



## **Achieving eAccessibility: The Role of Equality Legislation and Other Measures**

### **‘The Potential Offered by the Equality Approach**

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## **1. Introduction.**

It falls to me to introduce the 'Equality Approach', to suggest a conceptual framework within which the various components fit together and collectively contribute to the same overall goal.

The window through we, as lawyers, tend to frame the eInclusion issues is the equality window. Like all majestic generalities it suffers because of its generality. Those with a stake in the debate – especially industry – are sometimes sceptical because of its seemingly open-ended and never-ending cascade of burdensome obligations. Let me suggest otherwise and let me try to crunch it down to reveal its lawyers and its cash value in the eInclusion context.

## **2. The Many Layers of Equality.**

### ***Equality Treatment by the State.***

First of all, and at its thinnest, the equality principle plays a crucial role in controlling State action. It provides a vantage point to question the benefits and burdens imposed by Governments on individuals and groups through legislation and other administrative action. Unequal treatment may be justified by reference to objective human difference provided the measures taken are necessary and proportionate. Differential treatment on the basis of race and gender are suspected of never having a justification and as simply emanating from unwarranted stereotypes. Disability is a bit different in that there are objective differences – of which more shortly.

There is ongoing debate in the US and to certain extent here whether the equal treatment principle requires blindness to human difference or whether it requires the State to take due account of human difference. The European Court of Human Rights is certainly leading to the view that Governments may indeed have a positive obligation to take due account of difference and to modulate their legislation accordingly. This is the

Aristotelian conception of equality and is best reflected in the judgment of the European Court of Human Rights in *Thlimmenos v Greece*. Indeed, the President of the Court wrote in a speech that the main beneficiaries of this would be persons with disabilities.

***Equal Opportunities in Civil Society.***

Secondly, the equal treatment principle, so described, attaches to classic State action (e.g., legislation). Yet the reality is that most of us live or lives enmeshed in market-based transactions in civil society. If confined to its classic application the equality principle would not be able to generate enough change to bring about genuinely equal opportunities to flourish in private life – in the myriad web of transactions that make up our lives. The rules of the game within which the lottery of life is played out are determined primarily by market forces – and rightly so in a free society. Yet, it has to be acknowledged that securing equality in practice requires that we be conscious of the existing pattern of inequalities – regardless of how they are caused – and their impact. The impact is felt individually and by affected groups. It is also felt more generally. Letting losses lie where they fall may be attractive within a purist ideology of the market. But it does not ultimately suit market actors. It leads to unnecessarily lower levels of economic activity. It does not empower potential consumers who can further drive market innovation. And it places an undue burden on the welfare roles. The business case for diversity is just that – a business case.

Hence most countries have adopted equal opportunities legislation to advance equality – to reduce the adverse effects of inequalities – in the private sphere as well as in the public sphere. It has to be frankly admitted that there are two overlapping drivers for this: one is moral – respect for the human difference of disability – the other is economic – enhancing intra and inter-State commerce, both in the US and in Europe.

Allow me to return to Aristotle! I have already mentioned that laws that take explicit account of race or gender are suspected of lacking any rational basis since they are generally founded on stereotypes: moral inferiority or fixed social roles. Disability is different in that the difference of disability does have some objective grounding in fact.

Leaving to one side the academic debate about the ‘social construction of disability’ most people would detect some objective difference between persons with disabilities and others. True, social prejudice has often magnified these differences out of all proportion. Yet persons with disabilities do see differently, walk differently, learn differently, etc. Philosophers of equality see this. Social engineers see this. And Governments see this. That is why equality law in the field of disability moves in the direction of requiring due notice be taken of disability and that some concrete steps are taken to accommodate the difference to enable persons with disabilities to play out their life chances on a level playing field. The much debated concept of ‘reasonable accommodation’ is simply Aristotle in action.

A much neglected feature of the history of the ‘reasonable accommodation’ idea is that it in fact began its life on the ground of religion in the US Civil Rights Act of 1964 and indeed Christine Jolls and others argues that maternity leave can be conceptualised as ‘reasonable accommodation’ on the ground of gender. Some within our Discrimination Law Network openly speculate on the possibility of construction arguments by analogy to get the ECJ to extend the obligation on other grounds such as age and religion.

