the accommodation would amount to a disproportionate burden. In this way **Austrian** law makes an explicit link between reasonable accommodation duties and other obligations relating to accessibility. Lastly, as noted above,⁴³⁸ the Federal Government and some federal institutions have been granted immunity regarding indirect discrimination (including a failure to make a reasonable accommodation) in the context of a failure to remove physical barriers until 2020.⁴³⁹

In **Belgium**, both federal and regional anti-discrimination laws⁴⁴⁰ contain a duty to provide reasonable accommodations for disabled people, unless those measures would impose a disproportionate burden on the addressee of the duty. However, the burden will not be considered to be disproportionate where it is sufficiently remedied by measures existing within the framework of domestic disability policy. The

436 The term 'barriers' is not defined or specified by law, it nevertheless seems that the legislator wants it to be interpreted in a broad sense, to include physical, technological barriers and daunting procedures.

437 Austria, Federal Disability Equality Act, Article 6.

438 See subsection 4.1.3 above.

439 See Austria, Budget Implementation Act 2011.

440 See subsection 5.1.1 above.

Cooperation Agreement (mentioned above)⁴⁴¹ contains a non-exhaustive list of criteria to be taken into account in the assessing the disproportionateness of any burden. Such criteria include the financial impact of the measure, as well as its organisational impact, the frequency of use of the accommodation, the impact of the accommodation on the quality of life of other persons with disabilities, the impact on the general environment or other people, the lack of appropriate alternatives, as well as the non-application of existing compulsory rules.

Under the **Croatian** Anti-discrimination Act, a failure to provide a reasonable accommodation when needed to secure the participation of a disabled individual in public and social life, is considered discrimination unless making the accommodation would result in a disproportionate burden for the duty bearer.⁴⁴² There is no definition of the notion of disproportionate burden under the Act and it is up to the domestic courts to determine what factors are to be considered in deciding whether a burden is disproportionate or not.

In the **Czech Republic**, Section 3(2) of the Anti-Discrimination Law provides that indirect discrimination on the ground of disability includes a refusal or failure to take appropriate measures to enable a person with a disability to have access to services available to the public, unless such a measure represents a disproportionate burden. However, the concept of 'disproportionate burden' has not been developed further by the courts in the **Czech Republic**.

In the **Netherlands**, the duty to provide an 'effective accommodation' is subject to the defence that making the accommodation would result in a 'disproportionate burden'.⁴⁴³ This applies to employment, as well as to the non-employment fields covered by the DDA, namely education, housing and public transport.⁴⁴⁴ In addition, an accommodation must only be made if it would be 'effective'. In the context of employment, the test to establish 'effectiveness' involves asking two separate questions:⁴⁴⁵

- Is the accommodation that has been asked for *appropriate*: does it really enable the disabled person to do the job?
- Is the accommodation that has been asked for *necessary* (is it a pre-condition to do the job)?

This test can, by analogy, be applied to the non-employment areas covered by the DDA. Once it has been established that an effective accommodation would be possible, the enquiry can turn to the existence of a disproportionate burden. The DDA does not define what is meant by a 'disproportionate burden'. However, there are some indicators to be found in the Explanatory Memorandum to the DDA in the context of employment. A 'balancing exercise' must be carried out, reviewing the interests of the disabled person in comparison with those of the employer in the light of 'open norms' of civil law (e.g. the notion of 'reasonableness' in civil law).⁴⁴⁶ Once again, by analogy, these factors can also be considered in the context of non-employment areas. Moreover under Article 3 of the DDA, differential treatment, including a failure to make an effective accommodation, can be justified whenever 'the contested rule or measure is necessary for health and safety reasons'. In addition, compliance with accessibility legislation/standards, or the development of an accessibility plan, is not a defence to a claim of reasonable accommodation.

In **Portugal**, Article 2 (2) (e) of Decree-Law 163/2006 of 8 August and Article 4 of Decree-Law 3/2008 of 7 of January set out a disproportionate burden defence. The duty to accommodate, and hence this defence, only apply to the field of education.

⁴⁴¹ See subsection 5.1.1 above.

⁴⁴² Croatia, Anti-discrimination Act, Articles 4(2) and 8.

⁴⁴³ Netherlands, Act of 3 April 2003 regarding the establishment of the Act on Equal Treatment on the grounds of disability or chronic disease, Article 2.

⁴⁴⁴ For relevant Opinions see, Netherlands, Equal Treatment Commission (*Commissie Gelijke Behandeling (CGB)*), ETC 2010-35 and ETC 2011-30.

⁴⁴⁵ Netherlands, Explanatory Memorandum to the Act on Equal treatment on grounds of disability or chronic illness.

⁴⁴⁶ Netherlands, Explanatory Memorandum to the Act on Equal treatment on grounds of disability or chronic illness.

Article 3(3) of the **Slovenian** Act on Equal Opportunities of People with Disabilities states that appropriate accommodations (the equivalent of reasonable accommodations under the Act) means legislative, administrative and other measures which do not impose a disproportionate burden, but are needed in order to ensure to persons with disabilities equal enjoyment of their human rights.

In **Spain**, the General Law on the Rights of Persons with Disabilities and their social inclusion (RDL 1/2013) specifies that a reasonable accommodation shall not impose ‘a disproportionate or undue burden’⁴⁴⁷ on the entity concerned. Article 40(2) of RDL 1/2013 provides that, in order to determine whether a burden is disproportionate, it must be considered whether the burden is sufficiently remedied by measures, aids or subsidies for persons with disabilities, as well as financial costs and the size and volume of the total business of the organisation.

- Cost

In **Bulgaria**, Article 32 of PADA provides for reasonable accommodations in education. The duty to provide reasonable accommodation for people with disabilities outside the employment field does not apply when ‘costs are unreasonably big and would seriously hinder’ the educator.⁴⁴⁸

In **Ireland**, the refusal or failure to provide an accommodation is ‘reasonable’ if making the accommodation would give rise to more than a ‘nominal cost’ to the provider of the service in question under the ESA.⁴⁴⁹ Section 4(4) of the ESA also provides an exemption in circumstances where provision of a reasonable accommodation to a disabled person could cause harm to the person concerned or to others.

- Combination of disproportionate burden and cost

The reasonable accommodation duty introduced in 2014 under **Cypriot** legislation to areas beyond employment is to be discharged through measures ensuring reasonable accommodation ‘to the maximum of available resources’. It is, moreover, delimited by a disproportionate or unjustified burden defence. A burden will not be disproportionate if it is sufficiently balanced by measures taken in the framework of state policy in favour of persons with disabilities.⁴⁵⁰ The 2014 amendment falls short of creating a mandatory regime as the defence of disproportionate burden is likely to be successfully invoked by service providers or sellers in order to avoid any kind of expenditure.

- Unreasonableness

Section 15 of the **Finnish** Non-Discrimination Act contains an obligation to make a reasonable accommodation (termed ‘a due or appropriate adjustment’ under the legislation) to realise equality for persons with disabilities. This obligation is not subject to a disproportionate burden defence. Instead, an adjustment is only required to the extent that this would be ‘reasonable’. Section 15(2) of the Act sets out the factors to be considered in determining whether an adjustment would be reasonable:

- the needs of the disabled individual;
- the size, financial position and the nature and extent of activity of the actor;
- the estimated costs of the adjustments; and
- the support available for the adjustments.⁴⁵¹

Failure to provide a reasonable accommodation is defined as a separate form of discrimination (termed ‘inadequate accessibility’) under Chapter 1 of the **Swedish** Non-Discrimination Act. The duty is not

447 Spain, General Law on the rights of Persons with Disability and their Social Inclusion, Article 2.m.

448 Bulgaria, Protection Against Discrimination Act, Article 32.

449 Ireland, Equal Status Acts (2000-2012), Section 4(2).

450 Cyprus, Law amending the Law on Persons with Disabilities.

451 Finland, Non-discrimination Act, Section 15 (2).

subject to a disproportionate burden defence. Instead the Act provides that the duty exists where taking such measures would be reasonable in relation to laws and other forms of legislation and with regard to economic and practical considerations, as well as the duration and the extent of the relationship or contact between the person responsible for the activity and the individual and other circumstances of importance.⁴⁵² Compliance with accessibility legislation might be a relevant factor in relation to the reasonableness of requested measures, especially in instances where the cost is substantial. However, if the cost of an individualised accommodation is small in relation to the benefit accruing to the disabled individual, compliance with other legislation may not be deemed to justify a refusal to make that accommodation under **Swedish** law. The only exemption outside employment is contained in Chapter 2, Section 12 of the Non-Discrimination Act, which outlines some limitations in the context of the provision of goods and services.

Under the EqA in the **United Kingdom**, entities are required to provide 'reasonable' adjustments. However the failure to make an adjustment is not a form of discrimination where making the adjustment would be unreasonable. The question as to whether a particular adjustment is 'reasonable' is essentially a fact-sensitive justification test. In *Morse v. Wiltshire County Council*⁴⁵³ (an employment case decided under the now repealed Disability Discrimination Act), the Employment Appeals Tribunal held that an objective test must be applied in deciding whether a particular accommodation is 'reasonable' in the circumstances of a particular case. Under the objective test, one must enquire whether the employer's failure to comply with the accommodation duty was objectively justified, and whether the reason for failure to comply was in fact material to the circumstances of the particular case and, furthermore, substantial. The same analysis applies outside employment.

In Northern Ireland, Section 23 of the DDA allows a justification defence in relation to the failure to make reasonable adjustments pertaining to services/public functions, where the body providing the service/ carrying out the public function is reasonably of the opinion that:

- the treatment is necessary in order not to endanger the health or safety of any person (which may include that of the disabled person); and
- the disabled person is incapable of entering into an enforceable agreement, or of giving informed consent, and for that reason the treatment is reasonable in that case.

There is no express link between accessibility standards and reasonable adjustment duties in the **United Kingdom**, but an adjustment which is not required by an accessibility standard might be more likely to be regarded as not reasonable, and therefore not required.

- Substantial burden

According to the **Swedish** School Act,⁴⁵⁴ a student may only be denied a place at the nearest local school, or his/her school of choice, if allowing entrance to the school would cause a substantial ('*betydande*') organisational or financial burden on the education provider.⁴⁵⁵ This provision applies to all students, including students with disabilities.

- Accommodation excluded by other provisions of the legislation

In **Ireland**, the ESA states that a refusal or failure to provide a reasonable accommodation under Section 4(1) of the ESA does not constitute discrimination if, by virtue of another provision of the ESA, a refusal or failure to provide the service in question to that person would not constitute discrimination.⁴⁵⁶

452 Finland, Non-discrimination Act, Chapter 1, Section 4(3).

453 United Kingdom, *Morse v. Wiltshire County Council* [1998] ICR 1023, [1998] IRLR 352.

454 Sweden, School Act.

455 Sweden, School Act, Chapter 10, Section 30.

456 Ireland, Equal Status Acts (2000-2012), Section 4(3).

- Nature of justification is unclear

In **Luxembourg**, Articles 2-5 of the law of 15 July 2011 on access to school and professional qualifications of pupils with special educational needs⁴⁵⁷ provide for reasonable accommodations in education. However the law makes no reference to a defence of 'disproportionate burden' and no case law exists to date in that regard.

In **Slovakia**, Section 2(3) of the Anti-discrimination Act outlines the duty to adopt measures to prevent discrimination (which could be considered as a general reasonable accommodation duty) in the fields covered by the Act. The Act does not provide any detail on how the duty to accommodate is to be fulfilled, nor does it contain any kind of justification test.

- Implicit justification

Under **German** law, there is no reference to the concept of disproportionate burden in national legislative provisions pertaining to disability. In its decision on integrated schooling,⁴⁵⁸ the Federal Constitutional Court implied such a consideration within the framework of its weighing of interests in the case. It is also important to note that according to Section 554a BGB, a disabled person has the right to request changes in rented property which are necessary for his or her adequate use. However, the landlord can refuse consent if their interest in the unchanged status of the property carries more weight than the interest of the disabled person.⁴⁵⁹

5.2.2 Absolute reasonable accommodation duty with no defence

In **Bulgaria**, IPDA provides for accommodation duties for both schools and universities.⁴⁶⁰ Those duties are absolute. In other words, they are not subject to a disproportionate burden defence or any other type of justification. Under IPDA, the Minister of Education and Science has a duty to provide children with disabilities with a supportive environment in order to ensure their integrated education.⁴⁶¹ Furthermore, the Minister of Education and Science is under an duty to create educational opportunities for children with disabilities who are not integrated in mainstream educational environments.⁴⁶² That duty is also absolute.

5.2.3 Justifications regarding de facto reasonable accommodation obligations or obligations having similar effect to the reasonable accommodation duty

In **France**, there is no explicit reasonable accommodation duty and no general disproportionate burden justification. Notwithstanding this, in a landmark case handed down on 20 April 2011,⁴⁶³ the *Conseil d'Etat* decided that the personalised education project to be provided by school authorities created an obligation of result and that there should be no delay in implementation, regardless of budgetary and logistical considerations. There is a disproportionate burden defence included in French law in circumstances where there are delays in the implementation of accessibility requirements with respect to the provision of goods and services, as well as social housing, further to the adoption of Law 2014-789 of 10 July 2014.⁴⁶⁴

457 Luxembourg, Law of 15 July 2011 on access to school and professional qualifications of pupils with special educational needs.

458 Germany, Federal Constitutional Court (*Bundesverfassungsgericht*) BVerfGE 96, 288, 8 October 1997. See subsection 4.2.1. above.

459 See Germany, Regional Court Hamburg (*Landgericht Hamburg*), Az: 307 S 159/03, 29 April 2004.

460 Bulgaria, Integration of Persons with Disabilities Act, Article 17 and Article 20.

461 Bulgaria, Integration of Persons with Disabilities Act, Article 17 (2).

462 Bulgaria, Integration of Persons with Disabilities Act, Article 18.

463 France, Council of State (*Conseil d'Etat*), N° 345434, Inédit au recueil Lebon, 20 April 2011 and France, Council of State (*Conseil d'Etat*), N° 345442, Inédit au recueil Lebon, 20 April 2011.

464 Law No. 2014-789 of 10 July 2014 Habilitating Government to Adopt Legislative Measures by Way of Executive Order for the Implementation of Accessibility of Public Places, and adoption of the three decrees specifying the conditions of implementation of accessibility agendas.

In **Hungary**, Article 7(2) of the ETA contains the general exemption clause in respect of the Hungarian anti-discrimination system, including with regard to reasonable accommodation. Whether a general objective justification exists or not depends on the ground concerned, whilst the conditions applicable to the exemption depend on the type of right affected by the differential treatment. A different test is applied depending on whether a differentiation concerns a fundamental right (such as the right to education, healthcare, and in extreme cases, social housing) or a right that may not be regarded as such (for instance, access to services). In the former case, the justification test is stricter (there has to be a legitimate aim, notably the enforcement of another fundamental right, and the test of necessity, suitability and proportionality is applied). In the latter case, the justification is based on objective reasonableness. Article 7(2) of the ETA has not always been applied uniformly by the courts in **Hungary**. This is demonstrated by a case in which a visually impaired man claimed that the bus terminals of the national bus company were inaccessible, which he argued amounted to direct discrimination (on account of his inability to access the service on an equal footing with other passengers), and constituted a violation of his human dignity. In its decision of 19 June 2013,⁴⁶⁵ the *Curia* (**Hungary's** supreme court) found that this was a case involving fundamental rights involving the claimant's right to an accessible environment, and more generally, to human dignity. Nevertheless the Court assessed the claim under the looser test (objective reasonableness) and, accordingly, found that the respondent's failure to address the accessibility problems raised by the claimant had a reasonable economic justification. By way of analogy, one might conclude that financial burdens may be accepted in future case law as a defence to the duty to reasonably accommodate persons with disabilities. In the context of education, the case law handed down to date does not give an unambiguous answer as to whether the concept of 'disproportionate burden' might be accepted as a defence under **Hungarian** law. In 2006, the Equal Treatment Authority handed down a ruling in the case of a pupil with a visual impairment who was denied admission to his local school. The school sought to justify the refusal on account of a lack of necessary personnel and material conditions to accommodate the student. The authority accepted this defence (as an objective justification) in relation to the school, but not in relation to the municipality which maintained the school. The municipality also invoked the defence of financial burden to justify its decision not to provide the school with the required additional financial means. In that regard, the authority measured the burdens imposed on the parties against each other and held that the municipality's decision not to facilitate the disabled student by means of reasonable accommodation in this case could not be justified by financial reasons.⁴⁶⁶ The Authority found that the school had not discriminated but that the municipality was guilty of discrimination.

In **Malta**, while the Equal Opportunities (Persons with Disability) Act 2000, does not refer specifically to an obligation to provide reasonable accommodation other than in the case of employment, such a duty could be implied with regard to the education provisions under the Act. In that regard, a potential defence of unjustifiable hardship can be applied.

In **Romania**, domestic legislation contains obligations which are similar in effect to accommodation duties but does not contain an explicit duty to accommodate. There is no legal interpretation of what is 'reasonable' nor what constitutes a 'disproportionate burden' in the practice of the NCCD.

5.2.4 Conclusion on justifications for a failure to provide reasonable accommodation

The review conducted in this section of the report has revealed that national legislation setting out a duty to reasonably accommodate persons with disabilities almost always provides for a defence or justification. The most common terminology used in this respect is that of a 'disproportionate burden'. If such a burden exists, the duty to accommodate is removed. The review conducted in this section of the report has also revealed that defences or justifications with regard to the accommodation duty are referred to in other terms, relating, for example to a lack of reasonableness or high cost. However, where

⁴⁶⁵ Hungary, Curia of Hungary (Kúria), No. Pfv.IV.20.104/2013/4, 22 April 2015.

⁴⁶⁶ Hungary, Equal Treatment Authority (*Egyenlő Bánásmód Hatóság*) Case 17/2006, July 2006. See also Hungary, Equal Treatment Authority (*Egyenlő Bánásmód Hatóság*) Case 804/2010.

legislation or accompanying documents give an indication of the factors to be considered in assessing the ‘disproportionateness’ or ‘unreasonableness’ of any accommodation, as is the case for example in **Austria**, **Belgium** and **Finland**, cost is rarely the only factor to be taken into account. Other factors mentioned are, for example, the level of public assistance available or organisational factors. The guidance in **Austria**, **Belgium** and **Finland** all refer to the impact of (a failure to make) the accommodation on the population of disabled persons in general (**Austria** and **Belgium**) or the needs of the person with a disability in question (**Finland**). This is reflected to some degree in the Commission’s 2008 proposal, which refers, *inter alia*, to ‘the negative impact on the person with a disability of not providing the measure’. Such guidance on assessing the extent of the duty is both helpful, in and of itself (since this is a complicated area), and valuable because it reveals the multi-natured assessment which must take place in the circumstances of a given case. On the other hand, **Bulgarian** and **Irish** legislation refer exclusively to cost in the context of justifications for a failure to make a reasonable accommodation.

In most cases, once a disproportionate burden or lack of reasonableness has been established, it seems that the duty to accommodate is removed altogether. One interesting exception to this is contained in **Austrian** legislation, which still requires the duty bearer to improve the situation of the affected individual, with a view to achieving equal treatment even where the justification test has been satisfied. This is in contrast to the ‘all or nothing’ approach which accommodation duties in other Member States seem to embody.

National legislation establishes links between the accommodation duty and accessibility obligations in certain cases. In a number of instances, compliance with accessibility obligations cannot be argued as a defence to a duty to accommodate to meet the needs of an individual. This is the case in the **Netherlands**, for example. However, in **Austria** the temporary immunity granted to public institutions in the context of indirect discrimination and lack of accessibility means that compliance with such requirements, and the adoption of an accessibility plan, can remove the accommodation duty up until the end of 2019. In general, a claim for an accommodation may be more likely to be regarded as disproportionate or unreasonable where accessibility requirements have already been met. In some jurisdictions, the law explicitly provides that an accommodation claim which would have been met if other legal provisions, including accessibility-related provisions, had been complied with, can never be disproportionate or unreasonable. This is the case in Austria, and that approach evidences a constructive interaction between accessibility and reasonable accommodation obligations. However, in most jurisdictions this issue is not addressed explicitly.

The **Dutch** approach to assessing the legitimacy of a claim for a reasonable accommodation is particularly useful, as it separates the assessment of the ‘effectiveness’ of any considered accommodation from the question of the existence of a ‘disproportionate burden’ on the duty bearer. This could mean that an accommodation may be regarded as ‘effective’ but nevertheless not required because it would lead to a ‘disproportionate burden’. The two-stage test also allows for a consideration of various different accommodations, and any accommodation which can be regarded as ‘effective’ can pass on to the second ‘disproportionate burden’ part of the test. Such a clear two-stage test is not set out in the legislation of other Member States, even though it facilitates and structures the analysis of accommodation claims.

5.3 Remedies and sanctions

In this section of the report we explore the various remedies and sanctions applicable under national legislation in respect of a breach of the accommodation duty in fields beyond employment. In many cases, the law does not provide for specific remedies applicable to a breach of the duty to make a reasonable accommodation, but the general remedies available under non-discrimination law, or civil or administrative law apply. The principal types of remedies identified in Member States’ laws include compensatory damages and an order that a party refrains from certain action or takes certain action, including making an accommodation. In addition, in some cases, sanctions (such as a fine or imprisonment) can be imposed on the party which has breached the accommodation duty.

This section of the report is structured as follows: In subsection 5.3.1, we delineate those Member States' laws which contain provisions concerning compensatory damages. In subsection 5.3.2, we refer to those domestic laws which allow for an order to make the requested accommodation. In subsection 5.3.3, we identify provisions allowing for the publication of a judicial decision or ruling. Subsection 5.3.4 outlines the applicable sanctions at the domestic level, whilst subsection 5.3.5 contains a brief summary and evaluation of this subsection of the report as a whole.

5.3.1 Compensatory damages

In **Austria**, failure to comply with the reasonable accommodation duty constitutes indirect discrimination. A claim for compensatory damages, including non-pecuniary damages, is available under Section 9 of the Federal Disability Equality Act. Entities cannot be forced to provide reasonable accommodations under **Austrian** law. This corresponds to the overall situation existing in **Austria** for all discrimination claims outside an existing employment relationship, whereby financial compensation is permitted, but not restitution *in natura* or any other form of sanctions.

In **Belgium**, failure to meet the duty to provide a reasonable accommodation amounts to discrimination. The potential remedies (and sanctions) for failure to meet the duty are the same as those applicable in a case of unlawful discrimination, and this includes the payment of damages (in other words, payment of compensation either on the basis of the 'effective' damage, or on the basis of the lump sums defined in the relevant law).

In **Bulgaria**, failure to meet the duty of reasonable accommodation is not defined explicitly as a form of discrimination under PADA, although it does amount to a breach of the law. The remedies available under PADA in respect of a failure to reasonably accommodate a disabled individual in the field of education can include an award of compensation.

