

# **Idea behind Reasonable Accommodation as a Way Forward to Achieving Equality**

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## **Abstract**

According to statistics of the International Labour Organization, an estimated 386 million of the world's working-age people have some kind of disability. Unemployment among persons with disabilities is as high as 80 percent in some countries. The question of reasonable accommodation rises as an important issue that needs to be considered when speaking about disability discrimination in the area of employment and occupation. The purpose of every reasonable accommodation, which is exclusively based on the social model of disability, is to provide disabled persons with access to employment, work and advancement in the work, as a way forward to achieving equality.

This paper elaborates on the question of the legal nature and the effect of reasonable accommodation, on what type of accommodation is appropriate and effective in legal terms. In addition this paper will look at the question of protection, i.e. who should be protected - the individual person or the group of persons with disabilities, the framework of the legal obligation to protect and its limits. Comparatively, the paper analyses the reasonable accommodation duty as provided in the UN Convention on the Rights of Persons with Disabilities and the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Today, in different legal systems, there are various ways of regulating the reasonable accommodation. Namely, whether it should be considered as an anti-discrimination duty or as a form of an affirmative action? This question does not have a single answer and but will be

elaborated in greater detail in the paper using comparative experience from the EU Member-States, USA, and Australia. Furthermore, the paper assesses the current situation on the reasonable accommodation for persons with disabilities in the Macedonian context.

Finally, the paper identifies the key challenges and recommends actions for overcoming them. The text uses results from research and surveys that have been conducted in the country and abroad as an illustration of trends and patterns.

**Keywords:** *discrimination, reasonable accommodation, undue burden, Macedonia.*

### **Introduction**

The idea of reasonable accommodation is based on the social model of disability and 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" (UN Convention on the Rights of Persons with Disabilities, Article 2). The purpose of every accommodation is to provide the persons with disabilities with access to employment, work and advancement on the job. The question of what type of accommodation is appropriate can be answered following an individual analysis that will take into consideration the conditions of the person with the disability and of the job itself or the training. Thus, reasonable accommodation is always linked with individual assessment and individually tailored solutions. The group of persons with disabilities *per se* is not covered, but a specific person with disability and his/her needs are accommodated.

The reasonable accommodation duty is not endless rather it is limited. A judgment of the Supreme Court of Austria states that "the duty for reasonable accommodation is limited and does not comprise the duty to 'empty' a suitable post, which are held by non-disabled civil servants in order to avoid disadvantages, including dismissal of a disabled person who has become unable to serve on his post" adding that "such a dismissal of a non-disabled person would constitute discrimination on ground of disability" (Ref. Nr.VwGH 2006/12/0223, 17 December 2007, translated by the author). However, one of the more difficult issues to deal with is to set the limits to this duty that vary on case by case basis. Therefore, a legislative solution cannot cover an exhaustive list of reasonable accommodations, but it can ensure a general definition that will be accompanied with an illustrative list of appropriate types of reasonable accommodation, that the employer can use in individual cases. For example, reducing the working hours as in Cyprus (Cypriot Equality Body, File No. A.I.T. 1/2009, 20 September 2009), or procedure for reemployment in Ireland (IRLR 651, UKHI 32, *Archibald v. Fife Council*, 1 July 2004), or access to parking lots, appropriate procedures for interviewing employment candidates or for testing such as in France (French Council of State, No. 318565, 18 November 2009).