Let me pause momentarily. Whatever else, ‘reasonable accommodation’ is, it is not positive or affirmative action. Positive actions measures – which are specifically allowed under the Equality Framework Directive (of which more anon) are quality distinct. They focus on advancing the status of groups. They entail a bird’s eye view of inequality. ‘Reasonable accommodation’ focuses on individuals’ experience of discrimination. It entails a ‘worm’s eye’ view of discrimination. True, the only reason the individual experiences the discrimination is because of his/her membership of a group. Yet the insistent focus on how it is experienced by the individual places the concept of ‘reasonable accommodation’ much closer to the heart of the civil rights perspective than ‘positive action’. Positive action is generally programmatic in nature. If there are remedies they are generally not triggered by individuals who control the proceedings. Because of its closeness to civil rights philosophy and non-discrimination, the concept of

‘reasonable accommodation’ enables an individual to challenge action that adversely impacts on them.

So, rather than bring about widespread structural change – which is the goal of positive action – ‘reasonable accommodation’ envisages or leads to an accumulation of individualised responses by employers and others to the difference of disability. Cumulatively this helps to bring about structural change although that is not the primary focus. Of course, the more the would-be discriminator takes a cue from the concept of ‘reasonable accommodation’ and acts proactively without waiting for a complaint, the more structural change is brought about. And the more even is the process of internalising the externality of ‘reasonable accommodation’ the more level the playing field in the competitive marketplace.

### ***Positive Action and the Social Model.***

None of which is to disparage positive action of which we have a long tradition in Europe. Yet, positive action is merely permitted under non-discrimination law and theory. Theoretically, if positive action measures cease there is no issue from within non-discrimination law and theory. The obligation to engage in ‘reasonable accommodation’ is constant.

And none of which disparages our European Social Model which, building on an ethic of solidarity adds the much more substantive layer of egalitarianism to equality. Again, let me pause here. Our Social Model did the job of equality for many years. It handled the situation of those left out – of those who were marginalised and not through any fault of their own. And it did a good job of ensuring social cohesion. But observe the implicit assumption (probably wholly unintended but real nonetheless) which was that the appropriate response of the State was to compensate for the exclusion and not to tackle the dynamics of exclusion and to prime people to re-enter the mainstream. This has been changing in the past decade in Europe. Our Social Model is being refreshed by a civil rights model. Our Social Model is being made to play a much more complementary role in ensuring freedom and participation rather than underwriting exclusion. This is so

across a broad swath of policy areas – and it is so in EU disability law and policy. It is as if we are meeting the US half-way across the ocean but without an exclusive reliance on civil rights to achieve social goals.

***Equality Embedded in Market Forces.***

Let me return to the market. Equality law positions the individual to challenge market actions. A secondary effect may be to bring about cumulative change in the pattern of behaviour of market actors. But that is not its primary objective. Can or should we bring the equality ethic further? Market behaviour takes place against the background of rules of the game – rules set by the State. These rules keep markets open to new entrants, they regulate competition, they lay down standards that enable lubricate easy market transactions (even across borders) and raise general levels of economic activity, they allow all market actors equal opportunities to bid for public work. In short, these rules help to sculpt the marketplace in a way that is neutral towards any particular market player. Can these sculpting rules – or should they – be calibrated to get market actors to progress social goals? Can – or should – the equality ideal be used to animate market forces to get market actors to meet social goals spontaneously and autonomously from State action? Can the State – or should it – use its own economic leverage as a consumer of goods and services to ensure that those market actors that engage with it work to higher standards than might otherwise be the case?

What I am setting up – what this leads to- is the debate about public procurement as a tool for social ends. At least this is the way it is commonly put. I would perhaps put the issue slightly differently. Frederick Hayek once famously asserted that free societies tend to be those with free markets. Whatever one might think of the political baggage that went with Hayek’s general philosophy, there is nevertheless a germ of truth to this assertion. If markets have such liberating potential for human freedom, if our collective stake in the success of markets is to secure freedom and the prosperity that makes freedom possible then we have some stake in ensuring that markets can and should be nudged in directions that fit with our underlying commitment to freedom.