In **Croatia**, failure to meet the duty to reasonably accommodate persons with disabilities outside employment constitutes discrimination.⁴⁶⁷ In case of a breach of the reasonable accommodation duty, a victim can file a claim for protection in civil proceedings, requesting the court to order the defendant to pay pecuniary or non-pecuniary compensation.⁴⁶⁸

In **Cyprus**, the Law on Persons with Disabilities (No. 63(I)/2014) does not provide explicitly for remedies in the event of a failure to meet the duty to accommodate. A significant issue that arises in the **Cypriot** context is that the law designates the Labour Disputes Court as the competent court for dealing with compensation claims, but, in the context of disability, the mandate of that court does not extend beyond employment, resulting in the Court having no jurisdiction in disability discrimination cases outside the field of employment.⁴⁶⁹

In the **Czech Republic**, a failure to meet the reasonable accommodation obligation is deemed to be indirect discrimination under Section 3(2) of the Anti-discrimination law. If a disabled individual is refused a measure of reasonable accommodation, he/she can bring a general civil action on the basis of the discrimination encountered according to Section 10 of the Anti-discrimination law. That section of the law enables a claim for monetary compensation (but only where other remedies, discussed below, have been deemed unsatisfactory).⁴⁷⁰ This is, at least, the theory under **Czech** legislation. However, in practice most court decisions of this nature result in an award of monetary damages.

467 Croatia, Anti-discrimination Act, Article 4(2).

468 Croatia, Anti-discrimination Act, Article 17(1).

469 See Cyprus, Labour Court (Ανώτατο Δικαστήριο), *Avgoustina Hadjiavraam v. The Cooperative Credit Company of Morphou* (Αυγουστίνα Χατζηαβραάμ v. Συνεργατικής Πιστωτικής Εταιρείας Μόρφου), No. 258/05, 30 July 2008.

470 See section 5.3.2. below.

Since the coming into force of the amended Non-Discrimination Act⁴⁷¹ in **Finland** on 1 January 2015, the refusal to provide reasonable accommodation measures has been defined as discrimination. Accordingly, a victim of discrimination may file a complaint in a domestic court, claiming compensation under the Non-Discrimination Act.

In **Germany**, the failure to comply with reasonable accommodation duties may give rise to a right to compensation under Section 15 of the General Act on Equal Treatment of 14 August 2006 (the AGG).⁴⁷² Article 3.3(2) of the Basic Law (*Grundgesetz*) prohibiting discrimination on the basis of disability has indirect horizontal effect and can be enforced through the constitutional complaint mechanism, under Article 94(4)(a) of the Basic Law, as well as through other procedures, such as administrative court proceedings.

In **Hungary**, the RPD Act does not contain an explicit duty to provide reasonable accommodation. However, it contains certain obligations that can be regarded as manifestations of the duty to accommodate disabled persons. The case law of the Equal Treatment Authority (**Hungary's** equality body) is not consistent in terms of whether the failure to provide reasonable accommodation is to be regarded as a form of discrimination or not. If such a failure is deemed to amount to discrimination, a victim of such discrimination may bring a claim in the **Hungarian** civil courts based on Articles 2:42 and 2:43 of the Civil Code (Act V of 2013), claiming that his/her inherent rights are protected by the Civil Code, and that the right to non-discrimination is an inherent right. The possible remedies available to the court are listed under Articles 2:51-2:53 of the Civil Code. Article 2:53 of the Code prescribes that an individual who suffers pecuniary damages on account of a violation of his/her inherent rights, may claim damages in accordance with the general provisions governing damages.

Under **Irish** law, redress for a failure to reasonably accommodate in areas outside employment may be ordered under Article 27 ESA. Compensation of up to €15,000 (in total) can be ordered. In the context of access to goods and services, failure to meet the duty of reasonable accommodation constitutes discrimination.⁴⁷³ The same applies in the context of education.⁴⁷⁴ It is not specified under the relevant legislative provisions whether failure to reasonably accommodate constitutes direct or indirect discrimination.

Under **Latvian** legislation, general remedies apply to breaches of domestic laws providing for measures akin to reasonable accommodation by state institutions, e.g. restitution, compensation, and moral compensation. The failure to provide reasonable accommodation has been deemed to constitute disability discrimination in a case related to access to health premises. In that case,⁴⁷⁵ the Administrative District Court deemed that compensation was payable to the disabled person in question. Article 92 of the *Satversme* (the Constitution of the Republic of **Latvia**) contains the general provision on remedies. It states that 'Everyone, where his or her rights are violated without basis, has a right to commensurate compensation'. Compensation can cover material loss as well as moral damages.

In **Luxembourg**, the law of 15 July 2011 on access to school and professional qualifications of pupils with special educational needs does not provide for any remedies. Nonetheless, the payment of damages could be ordered by the domestic courts according to the general principles of civil law.

In a similar vein, in the **Netherlands**, failure to fulfil the duty to accommodate can give rise to an order for damages. Furthermore, such failure comprises an act of discrimination, or more specifically, is a form

471 Finland, Non-discrimination Act.

472 Germany, General Act on Equal Treatment.

473 Ireland, Equal Status Acts (2000-2012), Section 4(1).

474 See, for instance, *Mrs. X (on behalf of her son, Mr. Y) And A Post-Primary School*.

475 Latvia, Administrative District Court (*Administratīvā rajona tiesa*), Case No. A420571712, 2 December 2013.

of forbidden distinction, for which the ordinary sanctions can be imposed.⁴⁷⁶ However sanctions can only be imposed by the courts. Notably, the **Dutch** Human Rights Institute can declare that a certain situation is in breach of the equal treatment legislation in its Opinions, but cannot impose fines or order damages be paid to the victim.

In **Portugal**, a person with a disability is entitled to compensation for the damage (losses) he or she has suffered directly, pursuant to Article 7 of Law 46/2006. Civil damages can be awarded under the general principles of Articles 483, 484 and 496 of the **Portuguese** Civil Code. In that regard, it is notable that there are no statutory limits for pecuniary or non-pecuniary (moral) damages. Furthermore, the breach of the duty to reasonably accommodate by public sector schools and by private and cooperative sector schools has a distinct and separate remedy. Breach of the duty in the context of education can lead to disciplinary proceedings under Article 31(a) of the Decree-Law 3/2008, among other remedies.⁴⁷⁷

Under the **Romanian** Anti-Discrimination Law, in instances where a failure to ensure reasonable accommodation is interpreted as direct discrimination the remedies available in the civil court include monetary damages.

The duty to adopt measures to prevent discrimination under Section 2(3) of the **Slovakian** Anti-discrimination Act can be considered as including a general reasonable accommodation obligation. Therefore, general remedies provided for in the Anti-discrimination Act apply to violations of the duty to prevent discrimination, and hence the failure to reasonably accommodate. However, since the duty is not specifically formulated, it is difficult to predict the outcome of a concrete case which might come before the domestic courts. Pursuant to the Anti-discrimination Act, victims of discrimination can request a number of remedies, including adequate satisfaction⁴⁷⁸ and non-pecuniary damages in cash where the remedy of satisfaction is deemed inadequate.⁴⁷⁹

In **Slovenia**, the Act on Equal Opportunities of People with Disabilities defines the duty of reasonable accommodation outside employment, but does not state explicitly that failure to accommodate disabled persons constitutes discrimination. However, there is a specific provision in the Act which provides that discrimination on the ground of disability includes a failure to enable access to information to people with disabilities, taking into account the duty of 'appropriate accommodation' (the term used under the Act in place of 'reasonable accommodation').⁴⁸⁰ In addition, opinions of the national Advocate of the Principle of Equality⁴⁸¹ reflect the fact that a failure to meet the duty of reasonable accommodation constitutes discrimination. If failure to provide reasonable accommodation is deemed to constitute discrimination by the domestic courts, all the remedies available in discrimination cases are applicable. In accordance with Article 22(1) of the Act Implementing the Principle of Equal Treatment, there is a right to compensation in respect of discrimination under the general principles of tort law.

Under **Spanish** law, failure to provide reasonable accommodation constitutes discrimination and is considered to be a serious offence. **Spanish** courts may order the payment of compensation to the

476 See, Netherlands, Equal Treatment Commission (*Commissie Gelijke Behandeling (CGB)*), ETC 2004-140, where it held: 'It concerns a *sui generis* form of (making a) distinction, which does not yet occur in the other equal treatment laws'.

477 Breach of the reasonable accommodation duty in the education context can also lead to withdrawal of parallel teaching and co-financing.

478 Slovakia, Anti-discrimination Act - Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act), Section 9(2), second sentence. The law does not specify what the term 'adequate satisfaction' means. In general, when adequate satisfaction is interpreted by, for instance, academics or courts, it is usually regarded as an apology. However the list of possible claims is open-ended and in principle any claim could be sought/pursued in that regard.

479 Slovakia, Anti-discrimination Act - Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act), Section 9(3).

480 Slovenia, Act on Equal Opportunities for People with Disabilities – AEOPD (*Zakon o izenačevanju možnosti invalidov*), Article 14.

481 See Slovenia, Advocate of the Principle of Equality, Case No. UEM – 0921-1/2008-2. (disability) and Case No. UEM – 0921-10/2008-3. (religion).

disabled individual where there has been a failure to reasonably accommodate. **Spanish** law does not impose any compensation ceiling in that respect.⁴⁸²

In **Sweden**, the Discrimination Award is the primary remedy that is available in instances of discrimination, including failure to accommodate. It is regulated under Chapter 5, Section 1 of the Discrimination Act. The Discrimination Award was created to allow domestic courts to award damages which are higher than the general level of civil damages applicable in other legal areas. The Award includes a right to damages in respect of the discriminatory violation. Chapter 5, Section 1 of the Discrimination Act also requires the courts to pay particular attention to discouraging or preventing future infringements.

In the **United Kingdom**, failure to meet the duty of reasonable adjustment constitutes discrimination pursuant to Section 21 EqA and Section 3A(2) DDA. The legislation defines such a failure as a free-standing form of discrimination, rather than as direct or indirect discrimination. The remedies for breach of the duty to provide reasonable adjustments are the same as those applicable to any other act of discrimination. The EqA and DDA both provide for full recovery in respect of damage resulting from the discrimination, including injury to feelings (under Section 119 EqA and Section 25 DDA). Compensation is not an available remedy in the context of a failure to provide reasonable adjustments in the sphere of education, although education providers can be ordered to carry out particular accommodations.⁴⁸³

5.3.2 Court order to make a reasonable accommodation for a disabled individual

In **Belgium**, remedies are not confined to pecuniary damages and can extend to ordering that a particular reasonable accommodation be made. On 16 July 2014, the Brussels Court of First Instance⁴⁸⁴ convicted a press agent and his company for having discriminated against a disabled journalist who was in a wheelchair, on account of a refusal to reasonably accommodate the claimant by giving him the opportunity to interview an artist.⁴⁸⁵ The journalist had requested that the interview take place in an accessible location and the agent had declined to arrange that. By way of remedial action, the Court granted an injunction requiring the cessation of the discriminatory practice, under threat of a daily fine of 1 000 Euro. In addition, it required the defendant to pay a lump sum of 1 300 Euro in damages.

Under **Bulgarian** law, an order may be made to require educational institutions to provide reasonable accommodations. Under Article 71 of PADA, the court may order the respondent to stop a violation and to restore the *status quo ante*, as well as to refrain from further violations in the future. This applies by implication to all violations under PADA, including a denial of reasonable accommodation.

In **Croatia**, failure to provide reasonable accommodations is not among the misdemeanours regulated by the Anti-discrimination Act.⁴⁸⁶ Nonetheless, a disabled individual who has been refused a reasonable accommodation can file a claim for protection in civil proceedings, seeking to prohibit activities that violate or may violate the victim's right to equal treatment, or to carry out activities that eliminate discrimination or its consequences.⁴⁸⁷

Under Section 10 of the **Czech** Anti-discrimination law, victims of discrimination have the right to demand that the discrimination in question is stopped, and that redress is provided in that regard. As a result, providers in breach of the duty to accommodate can be ordered to carry out a particular accommodation.

482 Spain, General Law on the Rights of Persons with Disabilities and their social inclusion, Article. 75.2 (RDL 1/2013).

483 See section 5.3.2 below.

484 Belgium, Court of First Instance of Brussels (*tribunal de première instance de Bruxelles*) No. RG 13/13580/A, 16 July 2014.

485 See, Belgium, Federal Act pertaining to the fight against certain forms of discrimination, Article 14.

486 Misdemeanours regulated by the Croatian Anti-discrimination Act (*Zakon o suzbijanju diskriminacije*) are harassment, sexual harassment, victimisation and failure to submit declarations, data and documents related to discrimination at the request of the Ombudsperson or a special ombudsperson.

487 Croatia, Anti-discrimination Act, Article 17(1).

In **Finland**, the National Discrimination Tribunal and the Equality Board may prohibit the continuation of discriminatory conduct, presumably including ordering that an accommodation must be made. The decisions of the Tribunal are binding but can be appealed before the Administrative Court.

In **France**, case law reveals that an order can be made to require education authorities to carry out reasonable accommodations.⁴⁸⁸

In **Germany**, providers in breach of the duty to accommodate can be ordered by law to carry out particular accommodations which the Court regards as reasonable. If a right under the Social Codes is breached, the Social Courts have competence to order binding and enforceable legal remedies as part of the Administrative Court System of **Germany**, pursuant to Section 1 of the Law on Social Courts (*Sozialgerichtsgesetz*). The general rules of administrative court proceedings apply, which may lead to ordering that an accommodation be made amongst other things.

In **Hungary**, if a failure to provide reasonable accommodation is regarded as discrimination by the Equal Treatment Authority, several remedies are at the disposal of the Authority (under Article 17/A(1) of the ETA), including an order that the situation constituting a violation of the law is terminated and an order prohibiting the future continuation of the conduct constituting a violation of the law. It is a matter of interpretation as to whether the Authority can order that a specific accommodation is made. In practice, the Authority refrains from prescribing exactly how an obligation shall be carried out, but simply issues a general obligation indicating, for example, that a failure to make a reasonable accommodation amounts to discrimination or that an injurious situation must be terminated. In the realm of education, there are some additional remedies available. Article 79(6) of the Public Education Act provides that, if the relevant Government Office establishes that the educational institution has violated the requirement of equal treatment in the course of the admission or the transfer of a pupil, it can (upon the request of the concerned parent) declare that the student in question is admitted or transferred to that particular educational institution, implying that the institution in question is obliged to provide the appropriate accommodations.

The **Irish** Equality Tribunal can order persons to take specified courses of action,⁴⁸⁹ including making a particular accommodation, in addition to the Tribunal's ability to order compensation for failure to provide a reasonable accommodation.

In the **Netherlands**, failure to meet the duty to accommodate in the fields covered by the DDA can give rise to an order to make the relevant adaptations.

In **Romania**, a failure to ensure reasonable accommodation, which is interpreted as an instance of direct discrimination, can lead to an order to make the particular accommodation in the civil court.

Pursuant to the **Slovakian** Anti-discrimination Act, victims of discrimination can request a number of remedies, including requiring the perpetrator to refrain from discriminatory conduct and, where possible, rectify the illegal situation or provide adequate satisfaction.⁴⁹⁰ In light of the fact that the list of possible remedies is not exhaustive, it is arguable that several types of remedies are possible under **Slovakian** law, including monetary damages and requiring that a particular reasonable accommodation be carried out.

Under **Spanish** law, an order can be made to require entities to provide reasonable accommodations. Perpetrators found to be in breach of the duty to accommodate can be ordered by a court to make specific

488 France, Administrative Supreme Court, 15 December 2010, decision No. 344729.

489 Ireland, Equal Status Acts (2000-2012), Section 27.

490 Slovakia, Anti-discrimination Act - Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act), Section 9(2).

accommodations. Domestic courts can take ‘all necessary measures to stop the violation of law and prevent further violations, as well as to restore the injured party to the full exercise of his/her right’.⁴⁹¹

In **Sweden**, a decision to place a disabled pupil in a school other than the one which the student's parents request can be appealed to the administrative courts according to Chapter 29, Section 12(6) of the **Swedish** School Act. A placement in the school of choice will then entail a duty to make the reasonable accommodation.

In the **United Kingdom**, claims related to a failure to provide reasonable adjustments in education can be pursued through the First-tier Tribunal (in the **United Kingdom**) and the Special Educational Needs and Disability Tribunal (in Northern Ireland). While the respective tribunals do not have the competence to order compensation, they may order educational institutions to take action in order to comply with the duty to provide reasonable adjustments.

5.3.3 Publication of ruling

In **Belgium**, the courts can require publication of the judicial decision, in addition to the imposition of fines in the case of non-compliance with a judicial order, which could be either an order to pay damages or a judicial injunction.

In **Croatia**, the victim of a failure to make an accommodation can request the court to order the defendant to publish (in the media and at the defendant's costs) the ruling establishing the violation of the right to equal treatment.⁴⁹² This will be done if it is deemed necessary for the claim for compensation or to provide protection against unequal treatment in future cases.

5.3.4 Sanctions

In this sub-section, we refer to a selection of sanctions⁴⁹³ which can be imposed in respect of a breach of the reasonable accommodation duty.

Under **Cypriot** law, if a breach of the duty to provide reasonable accommodation is regarded as discrimination, it can result in the sanctions foreseen in the Law on Persons with Disabilities.⁴⁹⁴ The perpetrator is then liable to a fine and/or to a term of imprisonment of up to a year,⁴⁹⁵ provided that the act complained of was carried out ‘without reasonable cause’.⁴⁹⁶

In **Finland**, the National Discrimination Tribunal may impose a conditional fine, in circumstances where an order prohibiting discriminatory conduct is not adhered to.

In **Hungary**, if a failure to provide reasonable accommodation is regarded as discrimination by the Equal Treatment Authority, the Authority can impose fines (under Article 17/A (1) of the ETA). Under Paragraph (5) of the ETA, the amount of the fine imposed by the Authority can range from 167 Euro (HUF 50 000) to 20 000 Euro (HUF 6 million).

491 Spain, General Law on the Rights of Persons with Disabilities and their social inclusion, Article. 75.1.

492 Croatia, Anti-discrimination Act (*Zakon o suzbijanju diskriminacije*), Official Gazette No. 85/2008, Article 17(1), 17(4), 17(5) and 17(6).)

493 Due to space constraints, the full range of sanctions available at the domestic level in the 28 EU Member States is not outlined.

494 Cyprus, Law on persons with disabilities (*Ο Περί Ατόμων με Αναπηρίες Νόμος*).

495 Cyprus, Law on persons with disabilities (*Ο Περί Ατόμων με Αναπηρίες Νόμος*).

496 Cyprus, Law on persons with disabilities (*Ο Περί Ατόμων με Αναπηρίες Νόμος*).

Under **Romanian** Law 448/2006, the relevant authority is permitted to issue fines to private or public actors in respect of the failure to adhere to a variety of provisions,⁴⁹⁷ which can be interpreted as *de facto* reasonable accommodation duties. If the complainant files a case before the national equality body, the NCCD can, upon finding discrimination, issue a warning (carrying no financial penalty) or a fine. In circumstances where the victim is an individual, the amount of the fine that can be imposed varies between 1 000 and 30 000 RON (250-7 500 Euro). In instances where the victims are a group, the fine may range between 2 000 and 100 000 RON (500-25 000 Euro).

In **Slovenia**, Article 24 of the Act Implementing the Principle of Equal Treatment sets out the applicable sanctions in respect of discriminatory conduct, including with regard to a denial of reasonable accommodation outside of employment. A natural person who commits a minor offence can be fined between 250 and 1 200 Euro, while a legal person or an individual entrepreneur can be fined between 2 500 and 40 000 Euro. An official of a state body or local community can be fined between 250 and 2 500 Euro.⁴⁹⁸ There is a particular sanction foreseen in the context of access to goods and services. In that regard, Article 36 of the Act Implementing the Principle of Equal Treatment states that, in circumstances where the provider of goods and services does not ensure access to goods and services available to the public, he/she can be fined between 2 500 and 40 000 Euro in respect of a legal person, and between 250 and 2 500 Euro in the case of the public sector.

Under **Spanish** law, failure to provide reasonable accommodation is considered a serious offence under Article 81(3) of General Law on the Rights of Persons with Disabilities and their social inclusion (RDL 1/2013) and is punishable with a penalty of up to 90 000 Euro. In circumstances where the breach of the duty to accommodate persists, the infringement can be regarded as very serious under Article 81(4) of RDL 1/2013, with an applicable fine of up to 1 million Euro.

5.3.5 Conclusion on remedies and sanctions

The way in which a breach of the duty to accommodate is classified can have consequences for the remedies available to the victim, and the sanctions that can be imposed. In several EU Member States, failure to accommodate the needs of a disabled person in areas outside employment is formulated explicitly as a breach of the non-discrimination norm. This is the case in **Austria, Belgium, Croatia, the Czech Republic, Finland, Ireland, the Netherlands and Sweden**, among others. In many EU Member States, the particular form of discrimination is not specified (be that direct, indirect or *sui generis* discrimination). In other Member States' legislative provisions, failure to accommodate is not defined explicitly as constituting discrimination. Where a failure to accommodate is regarded as a form of discrimination, the (discrimination-specific) remedies and sanctions available in cases of discrimination are applicable. However, on occasions general remedies available in civil law are applicable.

In the vast majority of EU Member States, compensatory damages are applicable in case of breach of the accommodation duty. This is the case in **Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, Germany, Hungary, Ireland, Latvia, Luxembourg, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden** and the **United Kingdom** (with the exception of education). In some instances, the compensatory damages are available under the applicable non-discrimination laws or specialised disability laws. In other instances, such as in **Hungary**, failure to accommodate (if regarded as discriminatory conduct by the relevant domestic authority) may be compensated through the civil courts based on a claim under the relevant Civil Code.

In addition to compensatory damages, courts or semi-judicial bodies in many EU Member States can order the requested accommodation to be carried out. This is the situation in **Belgium, Bulgaria, Croatia**, the

497 Romania, Law 448/2006 on protection and promotion of rights of persons with a handicap. Article 15(1), Articles 18-20, Article 21 paras. (3) and (4), Article 22, Article 23 paras. (1) and (2), Articles 24, 30, 31, Article 34(3), Article 51(4) and Article 55(1).

498 Slovenia, Minor Offences Act – Official Consolidated Version (*Zakon o prekrških - Uradno prečiščeno besedilo*), (Official Journal RS, No. 55/05, No. 29/11).

Czech Republic, Finland, France, Germany, Hungary, Ireland, the Netherlands, Romania, Slovakia, Spain, Sweden and the **United Kingdom**. Notably, entities cannot be forced to provide reasonable accommodations under **Austrian** law (in particular), even though compensatory damages are available. In **Belgium** and **Croatia**, the courts can require publication of the judicial decision.

In some EU Member States, remedies can only be sought through the court system, whilst in others, such as the **Netherlands** and **Romania**, equality or human rights commissions can also issue (non-binding) opinions or rulings in response to a complaint. This would seem to provide victims with greater choice in deciding whether, and how, to proceed with a claim based on a failure to provide a reasonable accommodation.

6 Social protection

In this section of the report, we consider the duty to reasonably accommodate persons with disabilities in the field of social protection. We include a consideration of case law, where relevant. The 2008 Commission proposal contains a duty to provide reasonable accommodations in the overall context of social protection and that duty is broken down into the areas of social security/disability benefits, social housing and healthcare. This section of the report is divided into subsections as follows: Subsection 6.1 outlines the general duties in Member State legislation in the field of social protection. In that regard, we outline firstly those Member States where there is a complete duty to provide reasonable accommodation in the fields of social security, social housing and healthcare. In the second instance, we refer to those Member States where there is a partial duty to provide reasonable accommodation in the field of social protection in one or two of the foregoing areas. Thereafter, we highlight those Member States in which there is no explicit duty to accommodate but whose legislative provisions contain *de facto* obligations or obligations having similar effects to a duty to accommodate. Finally, we draw attention to those Member States whose domestic laws contain no reasonable accommodation duty, or comparable duty, in the field of social protection. After providing a general overview of the situation existing in the Member States, the various aspects of social protection will then be considered in turn. In that respect, subsection 6.2 below outlines provisions of domestic legislation concerning social security/disability benefits, whilst subsection 6.3 covers domestic provisions related to social housing. Subsection 6.4 details national provisions pertaining to the field of healthcare. Finally, subsections 6.5 contains a conclusion to this section of the report as a whole.