## 1. CHARACTERISTICS OF THE REASONABLE ACCOMMODATION

### 1.1 Legal nature of the reasonable accommodation

The reasonable accommodation duty is prescribed in much legislation worldwide. However, different legislations treat this issue differently. Thus, in some legislations this duty is raised to the level of a separate discriminatory form as in Ireland and France; in other legislations it is defined as an obligation the non-fulfilment of which brings about legal consequences as in United Kingdom, Sweden, Germany and Cyprus<sup>1</sup>; yet in other legislations it is an obligation the non-fulfilment of which does not imply explicit consequences as in Finland, the Netherlands, Spain, Belgium, Lithuania, Greece, Hungary, and Romania; and finally there are countries the legislation of which does not explicitly mention reasonable accommodation as a duty as in Australia, Austria, Bulgaria, Italy, Slovenia, Poland and Turkey (Poposka, 2015, pp.67-68). It can be said that the United States legislation is the most advanced, thus reasonable accommodation is an instrument used to eliminate or overcome obstacles to equal opportunities for persons with disabilities (primarily possibilities for employment and work and obstacles to access to buildings, services and goods, access to programs available for the public at large).

This obligation favours individualization of possibilities for persons with disabilities and covers many ways in which this can be done. Reasonable accommodation consists of three processes: (i) the process of competing for a job or training; (ii) the process of performance of tasks, which covers also the working environment; and (iii) enjoyment of benefits and privileges deriving from employment. The first process can be illustrated with an example. In the Irish case of *A Complainant v. An*

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<sup>1</sup> In Cyprus, this obligation is not limited to employment and labour relations, but it covers also fundamental human rights, such as for example: the right to independent living, diagnosing and preventing disability, personal support with assistive technology and equipment, access to housing, buildings, streets, environment, public transport, education, access to information and communications with special devices, services facilitating social and economic inclusion, professional training, employment at the open labour market and access to goods and services. However, it should be pointed out that outside the area of employment and labour relations this duty is not of absolute nature.

*Employer*, the Equality Tribunal ruled that the complainant was indirectly discriminated against on grounds of his disability (hearing impairment), because he was denied reasonable accommodation for the job interview, i.e. the person was not granted a re-schedule of his interview nor he was enabled an interview with the aid of a computer (Equality Tribunal, *A Complainant v. An Employer*, 30 December 2008).

### 1.2 Legal effect of the reasonable accommodation duty

The question of whether reasonable accommodation should be considered as an anti-discrimination duty or as a form of an affirmative measure, does not have a single answer and therefore it will be elaborated further in the paper. Anglo-Saxon theoreticians<sup>2</sup> most often consider reasonable adjustment as a form of affirmative measures, while the continental European theoreticians link this institute to the anti-discrimination legislation. The following are arguments in support of the second position: the individual character of reasonable accommodation (and not the group approach, as in the case of affirmative measures) and the fact that it is not a matter of under or over representation of persons with disabilities in social life as a group (as in the case of affirmative measures), but it is in fact a matter of regularly adjusting the environment and conditions to the needs of a specific person with disability. Furthermore, reasonable accommodation is part of the anti-discrimination legislative framework and is not an affirmative measure, since its goal is not to increase the participation of persons with disabilities in social life, although it does encompass certain elements of redistributive justice. Instead, it is focused on eliminating a present discrimination, and, different from affirmative measures, it is not focused on eliminating existing effect of a past discrimination.

Although the European Union Directive 2000/78/EC, elaborated in detail below, does not explicitly envisage that the lack of reasonable

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<sup>2</sup> See: B. Doyle, *Enabling legislation or Dissembling Law? The Disability Discrimination Act 1995*, *Modern Law Review*, Volume 60, 1997, pp. 64-74; P.S.Karlan, G. Rutherglen, *Disabilities, Discrimination and Reasonable accommodation*, *Duke Law Journal*, Volume 46, Number 1, 1996; B.P. Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, *62 Ohio State Law Journal*, 2001, 335.