Of course, this begs a much bigger debate about the appropriate role of the State in Markets. Clearly, such intervention should not undermine the capacity of markets to generate wealth, to grow new markets and to innovate. Clearly, such intervention should not undermine market forces but instead underpin them. But equally clearly, if we confine the pursuit of equality to formal legislation and leave intact market trajectories that tend away from freedom then we have not done all we can to ensure equality in practice. I think the key point here, though, is that an appropriate level of intervention can lead to more economic opportunities and not fewer, that market-rationality can be partial and that markets can grow and not shrink if intervention is undertaken sensibly and with stakeholder consensus.

#### **4. European Equality Law.**

I will not directly address the question of standards although that is key to tapping the social potential of the market. And I will not directly address changes in public procurement law at EU level. Others more expert than I can draw out the entailments and potential of this development.

Let me drill narrowly down to our existing EU anti-discrimination instruments to see how the concept of ‘reasonable accommodation’ is currently understood and to make some observations about its potential in the eInclusion field. Recall that the motor force for change is both moral (human rights) and economic (enhancing economic efficiency). The US Inter-State Commerce Clause provides the legal basis for quite intrusive economic regulation in the US and Section 5 of the 14<sup>th</sup> Amendment which create space for legislation enforcing equality provide dual constitutional authority for action at the Federal level in the US. I believe it is the equal presence of these two bases for constitutional action in the US that has made the US a world leader in the field.

Europe is different. We generally left moral considerations – considerations of human rights – to another body, the Council of Europe in Strasbourg. Those parts of the Treaties that made ample provision for the regulation of Inter-State commerce here (a great Commercial Republic in Europe) were insensitive to moral or social concerns. This in-

built default setting which automatically puts social regulation of market forces on the defensive is still there despite the many innovations of late. Famously, Article 13 of the Treaty of Amsterdam now provides a clear legal basis for Community non-discrimination law on the ground of disability as well as others. It has led to the adoption of the Framework Employment Directive which, *inter alia*, prohibits discrimination on the ground of disability in the employment sphere. Let me be bold enough to suggest that the full value of Article 13 will not be achieved unless the ethic of equality which it embodies spills over to animate a wide spread of policy areas and legal competencies of the Union.

The Framework Directive only applies in the sphere of employment. The fact that the Race Directive which also owes its root of title to Article 13 sweeps in many other areas such as housing demonstrates that there exists a sufficient legal basis in the Union to broaden the Framework Directive to cover disability discrimination in education and in the provision of goods and services which must be taken to include the provision of ICT (although this is precisely what is being litigated now in the US and elsewhere).

There may well be ICT implications even in the Framework Directive. For example, Article 3.1 (a) makes the Directive apply to ‘conditions for access to employment’. If application forms are online this could bring the question of accessibility into focus. Likewise, Article 3.1.(b) refers to ‘access to ...vocational guidance’ which could certainly be interpreted to apply to ICT especially if such guidance is provided online. Leaving these ICT potential applications to one side for the moment, it is probably true to say that that the main value in studying the Directive – and the national legislation giving effect to it – lies in how the concept of ‘reasonable accommodation’ is conceptualised and then made operational in State law transposing it. From this we will get a better sense of the overall value of the concept in advancing the goal of eAccessibility once properly framed in a Goods & Services Directive.

Some drafting history. The concept was originally proposed by the Commission as an integral part of Article 2 which defines discrimination. That is, it was clear that failure to

achieve ‘reasonable accommodation’ was a form of actionable discrimination. The concept was moved during negotiations in Council to a separate Article – Article 5. It is important to understand that this was not done to break the link between non-discrimination and reasonable accommodation. It was done to unburden the headline norm prohibiting discrimination from detail that focused on one ground among the five covered. Indeed, the Commission argued successfully that the opening language from the original Article 2(4) be retained precisely in order to emphasise the automatic link between non-discrimination and ‘reasonable accommodation’. I have two reasons for emphasising this point. First, the ECJ will be faced with an interpretive choice concerning the obligation. It might use the unfortunate severing of ‘reasonable accommodation’ from Article 2 to break the link between discrimination and the obligation. This would be against the weight of the drafting history and most comparative law on the subject. Secondly, the Council Presidency actually argued this point in New York when drafting the recently agreed UN treaty on the rights of persons with disabilities. Thankfully it changed its mind.