An explicit legal obligation to provide reasonable accommodations for disabled individuals in the general field of social protection exists in **Austria, Belgium, Croatia, Finland, Germany, Ireland, Slovakia, Spain, Sweden** and the **United Kingdom**. In certain EU Member States (namely, **Bulgaria, the Netherlands** and **Slovenia**) a partial duty exists in one or two of the areas subsumed under the heading of social protection. In **Cyprus**, social protection is not explicitly covered. However, the amendment to the **Cypriot** Law on Persons with Disabilities in 2014 established an implicit duty to reasonably accommodate persons with disabilities in relation to healthcare. In the **Czech Republic**, there is a partial (very limited) reasonable accommodation duty, which applies in the context of communication only in the field of healthcare. In other Member States (**Denmark, France, Greece, Hungary, Latvia, Malta** and **Romania**) there is no explicit duty to provide a reasonable accommodation in the field of social protection. However, domestic laws provide for measures akin to reasonable accommodation duties in the field of social protection. In the remaining EU Member States, (**Estonia, Italy, Lithuania, Luxembourg** and **Poland**), there is no duty at all to provide reasonable accommodations in the field of social protection

6.1 National provisions in the field of social protection

- National provisions in the fields of social security, social housing and healthcare

The **Austrian** Federal Disability Act covers the competences of the Federation as a whole in relation to the entire range of services which the Federation provides, including social protection services. Social protection under the Act covers social security and healthcare. A failure to provide a reasonable accommodation is regarded as a form of indirect discrimination under Section 5(2) of the Act. There is also a legal requirement to provide reasonable accommodation on providers of social housing. Social housing is not referred to explicitly in the Federal Disability Equality Act, but it is covered by the general anti-discrimination norm at the federal level and, with the exception of Lower **Austria**, it is mentioned in most provincial non-discrimination acts.

In **Belgium**, the duty to accommodate which falls on the State and other service providers in the field of social protection is contained in various Federal and regional domestic laws.⁴⁹⁹ The duty to accommodate applies to all three areas of social protection. Social security is in principle regulated by legislation adopted at the federal level.⁵⁰⁰ The General Anti-discrimination Federal Act⁵⁰¹ covers housing under the overall heading of goods and services,⁵⁰² whilst social housing is a competence of the Regions.⁵⁰³ Healthcare is essentially a competence of the Communities.⁵⁰⁴ The relevant legislation covering disability and healthcare at the Federal level is the General Anti-discrimination Federal Act.⁵⁰⁵ Under that Act, failure to provide an accommodation to a disabled individual is prohibited.⁵⁰⁶

The **Croatian** Anti-discrimination Act requires the provision of reasonable accommodations in the context of the 'use of publicly available resources' and 'participation in public and social life,' without providing any further details in that connection. This would appear to include implicitly social security (including social welfare, pension and health insurance and unemployment insurance), (social) housing and healthcare, under the overall duty to accommodate contained in Article 4(2). However this remains a matter of interpretation.

In **Finland**, Section 15(1) of the amended Non-Discrimination Act sets out a broad duty to provide 'due and appropriate adjustments' to disabled persons in the field of social protection. This includes a duty to accommodate in the context of social security/disability benefits and in the field of healthcare. The Non-Discrimination Act also includes (social) housing within the reasonable accommodation obligation.

In **Germany**, reasonable accommodations in the field of social protection result from, *inter alia*, the constitution.⁵⁰⁷ The social security system in **Germany** has the general aim of integrating disabled people into society through individual assistance and accommodation of their needs⁵⁰⁸ and establishes claims to material means of integration.⁵⁰⁹

In **Ireland**, the general obligation to provide reasonable accommodation is found in Article 4(1) of the ESA. Services provided by the state have been deemed to fall under the accommodation duty in case law⁵¹⁰ (subject to exceptions). Thus, social security, social housing and healthcare would appear to be covered under the reasonable accommodation duty, to the extent that state authorities provide a service within the meaning of the ESA. The ESA do not elaborate on what services are provided by the State and, therefore, are subject to the reasonable accommodation obligation. Thus, it is impossible to state definitively whether state services are covered in all instances pending further judicial interpretation of the relevant statutory provisions.

499 See further in Section 5.1.1 of this report.

500 Except for family allowances which is a competence of the Communities since the Belgium, Sixth Reform of State (*Loi spéciale relative à la Sixième Réforme de l'Etat*), 6 January 2014.

501 Federal Act of 10 May 2007 pertaining to fight certain forms of discrimination (*Loi tendant à lutter contre certaines formes de discrimination*). OJ (*Moniteur belge*), 30 May 2007; lastly modified on 17 August 2013, *Moniteur belge*, 5 March 2014.

502 Note that since the 2014 Sixth Reform of the State, housing has entirely become a competence of the Regions. The 2007 Federal Acts still apply in this field but could be amended by the Regions in the future.

503 See Belgium, Special Federal Act for institutional reforms (*Loi spéciale de réformes institutionnelles*), 8 August 1980, Articles 5 and 6.

504 Except for certain matters including the adoption of framework legislation and health insurance, which remain matters of federal competence.

505 Belgium, Federal Act pertaining to the fight against certain forms of discrimination, Article 4, para. 4.(disability) and Article 5, para. 1.2. (healthcare).

506 Belgium, Federal Act pertaining to the fight against certain forms of discrimination, Article 14.

507 See section 5.1 of this report.

508 Germany, Social Code I (*Sozialgesetzbuch I - SGB I*) of 11 December 1975 (BGBl. I, 3015), last amended on 19 October 2013 (BGBl. I, 3836), Section 10.

509 Germany, Social Code IX (*Sozialgesetzbuch IX - SGB IX*) of 19 June 2001 (BGBl. I, 1046), last amended on 07 January 2015 (BGBl. II, 15), Section 4ff; Social Code XII (*Sozialgesetzbuch XII, SGB XII*) of 27 December 2003 (BGBl. I, 3022), last amended on 21 July 2014 (BGBl. I, 1133), Section 53ff. Special regulations for blind people: Social Code XII (*Sozialgesetzbuch XII - SGB XII*), Section 72.

510 Ireland, Equality Tribunal, *Donovan v. Donnellan*, DEC-S2001-011, 17 October 2001.

There is an implicit duty to provide reasonable accommodations in the context of social protection under Section 2(3) of the **Slovakian** Anti-discrimination Act. With regard to social security, the Act covers social assistance, social insurance, old-age pension savings, supplementary pension savings, state social support, and social advantages.⁵¹¹ Healthcare is also covered,⁵¹² as well as the provision of goods and services. The latter includes housing provided to the public by legal entities and natural persons who are entrepreneurs.⁵¹³

In **Spain**, the General Law on the Rights of Persons with Disabilities and their social inclusion (RDL 1/2013) sets out the duty to provide reasonable accommodation for persons with disabilities⁵¹⁴ with regard to social security/disability benefits, social housing and healthcare. It also establishes accessibility provisions for some specific fields under Article 22 RDL.

In **Sweden**, there is a duty to provide reasonable accommodations for people with disabilities pursuant to the Discrimination Act (2015).⁵¹⁵ In that regard, Sections 13–13(b) of the Discrimination Act (Chapter 2) provide for various duties to accommodate in the context of disability benefits and social protection. With regard to social security, unemployment insurance and financial aid for studies, Sections 14–14(b) of the Discrimination Act (Chapter 2) establish reasonable accommodation duties. Chapter 2, Section 12(c) (1) exempts housing from the discrimination ground of ‘inadequate accessibility’ (or failure to provide a reasonable accommodation). In any event, social housing is not recognised as a subcategory of housing under **Swedish** law. Local municipalities are under an obligation to grant an allowance for adaptations,⁵¹⁶ as well as to pay for the future removal of such adaptations. However, this does not include an obligation on the landlord to permit them. Reasonable accommodation duties regarding health and medical care and social services, as well as social insurance are covered under Chapter 2, Sections 13–13(b) of the Discrimination Act.

Finally, although the notion of ‘social protection’ is not defined under the legislation of the **United Kingdom**, the EqA prohibits disability discrimination (including a failure to make an anticipatory reasonable adjustment) by public or private sector organisations in the provision of goods, facilities and services to the public or to a section of the public. The Act also covers all functions of public authorities, which includes any publicly provided social protection services, including social security, social housing and healthcare.⁵¹⁷ In Northern Ireland, the DDA prohibits discrimination on the grounds of disability (including failure to make reasonable adjustments) in the exercise of public functions by public authorities, which encompasses the administration of publicly provided forms of social protection, including social security, social housing and healthcare.⁵¹⁸

- National provisions in the field of social housing and a partial duty to accommodate in the fields of social security and healthcare

In **Slovenia**, the Act on Equal Opportunities of People with Disabilities (2010) defines the duty to reasonably accommodate in the context of social housing under Article 13(2) of the Act. The Act does not explicitly define the obligation incumbent on the state and other service providers in the fields of social

511 Slovakia, Anti-discrimination Act - Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act), Section 5(2)(a).

512 See Slovakia, Anti-discrimination Act - Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act), Section 3(1).

513 See Slovakia, Anti-discrimination Act - Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act), Section 5(2)(d).

514 Spain, General Law on the rights of Persons with Disability and their Social Inclusion, Articles 2.m and 66.

515 Sweden, Act on the amendment to the Discrimination Act (2008:567); Proposed amendments to the Discrimination Act (2008:567) (*förslag till ändringar i diskrimineringslagen, lag 2008:567*), Government Bill 2013/14:19.

516 According to Section 4 Law on Housing Adaptation Allowance (*Lag om bostadsanpassningsbidrag m*), (1992:1574) the tenant applies for the allowance.

517 See United Kingdom, Equality Act 2010 (Great Britain), Sections 20, 29 and 32–35; see also the Disability Discrimination Act 1995 (Northern Ireland), Sections 19, 20B, 21B and 22–24M.

518 United Kingdom, Disability Discrimination Act 1995 (Northern Ireland), Sections 19 and 21B.

security and healthcare. Therefore, there is no overall reasonable accommodation duty in those fields. Nevertheless, under Article 14 of the Act a partial reasonable accommodation duty applies in the context of access to information.

- National provisions in the field of social housing only

In **Bulgaria**, existing legislation does not provide for reasonable accommodations in the field of social protection generally. Ordinance No. 4 of 1 July 2009⁵¹⁹ is the only piece of existing legislation providing for *de facto* reasonable accommodations in the field of housing, including social housing.

Under **Dutch** law, there is no general duty to provide an ‘effective accommodation’ in relation to social protection, healthcare or social security/disability benefits. However, there is a duty to provide an ‘effective accommodation’ in the field of housing, including in the area of social housing.⁵²⁰

- National provisions in the field of healthcare only

The amendment to the **Cypriot** Law on Persons with Disabilities in 2014 established an implicit duty to reasonably accommodate persons with disabilities in relation to healthcare.

In the **Czech Republic**, while there is no overall duty to reasonably accommodate in the field of healthcare, under the Law on Healthcare Services No 372/2011 Coll., there is a duty to provide communication in accessible formats to meet the needs of an individual.⁵²¹

- No explicit reasonable accommodation obligation but *de facto* duties or obligations having similar effect

In **Denmark**, there are obligations having similar effect to the obligation to provide reasonable accommodation with regard to social protection in the context of social security/disability benefits and social housing. The term ‘reasonable accommodation’ is not explicitly used in this context. Chapter V and VI of the Act on Social Services provides for various resources and housing for individuals with disabilities.⁵²²

Under **French** legislation, the prohibition of disability discrimination can be interpreted as requiring various measures in the areas of social security/disability benefits, social housing and healthcare.⁵²³

In **Greece**, specific provisions of national law provide for various measures akin to reasonable accommodation duties.⁵²⁴

In **Hungary**, the RPD Act does not use the term ‘reasonable accommodation’ expressly. Nonetheless, it does set forth certain obligations that can be regarded as manifestations of the duty to accommodate in the field of social protection.⁵²⁵

519 Bulgaria, Ordinance No. 4 of 1 July 2009 on designing, implementing and maintaining of constructions in accordance with the requirements for an accessible environment for the population, including persons with disabilities. Article 83(3) provides for ‘dwellings to take into account the individual needs of persons with disabilities, their sex, numbers, age and their specific capabilities (type and degree of disability)’.

520 See section 8 below.

521 Czech Republic, Law on healthcare services (*o zdravotních službách a podmínkách jejich poskytování (zákon o zdravotních službách)*), No. 372/2011 Coll., Article 30. Information taken from Waddington, L. (2014), *Access to Healthcare by People with Disabilities in Europe – A Comparative Study of Legal Frameworks and Instruments*, Synthesis Report for the Academic Network of European Disability Experts, December 2014, at p. 31.

522 Denmark, Act on Social Services (*Serviceoven*) LBK No. 1053 of 8 September 2015.

523 See subsections 8.2, 8.3 and 8.4 below.

524 See subsection 6.2.

525 See subsection 6.3 below.

Article 12 of the **Latvian** Law on Social Security could be interpreted in such a manner as to require reasonable accommodations outside the field of employment. However, it is perceived as a declaratory norm, rather than as a reasonable accommodation duty. There is case law relating to reasonable accommodation in the context of social security benefits in **Latvia**.⁵²⁶ In addition, although there is no express obligation to provide reasonable accommodations to people with disabilities in the context of healthcare under **Latvian** legislation, there is relevant case law in that regard.

The **Maltese** Equal Opportunities (Persons with Disability) Act, 2000,⁵²⁷ does not contain an explicit reasonable accommodation duty in any of the areas covered by the 2008 Commission proposal. However there is an implicit duty to accommodate in the overall provision of goods, facilities or services under Article 13 of the Act. This may be interpreted to cover healthcare services.

In **Romania**, Law 448/2006⁵²⁸ imposes a duty on public authorities to adopt special measures in support of persons with disabilities, *inter alia*, in relation to healthcare, social services, including social indemnities and social housing. The Law does not provide explicitly for reasonable accommodation measures in the foregoing fields. Rather, it specifies *de facto* reasonable accommodation measures which must be implemented by the responsible authorities and which might be interpreted by the courts as being a form of reasonable accommodation. These duties are elaborated on in the subsections below, where relevant.

– No reasonable accommodation obligation or comparable duty in the field of social protection

No duty to make a reasonable accommodation, nor any comparable duty, exists in the field of social protection in **Estonia, Italy, Lithuania, Luxembourg** and **Poland**. Notwithstanding the fact that the laws of the above Member States do not provide for reasonable accommodation duties in the field of social protection, this does not preclude the application in those Member States of anticipatory measures aimed at, or requiring, physical accessibility of buildings where social protection services or healthcare services are provided. However, the latter measures cannot be described as entailing a duty to respond in an individualised manner to the needs of a disabled person and, therefore, are not detailed in this report.

Having provided an overview of the relevant obligations of reasonable accommodation at the domestic level in the 28 EU Member States in the overall field of social protection, the next three subsections of the report explore the specific areas of social security/disability benefits, social housing and healthcare, paying particular attention to any relevant case law.

6.2 Social security/disability benefits

All EU Member States provide for disability-specific social security and social assistance benefits. In some cases, these are designed to provide a basic income to disabled people who are (temporarily) unable to work, whilst in other cases the benefits are intended to cover additional disability-specific costs, such as with regard to mobility. National constitutions often set out a general duty to provide support for disabled people,⁵²⁹ whilst statute law and regulations address the specific kinds, and amount of, social security and social assistance benefits available, eligibility criteria and any related conditions. Disabled people can also receive social security or social assistance benefits which are not disability-specific, such as general unemployment benefits, child support and old age pensions.

This subsection of the report does not explore (disability) social security or social assistance benefits as such, since the payment of such benefits is not regarded as a reasonable accommodation. Instead the subsection considers reasonable accommodation obligations and case law relating to social security and

526 See subsection 6.2 below.

527 Malta, Equal Opportunities (Persons with Disability) Act (2000), 10 February 2000, latest amendments Act XXIV of 2012.

528 Romania, Law 448/2006 on protection and promotion of rights of persons with a handicap.

529 See Section 2 of this report.

social assistance. Such accommodation duties can be relevant in the context of, for example, application procedures, where application forms could be provided in alternative formats or alternative means of application could be permitted; additional application time (extended deadlines); or allowing an applicant to be assisted by another person when applying. Other forms of accommodation could relate to the means of eligibility assessment, payment procedures or the way in which authorities communicate with benefit applicants and recipients. In essence, reasonable accommodations concerning social security and social assistance do not relate to the existence of such benefits or the amount paid to recipients, but rather matters such as the means by which eligibility is determined, how communication takes place and the way in which payments are made. In some instances, Member States provide for explicit reasonable accommodation duties with regard to social security and social assistance. In other instances, there is no duty to accommodate with regard to social security/disability benefits, but national laws contain provisions with similar effect to reasonable accommodations or, alternatively, there is relevant case law. Hereunder, we outline the situation in some Member States with regard to social security/disability benefits.

The majority of complaints received by the **Croatian** Disability Ombudsperson have been related to the field of social protection/security. In that regard, the Disability Ombudsperson has reported on the unacceptable attitude of staff towards persons with disabilities in social care centres. The types of issues identified include the refusal to give adequate information/advice, making procedures even more complicated for persons with disabilities by asking for documents that are not needed, and lack of staff training with respect to interaction with persons with disabilities, among other complaints.⁵³⁰ This indicates a lack of reasonable accommodation in practice.

In **Greece**, there is no general duty to provide reasonable accommodation for people with disabilities outside the employment field. However, there are sporadic legal provisions related to various fields of the 2008 proposal (including in the field of social protection), which have similar effects to reasonable accommodation obligations. For instance, with regard to transactions conducted with public services, all disabled individuals are entitled to personal assistance given by competent public employees, according to Law 2690/1999.⁵³¹ Under Article 3 of the Law, disabled persons have the right to receive assistance in order to fill in an application form. Furthermore, as a departure from the generally applicable rule which requires application be made in person, disabled persons may submit an application by fax or e-mail, under Article 14 of Law 2672/1998.⁵³²

In **Latvia**, there is case law relating to reasonable accommodation in the context of social security benefits. In a recent case, the Latvian Administrative District Court⁵³³ referred, for the first time, to the notion of reasonable accommodation in the context of a claim for a pension by a person with a psychosocial disability. The case related to a decision by state agencies to pay the plaintiff a retirement pension, instead of the higher disability pension. This decision was based on the fact that the plaintiff had been late in submitting information proving length of employment. This delay rendered the plaintiff ineligible for the higher benefit, for which the plaintiff would otherwise have qualified. The Court held that a reasonable accommodation entailed allowing the plaintiff more time to submit the necessary documentation. If this were not allowed, there would be discrimination on the basis of disability, contrary to the CRPD and Article 91 of the Constitution of the Republic of Latvia.⁵³⁴ The Court held that there were objective reasons for the extension of the period of time for submitting the requisite documents, in light of the psychosocial disability of the plaintiff. Finally, the Court referred to Article 28 of the CRPD, requiring Member States to recognise the right to social protection of disabled persons, without discrimination, including the provision of reasonable accommodation.

530 Croatia, Disability Ombudsperson (2014) i (*Izvjestje pučke pravobraniteljice za 2014*) Zagreb, 31 March 2015.

531 Law 2690/1999 on the Establishment of Code of Administrative Procedures (OJ 45 A /09.03.1999).

532 Law 2672/1998 on Provisions regarding Financial Resources of Prefectures(OJ 290A/ 26.12.1998).

533 Latvia, Administrative District Court (*Administratīvā apgabaltiesa*), *B. v. State Social Insurance Agency (Valsts Sociālās apdrošināšanas aģentūra)*, Case No. A420528911, 27 September 2013.

534 Latvia, Constitution of the Republic of Latvia, Article 91 provides that: 'All human beings in Latvia shall be equal before the law and the courts. Human rights shall be realised without discrimination of any kind.'

In 2014, the **Slovakian** government adopted the *National Programme for the Development of Living Conditions of Persons with Disabilities (2014-2020)*.⁵³⁵ The National Programme envisages the provision of barrier-free access to all public administration buildings (also to those providing social protection services). It also seeks to ensure that bodies providing assistance to people using e-government services include assistance for people with disabilities,⁵³⁶ and to guarantee the development of transport services providing access to all public services. The programme also addresses services in the field of social protection, including social housing and healthcare.⁵³⁷

In the **United Kingdom**, one of the most important cases concerning disability benefits is *Secretary of State for Work and Pensions v. MM*.⁵³⁸ In that case, the Court of Appeal ruled that the Secretary of State had discriminated unlawfully against individuals with cognitive, psychosocial and intellectual disabilities by limiting the amount of medical evidence taken into account in assessing eligibility for the Employment and Support Allowance (ESA). The claimants had argued that, when assessing entitlement to the ESA, further medical evidence should be requested from the doctors and mental health services which had worked with the claimants. Failure to do so was, they argued, a breach of the duty to make reasonable adjustments under the EqA. The Court found that individuals with the aforementioned disabilities could be disadvantaged by the decision-making process designed to determine whether claimants were fit to work on two counts. Firstly, it was held that people with cognitive, psychosocial and intellectual disabilities were at a higher risk that the decision-maker would not reach the correct decision because the information available from such claimants is often insufficient to indicate the true nature and extent of the illness which they have. Secondly, the Court ruled that the process of decision-making created greater stress and anxiety levels for this group than others.

This is one of the foremost decisions on disability discrimination in the **United Kingdom** as it applies to public functions. The case is similar to the **Latvian** case (detailed above) as both cases required accommodations in the form of adaptations to the standard application and assessment procedures. The **United Kingdom's** case is particularly interesting from the perspective not only of how the disabled individuals in question were treated, but also in relation to the general system for assessing entitlement to certain benefits for disabled individuals. It is also a noteworthy judgment with regard to its interpretation of the reasonable adjustment duty in respect of services and public functions.

6.3 Social Housing

The provision of social housing is a particular element of social protection. However, there seem to be rather limited provisions specifically concerning reasonable accommodation and social housing in EU Member States. On the other hand, some kind of reasonable accommodation obligations (whether explicit, *de facto* or obligations similar to a reasonable accommodation duty) regarding housing exist in **Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, Germany, Hungary, Ireland, the Netherlands, Romania, Slovakia, Spain** and the **United Kingdom**. In some cases, these duties are quite explicit (as under the DDA in the **Netherlands**), although in other cases they are more implicit or a matter of interpretation. The duty to accommodate in the field of housing generally is explored below in section 8 of this report.

The present subsection of the report concentrates on the information identified by the national experts of the European network of legal experts in gender equality and non-discrimination related to social

535 Slovakia, *National Programme of the Development of Living Conditions of Persons with Disabilities (2014-2020)* (Národný program rozvoja životných podmienok osôb so zdravotným postihnutím na roky 2014-2020), adopted by Government Resolution No. 25 of 15 January 2014.

536 Slovakia, *National Programme of the Development of Living Conditions of Persons with Disabilities (2014-2020)* (Národný program rozvoja životných podmienok osôb so zdravotným postihnutím na roky 2014-2020) Measures 4.3.4 and 4.3.3, p. 22 and 21.

537 Slovakia, *National Programme of the Development of Living Conditions of Persons with Disabilities (2014-2020)* (Národný program rozvoja životných podmienok osôb so zdravotným postihnutím na roky 2014-2020) Measure 4.5.4, p. 25-26.