accommodation constitutes discrimination, it can however be concluded that it does not consider these two terms, reasonable accommodation and affirmative action to be identical. According to the Directive, reasonable accommodation is a duty, while Article 7 of the Directive grants Member-States the possibility (not an obligation, but a possibility) to adopt affirmative measures for persons with disabilities that they consider necessary in a given context. Thus, the different levels of protection - one that prescribes a duty for reasonable accommodation and the other that leaves a margin of appreciation to the EU Member-States in relation to affirmative action indicates that reasonable accommodation is covered by the anti-discrimination framework. EU Member-States have reflected the same approach in their national legislations. More specifically, in Finland, the Netherlands, the United Kingdom, Ireland, and in Spain there is a clear delineation between reasonable accommodation and affirmative measures; in Germany, this is not clearly delineated, because under the Severely Handicapped Persons Act of 1974, the reasonable accommodation duty is provided in the same article as affirmative measures; and in France and in Belgium, on the other hand, there is a link between these two institutes. It is interesting to mention that the USA too, especially the case law of the Supreme Court on the implementation of the Americans with Disabilities Act, also has assumed the position that reasonable accommodation is covered by the anti-discrimination framework. Contrary to this position, the case law of Australia considers reasonable accommodation as an affirmative measure.

The author would follow the lead of a large number of countries, and regulate the reasonable accommodation duty under the non-discrimination principle and not affirmative measures. The following question unavoidably poses itself: if reasonable accommodation is considered as part of the anti-discrimination framework then does it encompass only the negative obligation, unjustifiable non-fulfilment of the reasonable accommodation duty constituting discrimination or does it also encompass the positive obligation, right to reasonable accommodation? Article 5 of Directive 2000/78/EC clearly envisages the positive obligation, despite the fact that it does not contain an explicit provision according to which the unjustified failure to make a reasonable accommodation constitutes discrimination. This position is present in almost all legislations of EU Member- States, except for a few states that have opted only for a negative obligation such as Sweden, Belgium, Austria and Luxemburg. In a similar vein, the

Australian Supreme Court in *Commonwealth v. Humphries* has established that the Australian Disability Discrimination Act envisages only a negative obligation (86 FCR 324, *Commonwealth v. Humphries*, 1998).

### 1.3 Reasonable accommodation as a form of discrimination

After establishing that the reasonable accommodation duty falls within the anti-discrimination legislation, then the question as to how this duty fits the existing anti-discrimination framework inevitably arises. States do not have a harmonized view and a position on this issue. There is also no harmonized view on the question whether a failure to make a reasonable accommodation should be considered as a form of discrimination or not; and if it is a form, whether it is direct or indirect discrimination, or a *sui generis* form of discrimination. Examples of all three alternatives can be found in legislations of different states. The analysis of the legislation leads to the conclusion that it would be most difficult to justify that failure to make a reasonable accommodation is considered as a form of indirect discrimination, because this could hardly fit the understanding of indirect discrimination in the EU legislation, despite the fact that examples in this respect could be found in EU Member-States, for example in France, Spain, Austria, Denmark and Slovakia. In the Netherlands, the unjustified lack of reasonable accommodation may be seen as either indirect or direct discrimination. In Italy, considering that the law is silent on the issue of reasonable accommodation, unjustified lack of reasonable accommodation was considered as indirect discrimination in a 2005 case before the court in the city of Pistona. Therefore, the best approach would be to consider unjustified failure to make reasonable accommodation either as a form of direct discrimination or as a *sui generis* form of discrimination.

However, regardless of which approach is chosen, there are be deficiencies. Namely, if unjustified failure to make reasonable accommodation is identified as direct discrimination, then it will be given greater strength as one of the most serious forms of discrimination that will be appropriately sanctioned in case of non-compliance. Most EU Member-States adopted this position such as for example in Ireland, Sweden, Finland, Malta, Bulgaria and Luxemburg. However, this step will create a new justification for direct discrimination, which now does not exist currently as part of the anti-discrimination law of the EU - that of the existence of disproportionate burden, particularly financial burdens. This