Article 5 is in many respects the lynchpin of the Framework Employment Directive on the ground of disability.<sup>2</sup> It reads 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. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State.

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<sup>2</sup> See generally, L. Waddington, *Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive – Learning from Experience and Achieving Best Practice*, EU Network of Disability Discrimination (2004), available at [http://www.europa.eu.int/comm/employment\\_social/fundamental\\_rights/pdf/aneval/reasonaccom.pdf](http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/aneval/reasonaccom.pdf).

See also L. Waddington and A. Hendricks, “The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination”, 18 *International Journal of Comparative Labour Law and Industrial Relations*, (2002) 403.

The conceptual linkage between non-discrimination and ‘reasonable accommodation’ was clearly explained by the Commission in its original proposal. The Commission explained:

The principle of equal treatment under Article 2 as applied in the context of disability entails an identification and removal of barriers in the way of people with disabilities who, with reasonable accommodation, are able to perform the essential functions of a job. *The concept has become central in the construction of modern legislation combating disability-based discrimination* [citing the British DDA which specifically deems a failure to provide ‘reasonable accommodation’ or its equivalent as discrimination] and is also recognised at an international level<sup>3</sup>.

[emphasis added].

The Commission continued:

Essentially the concept stems from a realization that the achievement of equal treatment can only become a reality where some reasonable allowance is made for disability in order to enable the abilities of the individual concerned to be put to work. It does not create an obligation with respect to individuals who, even with reasonable accommodation, cannot perform the essential functions of any given job.<sup>4</sup>

The link between failure to provide ‘reasonable accommodation’ and the proscription against discrimination was more recently underlined by the Commission in its aforementioned working paper on disability and the European Employment Strategy. It stated:

Reasonable accommodation is not a positive action left to the discretion of public or private operators, but an obligation whose failure can constitute unfair discrimination.<sup>5</sup>

Under Article 5, ‘reasonable accommodation’ in the form of “appropriate measures” shall be taken “where needed in a particular case”. This rightly assumes that such

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<sup>3</sup> COM (1999) 565 final at 8, 9.

<sup>4</sup> Id at 9.

<sup>5</sup> See, *Disability Mainstreaming in the European Employment Strategy*, Brussels, European Commission, EMCO/11/290605 (2005), at p.3.

accommodation will not be required in all cases. Of importance is Recital 17 which asserts that the Directive only covers those who can perform the ‘essential functions’ of a job whether with or without ‘reasonable accommodation’.

The reference to ‘essential functions’ in Recital 17 is important at a number of levels. First of all, it serves to underscore the point that the quest for a particular ‘reasonable accommodation’ should be an interactive one between the employer and individual. The employer will need to carefully identify the truly ‘essential functions’ of a given job and to distinguish them from marginal functions. Obviously, if an employer over-conflates the ‘essential functions’ of a job in order to deliberately screen a person with a disability out or if such over-conflation has that result, then the employer is guilty of at least indirect discrimination. Adjudicatory bodies including courts must obviously retain jurisdiction to review how the ‘essential functions’ of any particular job are defined and should not automatically defer to the employer’s own judgments. Otherwise the prohibition on discrimination will have little effect.

Secondly, the reference to ‘essential functions’ is also relevant to the kind of ‘reasonable accommodation’ that an employer might be required to engage in. For example, if the marginal or non-essential functions of a job could be transferred to another employer in order to enable an employee with a disability to perform the ‘essential functions’ of the job then such ‘reasonable accommodation’ might be required.