538 United Kingdom, Court of Appeal, *Secretary of State for Work and Pensions v. MM* [2013] EWCA Civ 1565 [2014] EqlR 34.

housing. In a number of Member States,⁵³⁹ disabled people have some degree of priority in terms of allocation of social housing. Whilst this could be regarded as equivalent to a specific form of reasonable accommodation, it does not amount to a wide-ranging or complete obligation to reasonably accommodate persons with disabilities in the context of social housing. Such priority measures could arguably be better regarded as a particular form of positive action targeting disabled people and their families, rather than as a form of reasonable accommodation. In addition, some Member States provide certain social benefits or supports to disabled people living in social housing. These are considered below, although none of the identified measures amount to an explicit reasonable accommodation duty.

In **Finland**, the Services and Assistance for the Disabled Act (Disability Act)⁵⁴⁰ creates a duty for municipalities to enable persons with disabilities to live and function on an equal footing with other people.⁵⁴¹ Persons with severe disabilities have certain rights, including the rights to housing services ('service housing'), personal assistance, necessary home alteration work to enable independent living, as well as necessary devices and equipment in the home to enable independent living.

In **Hungary**, there are no provisions concerning reasonable accommodation in the field of social housing under the RPD Act or under any other legislative enactment. Notwithstanding this, a case was considered by the **Hungarian** Equal Treatment Authority involving a woman living in social housing with her two autistic sons. The municipality provided the family with an apartment that was in very poor condition. The family's request for alternative, more suitable, housing was rejected. Although there is no statutory requirement of reasonable accommodation in relation to housing under **Hungarian** law, the Equal Treatment Authority agreed to consider the complaint. The case ended with a friendly settlement after the municipality agreed to provide the family with an apartment in a better state of repair.⁵⁴²

In **Slovakia**, the Social Services Act⁵⁴³ stipulates different kinds of social services for, *inter alia*, persons with a 'serious disability' and those with an 'unfavourable state of health',⁵⁴⁴ such as facilities for supported housing.⁵⁴⁵ Moreover, the *National Programme for the Development of Living Conditions of Persons with Disabilities* (2014-2020)⁵⁴⁶ envisages the provision of subsidies to municipalities and to NGOs (among others) to achieve barrier-free housing for persons with disabilities.⁵⁴⁷

In **Slovenia**, Article 13(2) of the Act on Equal Opportunities of People with Disabilities obliges local communities to ensure that every individual with a disability who is allocated social housing receives an adapted apartment. The law does not differentiate clearly between reasonable accommodation and accessibility.

In the field of social housing in **Spain**, the General Law on the Rights of Persons with Disabilities and their social inclusion (RDL 1/2013) provides for reasonable accommodation obligations.⁵⁴⁸ The Law also

539 This was identified to be the situation in Croatia, France and Romania.

540 Finland, Services and Assistance for the Disabled Act (*Vammaispalvelulaki*) (380/1987).

541 Finland, Services and Assistance for the Disabled Act.

542 Hungary, Equal Treatment Authority (*Egyenlő Bánásmód Hatóság*) Case 934/2008.

543 Slovakia, Act No. 448/2008 Coll. on Social Services and on amending and supplementing Act No. 455/1991 Coll. on Licensed Trades (Small Business Act), as amended (*zákon č. 448/2008 Z. z. o sociálnych službách a o zmene a doplnení zákona č. 455/1991 Z. z. o živnostenskom podnikaní (živnostenský zákon) v znení neskorších predpisov*), 30 October 2008.

544 Slovakia, Act No. 448/2008 Coll. on Social Services and on amending and supplementing Act No. 455/1991 Coll. on Licensed Trades (Small Business Act), Section 2(2)(d).

545 Slovakia, Act No. 448/2008 Coll. on Social Services and on amending and supplementing Act No. 455/1991 Coll. on Licensed Trades (Small Business Act), Section 34.

546 Slovakia, *National Programme of the Development of Living Conditions of Persons with Disabilities (2014-2020)* (*Národný program rozvoja životných podmienok osôb so zdravotným postihnutím na roky 2014-2020*).

547 Slovakia, *National Programme of the Development of Living Conditions of Persons with Disabilities (2014-2020)* (*Národný program rozvoja životných podmienok osôb so zdravotným postihnutím na roky 2014-2020*), Measure 4.2.1, p 20.

548 Spain, General Law on the rights of Persons with Disability and their Social Inclusion, Article 66.

provides for accessibility standards pertaining to construction,⁵⁴⁹ accessible housing for people with disabilities⁵⁵⁰ and renovation of existing housing to make it accessible for people with disabilities.⁵⁵¹

6.4 Reasonable Accommodation in Healthcare

In this subsection of the report, we outline the various provisions of domestic legislation, over and above those provisions referred to in section 6.1 above, relating to healthcare. The sources drawn on to compile the information in this subsection on healthcare are the country reports and templates of the European network of legal experts in gender equality and non-discrimination, as well as a 2014 report prepared by Professor Lisa Waddington, entitled *Access to Healthcare by People with Disabilities in Europe*. This latter report was drafted on the basis of country reports provided by national experts in the Academic Network of European Disability experts (ANED).⁵⁵²

– Full duty of reasonable accommodation

In **Croatia**, there is a duty to reasonably accommodate disabled persons in the field of healthcare and this is an area in which significant problems have been identified. According to a report by the Disability Ombudsman, there is a lack of staff in healthcare institutions trained to work with persons with disabilities. In addition, hospitals often do not have basic devices (e.g., wheelchair lifts) or adequate staff levels to take care of patients with disabilities.⁵⁵³

In **Cyprus**, the Law on Persons with Disability⁵⁵⁴ includes an implicit reasonable accommodation duty as it prohibits discrimination against people with disabilities in health services due to: '[...] failure to carry out changes in services or facilities which are impossible or unreasonably difficult for a disabled person to use'. Article 6(d) of the Law provides that such changes may relate to:

- (i) Appropriate means of access and facilities for comfortable and safe use of services and facilities;
- (ii) Use of special means, tools or contact persons for some categories of disability; and
- (iii) Use of special means, tools and facilities in specific areas to provide services such as schools, hospitals, clinics and other similar places.⁵⁵⁵

It is noteworthy that the 2014 **Cypriot** National Action Plan on Disability⁵⁵⁶ covers the area of health and rehabilitation. However, it provides that the duty of the state to ensure respect for the dignity of persons with intellectual disabilities and to provide for their needs, healthcare, advice, support and advocacy is conditional upon the availability of state resources. The Cypriot confederation of disability organisations (KYSOA) has vehemently objected to the contents of this bill, arguing that it fails (among other things) to meet the requirements of Article 12(4) of the CRPD (equality before the law and legal capacity).⁵⁵⁷

The **Spanish** General Law on the Rights of Persons with Disabilities and their social inclusion (RDL 1/2013) establishes reasonable accommodation duties in the field of healthcare.⁵⁵⁸

549 Spain, General Law on the rights of Persons with Disability and their Social Inclusion, Articles 25 and 26.

550 Spain, General Law on the rights of Persons with Disability and their Social Inclusion, Article 32.

551 Spain, General Law on the rights of Persons with Disability and their Social Inclusion, Article 33.

552 Waddington, L. (2014), *Access to Healthcare by People with Disabilities in Europe – A Comparative Study of Legal Frameworks and Instruments*, Synthesis Report for the Academic Network of European Disability Experts, December 2014.

553 Croatia, Disability Ombudsperson (2014) *Report for 2014 (Izveštaje pučke pravobraniteljice za 2014.)* Zagreb, 31 March 2015.

554 Cyprus, Law on Persons with Disability.

555 Cyprus, Law on Persons with Disability, Article 6(d).

556 Cyprus, Ministry of Labour Welfare and Social Security (2013), *National Disability Strategy (2013-2015)* (Σχέδιο Δράσης Για Την Αναπηρία 2013-2015).

557 Cyprus, Letter from the Cyprus Confederation of Organisations of the Disabled (KYSOA) to the Minister of Labour, Welfare and Social Insurance, 17 December 2014.

558 Spain, General Law on the rights of Persons with Disability and their Social Inclusion, Articles 10 and 23(3).

In **Sweden**, reasonable accommodation duties exist in the area of health/medical care and social services, pursuant to Chapter 2, Sections 13-13(b) of the Discrimination Act.

- Partial reasonable accommodation duty

In the **Czech Republic**, while there is no overall duty to reasonably accommodate in the field of healthcare, under the Law on Healthcare Services No 372/2011 Coll., there is a reasonable accommodation duty which applies in the context of communication only.⁵⁵⁹

In **Slovenia**, the Equalisation of Opportunities for Persons with Disabilities Act of 2010⁵⁶⁰ does not define the obligation incumbent on the state and other service providers with regard to healthcare. However, Article 14 of the Act establishes a specific obligation to provide a reasonable accommodation with regard to access to information in the area of healthcare.

- No reasonable accommodation duty but obligations having similar effect

Reasonable accommodation obligations are not regulated under the **Hungarian** ETA in the context of access to healthcare.⁵⁶¹ Nonetheless, Article 12 of the Act XXVI of 1998 on the Rights of Persons with Disabilities (the RPD Act)⁵⁶² states that ‘in the course of providing healthcare for persons with disabilities – in line with the Act on Healthcare – the needs arising from their disability must be taken into account’.

Although there is no express obligation to provide reasonable accommodations to disabled people in the context of healthcare under **Latvian** legislation, there is relevant case law in that regard. In the most important case in the field of healthcare,⁵⁶³ the claimant (a wheelchair user) submitted a complaint to the Administrative District Court regarding the inaccessibility of several health institutions. The Court referred to Article 111 of the **Latvian** Constitution (on the right to health).⁵⁶⁴ The Court ruled that failure to ensure physical access to healthcare institutions is a form of discrimination on the grounds of disability. According to the Court, a duty to provide reasonable accommodation to allow access to healthcare premises exists under **Latvian** law. In order to interpret the domestic law, relevant norms contained in the CRPD were drawn on.⁵⁶⁵ The Court referred to the definition of reasonable accommodation in the Convention and invoked the duty to accommodate in order to assess whether the various health service premises in question were accessible to the claimant. In some instances, the Court found a lack of reasonable accommodation as required under the CRPD. The Court noted, for example, that persons using wheelchairs were not able to reach the call button in order to ask for assistance by the personnel to gain access to the building.⁵⁶⁶ In other instances, the Court ruled that reasonable accommodations had been provided.⁵⁶⁷ Overall, the Court found an omission by the Health Inspectorate with regard to the rights of the claimant and ruled that moral compensation was payable.

559 Czech Republic, Law on healthcare services (*o zdravotních službách a podmínkách jejich poskytování (zákon o zdravotních službách)*), No. 372/2011 Coll, Article 30. Information taken from Waddington, L. (2014), *Access to Healthcare by People with Disabilities in Europe – A Comparative Study of Legal Frameworks and Instruments*, Synthesis Report for the Academic Network of European Disability Experts, December 2014, at p. 31.

560 Slovenia, Act on Equal Opportunities for People with Disabilities – AEOPD (*Zakon o izenačevanju možnosti invalidov*).

561 Information taken from Waddington, L. (2014), *Access to Healthcare by People with Disabilities in Europe – A Comparative Study of Legal Frameworks and Instruments*, Synthesis Report for the Academic Network of European Disability Experts, December 2014, at p. 32.

562 Hungary, Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities.

563 Latvia, Administrative District Court [*Administratīvā rajona tiesa*], Case No. A420571712, 2 December 2013.

564 Latvia, Constitution of the Republic of Latvia (*Latvijas Republikas Satversme*), Article 111 provides that: The State shall protect human health and guarantee a basic level of medical assistance for everyone.

565 Latvia, Administrative District Court [*Administratīvā rajona tiesa*], Case No. A420571712, 2 December 2013, See paras. 13 and 17 of the judgment, for instance.

566 Latvia, Administrative District Court [*Administratīvā rajona tiesa*], Case No. A420571712, 2 December 2013, See paras. 13, 17, 19, 27 of the judgment.

567 Latvia, Administrative District Court [*Administratīvā rajona tiesa*], Case No. A420571712, 2 December 2013, The Court found that the availability of a lift with a specially adapted wheelchair, the provision assistance by an employee of the healthcare

In **Romania**, the Law on People with Disabilities' Rights⁵⁶⁸ provides for an obligation on health service providers to ensure reasonable accommodation to individuals with disabilities,⁵⁶⁹ including through providing high-tech assistance.⁵⁷⁰ Law 448/2006⁵⁷¹ imposes an obligation on public authorities to take special measures to support persons with disabilities in relation to healthcare,⁵⁷² among other fields. The Law does not mention reasonable accommodation measures explicitly. Notwithstanding this, it specifies general support measures which must be carried out by the relevant authorities.⁵⁷³ The provisions related to healthcare can potentially be invoked by individuals claiming reasonable accommodation. However, there are limited mechanisms of enforcement in that regard.

- No reasonable accommodation duty in the field of healthcare

There is no duty to reasonably accommodate persons with disabilities, nor does there appear to be any comparable duty, in the context of healthcare in **Denmark, Estonia, Greece, Italy, Lithuania, Luxembourg, the Netherlands, Malta and Poland**. In **Bulgaria**, existing legislation does not provide for reasonable accommodation duties in the field of healthcare. However draft legislation, entitled the Natural Persons and Support Measures Act (NPSMA), has as its objective the regulation of healthcare issues for individuals with intellectual disabilities and individuals with psycho-social disabilities.⁵⁷⁴ With regard to the provision of reasonable accommodation, the NPSMA states that when consenting to medical aid or when exercising reproductive rights a person is entitled to an appropriate consultation, taking into account his/her capabilities for communication, by a medical expert appointed by the medical establishment concerned.⁵⁷⁵

6.5 Conclusion on Social protection

It is evident from the information provided in the current section of this report that national laws and policies related to social protection vary greatly between the 28 EU Member States. There is very little specific information available in the context of social security/disability benefits and social housing throughout the Member States, while information on healthcare is more readily available. With regard to social security and assistance benefits, there are not many examples of explicit reasonable accommodations in national legislation. However, there is relevant case law (notably, in **Latvia** and the **United Kingdom**), which elaborates on the duty to accommodate disabled persons in the context of accessing disability benefits. In a similar vein, there are very few examples of complete obligations to reasonably accommodate disabled persons in relation to social housing. In several EU Member States, there are priority measures (or positive action measures) for disabled persons in terms of allocation of social housing. Finally, it is

facility, and that patient reception took place on the ground floor, should be considered as reasonable accommodations in providing accessibility. See para. 25 of the judgment.

568 Romania, Law 448/2006 on protection and promotion of rights of persons with a handicap.

569 This paragraph was taken directly from Waddington, L. (2014), *Access to Healthcare by People with Disabilities in Europe – A Comparative Study of Legal Frameworks and Instruments*, Synthesis Report for the Academic Network of European Disability Experts, December 2014, p. 35.

570 Romania, Law 448/2006 on protection and promotion of rights of persons with a handicap, Article 9(1).

571 Romania, Law 448/2006 on protection and promotion of rights of persons with a handicap.

572 See, in particular, Romania, Law 448/2006 on protection and promotion of rights of persons with a handicap, Articles 9-14.

573 See Romania, Law 448/2006 on protection and promotion of rights of persons with a handicap, Articles 9-14. Article 9(1) obliges public authorities to take (*inter alia*) the following specific measures: a) inclusion of the needs of disabled persons and of their families in regional, county or local policies, strategies and programmes, and in governmental health protection programmes; b) creation of conditions ensuring the availability of transport, infrastructure, communication networks, and medical and socio-medical services; c) establishment and support of specialised rehabilitation centres, according to impairment type; d) creation of conditions for ensuring assistive technology; and e) development of programmes for the prevention of disability. Furthermore, Article 10 of the law provides that disabled persons shall benefit from free medical assistance, including free medication, both for ambulatory treatment and during a stay in hospital, under the social health insurance system.

574 Bulgaria, Natural Persons and Support Measures Act (draft) (*Проект на Закон за физическите лица и мерките за подкрепа*). This draft was submitted to the government on 9 April 2015. It was discussed by the government on 27 April 2015. It has not been introduced into Parliament so far. The draft is available via the Ministry of Justice website: <https://mjs.bg/15/>.

575 Bulgaria, Natural Persons and Support Measures Act (draft), Article 10 (4).

notable that Member States' laws and policies regarding healthcare ensure quite a wide coverage. In a handful of Member States, there is a complete duty to reasonably accommodate persons with disabilities in the context of healthcare. In other Member States, there is a partial duty only, related in particular to methods of communication or access to information. In several other Member States, there is no explicit reasonable accommodation duty but there are obligations having similar effect or relevant case law (notably, in **Latvia**).

7 Education

The CRPD contains far-reaching obligations to ensure inclusive education for persons with disabilities. In that regard, Article 24(2)(c) of the Convention mandates that ‘reasonable accommodation of the individual’s requirements is provided’. Furthermore, Article 24(2)(d) requires states parties to the Convention to ensure that persons with disabilities ‘receive the support required, within the general education system, to facilitate their effective education’. A substantial number of EU Member States’ laws contain complete and wide-ranging reasonable accommodation obligations in the context of educational provision for persons with disabilities. In those Member States’ laws where there is no general duty to reasonably accommodate in the context of education, there is often an obligation having a similar effect or an implicit duty. This section of the report is divided into four subsections. In subsection 7.1, we outline national provisions relating to reasonable accommodation in the field of education. Subsection 7.2 highlights some of the latest developments in education at the national level. Subsection 7.3 contains a conclusion on the status of reasonable accommodations in the field of education. The focus in this section of the report is on the education of children with disabilities, and limited attention is paid to higher or further education. Since the latter form of education is generally regarded as vocational training under EU law, it falls within the scope of the Employment Equality Directive. This section of the report may be read together with subsection 4.2 on legislative and policy developments on education (not covering discrimination) at Member State level.

In a large number of Member States, there are explicit reasonable accommodation duties in the relevant domestic legislation (namely, in **Austria, Belgium, Bulgaria, Croatia, Cyprus, Finland, Germany, Ireland, Luxembourg, the Netherlands, Portugal, Slovakia, Slovenia, Spain, Sweden** and the **United Kingdom**). The **German** obligation of reasonable accommodation in the educational context derives from the Constitution. In a handful of other Member States, there are what might be termed *de facto* reasonable accommodation duties. This is the case in the **Czech Republic, Denmark, France, Greece, Hungary**, as well as in **Malta** and **Romania**. Some Member States do not provide for any (explicit or *de facto*) reasonable accommodation duty in the field of education. However, the laws of such Member States contain measures which are very similar to the reasonable accommodation duty in nature and, as a result, the domestic authorities appear (in most instances) to be taking certain measures to promote integration of children with disabilities in mainstream education. That is the case in **Estonia, Italy, Latvia, Lithuania** and **Poland**.

7.1 National Provisions in the Field of Education

In this sub-section of the report, we outline the various provisions contained in national legislation relating to the field of education. We have divided the domestic provisions into three categories. Firstly, we delineate those national legislative provisions which provide for a complete duty to reasonably accommodate disabled persons in the field of education on the basis of non-discrimination or specialist disability legislation. Secondly, we consider those domestic legislative provisions which contain a *de facto* reasonable accommodation duty. Thirdly, we consider those Member States whose laws do not contain an explicit duty to reasonably accommodate disabled persons, but which provide for measures to ensure integrated/inclusive education. In some instances, the categorisation in this subsection is rather arbitrary, as legislative provisions are not always clear.

- Complete duty to reasonably accommodate disabled persons in the field of education

In **Austria**, there is a legal requirement to provide reasonable accommodation imposed on providers of public and private education. The failure to reasonably accommodate in the context of education is not mentioned explicitly in the Federal Disability Equality Act but is covered by the general anti-discrimination

norm at the federal level.⁵⁷⁶ In most provinces, except Lower Austria, discrimination (including failure to provide reasonable accommodation) is regulated with regard to education.

In **Belgium**, there is a complete and explicit duty to provide reasonable accommodation in the field of education, pursuant to a variety of statutes.⁵⁷⁷ The 2009 judgment of the President of the First Instance Court of Ghent illustrates how the duty to provide reasonable accommodation operates in the field of education.⁵⁷⁸ In that case, the applicants (parents of three children with hearing impairments attending mainstream school) claimed that an allocation of 5–9 hours a week of interpretative assistance in the school was insufficient for their children to follow the required educational courses. As a result, they brought a case against their childrens' respective schools and the Flemish Community. They claimed that the refusal to grant their children more assistance hours amounted to a denial of reasonable accommodation. Furthermore, they argued that the procedure established by the Flemish Government with regard to providing interpretative assistance constituted a denial of reasonable accommodation, in and of itself. The Court referred to the U.S. case of *Vande Zande v. State of Wisconsin Department of Administration*⁵⁷⁹ and stated that the notion of financial burden is only one element that must be considered in assessing the 'reasonableness' of a requested accommodation. Furthermore, the Court stated that reasonableness is to be set against the advantages resulting from the provision of such accommodation. The judge discharged the school from its obligation, but held the Flemish community liable for a failure to provide reasonable accommodation. The Court also referred to an opinion of the Dutch Equal Treatment Commission of 9 February 2005,⁵⁸⁰ in ruling that the manner in which a request for reasonable accommodation is handled may, in itself, amount to a denial of such accommodation. In the instant case, the procedure established by the Flemish Government in the allocation of assistance with regard to interpretation did not take into account the individual needs of each child. Accordingly, the Court ordered the Flemish Community to, *inter alia*, cease the above-mentioned denials of reasonable accommodation and to provide the plaintiffs with assistance hours corresponding to 70 % of their school time within five months of the notification of the judgment. The Flemish Community launched an appeal against this decision but the Court of Appeal of Ghent confirmed the decision on 7 September 2011. Notwithstanding this positive case law, it is important to note that, according to the Inter-Federal Centre for Equal Opportunities:

'Inclusive education in Belgium is too often incorrectly equated with integrated education, where it is not the school that adapts to the pupil's disability, but the pupil who adapts to the limitations imposed on him by the school. In the various Communities there is still no long-term strategy and vision (including budgeting) for more inclusive education'.⁵⁸¹

Under **Bulgarian** law, namely Article 32 of PADA, educational establishments must provide appropriate measures in order to equalise opportunities for persons with disabilities in terms of the right to education and training, except where costs are unreasonably high and would seriously hamper the educational

576 See Austria, Federal-Constitutional Act, Articles 5 and 6.

577 Belgium, Decree establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy (Flemish Community/Region), Article 15, 6° and Article 19; Decree on the fight against certain forms of discrimination (French Community), Article 3, 9° and Article 5, 4°; and Decree aimed at fighting certain forms of discrimination (German-speaking Community) (German-speaking Community, Article 3, 9° and Article 5, 5°.

578 Belgium, Court of First Instance of Ghent (*tribunal de première instance – Rechtbank van eerste aanleg*), (emergency proceedings), *Marie Gerday (representing her son Dylan Moens) v. Sint-Bavohumaniora and the Flemish Community ; Ronny Van Landuyt and Carine Van De Ginste (representing their daughter Sylvie Van Landuyt) v. Maria Assumpta and the Flemish Community ; Yalçın Batur and Sandra Roose (representing their daughter Charlotte Batur) v. Schoolcomité van het Sint-Franciskusinstituut and the Flemish Community*, Judgment of the President, 15 July 2009.

579 United States, Court of Appeals, 7th Circuit, *Vande Zande v. State of Wisconsin Department of Administration*, 44 F. 3d 538, 3 A.D. Cas. 1636, 5 January 1995.