leads to the possibility of taking advantage of this justification, which is unacceptable. Furthermore, it is interesting to point out that if unjustified lack of reasonable accommodation is direct discrimination, then in order to prove it will be necessary to find a comparable situation, which is a constitutive element of proving direct discrimination. Taking into consideration the individualized character of the accommodation, it will be very difficult to find such an element. Yet, there are examples of legislators expanding the discrimination against persons with disabilities in working life), and the anti-discrimination legislation of the EU regarding pregnancy (see Case C-177/88, *Dekker*, 1990). On the other hand, it cannot be denied that disability is a much more complex concept than pregnancy, not only because of the differences in the need for accommodation, but also because of the nature and duration of the condition. However, the manners of exclusion are identically problematic in terms of the right to equality meaning of direct discrimination, by including in its remit the failure to establish equal possibilities for employment, as in Sweden in relation to disability (Article 6 of the Law on a ban of discrimination against persons with disabilities in working life), and the anti-discrimination legislation of the EU regarding pregnancy (see Case C-177/88, *Dekker*, 1990). On the other hand, it cannot be denied that disability is much more complex concept than pregnancy, not only because of the differences in the need for accommodation, but also because of the nature and duration of the condition. However, the manners of exclusion are identically problematic in terms of the right to equality (Poposka, 2015, p.70).

Another possibility is to recognize unjustified failure to make reasonable accommodation as a separate *sui generis* form of discrimination. This has its advantages because only in this way can the specific features of the individualized character of the reasonable accommodation duty come to full light, i.e. the fact that the less favourable treatment arising from the refusal to ensure reasonable accommodation is suffered by only one person with disability and not by all or a larger group of persons with disabilities. However, this approach carries the risk of creating a specific category of disability discrimination, seen as a much wider encompassing category than the current reasonable accommodation duty that covers only persons with disabilities (Waddington, Hendriks, 2002).



#### **1.4 Personal scope of the reasonable accommodation**

Different approaches can be applied to the issue of the *ratione personae* of the reasonable accommodation duty. The approach applied by the European Union Directive 2000/78/EC reflected in Article 5 is a restrictive one and it covers only persons with disabilities who are capable and skilled for a given job, such as: employment candidates, currently employed persons and formerly employed persons who are using employment benefits such as pension. This is because when it comes to reasonable accommodation, it is necessary to strictly apply the asymmetric model of anti-discrimination legislation. Thus, only persons with disabilities may take advantage of reasonable accommodation. However, this does not resolve the problem that members of the immediate family of the persons with disabilities face, considering that sometimes they too need reasonable accommodation as pointed out by the Court of Justice of the EU in the *Coleman case*. In *Coleman case* the Court of Justice of the EU states that in the EU law discrimination by association on grounds of disability, mother of a son with disability, is protected only in cases of direct discrimination and harassment.

The criterion according to which only persons with disabilities that are capable and qualified for a given job are able to utilize the reasonable accommodation duty implies a two-fold approach. First it is necessary to determine the basic elements of the given job, which is done on case-by-case basis and to establish whether the person with disability will be qualified for the job after a reasonable adjustment has been made, and second to establish reasonable accommodation. In order for reasonable accommodation to serve its purpose, the employer needs to consult the concerned person with disability in an open and interactive negotiating process, which would include experts in a given field, both medical and technical experts such as machine engineering experts who can offer advice on what adjustments could be made to the equipment, architects who can point out possible changes to be made in the physical environment and buildings, rehabilitation experts, organizations of persons with disabilities and others. In order for the activities connected with providing for the reasonable accommodation to start, it is necessary that the following precondition be fulfilled: the employer must be aware that the person has a disability and that there is a need for reasonable accommodation.