A good example of a case turning on the ‘essential functions’ notion arose in 2005 in Cyprus<sup>6</sup>. The Cypriot Ombudsman entertained a complaint dealing with entry requirements for obtaining placement in a nursing school. Among the requirement was one that stated that the candidate should be ‘in good health’. The applicant in question had reduced hearing and was on that count refused entry. The refusal was defended on the basis that a nurse would have to be capable of hearing. The Ombudsman concluded that this amounted to direct discrimination the ground of disability. Interestingly, the

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<sup>6</sup> The Ombudsman Office: Decision of the Equality Authority, No 16/2005 regarding the Nursing School’s entry requirements and the exclusion, on that basis, of persons with disabilities.

Ombudsman pointed to many examples of deaf persons being admitted to educational and training establishments worldwide. And revealingly the Ombudsman stated that many new opportunities were opening up for graduates of the nursing school and may include positions that do not require excellent hearing or vision. Therefore, it might be conjectured (although this did not form part of the ratio of the decision) that being able to hear or see fully was not necessarily an ‘essential function’ of the range of jobs to which the applicant might be able to apply for in the future. In essence, to deny the applicant entry into nursing school might be said to deny a right to work in jobs whose ‘essential functions’ did not require excellent hearing or sight. Bearing in mind that the material, scope of the Framework Directive reaches to ‘all types and to all levels of vocational guidance, vocational training, advanced vocational training retraining’ (Article 3(1)(b)) and that this enables the Directive to reach into many types of education (if not general education) this precedent could prove extremely important.

Article 5 does not itself provide an exhaustive or even an indicative list of ‘appropriate measures’ of accommodation. But the object of such accommodation is stated to be to “enable a person to have access to, participate in, or advance in employment or to undergo training.” Recital 20 does, however, refer to some illustrative examples including:

adapting premises, and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.

Given the potential range of accommodations (e.g., reassignment of non-essential or marginal functions to other employees) and the amount of variables at play, it follows that the process of identifying any particular ‘reasonable accommodation’ must, *perforce*, be interactive and individualised to the needs of the person in question.

The concept of ‘reasonable accommodation’ (‘reasonable adjustment’ under UK law) has been most developed under British and Irish disability discrimination law. With respect to British law and practice, and as pointed out in the aforementioned *Disability Baseline Study*:

Typical ‘reasonable adjustments’ under the DDA include making physical adjustments to premises, re-assigning ‘non-essential’ duties of the job to other employees, flexible working hours, acquiring or modifying equipment, modifying procedures or reference manuals, modifying procedures for testing and assessment, providing a reader or interpreter and providing supervision.<sup>7</sup>

The recent 2004 House of Lords decision in *Archibald v Fife Council* is illustrative of the kinds of issues that arise and how they can be creatively handled by the courts.<sup>8</sup> This case involved a road sweeper for a local council who became unable to walk and therefore unable to continue working as a road sweeper. Section 6(2)(b) of the British DDA states that ‘reasonable adjustments’ to work arrangements can include:

Any term, condition or arrangement on which employment, promotion, a transfer training or any other benefit is offered or afforded.

Archibald was temporarily re-assigned to a sedentary job at the Council which did not require walking but which the council considered to be a promotion since it carried a higher pay scale. The redeployment procedure then in force required each candidate for such a ‘promotion’ to undergo an examination without any exceptions. Archibald took the examination but failed and was therefore let go. The House of Lords held that the duty to make ‘reasonable adjustments’ effectively obliges an employer to treat a disabled person ‘more favourably’ than others. By this it did not mean to suggest that persons with disabilities should be afforded ‘special rights’. What it meant, instead, is that the regulations that apply to promotions (i.e., requiring satisfactory performance of the test) should themselves be adjusted to take account of the rights of workers with disabilities. The ruling affects the operation of ancillary legislation which mandates that appointment to public posts should be strictly on merit. That is to say, the latter legislation should be interpreted in light of the DDA and not the other way around – thus erecting a sort of lexical hierarchy in favour of the DDA.

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<sup>7</sup> See Disability Baseline Study, *loc. cit.* at 80.