580 Netherlands, Equal Treatment Commission (*Commissie Gelijke Behandeling (CGB)*), ETC.

581 Interfederal Centre for Equal Opportunities and Opposition to Racism (2014) *Parallel Report on the first periodic report from Belgium in the context of the implementation of the United Nations Convention on the Rights of Persons with Disabilities*, Brussels, 2014, pp. 28–34 (Article 24), available on the website of the Centre (www.diversity.be). These pages provide extensive information on the situation in the three Communities in Belgium where different pieces of legislation apply.

establishment.⁵⁸² This provision could be interpreted as an individualised reasonable accommodation measure rather than an anticipatory accessibility provision, but it has not been implemented in any meaningful way to date and no case law has been reported on the provision. Under Ordinance No. 1 on the Education of Children and Pupils with Special Educational Needs and/or Chronic Ailments,⁵⁸³ persons with disabilities must be educated under individual educational programmes, in addition to generally applicable curricula.⁵⁸⁴

In **Croatia**, the provision of reasonable accommodations in education is not explicitly covered under the general obligation to accommodate contained in Article 4(2) of the Anti-discrimination Act. The Act regulates reasonable accommodation in the context of the 'use of publicly available resources' and 'participation in public and social life', without any further details being given in the Act. However, it appears that education is covered implicitly under those particular criteria, subject to judicial interpretation. In addition, the Rules on Primary and Secondary Education of Students with Developmental Difficulties⁵⁸⁵ regulate various types of support for the integration of students with disabilities.

In **Cyprus**, the original Law on Persons with Disabilities contained a general and rather vague right to integrated education,⁵⁸⁶ without linking this to reasonable accommodations and without containing a mechanism for implementation of that right. The 2014 amendment to the Law⁵⁸⁷ (extending the duty of reasonable accommodation to fields beyond employment) covers the field of access to integrated education. Since this amendment was introduced, no complaint with regard to reasonable accommodation in education has been examined either by the Equality Body or the **Cypriot** courts. It is therefore not possible to assess the impact (if any) of this new amendment. In addition, the Law on the Education of Children with Special Needs⁵⁸⁸ specifies that education for children with disabilities may be provided in alternative settings. These alternative settings are as follows: In a mainstream classroom with individualised support on a temporary basis; in special units within the mainstream school, catering for the needs of small groups; in special schools; or at home, visited by educators on a daily basis or a few days per week. This last form of education is for children who, due to poor health or disabilities, need to stay at home. The law sets out a number of measures that schools must take in order to adapt the school to the needs of the children with disabilities. However, it provides no framework or monitoring mechanism for the adoption of such measures.

It is noteworthy that **Cypriot** state policies regarding exams do not appear to be compliant with the principle of reasonable accommodation. This is evidenced by decisions of the **Cypriot** Equality Body. In 2006, a decision was handed down by the Equality Body following a complaint from a dyslectic student who needed specific reasonable accommodation measures in the state examination process. The decision found that the Ministry of Education's practice of only providing additional examination time was discriminatory towards children with dyslexia and also that the two national laws regulating the issue of exams⁵⁸⁹ were indirectly discriminatory. The Equality Body requested that the two laws in question be revised in order to provide for additional accommodations over and above the allocation of a mere 30

582 Bulgaria, Protection Against Discrimination Act, Article 32.

583 Bulgaria, Ordinance No. 1 of 23 January 2009 on the Education of Children and Pupils with Special Educational Needs and/or Chronic Ailments (*наредба № 1 от 23 януари 2009 г. За обучението на деца и ученици със специални образователни потребности и/или с хронични заболявания*), SG 11/10 February 2009.

584 Bulgaria, Ordinance No. 1 of 23 January 2009 on the Education of Children and Pupils with Special Educational Needs and/or Chronic Ailments (*наредба № 1 от 23 януари 2009 г. За обучението на деца и ученици със специални образователни потребности и/или с хронични заболявания*), Article 5.

585 Croatia, Rules on Primary and Secondary Education of Students with Developmental Difficulties, (*Pravilnik o osnovnoškolskom i srednjoškolskom odgoju i obrazovanju učenika s teškoćama u razvoju*) Official Gazzete 24/2015.

586 Cyprus, Law on Persons with Disability, Article 4.

587 Cyprus, Law amending the Law on Persons with Disabilities.

588 Cyprus, Law on training and education of children with special needs of 1999.

589 Cyprus, Law for the Carrying out of the Pancyprian School Exams (Ο περί Διεξαγωγής των Παγκύπριων Εξετάσεων Νόμος του 2006) No. 22(I)/2006.

minutes of extra time in exams.⁵⁹⁰ It is notable that in 2007, domestic legislation⁵⁹¹ was revised to provide that an extra 30 minutes ‘and/or other possible facilities’ are granted to (eligible) persons with special needs.⁵⁹² However, it appears that the above decision of the Equality Body, and the legislative change which followed the decision, did not impact significantly on policy and practice in **Cyprus**. A further decision of the Equality Body in 2008 revealed that the only adaptation being offered to disabled exam candidates was additional time. In the instant case, the Equality Body ruled that the measure offered to the exam candidate with a disability was not sufficient to create conditions of true equality for the complainant to compete with other exam candidates. In that regard, the Equality Body stated that the principle of reasonable accommodation is founded upon the premise that the measure in question must ensure equality of opportunity and not in the result.⁵⁹³

In **Finland**, the duty to provide reasonable accommodation for people with disabilities in the context of education is contained explicitly in Section 15(1) of The Non-Discrimination Act.⁵⁹⁴

In **Germany**, reasonable accommodation in public education is a right which derives from the Constitution.⁵⁹⁵ In the leading case concerning integrated schooling, the **German** Federal Constitutional Court ruled that the decision to place a child in a special school for children with disabilities, against the wish of the child’s parents, constituted a breach of Article 3.3, sentence 2 of the Basic Law (the Constitution). The Court held that the child should be placed in a mainstream school if it was possible for the child to attend an ordinary school without special pedagogical help, if his/her special needs could be fulfilled using existing means, and if other interests worthy of protection, especially of third parties, did not weigh against integrated schooling. A general ban on integrated schooling was therefore regarded as unconstitutional.⁵⁹⁶ The Federal Constitutional Court ruled that persons with disabilities are not only discriminated against if there is unequal treatment, but also when a disadvantage results from the lack of appropriate measures to accommodate the needs of the persons with disabilities.⁵⁹⁷

The **Irish** ESA cover public and private educational establishments (pre-school services through to higher-level institutions) under Section 7. Disability discrimination is prohibited in relation to: The terms or conditions of admission of a person as a student to an establishment; the access of a student to any course, facility or benefit provided by an establishment; any other term or condition of participation in the establishment by a student; and the expulsion of a student from the establishment or any other sanction imposed on the student. The prohibition on discrimination does not apply where the provision of education to a student with a disability would make it impossible or have a seriously detrimental effect on the provision of education to other students.⁵⁹⁸ In *Mrs. X (on behalf of her son, Mr. Y) And A Post-Primary School*,⁵⁹⁹ the Equality Tribunal ruled that an educational establishment had discriminated against the complainant on the grounds of disability, under Section 7(2) ESA, by failing to provide a reasonable accommodation in accordance with Section 4(1) of the Acts. The complainant’s son had access to a full-time special needs assistant at the school in question, as well as one-to-one tuition in a range of subjects, but the school failed to make use of further supports that were available (including the services of the Educational Welfare Officer and the official psychologist), nor did it put in place an Individual Education Plan and a behaviour management plan for the child. The Tribunal found that reasonable accommodation had not been provided and awarded the plaintiff the maximum amount of compensation allowable.

590 Cyprus, Equality Authority (*Αρχής Ισότητας*), File No. AKI 24/2006, AKI 27/2006, 31 October 2006.

591 Cyprus, Law for the Carrying out of the Pancyprian School Exams.

592 Cyprus, Law for the Carrying out of the Pancyprian School Exams.

593 Cyprus, Equality Authority (*Αρχής Ισότητας*), File No. AKI 37/2008, 8 October 2008.

594 Finland, Non-discrimination Act.

595 See section 2.1.1 of this report.

596 See Germany, Federal Constitutional Court (Bundesverfassungsgericht) BVerfGE 96, 288, 8 October 1997.

597 Germany, Federal Constitutional Court (Bundesverfassungsgericht) BVerfGE 96, 288, 8 October 1997. This judgment is not limited to severely disabled people.

598 Ireland, Equal Status Acts (2000-2012), Section 7(4)(b).

599 Ireland, Equality Tribunal, *Mrs. X (on behalf of her son, Mr. Y) and A Post-Primary School*, DEC-S2010-009, 2 February 2010.

In **Luxembourg**, there is a reasonable accommodation duty imposed on those providing education pursuant to Law of 15 July 2011 on access to school and professional qualifications of pupils with special educational needs.⁶⁰⁰

In the **Netherlands**, there is a right to reasonable accommodation in education under Article 5(b) DDA, in conjunction with Article 2 DDA. The Tailored Education Act⁶⁰¹ also facilitates the integration of disabled children in mainstream education. That law entered into force in 2014 and its effects are not yet known. This new act brings thorough changes in the manner in which schools are compensated for costs associated with teaching students with learning disabilities, meaning that the total budget available to schools solely open to students with learning disabilities has been reduced. This will inevitably lead to increased numbers of intellectually and physically disabled pupils applying to mainstream schools. The Equal Treatment Commission (now the **Netherlands** Institute for Human Rights) has developed a consistent line of opinions concerning the obligation to provide reasonable accommodation to pupils with disabilities.⁶⁰² In 2012, a case⁶⁰³ was brought before the (then) Commission in connection with a reasonable accommodation required by a pupil with dyscalculia. The pupil in question needed to use a math's chart during her final exam, which was refused on the ground that the relevant regulations prohibited the use of such charts. However, the Commission noted that the school should still have offered the pupil a reasonable accommodation, in spite of the existence of such a prohibition in the regulations.

In **Portugal**, there is a duty to reasonably accommodate students with disabilities pursuant to Decree-law 3/2008 of 7 January 2008, according to which children with disabilities should be integrated into mainstream education whenever possible, or alternatively in special classes (separate classes generally in mainstream schools, with specifically adapted programmes). Under that law, students are entitled to support services and to receive materials adapted to their disability. The assistance offered to the student depends on the kind of disability and may include extra teaching assistance, reasonable accommodations (other than material in Braille), and physically accessible schools. Articles 4(h) and (i) of Law 46/2006 of 28 August 2006 provide that the denial or limitation of access to educational institutions, (public or private), as well as appropriate support for the specific needs of students with disabilities, shall be considered discrimination.

In **Slovakia**, the Anti-discrimination Act,⁶⁰⁴ (which applies to several fields, including education) stipulates a legally enforceable duty to adopt measures to prevent discrimination in all the fields covered⁶⁰⁵ and in relation to all the grounds covered by the Act. Thus, the duty to provide reasonable accommodation for people with disabilities in the field of education is covered by this generally framed legal duty to prevent discrimination, including on the ground of disability. There are also some specific duties contained in other **Slovakian** laws. For instance, the Schools Act⁶⁰⁶ contains special provisions designed to accommodate the needs of children and pupils with disabilities in nurseries, as well as in primary and secondary education.⁶⁰⁷ Little data exists on the impact and effectiveness of these measures and, generally speaking, the duty to provide reasonable accommodation in education is not widely known or enforced in **Slovakia**.

600 Luxembourg, Law of 15 July 2011 on 2011 on access to school and professional qualifications of pupils with special educational needs, Articles 2-5.

601 Netherlands, Tailored Education Act (*Wet van 11 oktober 2012 tot wijziging van enkele onderwijswetten in verband met een herziening van de organisatie en financiering van de ondersteuning van leerlingen in het basisonderwijs, speciaal en voortgezet speciaal onderwijs, voortgezet onderwijs en beroepsonderwijs (Wet Passend Onderwijs)*), 11 October 2012, Staatsblad 2012, 533.

602 E.g. Netherlands, Equal Treatment Commission (*Commissie Gelijke Behandeling (CGB)*), Cases ETC 2005-11; ETC 2005-230; ETC 2006-81; ETC 2006-95; ETC 2007-37 and ETC 2010-11.

603 Netherlands, Equal Treatment Commission (*Commissie Gelijke Behandeling (CGB)*) ETC 2012-85.

604 Slovakia, Anti-discrimination Act - Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act).

605 Slovakia, Anti-discrimination Act - Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act), Section 2(3).

606 Slovakia, Schools Act - Act No. 245/2008 Coll. on Education (Schools Act).

607 Slovakia, Schools Act - Act No. 245/2008 Coll. on Education (Schools Act), Sections 3(c) and (d).

It is noteworthy that only about 6% of schools in **Slovakia** had barrier-free access for children with disabilities in 2013.⁶⁰⁸

According to Article 11 of the **Slovenian** Act on Equal Opportunities of People with Disabilities (2010), there is a duty to ensure to people with disabilities inclusion into educational programmes at all levels, including a duty to reasonably accommodate, where necessary.

In **Spain**, Article 74 of the Organic Law 2/2006 on education provides for measures to make the various stages of education more flexible, whenever this is considered necessary. The General Law on the Rights of Persons with Disabilities and their Social Inclusion (RDL 1/2013) complements the foregoing law. Article 16 of RDL 1/2013 recognises the right to inclusive education and establishes the duty on education authorities to provide reasonable accommodations. On 2 November 2009, the **Spanish** National High Court⁶⁰⁹ ruled in a case concerning disability discrimination in the field of education. The applicant, a person with physical and intellectual disabilities, applied for a scholarship to study law. The Ministry denied the scholarship, applying the same criteria to the applicant as to all other students. The Court began its judgment by recalling the requirement in the CRPD to ensure reasonable accommodations in education (although the CRPD had not at that point been transposed into domestic law). The Court concluded that the rules governing the scholarships should be subject to the provision of reasonable accommodations and ordered that the scholarship be granted to the applicant. This was an innovative judgment, in light of the fact that it can be linked directly to the CRPD and, furthermore, that it led to a *de facto* duty of reasonable accommodation at a time when the CRPD was not transposed into **Spanish** law.

According to the **Swedish** School Act, a student (including a student with a disability) may only be denied a place at the nearest local school, or the school of choice, if admitting the student to the school would cause a substantial organisational or financial burden on the provider.⁶¹⁰ The Discrimination Act,⁶¹¹ Chapter 2, Sections 5-8, in conjunction with Chapter 1, Section 4(3), also contains a duty to make education available through reasonable adaptation.

In the **United Kingdom**, the EqA⁶¹² applies to children in education and imposes duties of reasonable adjustment in that context. Limited duties of reasonable adjustment also apply in Northern Ireland under the Special Educational Needs and Disability Order 2005 (SENDO). Additionally, in Northern Ireland, there is a system whereby students with special educational needs (which covers students with disabilities) are entitled to have those educational needs met whether in mainstream, 'special' or private schools, at the expense of the state.⁶¹³

– *De facto* duty to reasonably accommodate

In the **Czech Republic**, Section 16 of the Schools law⁶¹⁴ guarantees disabled students:

- the right to be educated in a manner which is adapted to their needs and abilities;
- the right to advisory help;
- the right to special teaching aids, didactical and compensation aid; and
- the right to a pedagogic assistant.

608 See TA3 (2013), 'Ministerstvo školstva pracuje na bezbariérovom prístupe do škôl', 23 March 2013.

609 Spain, National High Court (*Audiencia Nacional*), Appeal 160/2007, 2 November 2009.

610 Sweden, School Act.

611 Sweden, Discrimination Act.

612 United Kingdom, Equality Act 2010 (Great Britain), Sections 20, 21, 85.

613 See, among others, United Kingdom, Education Act 1996, Part 4; Special Education and Disability Needs (NI) Order 2005 (Northern Ireland).

614 Czech Republic, Law on pre-school, primary, secondary and higher vocational and other education (Education Act).

The foregoing provisions have not been defined explicitly as reasonable accommodation duties in the relevant legislation. Nonetheless, the content of the obligations can be seen as encompassing a *de facto* reasonable accommodation duty. In fact, the **Czech** Constitutional court has even characterised the provision of teaching assistants in Section 16(6) of the Schools law as a form of reasonable accommodation.⁶¹⁵ In contrast, the general obligation to provide reasonable accommodation, as contained in Section 3(2) of the Anti-discrimination law, does not relate explicitly to the field of education.

In **Denmark**, an amendment to the Act on State School⁶¹⁶ was adopted in 2012 with the goal of including more students with special needs in mainstream education.⁶¹⁷ The amendment mandates that students with special needs receive support in the mainstream education system⁶¹⁸ and it, therefore, imposes a *de facto* duty of reasonable accommodation on public education providers. Children with disabilities for whom teaching within the framework of mainstream education is not effective can receive special educational assistance.⁶¹⁹ No clear assessment of these measures exists at present. However, there is evidence that children and young pupils with disabilities are performing worse than other pupils in Danish schools.⁶²⁰

In addition, in **France**, there is a *de facto* duty on education authorities⁶²¹ to provide reasonable accommodations arising from case law. In a 2010 case, the Marseilles Administrative Court granted an injunction ordering the replacement of a school auxiliary which had been awarded to a child in kindergarten. The decision of the Administrative Court was challenged before the Administrative Supreme Court, which decided that adapted access to education of disabled children at preschool level is a fundamental freedom, and that failure to provide the required accommodation in question violated that freedom. Accordingly, the Court ordered injunctive relief under Article L 521-2 of the Code of administrative justice and ruled that all necessary measures be taken by education authorities in order to satisfy the requirements of that article. Certain obligations regarding the education of disabled children are set out in Articles 19 to 22 of Law 2005-102.⁶²² Article 11 of the same law provides for a right of access to local mainstream schools for persons with disabilities and the right to a personalised educational plan.⁶²³ The law provides for a national policy on education and integration of disabled children in mainstream schools. However, that policy has not yet been extensively implemented and a report to the Minister of social affairs in 2014 estimates that there are approximately 20 000 disabled children in France placed in schools without adequate facilities.⁶²⁴ Furthermore, Article L112-1 of the Code of education⁶²⁵ includes a *de facto* obligation to make the necessary adaptations to render mainstream schools accessible to disabled children. Paragraph 2 of Article L112-1 provides for a right to a personalised education plan for persons with disabilities. Moreover, Article L112-4 of the Code of Education contains an obligation to adapt examination processes for disabled students.

In **Greece**, sporadic provisions at the domestic level contain duties which may be considered as *de facto* reasonable accommodation duties. Law 3699/2008⁶²⁶ aims to guarantee all children with disabilities

615 Czech Republic, Constitutional Court (Ústavní soud) Decision No. Pl. ÚS 365/14, 18 March 2014, para. 17.

616 Denmark, Amendment on Inclusion: Act No 379 of 28 April 2012. This amendment has been included in Act on State School (*Folkeskoleloven*), LBK No. 665 of 20 June 2014.

617 Information can be found on the website of the Danish Ministry of Education: <http://uvm.dk/Uddannelser/Folkeskolen/Laering-og-laeringsmiljoe/Inklusion/Regler-om-inklusion>.

618 Denmark, Act on State School Section 3(a) and 5(5).

619 Denmark, Act on State School, Section 3(2).

620 Epinion (2014), Education results and patterns for children and young people with disabilities - Year 1990 (*Uddannelsesresultater og -mønstre for børn og unge med handicap – Årgang 1990*), 19 November 2014.

621 France, Administrative Supreme Court, 15 December 2010, decision No. 344729.

622 France, Equality of Rights and Opportunities, Participation and Citizenship of People with Disabilities Law.

623 France, Ministerial instruction (*Circulaire*) relating to the implementation of the personalized education project (*Élèves Handicapés Mise en œuvre et suivi du projet personnalisé de scolarisation*), No. 2006-126 of 17 August 2006.

624 Piveteau, D., Acef, S., Debrabant, F-X., Jaffre, D., Perrin A. (2014), Report to the Minister of Social Affairs, The collective duty to enable a seamless life course for people with disabilities and their families (*Le devoir collectif de permettre un parcours de vie sans rupture, pour les personnes en situation de handicap et pour leurs proches*), Minister of Social Affairs, 10 June 2014.

625 France, Code of Education (*Code de l'éducation*).

626 Greece, Law 3699/2008 on special education of individuals with disability or special educational needs.

a right to education and social and professional integration, along with equal opportunities for full participation in society. Under that law, Centres of Special Committees for Evaluation and Diagnosis propose individualised projects for pedagogical and psychological support of disabled children and provide advisory support to the staff of the schools. Furthermore, Article 6 of Law 3699/2008 introduces special preparatory 'Departments for Integration' to facilitate the adjustment of disabled pupils to the educational environment of the school. The **Greek** Ombudsman has addressed issues of reasonable accommodation in the field of education, as noted in the Ombudsman's Special Report on Discrimination.⁶²⁷

In **Hungary**, there is no explicit reasonable accommodation duty contained in domestic law in the context of education generally. A *de facto* accommodation duty in education can be read into Act CXC of 2011 on National Public Education (Public Education Act)⁶²⁸ for children with so-called 'special educational needs'. Under Article 47 of the Public Education Act, the educational institution shall provide specialist assistance (a specialised teacher, a speech or other therapist, etc.), a special curriculum and educational materials required by a specific child who has been placed in integrated schooling. Case law has qualified a failure to provide reasonable accommodation in the education context as a form of discrimination.⁶²⁹ There have been a number of cases before the Equal Treatment Authority in which educational institutions refused to provide reasonable accommodations, or only agreed to provide partial accommodations, referring to the difficulties the duty to accommodate would impose on them. Most of those cases have ended in a settlement between the parties.⁶³⁰

The **Maltese** Equal Opportunities (Persons with Disability) Act 2000 does not refer specifically to the obligation to provide reasonable accommodation in education. Notwithstanding this, a *de facto* reasonable accommodation duty can be read into Article 11 of the Act. That article enables the provision of additional services or facilities to persons with disabilities to ensure their admission or continued participation in an educational institution, unless such provision would impose an unjustifiable hardship on the educational institution or authority concerned.

In **Romania**, Law 448/2006 includes a full chapter on education (in Articles 15-19 thereof). That law is supplemented by the prohibition of discrimination in education contained in Article 11 of the Anti-discrimination Law (which has been interpreted as covering disability),⁶³¹ as well as the disability-related provisions contained in Articles 48-54 of the Education Code. None of these provisions mention reasonable accommodation duties expressly, but the general measures provided for in the laws could be interpreted by the courts as a reasonable accommodation duty. In particular, Article 18 of Law 448/2006

627 Greece, Ombudsman (2014), Combating Discrimination – Special Report 2014 (Καταπολέμηση των διακρίσεων - Ειδική έκθεση 2014), 2014.

628 Hungary, Act CXC of 2011 on National Public Education (2011. évi CXC. törvény a nemzeti köznevelésről), 29 December 2011, Last amended 2 September 2015.

629 See, for instance, Hungary, Equal Treatment Authority (*Egyenlő Bánásmód Hatóság*) Cases 17/2006 and 804/2010. (detailed in Section 5.2.3 of this report).

630 Hungary, Equal Treatment Authority (*Egyenlő Bánásmód Hatóság*) Case 121/2015, in which, a kindergarten restricted the amount of time a child with autism was allowed to spend in the institution on the basis that 'in the absence of the required technical any hygienic conditions', the institution could not handle the situation that the child was not toilet-trained. In the settlement the parties agreed that the parent would stay in with the child for a period of six weeks during which the kindergarten would develop the conditions required for accommodating the needs of a child who is not toilet-trained.