## 2. ELEMENTS OF THE REASONABLE ACCOMMODATION

In answer to the question whether the accommodation is reasonable. Based on the comparative analysis of several EU Member-States the following two-stage test could be applied: first, it is necessary to establish whether the accommodation is reasonable/appropriate, i.e. is it viable and does it satisfy the requirements of the concerned person, does it enable the person with disability to perform the tasks required for the job and whether it is required; and second, whether the adjustment will bring a disproportionate burden for the employer. The issue of whether the accommodation is reasonable is considered separately from the issue of disproportionate burden, because the former is focused on the potential to ensure equal possibilities for persons with disabilities, and not on the ensuing cost. This is primarily a European position, while the USA case law applies an approach, which is different from the one envisaged in the Americans with Disabilities Act itself. Specifically, before the judgment in the *Barnett* case, courts held the position that the accommodation is unreasonable if it results in disproportionate burden, while the 'reasonable' element was not considered as relevant at all. However, in *Barnett* the analysis of whether the accommodation was reasonable was made separately from the analysis of the disproportionate burden for the employer and in this respect the Court considered that the Americans with Disabilities Act did not demand action beyond the realm of reasonable, stating that "accommodation could prove unreasonable because of its impact, although it is effective in enabling a person with disability to perform the essential functions of a task". By allowing employers and courts to assess whether the accommodation is 'reasonable' beyond the scope of the financial and administrative burden/costs, the judgment in the *Barnett* case dramatically undermines the efficiency of the Act because it narrow the *ratione personae* of the legislation.

On the other hand, when it comes to 'disproportionate burden', it should be taken into consideration that the justification of the reasonable accommodation duty is not related to the economic efficiency of the employer. On the contrary, it is related to equal opportunities for persons with disabilities. In this respect, different legislations envisage different elements according to which it is assessed whether the costs of accommodation are proportionate or not. Legislatures of Bulgaria, Cyprus, Finland, France, Germany, Ireland, Malta, Spain, and the United Kingdom have considered the following elements: the nature and cost of the

accommodation, the overall financial costs incurred by the endeavour including the benefits arising from the accommodation; Austria, Finland, Ireland, Malta, Slovakia and the United Kingdom consider the overall financial resources of the concerned legal person; and other legislatures consider the type of activity the legal person engages in; including the structure and type of work force. Furthermore, special attention should be paid to the question of whether the accommodation itself would ensure external benefit such as for example, increased access to goods and services through the inclusion of consumers with disabilities. Finally, it should be born in mind that all employers cannot be treated identically, and that as different from small businesses, for large companies stricter criteria are always applied because of their financial capacity to undertake more costly accommodation without affecting their day-to-day work significantly. The same goes for the public sector, as different from private companies. The public sector should serve as a good model to be followed by the private sector. Austria, Cyprus, Finland, France, Germany, Ireland, Malta, the Netherlands, Portugal, Spain, Slovakia and the United Kingdom include the possibility of getting financial assistance and other support for making reasonable accommodation for persons with disabilities is a criterion. However, it is interesting to underline that different legislations envisage different levels of accommodation and that accordingly there are different levels of assistance and support provided by the state. This type of measures are applied in: the Netherlands, Spain (there is an established system of state aid with a view to compensating part of the costs for reasonable adjustment made by employers), Germany, Austria, Estonia (the state compensates the costs of employers in the amount of 50% of the total costs for reasonable accommodation up to a set maximum amount; in addition, the state provides persons with disabilities with special services such as: provision of assistance and support for job interviews, assistance at work by a support officer and similar), France (the state has established a fund for professional inclusion of persons with disabilities, which includes payments from all employers that do not employ persons with disabilities in their companies), Luxemburg, Finland and other countries.

### **3. REASONABLE ACCOMMODATION IN INTERNATIONAL LAW**

#### **3.1 UN Convention on the Rights of Persons with Disabilities**

On 13 December 2006, the UN General Assembly adopted with a consensus the Convention on the Rights of Persons with Disabilities (hereinafter CRPD) and its optional Protocol, which were open for signature on 30 March 2007 and entered into force on 3 May 2008. A major part of the CRPD relates to the issue of disability discrimination, which is the issue of interest elaborated in this paper. There is a separate article, Article 5, which has been intentionally placed in the first part of the Convention, which contains articles of horizontal application, which enables interpretation of all provisions of the Convention through the prism of non-discrimination and equality of persons with disabilities (Poposka, 2015).