<sup>8</sup> [2004] UKHL 32. Available at, <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040701/arch-1.htm>

A series of Irish cases reveals that the process for identifying a 'reasonable accommodation' must be an individualized and participatory one. In the 2003 Irish case of *A Computer Component Company v a Worker* an employer was found liable because it had not conducted an assessment of the potential range of abilities of the worker in question.<sup>9</sup> In another Irish case of 2003 evidence that a railway crossing attendant suffered from depression - and so might pose a danger to the public - was held to be insufficient ground for letting him go. The Equality Officer (part of the Equality Tribunal in Ireland) held that such assumptions in the absence of an individualized assessment was not enough to ground a negative decision against the worker in question.<sup>10</sup>

A defence of 'disproportionate burden' is provided for by Article 5. Any assessment of when an otherwise 'reasonable accommodation' reaches the threshold of 'disproportionate burden' involves a complex balancing of the circumstances of the employer with the rights and interests of the employee or prospective employee. Recital 21 asserts that within this calculus account should be taken of:

financial and other costs involved, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.

This defence is a key element to Article 5. A wide variety of factors will no doubt be relevant in the determination of whether the threshold of a 'disproportionate burden' has been exceeded. Among other things, it brings the intersection between general social provision and non-discrimination law into sharp focus in the disability context. Many employers are in fact directly or indirectly assisted in several Member States to employ persons with disabilities<sup>11</sup>. This assistance takes many forms including capital grants, technical advice and assistance, tax credits and other tax breaks. If such aid is taken into

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<sup>9</sup> ED/00/8 Determination No 013 (July 2001).

<sup>10</sup> *C v Iarnrod Eireann*, DEC E/2003/054.

<sup>11</sup> These positive action measures are usefully summarised in a Council of Europe publication, *Legislation on the rehabilitation of people with disabilities : Policy and legislation*, Strasbourg, Council of Europe, 2002, (6th edition).

account then there will be a reduced opportunity to plead ‘disproportionate burden’ in many instances.

A recent example of innovative legislation in this field is the new Estonian *Law on Employment Services and Allowances* which entered into force on 1 January 2006.<sup>12</sup> According to this law, the Estonian State will compensate employers for up to 50% of expenses necessary for job accommodations up to a specified maximum amount. However, if this State assistance were not to be factored into the equation then there would have been many more opportunities for employers to avail of the defence. The drafters of the Directive were keenly aware of the problem and Article 5 now specifically provides that the burden shall not be considered disproportionate when it:

is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

So the availability of State aid and assistance to employers is relevant to the identification of the thresholds. Interestingly, the Irish Equality Tribunal has held in *An Employee v a Local Authority* that an employer may be denied recourse to the defence of ‘disproportionate burden’ if it had in fact access to State resources and technical assistance to help offset the costs of ‘reasonable accommodation.’<sup>13</sup>

Indeed, the fact that the State itself may be the employer is highly relevant on the assumption that it can bear a higher threshold. In the above case the Irish Equality Tribunal held that the extent of the obligation to engage in ‘reasonable accommodation’ might vary according to whether the entity in question was in the public or the private sector - the latter could be presumed to be able to bear a higher burden.<sup>14</sup>

Other relevant factors will include the financial capacity of the enterprise (which brings the link between parent and subsidiary companies into focus) and its overall capacity to

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<sup>12</sup> RT I 2005, 54, 430.

<sup>13</sup> DEC E/2002/4, at para 6.13.

<sup>14</sup> Id at para 51.

concede the accommodation required. All of which must be balanced against the overall objective of the Framework Employment Directive which is to lay down a ‘level playing field’ for all in the employment context (Recital 37).

It is worthy of note that the European Committee of Social Rights – the treaty monitoring body that interprets the *European Social Charter* – now interprets the Charter require anti-discrimination law on the ground of disability in the employment sphere and that such law should expressly require an obligation of ‘reasonable accommodation.’<sup>15</sup>

It is not an exaggeration to say that the way in which the obligation of ‘reasonable accommodation’ is handled will probably determine whether national legislation will be effective in combating discrimination on the ground of disability.

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<sup>15</sup> See, *Conclusions XVI-2*, Vol 1 & 2, European Committee of Social Rights, (covering Article 15 of the Charter). All conclusions of the Committee are available at, [http://www.coe.int/T/E/Human\\_Rights/Esc/3\\_Reporting\\_procedure/](http://www.coe.int/T/E/Human_Rights/Esc/3_Reporting_procedure/)