631 Romania, Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, Article 11 - '(1) Under the ordinance herein, denying the access of a person or of a group of persons to the state-owned or private education system of any kind, degree or level, on account of their belonging to a race, nationality, ethnic group, religion, social category or to a disadvantaged group, on account of their beliefs, age, gender or sexual orientation, shall constitute a contravention. (2) The provisions of the paragraph above shall be applicable to all stages and levels of education, including admission or enrolment in education institutions and the assessment and examination of students' knowledge. (...) (4) The provisions under paras. (1), (2) and (3) shall not be interpreted as a restriction of the right of an education institution to deny the application of a person whose knowledge and/or prior results do not meet the required admission standards of that institution, as long as the refusal is not determined by the person's belonging to a race, nationality, ethnic group, religion, social category or to a disadvantaged group, by his/her beliefs, age, gender or sexual orientation.

provides for the right of persons with disabilities to various forms of support, including the use of assistive technology.⁶³²

- No explicit duty to reasonably accommodate but measures to ensure integrated/inclusive education

In **Estonia**, no obligation of reasonable accommodation exists in the context of education. Notwithstanding this, the domestic authorities are encouraged by legislation to take special measures to promote integration of children with disabilities in mainstream education.⁶³³ In practice, the general understanding among authorities is that disabled pupils shall study in mainstream classes/schools, whenever possible. According to the data maintained by the **Estonian** Educational Information System, in the academic year 2011/2012, out of 6 530 special education needs (SEN) pupils, 3 370 studied in segregated special schools and 1 103 in segregated special classes in mainstream schools. Notably, 2 057 SEN pupils studied in fully inclusive settings. In addition, there were 16 945 pupils with no official SEN status who received some form of SEN support in mainstream schools.⁶³⁴

Under **Italian** law, the concept of reasonable accommodation is not included as such in any law or programme of action concerning the integration of children with disabilities. Notwithstanding this, there are several informal measures in place at the domestic level with the aim of including children with disabilities in mainstream education through the provision of individualised special support. In that regard, Law No. 4 of 9 January 2004 on Measures to favour the access of persons with disability to informatics devices is noteworthy.⁶³⁵ There is also relevant case law at the domestic level. In 2010, the **Italian** Constitutional Court ruled that certain legislative provisions which set limits on the number of teachers employed to support disabled students, and which revoked the previous option of hiring new specialist teachers for students with particularly severe disabilities on fixed-term contracts, were illegal.⁶³⁶ According to the Court, disabled people have a fundamental right to education and, although it recognised that the State has a 'discretionary power to identify measures for the protection of disabled persons', it also reaffirmed that 'such discretion is not absolute'. An individualised approach to the needs of disabled people was, according to the Court, mandated by Article 24(2)(c) of the CRPD. The same principle was restated in several judgments issued during 2014.⁶³⁷

In the context of educational provision in **Latvia**, Regulation No. 710 on the Provision of General Basic Education and General Secondary Education Institutions According to Special Needs⁶³⁸ (adopted by the government in 2012)⁶³⁹ addresses the integration of students with special needs in mainstream schools. While the term 'reasonable accommodation' is not used in the Act, there is reference to various measures under the Regulation, including the provision of teaching assistants, additional pedagogical staff and educational programmes, as well as the accessibility of educational institutions.

632 Romania, Law 448/2006 on protection and promotion of rights of persons with a handicap, In that regard, Article 18(1) provides that within the educational process, irrespective of its level, disabled persons shall have the right to: a) educational support services; b) the endowment with the technical equipment adapted to the handicap type and degree and the use thereof; c) the adaptation of the furniture in classrooms; d) school manuals and courses in accessible format for the pupils and students with sight deficiencies; and e) the use of assistive equipment and software in taking exams of any type and level.

633 Estonia, Education Act (*Eesti Vabariigi haridusseadus*), RT 1992, 12, 192, According to Article 4(1), the state and local government shall ensure that every individual receives an obligatory education (this requirement is essentially equal to that based on Article 37 of the Constitution). In conjunction with Article 12 of the Constitution, this provision might be interpreted to the effect that obligatory education should be provided without any discrimination on any grounds, including the ground of disability.

634 European Agency for Development in Special Needs Education (2012), *Special Needs Education, Country Data*, March 2012, p. 19. Available at: https://www.european-agency.org/sites/default/files/sne-country-data-2012_SNE-Country-Data2012.pdf.

635 Italy, Law No. 4/2004 on Measures to favour the access of persons with disability to informatics devices.

636 Italy, Constitutional Court (*Corte Costituzionale*), Decision No. 80 of 22 February 2010, in Official Journal 3 March 2010.

637 See section 3.1 of this report.

638 Latvia, Disability Law (*Invaliditātes likums*) 25 May 2010, Article 5 (1). The term 'children with special needs' includes both children with disabilities and children who do not have disability under this Law.

639 Latvia, Regulation 710 on the Provision of General Basic Education and General Secondary Education Institutions According to Special Needs.

In **Lithuania**, the education of persons with disabilities is governed primarily by the Law on Social Integration of Persons with Disabilities (which establishes the general right to education for people with disabilities) and by the Law on Education.⁶⁴⁰ There is no explicit duty to reasonably accommodate disabled students under those laws. Nonetheless, the Law on Education provides for general measures designed to facilitate the integration in education of students with special educational needs (special educational assistance, special study aids, and social and medical care). In addition, disabled students have the right to financial support granted by the state during their studies at further education establishments and universities. According to Article 14 of the Law on Education, the state has the responsibility to ensure that children with disabilities are given appropriate assistance at all levels of the education system.

In **Poland**, there is no formal obligation of reasonable accommodation in the field of education. Notwithstanding this, the special Ordinance of the Minister of National Education⁶⁴¹ places a number of obligations on schools, including providing appropriate learning conditions, specialised equipment, etc. The Ordinance is, however, general in nature and it does not deal with the issue of ‘reasonableness’. Moreover, according to Article 17 of the Education Act, every local government has the duty to transport disabled pupils to schools free of charge. Finally, in accordance with another Ordinance of the Minister of National Education and Sport,⁶⁴² places for practical learning should be adequately adapted to the needs of disabled pupils. Their needs should also be taken into consideration when planning out-of-school activities.

7.2 Latest developments on education

In this subsection of the report, we consider a selection of important recent developments. Space constraints prevent a comprehensive overview of all such developments in the 28 EU Member States.

In **Austria**, the Federal Monitoring Board (*Monitoringausschuss*) has written a report⁶⁴³ addressed to the CRPD Committee outlining changes to the Austrian legal system, which the Board regards as necessary to ensure compliance with the Convention. These include:

- a radical structural reform of the Austrian education system based on a human rights-based approach;
- commitment to the fundamental principle of diversity and the elimination of all socio-economic barriers in the field of education through a reform of the primary educational system;
- a radical reform of pedagogical training in order to guarantee that all teachers obtain the skills necessary to work in inclusive settings.

In addition, it is envisaged that the adoption of the **Austrian** National Action Plan on Disability, which contains a clear commitment to the further development of inclusion in mainstream schools, will result in increased efforts to get more pupils into integrated schooling, as well as an increased number of students with disabilities in universities. Notably, Austria’s first report to the CRPD Committee⁶⁴⁴ in 2010 states that in recent years, more than 50% of all children with special educational needs were educated in integrated schools.

⁶⁴⁰ Lithuania, Law on Education.

⁶⁴¹ Poland, Ordinance of the Minister of National Education on conditions for the organisation of education, developmental support and care for children and young people that are disabled, socially maladapted or endangered with social maladaptation (*Rozporządzenie Ministra Edukacji Narodowej z dnia 24 lipca 2015 r. w sprawie warunków organizowania kształcenia, wychowania i opieki dla dzieci i młodzieży niepełnosprawnych, niedostosowanych społecznie i zagrożonych niedostosowaniem społecznym*), 24 July 2015, (Dziennik Ustaw 2015, Item 1113).

⁶⁴² Poland, Ordinance of the Minister of National Education and Sport on health and safety in public and non-public schools (*Rozporządzenie Ministra Edukacji Narodowej i Sportu z dnia 31 grudnia 2002 r. w sprawie bezpieczeństwa i higieny w publicznych i niepublicznych szkołach i placówkach*), 31 December 2002 (Dziennik Ustaw 2003 No. 6, Item 69).

⁶⁴³ Austria, Federal Monitoring Board (*Monitoringausschuss*) (2013) *Report of the Independent Monitoring Committee for the Implementation of the Convention on the Rights of Persons with Disabilities to the Committee on the Rights of Persons with Disabilities in preparation of the dialogue with Austria in September 2013*.

⁶⁴⁴ Austria, Federal Ministry of Labour, Social Affairs and Consumer Protection (2010), *UN-Disability Rights Convention: First State Report*, Adopted by the Austrian Federal Government on 5 October 2010.

The **Croatian** Disability Ombudsman reports annually on the issues faced by students with disabilities in the educational system. One of the most significant problems in that regard relates to the provision of assistants to students with disabilities. This is an area which lacks regulation and it is creating considerable barriers to the inclusion of students with disabilities in mainstream education. In relation to higher education, the Ombudsman has highlighted a lack of systematic supports related to reasonable accommodations for students with disabilities (pertaining mainly to physical accessibility, technical devices, assistants, digital textbooks, peer support, among others).⁶⁴⁵

In **Cyprus**, no formal assessment has been made of any reasonable accommodation measures in education. An informal assessment was, however, conducted in a report drawn up by the Commissioner for Children's Rights. The report notes that, in spite of the shift towards inclusive education and the measures adopted by the **Cypriot** government to include children with disabilities in mainstream schools, there is not much evidence of acceptance of diversity in schools, which results in children with disabilities being marginalised and excluded.⁶⁴⁶ The report further notes that, although the Ministry of Education commissioned a study in 2007 on 'Inclusive Schooling Practices in Cyprus,' no follow-up measures have been taken.⁶⁴⁷

In March 2015, the **Czech** Parliament adopted an amendment to the School Law. That amendment resulted in a new definition of pupils with special educational needs under Section 16(1) of the Law. The new definition focuses on the provision of support measures to ensure equal educational opportunities for persons with disabilities. This results in a shift away from the medicalised or functional approach to disability, towards a social model of disability, in line with the CRPD. However, according to the report on human rights⁶⁴⁸ drafted by the **Czech** government, courts deciding on the application of reasonable accommodation measures have not always dealt with the constitutionally guaranteed right to education in the best manner and, furthermore, the courts' approach appears to be contrary to the CRPD. The **Czech** National Plan for the Creation of Equal Opportunities for Persons with Disabilities⁶⁴⁹ draws on the principles on which the CRPD is based and it aims to implement the Convention. The National Plan has as its objective to increase the capacity of the **Czech** educational system in light of the mandate of inclusive education contained in the CRPD. The Plan emphasises the need to increase reasonable accommodations, including the provision of teaching assistants. It also highlights the role of school advisory centres, as well as the need for financing by the state of the costs associated with reasonable accommodations in higher education.

In **Malta**, the effectiveness of measures adopted in the field of education has been assessed. In that regard, the 'Education For All Special Needs and Inclusive Education in **Malta** – External Audit Report', drawn up in 2014,⁶⁵⁰ contains a recommendation to develop a ten-year plan for education with wide stakeholder consultation in order to ensure that current plans related to inclusive education are implemented and sustained over the long term.⁶⁵¹

645 Croatia, Disability Ombudsperson (2014) *Report for 2014 (Izvešće pučke pravobraniteljice za 2014)* Zagreb, 31 March 2015.

646 Cyprus, Commissioner for Children's Rights in Cyprus (2011), *Report to the UN Committee on the Rights of the Child, Supplementary Report to the 3rd and 4th Periodic Report of Cyprus*, September 2011.

647 Cyprus, Commissioner for Children's Rights in Cyprus (2011), *Report to the UN Committee on the Rights of the Child, Supplementary Report to the 3rd and 4th Periodic Report of Cyprus*, September 2011.

648 Czech Republic, Government Report on the State of Human Rights in the Czech Republic in 2013 (*Zpráva o stavu lidských práv v České republice v roce 2013*), 2013 p. 58.

649 Czech Republic, *National Plan for the Creation of Equal Opportunities for Persons with Disabilities 2015-2020 (Národní plán vytváření rovných příležitostí pro osoby se zdravotním postižením na období 2015-2020)*, 25 May 2015.

650 European Agency for Special Needs and Inclusive Education (2014), 'Education for All: Special Needs and Inclusive Education in Malta,' Malta, Ministry for Education and Employment.

651 The Report identified recommendations which included (i) creating clarity around the concept of inclusion; (ii) re-focusing support to colleges and schools; (iii) establishing a national education training body; (iv) undertaking development work to support all colleges and schools to use evidence-based teaching and learning approaches; (v) supporting all schools in teaching for diversity; and (vi) promoting self-review at all levels of the system.

The **Polish** Ombudsman has created an Expert Committee on People with Disabilities,⁶⁵² which has undertaken a number of research and advocacy activities, including the publication in 2012 of a key report, entitled *Protection of the Rights of Persons with Disabilities – Main Challenges following the Ratification by Poland of the UN Convention on the Rights of Persons with Disabilities: Analysis and Recommendations*.⁶⁵³ That report touches upon a number of issues, including issues related to equal access to education for persons with disabilities. The **Polish** Ombudsman has also drawn attention to the problems faced by students with disabilities in mainstream educational institutions.⁶⁵⁴ These include mainstream schools not being adequately prepared for the inclusion of pupils with disabilities, staff who have not been appropriately trained, and teachers and school administrations refusing access to schools. In 2012, the Ombudsman published a special report⁶⁵⁵ and formulated a number of recommendations regarding inclusive education and a system for financing education relating to specific kinds of disability. The Expert Committee on People with Disabilities collaborated with the Ministry of Education in order to advocate for the implementation of those recommendations. Finally, it is notable that one of the activities delineated in the **Polish** National Programme of Activities for Equal Treatment (2013-2016)⁶⁵⁶ is related to the promotion of reasonable accommodations in education.

Finally, in **Slovakia**, the *National Programme for the development of Living Conditions of Persons with Disabilities* (2014-2020)⁶⁵⁷ foresees an amendment to the Schools Act,⁶⁵⁸ in order to remove legislative provisions which are in violation of the rights of students to inclusive forms of education.⁶⁵⁹

7.3 Conclusion on education

It is evident from the information provided in this section of the report that the vast majority of EU Member States have adopted measures regarding reasonable accommodation in the context of education. The types of duties provided for in the laws highlighted in this section of the report are wide-ranging and can potentially result in a shift towards inclusive education, as mandated by the CRPD. The Convention appears to be having a discernible influence on the laws and policies of some Member States in the context of education. For instance, the latest developments noted above in the context of the **Czech Republic** demonstrate a clear shift towards the social model of disability underlying the Convention. In addition, the courts in some EU Member States are referring to the CRPD in the context of the provision of reasonable accommodations to disabled students (most notably, in **Spain** and **Italy**). Nonetheless, there is a significant way to go in many Member States in terms of the actual provision of education to children with disabilities.

652 For further information see: <http://rpo.gov.pl/en/content/expert-committee-people-disabilities>.

653 Poland, Polish Ombudsman Expert Committee on People with Disabilities (2012) *Protection of the rights of persons with disabilities – main challenges following the ratification by Poland of the UN Convention on the Rights of Persons with Disabilities: Analysis and Recommendations* (Ochrona osób z niepełnosprawnościami – najważniejsze wyzwania po ratyfikacji przez Polskę Konwencji ONZ o Prawach Osób Niepełnosprawnych. Analiza i zalecenia), 2012.

654 See for instance, Poland, Ombudsman, letter to the Minister of Education summarising problems of children with disabilities in access to education and calling for action, 25 January 2008; all documents may be found at: <https://www.rpo.gov.pl/>.

655 Poland, Ombudsman (2012), The rule of equal treatment – law and practice. Equal opportunities in access to education by persons with disabilities. Analysis and recommendations (*Zasada równego traktowania – prawo i praktyka. Równe szanse w dostępie do edukacji osób z niepełnosprawnościami. Analiza i zalecenia*), 2012.

656 Poland, Government Plenipotentiary for Equal Treatment (2015), *Report on execution of the National Programme of Activities for Equal Treatment for 2014* (*Raport z realizacji Krajowego Programu Działań na rzecz Równego Traktowania za 2014 r.*), May 2015, p.95.

657 Slovakia, *National Programme of the Development of Living Conditions of Persons with Disabilities (2014-2020)* (*Národný program rozvoja životných podmienok osôb so zdravotným postihnutím na roky 2014-2020*), adopted by Government Resolution No. 25 of 15 January 2014.

658 Slovakia, Schools Act - Act No. 245/2008 Coll. on Education (Schools Act).

659 See, Slovakia, *National Programme of the Development of Living Conditions of Persons with Disabilities (2014-2020)* (*Národný program rozvoja životných podmienok osôb so zdravotným postihnutím na roky 2014-2020*), adopted by Government Resolution No. 25 of 15 January 2014, p. 27.

8 Goods and services

As noted in section 5 of this report, a number of EU Member States have reasonable accommodation obligations which apply to goods and services. In examining reasonable accommodation obligations under this heading one can distinguish between obligations which apply to providers of services, including those parties selling goods; obligations which apply to the producers or manufacturers of goods; and obligations applicable specifically to housing. The foregoing distinction is applied throughout this section of the report, which is divided into the following subsections: Subsection 8.1 provides an overview of national provisions regarding reasonable accommodation in the broad fields of goods and services. Subsection 8.2 covers reasonable accommodation and services. Subsection 8.3 addresses reasonable accommodation and goods, whilst sub-section 8.4 covers reasonable accommodation and housing. Finally, subsection 8.5 contains a conclusion to this section of the report as a whole.

The majority of EU Member States have explicit or *de facto* reasonable accommodation obligations covering elements of access to, and supply of, goods and services. Whilst reasonable accommodation obligations regarding access to services (including the service of selling goods) and housing are relatively common, accommodation obligations imposed on manufacturers or producers of goods are far less widespread and case law in this field is similarly rare. Only **Austria, Croatia, Hungary, Romania, Slovakia, Spain** and the **United Kingdom** have accommodation obligations with regard to goods, services and housing, although on occasion this is a matter of interpretation rather than being explicitly stated in the legislation. Reasonable accommodation obligations covering services and housing apply in **Belgium, Cyprus, the Czech Republic, Finland, Ireland, and the Netherlands**, although sometimes the coverage is limited to specific areas, such as in the **Netherlands**, where only public transport and housing are covered. *De facto* accommodation obligations with regard to services only exist in **France, Malta, Slovenia and Sweden**, whilst such obligations regarding housing only exist in **Bulgaria and Germany**. There are no accommodations obligations in this broad field in **Denmark, Estonia, Greece, Italy, Latvia, Lithuania, Luxembourg, Portugal and Poland**.

8.1 National Provisions in the Field of Goods and Services

– National Accommodation Obligations Applicable to Goods, Services and Housing

A handful of EU Member States have established accommodation obligations applying to all three dimensions of the provision of goods and services. This is the case for **Austria, Croatia, Spain** and the **United Kingdom**. It is possible to argue that **Hungarian** and **Romanian** law contain *de facto* or similar accommodation duties applicable to goods, services and housing.

The **Austrian** Federal Disability Equality Act covers all fields falling within federal competences, including access to, and supply of, goods and services available to the public, housing, public spaces and infrastructure.⁶⁶⁰ A failure to provide a reasonable accommodation is regarded as a form of indirect discrimination.⁶⁶¹ Sections 4 and 5 of the Act address the situation in which the refusal to remove physical barriers experienced by a person with a disability constitutes discrimination.

In **Croatia**, the Anti-discrimination Act prohibits discrimination based on disability in all areas. Reasonable accommodations are required with regard to the use of 'publicly available resources' and 'participation in the public and social life'.⁶⁶² The duty to accommodate is contained in Article 4(2) of the Act.

In **Hungary**, there is no explicit reasonable accommodation duty with regard to these areas, but the case law of the Equal Treatment Authority and the domestic courts indicates that a failure to provide a *de facto*

⁶⁶⁰ Austria, Federal-Constitutional Act.

⁶⁶¹ Austria, Federal-Constitutional Act, Article 5(2).

⁶⁶² Croatia, Anti-discrimination Act, Articles 4(2) and 8.

reasonable accommodation in these fields can be regarded as a form of discrimination.⁶⁶³ This case law is explored further below.⁶⁶⁴

The **Romanian** Anti-discrimination Law⁶⁶⁵ does not include an explicit obligation to provide for reasonable accommodation with regard to access to goods and services. However, Article 10 of that law⁶⁶⁶ addresses the prohibition of discrimination in access to goods and services in general and could be interpreted as applying to cases in which there is a breach of the duty to make a reasonable accommodation.

In **Slovakia**, the Anti-discrimination Act⁶⁶⁷ ensures broad coverage, including the provision of goods, services and housing (excluding housing provided by private individuals or non-entrepreneurs).⁶⁶⁸ The duty to provide a reasonable accommodation can be regarded as being implicitly required under the Act. Having said that, it is not clear if the reference to ‘provision of goods’ in the statute only covers the selling of goods, or also their production or manufacture. There is no case law in this field.

In **Spain**, General Law on the Rights of Persons with Disabilities and their social inclusion (RDL 1/2013) provides for a duty to make a reasonable accommodation with regard to access to, and supply of, goods and services which are available to the public. Article 29(1) of RDL 1/2013 provides that all natural or legal persons in the public sector or the private sector, providing goods or services available to the public (outside the area of private and family life), are required to comply with the principle of equal opportunities for disabled people and to prevent direct or indirect discrimination on the grounds of disability.

In the **United Kingdom**, the obligation to provide a reasonable accommodation with regard to goods and services is set out in Sections 20 and 21 EqA (which provide for the reasonable adjustment duty in general) and Section 29 EqA, which specifies that ‘a “service-provider” concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service’. In addition, Section 31 EqA provides that ‘a reference to the provision of a service includes a reference to the provision of goods or facilities’ but Schedule 2, paragraph 7, adds that ‘a service provider is not required to take a step which would fundamentally alter the nature of the service’. Section 29(7) EqA, which applies in Great Britain, establishes that discrimination includes a failure to provide a reasonable adjustment, as do sections 19 and 20 DDA, which apply in Northern Ireland.

663 Although no relevant case law relating to the production of goods was identified.

664 See subsection 8.2 on Reasonable Accommodation and Services.

665 Romania, Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination.

666 Romania, Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, Article 10: ‘Under the ordinance herein, the following deeds shall constitute a contravention, if the deed does not fall under the incidence of criminal law, when perpetrated against a person or a group on account of their belonging or to the belonging of the management to a race, nationality, ethnic group, religion, social category or disadvantaged group, on account of their beliefs, age, gender or sexual orientation:
a) the refusal to ensure legal and administrative public services;
b) denying the access of a person or of a group of persons to public health services (choice of a family doctor, medical assistance, health insurance, first aid and rescue services or other health services);...
d) the refusal to grant a bank credit or to conclude any other kind of contract;
e) denying of access for a person or a group to services offered by theatres, movie theatres, libraries, museums, exhibitions;
f) denying of access for a person or a group to services offered by stores, hotels, restaurants, pubs, discos or any kind of service provider, whether private or public;
g) denying of access for a person or a group to services provided for by public transportation companies – plane, ship, train, subway, bus, trolley, tram, cab, or any other means of transportation;
h) refusal to grant the rights or benefits to a person or a group of persons.

667 Slovakia, Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act).

668 Slovakia, Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act), Section 2(3).

– National accommodation obligations applicable to services and housing

A larger number of Member States have established reasonable accommodation obligations applicable to services, including the provision of goods (or access to goods) through retail services, and housing. However, it is quite common to exclude manufacturers of goods from this obligation.