According to Article 5, paragraph 2, state parties are obliged to prohibit all discrimination on the grounds of disability, which according to Article 2 of the Convention means “any distinction, exclusion or restriction on the grounds 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 covers all forms of discrimination, including denial of reasonable accommodation”. It can be seen that as drafted the prohibition of disability discrimination in the CRPD is focused on the result of the action, and not on the intention of the perpetrator (Palacios, 2008).

Furthermore, the CRPD makes an important step forward not only because it envisages unjustified failure in making reasonable accommodation amounts to discrimination, which is in line with progressive views on disability discrimination. In addition places such a view in an article of horizontal application, which means that the principle is to be implemented throughout the CRPD. In addition, making reasonable accommodation a part of the discrimination definition sets the premise according to which the exercise of fundamental civil and political rights requires individualized measures in order to rectify the existing systemic discrimination of persons with disabilities. This will be a serious challenge for all countries, including developed ones. This especially applies to including the reasonable accommodation duty outside the employment

legislation context. A positive example in this respect is the Belgium General Anti-Discrimination Federal Act, which envisages that the refusal to make reasonable accommodation will be considered as a form of discrimination.

Several articles of the Convention envisage the obligation for reasonable accommodation. Article 24 deals explicitly with education, Article 27 deals with work and employment, Article 20 deals implicitly with personal mobility and Article 21 deals with freedom of expression, opinion, and access to information.

As clearly stated by Ferri and Lawson in *Jungelin v. Sweden*, the CRPD Committee held that States Parties enjoy a margin of discretion in the formulation of reasonable accommodation duties especially their decisions about when a burden should be regarded as 'undue' or 'disproportionate'. This discretion should not be interfered with by the Committee. However, as it had previously made clear in *HM v. Sweden*, the Committee is willing to find noncompliance with Article 5 where the State has not introduced requirements on organisations or individuals to consider departing from standard practice in order to accommodate the needs/circumstances of a particular person with disability (Ferri, Lawson, 2016, p.8).

Finally, the reasonable accommodation duty differs from the right to accessibility more in general for all persons with disabilities, as provided for in Article 9 of the CRPD and elaborated further in the General Comment No.2 to the Convention. Namely, the General Comment gives guidance on the differences between reasonable accommodation, which concerns one person with disability as an individualistic approach and accessibility, which is concerned with removing barriers for persons with disabilities more generally.

### **3.2 Council Directive 2000/78/EC**

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereinafter referred to as Directive 2000/78/EC) is of exceptional importance for the prohibition of disability discrimination. An important part of the Directive in the context of discrimination on grounds of disability is Article 5, which obligates employers to provide reasonable accommodation for persons with disabilities. This concept is rather new in

the EU, despite the fact that there were EU Member-States which recognized this concept in their respective national legislations even prior to the adoption of the Directive, for example in Ireland, the UK and Sweden.

Thus, the Article 5 envisages that “in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned”. In addition, recital 20 and recital 21 of the Preamble to the Directive offer guidelines for explaining the concepts of 'reasonable accommodation' and 'disproportionate burden'. “[A]ppropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources” (Recital 20). Furthermore, “to determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organization or undertaking and the possibility of obtaining public funding or any other assistance” (Recital 21). Thus, according to the relevant provision, the employer is to provide reasonable accommodation for persons with disabilities by undertaking measures that will provide these persons with access to jobs, participation in the work process and professional promotion. As regards 'disproportionate burden', it should be taken into consideration that the justification of the reasonable accommodation duty is certainly not the financial gain of the employer, but equal opportunities for persons with disabilities.

