



# Non-discrimination for people with intellectual disability

Position Paper

## The Transposition of Directive 2000/78/EC on Establishing a General Framework for Equal Treatment in Employment and Occupation into National Legislation

It is a rather positive fact that in the process of transposing the Directive, some Member States have gone beyond the minimum standards set out in Community legislation. For example, they have banned discrimination on grounds of disability outside employment, or extended the right to reasonable accommodation to other basic aspects of daily life, such as public transport.

Unfortunately though, this has not been the rule. Although the deadline for transposing the Directive into national law has already expired for almost all of the member states, a vast majority of them is adopting delayed and poor implementing legislations.

Many countries have not even drafted any implementing legislation yet, and in the countries where that implementing legislation exists we frequently find regulations that are either too vague (this is mostly the case as regards the right to reasonable accommodation), or too similar to the text of the Directive, with the consequence that the resulting provisions -of countries like Italy or Luxemburg- are so generic that they will be very difficult to apply to particular cases.

From the way they define disability in their laws, we can see that too many countries follow restrictive, medical approaches. In most cases, countries are still rather reticent towards adopting the social model, and this has consequences with regard not only to the definition of disability itself, but also to the way they approach the question of discrimination as a whole. Belgium, for instance, finds too many exceptions to the prohibition of direct discrimination, while the UK does not explicitly mention indirect discrimination at all. Almost every country excludes sheltered employment from the scope of the Directive, and in some cases selection procedures are not adequately covered. Reasonable accommodation, for its part, is usually defined as it is in the text of the Directive, but then again only very few countries provide for national arrangements in order to make this right possible in practice. Further elaboration is also needed on the principle of the reversal of the burden of proof, which only Belgium seems to have taken seriously. A rather critical aspect regarding the state of implementation concerns the regulation of the defense of rights. Only in very few occasions are disability organizations entitled to represent disabled people before a court, and people with learning disability are very specially damaged by this lack of compliance with article 9.2 of the Directive. Finally, it also has to be said that implementations of the provisions regarding the State's obligation to disseminate accessible information or to promote social dialogue are virtually inexistent.

Generally speaking, present anti-discrimination laws are not covering all persons affected or threatened by disability-based discrimination. In particular, such form of discrimination can also be based on past, future or assumed disabilities.

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Moreover, people suffer discrimination also because they are related to someone who has a disability. We strongly believe that implementing legislations have to include all these groups of individuals under their scope of protection.

## **Recommendations**

The purpose of the Framework Employment Directive is to protect and enhance the fundamental right to equality of opportunity. The Directive shall be interpreted, transposed and implemented in a way, which is not only compatible with its purpose, but in a way that promotes to the maximum extent the real enjoyment of equality of opportunity among the population groups covered by its scope.

When transposing a Framework Directive into national law, Member States may take into account their own legal traditions, and use different approaches to secure implementation. However, the Directives set goals, which Member States are obliged to achieve in any case. We hope that the following recommendations will be helpful for public authorities at the national and the European levels when interpreting the disability provisions of the Framework Employment Directive. They propose measures, which we believe are necessary in order to ensure that the Directive's provisions are also used to the advantage of people with intellectual disability and their families.

### **Defining disability-based discrimination.**

Inclusion Europe strongly believes that the definition should cover past and future disabilities, and that the people related to persons with intellectual disability, such as families, should also be protected against discrimination. Ideally, the definition should describe "disability-based discrimination" and the duties related to reasonable accommodation rather than the term "disability" or "disabled person".

### **Effective protection against discrimination.**

The exceptions to the general prohibition of discrimination included in Article 2 of the Directive are meant to be interpreted in a restrictive manner and from a human rights perspective.

**Reasonable accommodation.** Under our view, the "reasonableness" of the accommodation cannot be interpreted as referring to its limited cost or convenience to the employer, but rather to its efficiency to enable the right to equal opportunity. It

cannot be denied that the right to reasonable accommodation applies also to persons with intellectual disability. The failure to comply with this obligation is a form of discrimination.

**Effective remedies.** Member States are obliged under the Directive to offer remedies to the victims of discrimination. Remedies have to be effective, proportionate and dissuasive, and should be available to all persons that feel discriminated against, even after the working-relationship has ended.

Effective sanctions with regard to intellectual disability-based discrimination shall be, under our view, all the measures necessary to protect the right to equal opportunity of persons with learning disability, in accordance with the objectives pursued by the Directive.

**Protection against retaliation.** Protection against retaliation as a reaction to a complaint aimed at enforcing compliance with the principle of equal treatment should cover, under our view, not only the claimant, but also the witnesses.

**Reversal of the burden of the proof.** Although the Directive does not specifically mention it in this regard, it would be very helpful if Member States would apply the reversal of the burden of the proof also to discrimination cases resulting from a denial of reasonable accommodation.

### **Disseminating information and promoting social dialogue.**

We believe that Article 12 of the Directive imposes the obligation on the State to ensure that all the relevant issues concerning the Directive are known by all the people concerned, including employers. On the other hand, that the information shall be brought "by all appropriate means" necessarily implies the availability of accessible material, in Easy-to-Read format or equivalent.

In our view, the vast majority of the Member States are not complying with article 12. This has very negative effects for people with intellectual disability. By not providing the information necessary for people with learning disability to become aware of their rights, and especially by impeding their associations to represent them before the courts, States are seriously undermining the exercise – and therefore the meaning - of the rights contained in the Directive.