In **Belgium**, a duty to accommodate is contained in a variety of laws with regard to access to, and supply of, goods and services (with the exception of the Region of Brussels-Capital).⁶⁶⁹ Notably, however, there is no reasonable accommodation duty imposed on producers of goods. In respect of the reasonable accommodation duty, the various Belgian anti-discrimination statutory Acts do not refer to *producers* of goods, but only *providers* – including access and delivery – of goods and services.

In **Cyprus**, the Law on Persons with Disabilities provides for equality of treatment of persons with disabilities in the provision of goods, facilities and services. Differential treatment amounts to discrimination when the reason for such treatment is related to the person's disability and it is not 'justified'.⁶⁷⁰ The statute makes it clear that the obligation to provide equal treatment, and therefore provide a reasonable accommodation, falls on the provider of goods rather than the manufacturer or producer.

The **Czech** Anti-discrimination law establishes a duty to provide reasonable accommodation with regard to services provided to the public under Section 3(2). The material scope of the statute is set out in Section 1(1)(j), which refers to 'access to services, including housing, to the extent [that] they are offered to the public, or in their supply'. As noted above,⁶⁷¹ the duty to provide a reasonable accommodation in the area of services provided to the public has been interpreted in a wide sense by the **Czech** Ombudsman. The Ombudsman has held that the obligations cover access to reserved parking spaces for disabled persons⁶⁷² and access of guide and assistance dogs to public areas.⁶⁷³ However, the law does not include an obligation on producers of goods to provide a reasonable accommodation.

In **Finland**, the duty to provide reasonable accommodation for people with disabilities with regard to the provision of goods and services is set out in Section 15(1) of the Non-Discrimination Act.⁶⁷⁴ This duty does not extend to producers of goods.

In **Ireland**, the duty to provide reasonable accommodations under Section 4(1) of the ESA is extended to service providers, including sellers (of goods) under section 5. Section 5(1) prohibits discrimination by persons 'disposing of goods to the public generally or a section of the public or in providing a service, whether the disposal or provision is for consideration or otherwise and whether or not the service provided can be availed of only by a section of the public'. Section 6(1) of the ESA also provides that a person shall not discriminate when 'disposing of any estate or interest in premises, terminating any tenancy or other interest in premises, or providing accommodation or any services or amenities related to accommodation or ceasing to provide accommodation or any such services or amenities'. The statute provides for a

669 Belgium, Federal Act pertaining to fight against certain forms of discrimination, Article 4, 12° and Article 14; Decree establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy (Flemish Community/Region), Article 15, 6° and Article 19; Decree on the fight against certain forms of discrimination (French Community), Article 3, 9° and Article 5, 4°; Decree on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training (Walloon Region), Article 13 and Article 15, 6°; Decree aimed at fighting certain forms of discrimination (German-speaking Community), Article 3, 9° and Article 5, 5°; Decree on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment (*Commission communautaire française* (Cocof)), Article 5, 8° and Article 9.

670 Cyprus, Law on Persons with Disability.

671 Section 5.1.2. of this report.

672 Czech Republic, Ombudsman (2012), Recommendation of the Public Defender of Rights regarding the execution of the right to equal treatment during the establishment of reserved parking spaces (*Doporučení Veřejného ochránce práv*), File Ref.: 159/2011/DIS/JŠK, 21 May 2012.

673 Czech Republic, Ombudsman (2010), Recommendation of the Public Defender of Rights regarding access of guide and assistance dogs to public areas (*Doporučení Veřejného ochránce práv*), File ref: 31/2010/DIS/JKV, 10 August 2010.

674 Finland, Non-discrimination Act.

number of specific exceptions to these general rules. These are not disability-specific, although they could apply to disabled persons, and are not explored further in this report.

In the **Netherlands**, there is no general obligation to make a reasonable accommodation with regard to service providers. However the DDA does establish such an obligation with regard to housing and public transport.⁶⁷⁵

- National accommodation obligations applicable only to services

In **France**, Article 225-2 of the Penal Code prohibits direct discrimination in access to, and supply of, goods and services. This duty does not extend to the manufacturers of goods, but only covers access to, and supply of, goods, which can be regarded as a service in itself. This is also true for the other legislative provisions discussed in this report. Whilst the Penal Code does not explicitly establish reasonable accommodation duties, courts have held that the denial of access to facilities as a result of lack of accessibility amounts to discrimination. Article 1142 of the Civil Code, which allows for a civil action in cases of contractual liability, has also been invoked in at least one case in which a service provider failed to provide a requested accommodation. Relevant case law is discussed below under subsection 8.2.

In **Malta**, a *de facto* accommodation duty can be read into Article 13 of the Equal Opportunities (Persons with Disability) Act 2000 in relation to access to, and supply of, goods and services. That article prohibits the refusal to provide goods and services to qualified persons with a disability, but states that such prohibition shall not apply where compliance with such provisions in relation to a qualified person with a disability would be impracticable or unsafe and could not be made practicable and safe by reasonable changes to rules, policies or practices, or the removal of architectural, communication or transport barriers or the provision of auxiliary aids or services.

In **Slovenia**, the Act on Equal Opportunities of People with Disabilities specifies that providers of goods and services have a duty to eliminate obstacles to accessing goods and services.⁶⁷⁶ The duty does not apply to manufacturers of goods. The Act provides further information on specific kinds of appropriate accommodations, including:

- accepting and making available to a person with sensory impairments written information in a manner that is appropriate for, and chosen by, a person with disabilities (e.g. Braille systems, enlarged script, audio tape or electronic versions) (Article 7, § 2);
- adjustment of public buildings through construction and technical gadgets, sound and sensory indicators, written information and other reasonable adjustments (Article 9, § 2);
- the duty to provide appropriate accommodation in terms of accessibility of information through different types of scripts and technologies appropriate for different types of disabilities (Article 14);
- the duty to provide appropriate accommodations in terms of access to public cultural events by eliminating communication and construction barriers (Article 15, § 2).

The **Swedish** obligation to provide accessibility, which includes an obligation to make reasonable accommodation, covers a broad area.⁶⁷⁷ The duty covers the making available of goods and services, although it does not cover the manufacture or production of goods. In addition, under Chapter 2, Section 12(c), point 4, there is no duty to provide an accommodation with regard to altering premises in circumstances where goods and services are sold, where the seller/building owner has already complied with the applicable building permits. This constitutes a specific defence to a claim for, or a justification for a failure to make, a reasonable accommodation.

⁶⁷⁵ Netherlands, Amendment of 29 January 2009 to the Act on Equal Treatment concerning the extension to primary and secondary education and housing, Article 6a, 6b and 6c DDA (housing) and Articles 7 and 8 (public transport).

⁶⁷⁶ Slovenia, Act on Equal Opportunities for People with Disabilities – AEOPD (*Zakon o izenačevanju možnosti invalidov*), Article 8 § 3.

⁶⁷⁷ Sweden, Discrimination Act, as amended.

- National accommodation obligations applicable only to housing

In **Bulgaria**, there is arguably a *de facto* duty to provide reasonable accommodations through accessible housing when constructing or renovating housing. This duty results from Ordinance No. 4 of 1 July 2009 on designing, implementing and maintaining constructions in accordance with the requirements for an accessible environment for the population, including persons with disabilities (the Ordinance).⁶⁷⁸ This is discussed further below in subsection 8.4.

In **Germany**, Section 554a of the Civil Code (*BGB*) provides that a disabled person has the right to demand consent for changes to rented property, when those changes are needed to ensure the adequate use of the property by the disabled person. The landlord can refuse consent if their interest in the unchanged status of the property carries more weight than the interest of the disabled person.⁶⁷⁹

It is interesting to note that these accommodation obligations, although both applicable to housing, are very different in nature. The **Bulgarian** provision requires that the accommodations are provided during construction or renovation, whilst the **German** duty obliges a landlord to agree to allow a disabled tenant to make adjustments to the building in certain situations, subject to the exception in Section 554a of the Civil Code.

- No accommodation obligations

No duties to make a reasonable accommodation in the above fields exist in **Denmark, Estonia, Greece, Italy, Latvia, Lithuania, Luxembourg, Portugal** or **Poland**. However, this does not exclude the existence of provisions designed to encourage or require physical accessibility of buildings where services are provided. Nonetheless, such measures do not involve the duty to respond in an individualised manner to a particular person, and are not considered further here.

Having provided an overview of the relevant reasonable accommodation duties, the next subsection of the report explores some of the national duties in more depth, paying particular attention to any relevant case law. As above, a distinction is made between services (including services involving the provision/selling of goods), the manufacture or production of goods, and housing.

8.2 Reasonable accommodation and services

In **Austria**, Section 4 of the Federal Disability Equality Act was held to be breached when a bakery in Vienna, which had formerly been fully accessible to people using wheelchairs, was renovated and a 15.5 cm step was placed at the entrance. New ramps were also installed with a gradient of 22%, but these were inaccessible to wheelchair users. The plaintiff, a wheelchair user, who had been a frequent customer at the bakery before the renovation, filed a claim for discrimination. The court of first instance found a clear breach of the Federal Disability Act and awarded 1 000 Euro in compensation.⁶⁸⁰ This case was treated as an instance of indirect discrimination and the court did not discuss reasonable accommodation. However, the issues at stake could be regarded as involving reasonable accommodation.

In the **Czech Republic**, in the context of airline services, the Ombudsman had stated⁶⁸¹ that:

'If a person with a physical disability makes a request for the transportation of a special equipment on board an aircraft, an airline is obliged to enable the transportation of this aid. If the transportation

678 Bulgaria, Ordinance No. 4 of 1 July 2009 on designing, implementing and maintaining of constructions in accordance with the requirements for an accessible environment for the population, including persons with disabilities.

679 Germany, case law has underlined that the claim of the disabled tenant does not suppose extreme sacrifices on their side. See Regional Court Hamburg (*Landgericht Hamburg*), Az: 307 S 159/03, 29 April 2004,

680 Austria, Josefstadt District Court (*Bezirksgericht Josefstadt*), Nr. 4C 707/11 z-14, 14 November 2011.

681 Czech Republic, Ombudsman, Complaint File No. 27/2012/DIS/JKV, 2012.

of a specific aid is prevented by safety rules, an airline has to inform the passenger of this fact in an adequate manner and sufficiently in advance’.

This constitutes a form of reasonable accommodation in the context of air travel.

The **Finnish** Non-discrimination Act does not contain a general duty to provide accessibility by anticipation for people with disabilities. However, the government’s proposal⁶⁸² (on which the current legislation is based) states that it can be expected that those individuals and bodies which provide goods and services to a wide audience take action, in advance, to meet the most common accessibility needs of disabled people.⁶⁸³

Two **French** cases also illustrate how courts have applied *de facto* reasonable accommodation duties to services. A case of the Court of Appeal of Paris⁶⁸⁴ concerned a disabled plaintiff who needed to travel with an electric respiratory device. He informed the agent of SNCF (the **French** rail provider) of this when booking his train tickets, and requested that he be seated near an electrical socket. This request was not taken into consideration and the plaintiff had to travel in the toilet. In the absence of a civil action in damages for discrimination in access to goods and services, the plaintiff sued for contractual liability under Article 1142 of the Civil Code and was awarded 2 000 Euro in damages. A second case, which was decided by the Court of Appeals of Poitiers,⁶⁸⁵ involved a defendant who refused to sell cinema tickets to people using wheelchairs, allegedly for safety reasons. After having failed to negotiate the installation of an access ramp to the defendant’s cinema, the plaintiff association asked a bailiff to certify the state of the installations and filed a criminal complaint. The Court held that unless the defendant could demonstrate the technical impossibility of providing access to the cinema, or its disproportionate cost, the present condition of the cinema did not constitute a defence to the claim. The Court found that the failure to install means of access was driven by a policy not to disturb other customers with the presence of wheelchairs. The Court ordered the defendant to pay a fine under Article 225-2 of the Penal Code and set damages at 2 000 Euro.

In **Hungary**, whilst there is no express obligation to make a reasonable accommodation with regard to services, the case law of the domestic courts and the Equal Treatment Authority indicate that the failure to provide an accommodation in such circumstances will be regarded as a form of discrimination. This is illustrated by two decisions of the Metropolitan Appeals Court and the Equal Treatment Authority, respectively.

The first case⁶⁸⁶ involved a visually impaired plaintiff who wished to enter a large supermarket with his guide-dog. He was told by a security guard that he had to leave the dog outside and the head cashier confirmed that dogs could not enter the shop. As a result, the plaintiff could not do his own shopping. The plaintiff requested the court to establish that this treatment amounted to a violation of his right to equal treatment and also requested non-pecuniary damages. The defendant acknowledged that a violation had occurred, but contested that the plaintiff had experienced non-pecuniary damage. In its first instance decision of 18 March 2010, the Metropolitan Court established that the plaintiff’s right to equal treatment had been violated, prohibited a future violation, obliged the defendant to apologise by letter and granted non-pecuniary damages in accordance with the amount requested by the plaintiff (HUF 5 000 00 or 1 670 Euro). The Court emphasised that denying a blind person the right to enter with his/her guide-dog amounted to denying that person access to services on the ground of disability. Furthermore, the Court

682 Finland (2014), *Government Proposal on Non-discrimination Act 19/2014* (Hallituksen esitys yhdenvertaisuuslaiksi 19/2014 vp), HE 19/2014 vp, p. 81.

683 Finland (2014), *Government Proposal on Non-discrimination Act 19/2014* (Hallituksen esitys yhdenvertaisuuslaiksi 19/2014 vp), HE 19/2014 vp, p. 81.

684 France, Court of Appeal, Paris (*Cour d’appel de Paris*), *SNCF v. Thetier*, N° 200108355, 14 March 2005.

685 France, Court of Appeal, Poitiers (*Cour d’appel de Poitiers*), *Association des paralysés de France v. Société Hellucha*, N° 419/05, 1 September 2005.

686 Hungary, Metropolitan Appeals Court (*Fővárosi Ítéltábla*) First instance: 40.P.26.486/2009/5, 18 March 2010; Second instance: 2.Pf.21.104/2010/5, 7 December 2010.

pointed out that the violation of the requirement of equal treatment, as a violation of inherent personal rights, inevitably resulted in non-pecuniary damages. The defendant appealed against the decision and, while it acknowledged that the denial of access breached **Hungarian** laws, it requested that no compensation be granted as the plaintiff had failed to prove he had suffered damages. In its decision of 7 December 2010, the Metropolitan Appeals Court upheld the first instance decision. It emphasised that it is common knowledge that, for a person with a disability, the denial of access on the basis of the disability is extremely humiliating. Denial of entry of the dog amounts to denial of entry on the basis of disability, since the dog and the owner constitute an inseparable unit. Therefore, the fact that non-pecuniary damages had been suffered could be established without any further evidentiary procedure. The Court referred to Article 8 of the ETA as the basis for its rulings. The Court stated that it regarded the incident as a form of direct discrimination committed as a result of a failure to comply with a legislative measure aimed at equalising opportunities for blind persons (namely the provision which states that guide dogs are exempt from the general prohibition on taking dogs into food stores, public baths and restaurants, which is thus a very specific form of prescribing the duty to provide reasonable accommodation).⁶⁸⁷

In a second case,⁶⁸⁸ which came before the Equal Treatment Authority, a visually impaired passenger complained that an airline had denied him access to a flight because he had not informed them that he was disabled when he initially made the reservation, but only at a later stage (some ten days before his flight). The airline justified its decision by saying that it needed to know if passengers required special assistance when they booked due to safety reasons. The airline claimed that, if informed at a late stage, a flight attendant might have to provide assistance, which could cause a security risk. The Equal Treatment Authority concluded that this could not be regarded as a reasonably justified defence due to the arbitrariness of the requirement. They noted that a person may make a reservation months, but also just a few days, before the actual flight. The Authority also found that, in this particular case, the airline company was made aware of the particular need of the passenger ten days before the flight, which ought to have been sufficient time to prepare for the reasonable accommodation.⁶⁸⁹

The **Netherlands** Human Rights Institute has also held transport providers accountable for making reasonable accommodations.⁶⁹⁰

In **Romania**, a 2010 decision of the NCCD reveals the pro-active approach of the institution and its understanding that securing accessibility involves taking measures by anticipation to adapt services to persons with disabilities.⁶⁹¹ This can be linked to providing reasonable accommodations in some cases. The complainant in the 2010 decision, R.V., had visual impairments and was able to live independently without requiring a personal assistant. He approached the defendant, a bank, to open a bank account and requested a debit card. The bank made the opening of the account and the issuing of the card conditional on R.V. either appointing a proxy or signing a statement assuming liability for all the consequences of transactions. The NCCD found that discrimination occurred and issued a recommendation that the bank had to adequately consider the specificities of its clients and adapt its services to ensure their accessibility, irrespective of the type of disability. The NCCD stated that the bank should have considered that, in fact, it does not have to adapt its services on account of the degree of autonomy of the complainant, the possibility to dispose of his financial resources without a proxy, as well as his own ability to operate computer programmes and applications on his own computer (which is adapted to his visual impairment). The only adaptations required of the bank in this case were providing the contract and the confidential code in Braille, a measure that is adapted for persons with visual impairments. Such a requirement could not be considered disproportionate or unjustified. The NCCD held that fulfilling rights for the benefit of

687 Hungary, Metropolitan Appeals Court (*Fővárosi Ítéltábla*), 2.Pf.21.104/2010/5.

688 Hungary, Equal Treatment Authority (*Egyenlő Bánásmód Hatóság*) Case 146/2009.

689 Hungary, Equal Treatment Authority (*Egyenlő Bánásmód Hatóság*) Case 146/2009.

690 See Netherlands, National Institute for Human Rights (*College voor de Rechten van de Mens*) Opinions NIHR 2015-2, 19 January 2015 and NIHR 2014-50, 25 April 2014.

691 Romania, National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*), *R.V. v. Banca Transilvania and Agentia Grand Constanta*, Decision, 6 May 2010.

a category of persons implies not only legal measures, but also practical actions, having the aim of ensuring equal opportunities in accessing services. The NCCD therefore considered that the bank should have taken some minimal accommodation measures to meet the needs of this particular individual.

8.3 Reasonable accommodation and goods

An **Austrian** case regarding reasonable accommodation in the context of the manufacture of goods was dealt with by the Viennese Commercial Court under Section 4(1) of the Federal Disability Equality Act, employing the definition of indirect discrimination found in Section 5(2) of that Act.⁶⁹² The court also explicitly took reasonable accommodation duties into account.

The **Austrian** Broadcasting Corporation (ORF) was sued by the deaf plaintiff, who had bought a DVD produced and sold by ORF, which was not accessible to him as there were no subtitles. The lack of subtitling was found to amount to indirect discrimination. The court of first instance had already established that the additional cost for subtitling the DVD did not qualify as a disproportionate burden, which would have justified the failure to accommodate the needs of deaf persons. That court had established that the DVD had generated 65.000 Euro in revenue and 25.000 Euro in profit, while subtitling would have only cost between 1.500 to 3.000 Euro. Therefore this cost did not qualify as a disproportionate burden. The Viennese Commercial Court upheld the first instance court's finding of indirect discrimination and increased the award for immaterial damages from 700 Euro to 1 000 Euro. The main reason for this finding was based on a consideration of the minimum compensation awarded for discriminatory harassment (although this was not a harassment case) which, at that time, was 720 Euro. The Court argued that in light of this absolute minimum, 700 Euro would not suffice but 1000 Euro would be more appropriate. As this fully met the demands of the plaintiff, no further explanations or reasoning were given on this matter.

8.4 Reasonable accommodation and housing

In **Bulgaria**, Ordinance No. 4 of 1 July 2009 on designing, implementing and maintaining constructions in accordance with the requirements for an accessible environment for the population, including persons with disabilities (the Ordinance)⁶⁹³ can be regarded as establishing a *de facto* duty to accommodate in the field of housing. The Ordinance provides for 'dwellings to take into account the individual needs of persons with disabilities, their sex, numbers, age and their specific capabilities (type and degree of disability)'.⁶⁹⁴ This provision is to be applied alongside other provisions in the Ordinance, which set out general anticipatory accessibility obligations.⁶⁹⁵ The Ordinance applies to all new constructions, as well as to all reconstruction, renovation, repairs, restructuring, etc.⁶⁹⁶ In cases involving the construction of new properties where there are no identifiable inhabitants, an individualised approach will not be possible and general accessibility standards would be applied in that instance. There is no case law in this respect. The legislation does not state, either implicitly or explicitly, who is the bearer of the duty. In terms of administrative liability, a range of persons concerned with the planning or construction of the property might be liable. In terms of civil liability, the individual to be sued by a person with a disability would be the owner of the land or the owner of a separate right to build on that land.

⁶⁹² Austria, Viennese Commercial Court (*Handelsgericht Wien*), *L.H. v. ORF*, Nr. 60R93/10x, 8 September 2011

⁶⁹³ Bulgaria, Ordinance No. 4 of 1 July 2009 on designing, implementing and maintaining of constructions in accordance with the requirements for an accessible environment for the population, including persons with disabilities.

⁶⁹⁴ Bulgaria, Ordinance No. 4 of 1 July 2009 on designing, implementing and maintaining of constructions in accordance with the requirements for an accessible environment for the population, including persons with disabilities, Article 83(3).

⁶⁹⁵ Bulgaria, Ordinance No. 4 of 1 July 2009 on designing, implementing and maintaining of constructions in accordance with the requirements for an accessible environment for the population, including persons with disabilities. Under Article 83 (1-2) and (4-5) dwellings for persons with disabilities are to be designed on the first ground floor of a building. Those dwellings are to comply with accessibility requirements, including free and easy maneuvering in a wheelchair. All spaces need to allow easy and safe movement, as well as self-sufficient and independent use of all facilities and appliances, including any courtyards, terraces, etc. All spaces are to be able to be used by all inhabitants regardless of their disabilities and needs.

⁶⁹⁶ Bulgaria, Ordinance No. 4 of 1 July 2009 on designing, implementing and maintaining of constructions in accordance with the requirements for an accessible environment for the population, including persons with disabilities, Article 1 (1-2).

In the **Netherlands**, the duty to provide an effective accommodation applies to housing. Article 6a DDA provides a broad definition of housing (including, for example, houseboats and trailers). Article 6b provides that no distinction on the ground of disability may be made in the field of housing. Article 6c subsequently gives an exception to Article 2 (concerning the duty to provide an effective accommodation), stipulating that Article 2 is not applicable in instances where this would require reconstruction or building work in, or around, a residence. The provisions concerning reasonable accommodation in the area of housing have been successfully invoked before the (then) Equal Treatment Commission (now the Netherlands Institute for Human Rights).⁶⁹⁷ In Opinion 2010-35, the Equal Treatment Commission found, for the first time, a breach of the duty to reasonably accommodate in the field of housing. The Opinion concerned a case against a private association of owners of an apartment block. The applicant, who was one of the owners, used an electric scoot mobile to get around. She requested permission from the board of the owners' association to park this vehicle on a landing near her apartment, or (preferably) in the garage of the apartment. The defendant declined the request and argued that it was only obliged to provide a reasonable accommodation when the applicant had proved that she was unable to find an adequate solution. According to the Commission, this was not a correct understanding of the law. The applicant's own means to solve the problem did come into play within the framework of the proportionality test, but that was not decisive. The Commission found that a refusal to grant permission to park the scoot mobile on the landing near the apartment could be deemed reasonable when this would lead to serious risks, such as the risk that people would be hampered from leaving the building in a fire. However, the defendant's suggestion that the applicant should rebuild her own storage room and park her scoot mobile there, was not reasonable since there existed another less costly and more convenient possibility, namely allowing the applicant to park her scoot mobile in the garage.⁶⁹⁸ The Commission therefore found that the duty to accommodate in the context of housing under the DDA had been breached.