As pointed by Holtmaat “many EU Member-States, such as Austria, Bulgaria, France, Ireland, Malta, the Slovakia, Spain and the UK, have incorporated recital 21 in their national legislations, while other Member-States have, in addition, provided for conditions, which are to be taken into consideration in deciding whether or not reasonable accommodation gives rise to doubts about the proportionality of the burden. For example, Austria and the Slovak Republic envisage that reasonable accommodation will not

be deemed as disproportionate if this is an obligation stemming from another law, such as the law on access to public buildings. On the other hand, in the Netherlands, the duration of employment contracts may be considered as an additional condition to assess the need for reasonable accommodation, implicitly envisaging that short-term employees are less likely able to ask for expensive and large scale accommodation, as different from long-term employees” (Holtmaat, 2006). The Spanish legislation refers to the discriminatory effect on disabled persons that could arise from non-provision of reasonable accommodation in a given case. Finally, the legislation of the UK considers the issue whether the accommodation is 'practicable' as a relevant condition in this respect.

As regards how EU Member-States understands the meaning of 'reasonable', they have different approaches. There are three different approaches in this respect: firstly, the accommodation shall be considered 'reasonable' only if it does not cause disproportionate burden or expenses for the employer as in in Finland, Spain and Germany; secondly, the accommodation shall be considered as 'reasonable' only if it is effective, i.e. if it enables persons with disabilities to perform the essential tasks required for the specific job as in the Netherlands, Ireland and France; and thirdly, the accommodation shall be considered as 'reasonable' only if it is effective and does not cause disproportionate burden or expenses for the employer as in Latvia, Greece and the UK. According to the author, the third approach is the approach adopted under Directive 2000/78/EC and it is the approach that the Court of Justice of the EU is to apply in considering any eventual future cases.

According to the author “the issue of personal coverage of provisions under Article 5 is defined by Article 3, i.e. persons within the scope of protection are applicants for a job, already employed persons and former employees when starting to use employment benefits, such as the right to pension. This is owed to the fact that reasonable accommodation requires strict application of the asymmetric model of anti-discrimination legislation, i.e. only persons with disabilities may avail themselves of reasonable accommodation. Hence, disability is not to be put aside, but on the contrary, it is to be taken into consideration. According to this asymmetric model or model of 'different treatment', individuals who have a protected characteristic are different from individuals who do not possess the concerned characteristic, while the equal treatment of both groups of individuals could lead to discrimination” (Puposka, 2015, p.148).

Furthermore, the delineation of the personal coverage of this Article also depends on the nature of the accommodation, i.e. on the purpose or goal of the accommodation. As an element of non-discrimination, reasonable accommodation is aimed at eliminating obstacles that prevent persons with disabilities from competing on the open labour market. Therefore, this article applies only to persons with disabilities who are capable and qualified to perform a certain job, and need some encouragement or accommodation in order to perform a certain job. This is reflected in recital 17 of the Preamble of the Directive, which envisages that the “Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training”.

As different from accessibility, reasonable accommodation always consists of individualized solutions for a specific person with disability, except for the anticipatory reasonable accommodation for persons with disabilities in the UK. In addition, in the *Coleman case*, the Court of Justice of the EU has clearly stated that the reasonable accommodation duty is activated only upon the request of a person with disability, as explicitly stated in Directive 2000/78/EC, while clearly excluding the possibility for discrimination by association in relation to issues connected with the reasonable accommodation as elaborated above in the *Coleman case*.

An established deficiency of this provision is the fact that it does not explicitly envisage that lack of reasonable accommodation amounts to discrimination contrary to Article 5 of the CRPD elaborated above.

#### **4. REASONABLE ACCOMMODATION IN MACEDONIA**

Provisions providing for reasonable accommodation for persons with disabilities are contained in the Law on Prevention and Protection against Discrimination (Hereinafter: LPPD) in its Article 5, paragraph 1, item 12 and Article 8, paragraph 2, and in the Law on Employment of Persons with Disabilities in its Article 7, paragraph 2. The LPPD stipulates that “[a]djustment of the infrastructure and of the services means adopting appropriate measures required in some particular case, in order to provide to the person with intellectual and physical disability, the access, the participation and advancing in the labour process, unless these measures impose disproportionate burden to the employers” (translation by the



author). This legal provision has limitations, because it refers only to the adjustment of infrastructure and services, and not to other arrangements as part of the working process. Furthermore, the LPPD does not define the term 'appropriate measures', except that it explains that such measures are taken on an individual basis, i.e. as necessary in a given case. The LPPD also does not make a difference between major related tasks, and marginal functions, which is a serious deficiency of this provision.

As regards, the issue of the disproportionate burden, 'unreasonable encumbrance' according to the Macedonian legislation, it should be noted that the legislation of the Republic of Macedonia does not analyse nor does it condition the disproportionate burden, as in the other legislations, with the size and status of the legal entity (state owned or private), or by the financial costs, the volume and sources of finances of the employer, and it does not refer to the possibility of getting public funds or any other subsidies. The author considers that this explanation must be explicitly incorporated in the amendments to this LPPD and to serve as a guiding principle or orientation in measuring the disproportionate burden. The issue of reasonable accommodation is evidently covered by the national anti-discrimination legislation and according to Article 8, paragraph 2 of the LPPD unjustified lack of reasonable accommodation is considered as a form of discrimination. This is a rather progressive provision fully compliant with the CRPD (Poposka, 2013, pp.60-61).

In addition, Article 7, paragraph 2 of the Law on Employment of Persons with Disabilities stipulates that "[u]pon employment of a person with disability, the employer shall have the duty to create appropriate conditions for work and of adjusting the workplace, in line with the type of work, type and degree of education and type and degree of impairment of the person employed." The legislation does not explain in detail this norm, i.e. it does not state what conditions are to be created by the employer, e.g. whether the creation of such conditions would encompass adjusting the job interview process, or adjusting the working hours and practices, or ensuring vocational training. Leaving this provision without detailed explanation, the legislator has left room to set the boundaries of this legal institute by the courts through its case law.

Even though the legislator has not explained in detail what type of adjustment of the workplace is to be made, more detailed provisions in this context are prescribed under the Rulebook on the criteria and manner of

awarding grants under the special fund for improvement of the conditions for employment and work of persons with disabilities. Article 7, paragraph 2 of the Rulebook envisages that adjustment encompasses adjustment both of the work and of auxiliary facilities, of the equipment, tools, devices and other technical means for work. It is assuring that in addition to the reasonable accommodation duty, the legislation has also provided for financial means to be allocated under a special fund for the improvement of the conditions for employment and work of persons with disabilities (Article 8 and Article 20). The legislation has restricted the groups of persons that can be covered by the protection provided under this norm. In order for a person to request reasonable accommodation, the person must be employed in the private sector and the person's disability must have been recognized, i.e. established in accordance with the law, which can lead to narrowing the group of potentially affected individuals, contrary to the goals of the provision.

## 5. CONCLUSIONS

It can be concluded that the reasonable accommodation duty for persons with disabilities require different treatment for people whose circumstances are relevantly different in achieving equality for all. The paper discuss what reasonable accommodation means and refers to the UN CRPD as the most adequate source of law defining it as “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”. It is evident that this duty falls within the realms of the anti-discrimination legislation and its denial can be regarded as either direct discrimination or *sui generis* form of discrimination. It triggers only upon individual request or when an employer knows or ought to know that the person is with disability and in need of reasonable accommodation on the job. It is different from the concept of accessibility, which is concerned with removing barriers for all persons with disabilities in general. However, reasonable accommodation duties have an important role in enabling persons with disabilities to challenge accessibility barriers and accommodations made for one individual and may have the effect of enhancing accessibility for other persons with disabilities as well.

## Idea behind Reasonable Accommodation as a Way Forward to...

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In the Macedonian legal system the reasonable accommodation duty is a rather new concept and it can be concluded that there is a need for precise definition of the norms governing this concept, both in the labour area and in the anti-discrimination legislation. Furthermore, it would be beneficial to create a case law regarding the application of these provisions in order to show where the limits of these legal norms are.

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