8.5 Conclusion on goods and services

There is a significant amount of diversity in how EU Member States address the duty to provide a reasonable accommodation with regard to goods, services and housing. As noted above, the duty to provide a reasonable accommodation is least likely to be imposed on manufacturers or producers of goods. This may reflect both the distance between the manufacturer and the purchaser, as well as the fact that goods on sale within the EU are manufactured throughout the world and the impossibility of imposing such an obligation on manufacturers based outside the Member State in question. Such an obligation may be regarded as imposing an extra burden on domestic manufacturers – however, this 'problem' would be significantly less if the duty existed throughout the EU. To some extent, the lack of a duty imposed on manufacturers can be remedied by imposing a duty on the sellers of goods (and services), and this duty exists in a number of EU Member States.

Reasonable accommodation duties in these fields, where they exist, can apply to different service providers. In some jurisdictions the duty is confined to particular service providers, such as providers of public transport, whilst in many Member States the duty extends to all providers of services which are offered to the public. Moreover, as noted above, the duty can take different forms – this was particularly noticeable with regard to housing where, in the **Netherlands**, the duty does not extend to allowing reconstruction or building work, whilst in **Germany**, property owners are under a duty to allow such reconstructions in certain cases and in **Bulgaria**, the *de facto* accommodation duty explicitly applies to construction and renovation.

697 See e.g. Netherlands, Equal Treatment Commission (*Commissie Gelijke Behandeling (CGB)*), ETC 2010-35.

698 See for similar case, Netherlands, Equal Treatment Commission (*Commissie Gelijke Behandeling (CGB)*), ETC 2011-30.

9 Conclusion

There are widespread reasonable accommodation duties applicable beyond the field of employment in the Member States of the EU. This is in spite of the absence of such a duty existing within current EU equality law. However, there is a great deal of variety concerning, in particular, the reach of the duty to accommodate in the various EU Member States. The Commission's 2008 proposal for a new equality directive seeks to extend the duty to provide a reasonable accommodation to the areas of social protection, education, and access to goods and services. In **Austria, Belgium, Bulgaria, Croatia, Cyprus, Finland, Germany, Ireland, the Netherlands, Slovakia, Slovenia, Spain, Sweden** and the **United Kingdom**, reasonable accommodation duties already exist in all of the fields covered by the Commission's 2008 proposal, although in some of these Member States the duties do not cover the full extent of the areas addressed in the proposal. In the **Czech Republic**, there is a reasonable accommodation duty in two fields covered by the 2008 proposal (education and access to services), as well as a limited partial duty in the context of healthcare. In **Luxembourg** and **Portugal**, there is a reasonable accommodation duty in one field covered by the 2008 proposal, namely in the sphere of education. Furthermore, in **Denmark, France, Greece, Hungary, Latvia, Malta** and **Romania**, there are *de facto* accommodation duties in general laws covering some of the fields covered by the Commission's proposal. In a handful of Member States, namely **Estonia, Italy, Lithuania** and **Poland**, there is no duty to accommodate beyond employment. This is an exceptional situation though, and most Member States extend the duty beyond employment to some extent. Furthermore, it is notable that the legislation in the aforementioned countries (which do not have any duty to accommodate beyond employment) contains limited provisions in the field of education to ensure the integration/inclusion of persons with disabilities in mainstream education.

Some areas or fields which fall within the scope of the Commission's 2008 proposal are more likely to be subject to reasonable accommodation duties than others. In general, the most comprehensive framework exists with regard to education, with legislation establishing reasonable accommodation duties or *de facto* or similar duties in the vast majority of Member States. In terms of social protection, reasonable accommodation duties seem to be more widespread with regard to healthcare than with regard to the other areas explicitly referred to in the Commission's proposal (namely social security/disability benefits and social housing). Lastly, in the third field covered by the Commission's 2008 proposal, namely access to goods and services, reasonable accommodation duties were most likely to exist with regard to access to services, including the sale of goods, and, to a slightly lesser extent, housing. The duty to accommodate was least likely to be imposed on manufacturers of goods, with this only happening in a small number of Member States, with case law being similarly rare. In spite of these accommodation duties, there remain significant problems on the ground in terms of achieving equality, equal opportunity and equal access for people with disabilities across many fields, not least of all education.

It is worth drawing attention to the fact that reasonable accommodation duties are not always clearly defined or indeed identified as such. This report has frequently referred to *de facto* accommodation duties – these are obligations that impose a duty to provide an adjustment or make an adaptation to meet the needs of a particular individual with a disability, such as providing individualised teaching support, where the duty is not explicitly identified as a reasonable accommodation. There may also not be an explicit link between the failure to comply with such duties and a breach of the non-discrimination norm. We have also, on occasions, referred to duties which are similar to accommodation duties. This has been the case where the experts of the European network of legal experts in gender equality and non-discrimination have not identified the duty in question as a reasonable accommodation, but the description of the obligation they have provided indicates that the duty is similar to a reasonable accommodation duty. This reflects the fact that there is some confusion at the national level with regard to the extent and nature of reasonable accommodation duties, and that such duties extend beyond those legal obligations which are specifically defined as reasonable accommodations. This naturally makes the identification and analysis of such obligations at the national and EU level a challenging task.

The CRPD establishes a broad duty on states parties to establish reasonable accommodation duties and to define a denial of reasonable accommodation as a form of discrimination. The reach of the Convention is more extensive than the Commission's 2008 proposal, and it has been ratified by 25 of the 28 EU Member States to date. In spite of this, in many EU Member states there have been no significant changes introduced in law and policy following ratification of the CRPD. However, there are some notable exceptions in this respect. Legislation or policy relating to discrimination, or the rights of persons with disabilities more broadly, has been revised in the **Czech Republic, Slovenia** and **Spain** on the basis of the Convention. For instance, **Spanish** laws on reasonable accommodation have been altered dramatically by the national authorities since the entry into force of the CRPD. The General Law on the Rights of Persons with Disabilities and their social inclusion (RDL 1/2013) is a progressive legislative enactment, which sets out the duty to provide reasonable accommodation for persons with disabilities with regard to healthcare, social housing, and disability benefits/social security, education and in the context of access to, and supply of, goods and services which are available to the public. Spanish legislation furthermore defines a failure to provide reasonable accommodation as a form of discrimination. This report has also identified case law in **Italy, Latvia** and **Spain**, in which courts have relied on the CRPD, amongst other sources, to obtain an equitable result in case law involving reasonable accommodation.

With regard to justifications for a failure to make an accommodation, a variety of different terms and provisions are found in national legislation. The duty is sometimes defined as being limited by the defence of 'disproportionate burden'; however other terms, such as 'reasonableness', and 'cost' are also used to delimit the duty. In practice some of these terms may be interpreted and applied in the same way, and the difference may be more one of appearance than form. However, this would have to be borne out by an analysis of case law, and members of the European network of legal experts in gender equality and non-discrimination reported rather few examples of case law relating to this, or indeed other issues concerning reasonable accommodation outside employment. In some cases, the limits to the duty to accommodate are not clearly elaborated on in legislation. However, guidance contained in the legislation or accompanying documents in **Austria, Belgium** and **Finland** all refer to the impact of (a failure to make) the accommodation on the population of disabled persons in general (**Austria** and **Belgium**) or the needs of the person with a disability in question (**Finland**). These are things to be taken into account in determining whether a disproportionate burden would exist or whether making an accommodation would be reasonable. It is unusual for these factors to be taken into account explicitly and this demonstrates quite a progressive understanding of the concept of 'reasonable accommodation'.

As outlined above, a significant number of Member States have enacted reasonable accommodation duties addressing, to some extent, all three fields covered by the Commission's 2008 proposal. Of those Member States, a handful of countries are showing evidence of particularly progressive trends with regard to the duty to accommodate, some of which will be outlined below. It is not possible to discern coherent patterns in this regard or to classify Member States into groups according to the types of trends evidenced. However, the Member States which are showing progressive trends are predominantly those countries in which there is a wide protection from disability discrimination in all three fields covered by the 2008 Commission proposal.

Austrian and **Belgian** laws, in particular, are notable for ensuring a very wide scope of protection. The laws in those countries go far beyond the field of employment to cover all of the areas contained in the 2008 Commission proposal. The **Austrian** Federal Disability Equality Act prohibits direct and indirect discrimination with regard to the administration of the Federation and access to, and supply of, goods and services which are available to the public, to the extent that the matter falls under Federal competences. The Act covers the competences of the Federation in its entirety with regard to the services which the Federation provides. In **Belgium** the Federal Government, the Regions and the Communities have come to a common understanding of the concept of reasonable accommodation contained in the various legislative enactments, through the Cooperation Agreement adopted in 2008. That agreement seeks to clarify the meaning of the concept of 'reasonable accommodation' under **Belgian** law. The agreement

also puts in place a monitoring mechanism, which requires that each authority gathers information on reasonable accommodation and sets out examples of best practice.

The latest developments which have taken place in the **Czech Republic** demonstrate a clear shift towards the social model of disability underlying the CRPD. In March 2015, the Czech Parliament adopted an amendment to the relevant education law, which resulted in a new definition of pupils with special education needs. The new definition focuses on the provision of support measures to ensure equal educational opportunities for persons with disabilities. This results in a shift away from the medicalised or functional approach to disability, towards a social model of disability, in line with the CRPD.

In **Finland**, Section 15(1) of the Non-Discrimination Act (which first entered into force on 1 February 2004 and was renewed in 2014, re-entering into force on 1 January 2015) sets out a broad duty to accommodate, covering all three fields of the 2008 Commission proposal.⁶⁹⁹ These amendments were regarded as necessary in light of the future ratification of the CRPD in that jurisdiction.

The examination of the various domestic legislative provisions relating to reasonable accommodations outside employment has revealed some examples of good practice. These include the requirement found in **Austrian** legislation that, if a duty to accommodate does not exist (because making an accommodation would result in a disproportionate burden), there still remains a duty to improve the situation of the disabled individual in a considerable manner with a view to achieving equal treatment. This is unlike other Member States where, if there is no duty to accommodate, the duty bearer has no further obligations to the disabled person in practice. Another example of good practice is the clear two-step process for assessing whether an accommodation duty exists in the **Netherlands**. The duty is to be assessed by firstly identifying if there is an 'effective' accommodation which could be made. If that is the case, the second stage involves assessing whether making such an accommodation would result in a disproportionate burden. Other examples of good practice include the A further example of good practice emerges from **Slovakia**, where the judiciary is demonstrating an increasing awareness of the social construction of disability. In a case concerning an individual with psychosocial and intellectual disabilities, the Constitutional Court stated that disability is not only to be understood within a medical (individual) framework but within a social and legal framework which, when compared to the past, integrates values representing the totality of human rights, such as respect for, and the protection of, dignity. A further exemplary trend can be seen in **Spain**, where the national authorities have incorporated other aspects of the CRPD norms into domestic legislation in 2011, with the adoption of Law 26/2011. That law also updated the legal definition of 'persons with disabilities' to bring it into line with the guidance on the concept contained in the Convention. **Spanish** legislative provisions are also noteworthy for adopting a very broad approach to reasonable accommodation duties, referring to obligations to reasonably accommodate in the context of 'all human rights'.⁷⁰⁰

An innovative way of defining and approaching reasonable accommodation is also found in the recent revision to Swedish legislation. The term 'reasonable accommodation' is not used in the amended Discrimination Act 2015. Rather the duty to accommodate is viewed in light of the obligation to provide accessibility. Refusing to provide accessibility through making an accommodation is defined as a form of discrimination, subject to some exceptions.

Furthermore, policy developments in several EU Member States demonstrate positive trends. For instance, in 2015, the **Czech** Government approved the sixth National Plan for the Creation of Equal Opportunities for Persons with Disabilities (2015–2020), which aims to implement the provisions of the CRPD, particularly in the areas of inclusive education, transparent funding of social security services,

699 However, there is no legal requirement to provide reasonable accommodation imposed on producers of goods available to the public.

700 The Cypriot Law on Persons with Disabilities and Croatian legislation are also noteworthy for adopting a very broad approach, referring to accommodation duties in the context of participation in 'public and social life' (in Croatia), and 'human rights and fundamental freedoms' (in Cyprus).

healthcare, independent living, personal mobility and accessibility. It is also noteworthy that, upon **Malta's** ratification of the CRPD, a report of the National Commission for Persons with Disabilities was published. That report analyses the scope of the Convention and outlines the various measures that will be required, at the legislative and policy level, in order to implement the Convention. In addition, the report makes provision for measures in all fields covered by the 2008 proposal.

Lastly, it is worth noting that a link between accessibility and reasonable accommodation duties exists in practice. Compliance with obligations regarding accessibility, such as building regulations, means that the need for individualised reasonable accommodations is less likely to arise. However, compliance with accessibility norms, which can extend beyond building regulations to address, for example, the way information is provided, will not remove the need for individualised accommodations in all cases. In most EU Member States, there is no explicit link between compliance with accessibility duties and the obligation to accommodate – however, some Member States do make such an explicit link. In **Austria**, for example, a party can never argue that making a reasonable accommodation would amount to a disproportionate burden if that party is already under an obligation to comply with accessibility norms which, if complied with, would remove the need for the individualised accommodation. In the **Netherlands**, compliance with accessibility obligations cannot be raised as a defence to a duty to accommodate to meet the needs of an individual, where such a duty exists. It is also noteworthy that, in **Austria**, an embargo on prosecutions relating to achieving lack of accessibility and reasonable accommodation has been imposed. Initial deadlines for achieving accessibility, including through the provision of reasonable accommodation, have been deferred and exemptions have been granted from compliance with some accommodation duties. This has resulted in immunity from prosecution for the Federal Government and some federal institutions until 2020 on the condition that they publish plans to achieve accessibility in the meantime.

Among other things, this report has demonstrated the fact that the material scope of the CRPD is much broader than the scope of the 2008 Commission proposal and the Employment Equality Directive, meaning that the EU Member States which have ratified the CRPD are under an obligation to prohibit disability discrimination in fields beyond those covered by current EU equality law. Those EU Member States which have ratified the CRPD therefore have significant obligations, in terms of prohibiting and combatting discrimination on the ground of disability. As demonstrated above, many EU Member States are showing very progressive trends. However, there is no doubt that there is a long road ahead in that regard.

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Annex I Comparative Table

	SOCIAL PROTECTION		EDUCATION		ACCESS TO GOODS AND SERVICES	
	Persons with disabilities are protected in law	Persons with disabilities are addressed in policies	Persons with disabilities are protected in law	Persons with disabilities are addressed in policies	Persons with disabilities are protected in law	Persons with disabilities are addressed in policies
Austria	ADL ¹	PO	ADL ²	PO	ADL	PO
Belgium	ADL/C	OL/C	ADL/C	OL/C	ADL/p ³ /C	OL/C
Bulgaria	ADOL/p ⁴	No	ADOL/p ⁵	PO	ADOL/p ⁶	No
Croatia	ADOL/C	PO	ADOL/C	PO	ADL/C	p ⁷
Cyprus	OL/p ⁸	PO	OL/p ⁹	PO	ADL	No
Czech Rep.	ADL/C	PO	ADL/C	PO	ADL/C	PO
Denmark	No	PO	No	PO	No	No
Estonia	C	PO	C	PO	C	p ¹⁰
Finland	ADOL/C	OL	ADOL/C	PO	ADOL/C	p ¹¹
France	OL	OL	OL	PO	OL	PO
Germany	ADOL/C	PO	ADL/p ¹² OL/C ¹³	PO	ADL/C	PO
Greece	OL/C/p ¹⁴	p ¹⁵	OL/p ¹⁶	No	OL/p ¹⁷	p ¹⁸
Hungary	ADL/Jd ¹⁹ /C ²⁰	PO	ADL/Jd ²¹ /C	PO	ADL/Jd ²² /C	PO
Ireland	C/ADL/Jd ²³	PO	C/ADL	PO	C/ADL	PO
Italy	ADOL	ADOL	ADOL	ADOL	ADOL	ADOL
Latvia	OL	PO	Jd ²⁴	PO	OL	No
Lithuania	C/Jd ²⁵	C/Jd	ADOL	ADOL	ADL	ADOL
Luxembourg	ADOL	PO	ADOL	PO	ADL	PO
Malta	ADOL ²⁶	PO	ADOL	PO	ADOL	PO
Netherlands	No	No	ADL	PO	p ²⁷	No
Poland	C	p ²⁸	C	p	C	p
Portugal	ADOL/C	ADOL	ADOL/C	ADOL	ADOL/C	ADOL
Romania	ADL ²⁹	ADOL	ADOL	ADOL	ADOL	ADOL/PL
Slovakia	ADOL/C/Jd ³⁰	PO	ADOL/C/Jd	PO	ADOL-p ³¹ /C/Jd	PO
Slovenia	ADOL/C	PO	ADOL/C	No	ADOL/C	No
Spain	ADOL	OL & PO	ADOL	OL	ADOL	OL
Sweden	ADL	PO	ADL	PO	ADL	PO
United Kingdom	ADL	ADL	ADL	ADL	ADL	ADL

"ADL" yes national anti-discrimination law applies

"OL" yes other legislation apply

"ADOL" yes both national anti-discrimination and other legislation apply

"C" Constitutional or public international law rules apply

"No" no national law/policy apply

"p" partially: meaning that the area is only partially covered

"PO" yes national policy apply

"Jd" judicial interpretation is required of the legal provision

1. The actual protection comes from the specific anti-discrimination laws - the constitution just contains a few general clauses on equal treatment by and before the law, directed to the state only.
2. But for educational institutions run by the province of Lower Austria (primary schools, kindergartens, mainly).
3. Apart for the Region of Brussels-Capital.
4. Only housing, including social housing, is covered under *Ordinance No 4 of 1 July 2009 on designing, implementing and maintaining of constructions in accordance with the requirements for an accessible environment for the population, including persons with disabilities*.
5. Primary legislation (law) provisions do not strictly correspond to the definition of reasonable accommodation as opposed to general anticipatory accessibility duties. As for secondary legislation (executive-adopted) provisions, they only cover kindergartens and schools, not universities.
6. Only housing is covered under Ordinance No 4 of 1 July 2009 on designing, implementing and maintaining of constructions in accordance with the requirements for an accessible environment for the population, including persons with disabilities.

7. National Strategy of Equalization of Opportunities for Persons with Disabilities 2007-2015 covers access to some and not all services, and it does not cover access to goods in any way.
8. In Cyprus, anti-discrimination provisions and more general rights of persons with disabilities exist in a single legislation, which provides that persons with disability are entitled to a 'dignified standard of living and where necessary through financial grants and social services': Law on persons with disabilities (*Ο Περί Ατόμων με Αναπηρίες Νόμος*) No. 127(I)/2000) article 4(g). Available at www.cylaw.org/nomoi/enop/non-ind/2000_1_127/index.html. There is no prohibition from discrimination in social protection as such, but the Equality Body's mandate includes the power to investigate and issue decisions on all grounds and in all fields.
9. The relevant legislative provision does not explicitly prohibit discrimination in education but provides for right to access integrated education: Cyprus, Law on persons with disabilities (*Ο Περί Ατόμων με Αναπηρίες Νόμος*) No. 127(I)/2000) article 4(d). Available at www.cylaw.org/nomoi/enop/non-ind/2000_1_127/index.html.
10. According to Article 3 (9) of the Law on Building (*Ehitisseadus*, RT I 2002, 47, 297) '[i]f required for the purpose of use of the construction works, the works, parts thereof which are for public use and the premises and sites thereof shall be accessible to and usable by persons with reduced mobility and by visually impaired and hearing impaired persons'. According to Article 19 of the decree of 28 November 2002 by the Minister of Economic Affairs and Communications (RTL 2002, 145, 2120), for both public places (including infrastructure) and public buildings (e.g. administrative buildings, hospitals, educational institutions etc.) the rules regarding the accessibility are equally applicable to existing public buildings if they are renovated.
11. According to Section 5 of the Non-Discrimination Act the authorities providing goods and services but not private companies providing goods and services have a duty to evaluate the realisation of equality in their activities and take necessary action to foster equality.
12. For private education.
13. Both for public education.
14. Legal provisions are sporadic and they are included in various legal texts.
15. In Greece, there is a lack in policies concerning reasonable accommodation.
16. Legal provisions are sporadic and they are included in various legal texts.
17. *Idem*.
18. In Greece, there is a lack in policies concerning reasonable accommodation.
19. Authorities and courts apply national anti-discrimination law and other relevant laws to reasonable accommodation (qualified as direct discrimination), although it is not listed as a *sui generis* form of discrimination in national anti-discrimination law.
20. It is not that straightforward, as the effect of Constitutional and international norms is at best indirect. Judges often do not rely on these when deciding individual cases (same as to the three columns in which C is mentioned).
21. As explained in footnote 19.
22. *Idem*.
23. *Donovan v. Donnellan*, Equality Tribunal, DEC-S2001-011 https://www.workplacerelations.ie/en/Equality_Tribunal_Import/Database-of-Decisions/2001/Equal-Status-Decisions/DEC-S2001-011.pdf - certain services provided by the State are available to the public but the extent is not clear.
24. Latvia, Law on Education (*Izglītības likums*), 29.10.1998, Section 3.¹ (1) of the Law on Education provides: "Every citizen of the Republic of Latvia and every person who has the right to a non-citizen passport issued by Latvia, or person to whom a permanent residence permit has been issued, as well as citizens of the European Union states to whom temporary residence permits have been issued and their children have equal rights to receive education independently from property and social status, race, ethnicity, gender, religious or political opinions, health condition, occupation and place of residence." <http://likumi.lv/doc.php?id=50759>.
25. The Law on Equal Treatment does not explicitly state that social protection, including social security and healthcare, fall under the scope of this law. There are no particular provisions on this in the LET with the exception of a general duty to implement equal opportunities (Article 5), which reads as follows: 'state and local government institutions and agencies must within the scope of their competence ensure that in all the legal acts drafted and passed by them, equal rights and treatment are laid down without regard to gender, sexual orientation, age, disability, race, ethnicity, origin, religion, beliefs or convictions, language and social status.'. Please also apply to the next column (Jd).
26. Maltese law does afford protection to persons with disabilities in all fields, including social protection. However the obligation to provide reasonable accommodation is only specifically provided for in the field of employment.
27. Only housing.
28. There is no formal obligation of RA beyond employment, there are number of measures taken. Please apply for all 3 policy related columns.
29. While disability is not specifically mentioned as a protected ground against discrimination in all three relevant provisions on social protection, education, access to goods and services, it is interpreted by the national equality body and by the courts as being a protected ground based on the correlation of the specific provisions with the Art. 2 of GO 137/2000 (the general definition of AD).
30. Judicial interpretation is required mainly with regard to the provision of Section 2(3) of the Anti-discrimination Act (Act No 365/2004 Coll. on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act) (*zákon č. 365/2004 Z. z. o rovnakom zaobchádzaní v niektorých oblastiach a o ochrane pred diskrimináciou a o zmene a doplnení niektorých zákonov (antidiskriminačný zákon)*) since it is very general and vague. Please apply to the three columns whose answer is Jd.
31. Other legislation applies to the field of services only. With regard to goods, it is also unclear whether the reasonable accommodation obligation applies also to their production or only to their selling to customers.

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