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gender equality and non-discrimination



The Employment Equality Directive and supporting people with psychosocial disabilities in the workplace

A legal analysis of the situation
in the EU Member States

Including summaries in English,
French and German

*Justice
and Consumers*

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The Employment Equality Directive and supporting people with psychosocial disabilities in the workplace

A legal analysis of the situation
in the EU Member States

Written by Mark Bell and Lisa Waddington

On the basis of country reports provided by the
European network of legal experts in gender equality and non-discrimination

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Executive summary

Introduction

For those individuals who experience mental health problems, there is frequently an impact upon their working lives. A period of poor health may lead to absence from the workplace and pose the challenge of managing a successful resumption of work at a later point in time. In general, being in work can be beneficial for maintaining good mental health. Yet adverse working conditions can be a contributing factor to experiencing mental health problems. Therefore, the workplace is a crucial site for mental health policy. An inclusive working environment makes a contribution to reducing the social and economic consequences of mental ill-health by enabling people to participate in employment and to remain in jobs after a health-related absence.

The Employment Equality Directive¹ was adopted in 2000 and it prohibits discrimination in employment and occupation on the grounds of religion or belief, disability, age and sexual orientation. There is no definition of disability found within the Directive, but the Court of Justice (CJEU) has recognised that this includes disabilities arising from ‘psychological impairments’.² Therefore, individuals who experience mental health problems may be regarded as disabled and may benefit from the duty on employers to provide reasonable accommodation to allow individuals to have ‘access to, participate in, or advance in employment’.³

It is widely understood that not every instance of physical ill-health constitutes a disability. In a similar fashion, a distinction can be drawn between mental ill-health and psychosocial disability. Where an individual experiences a short-term mental health problem of limited severity, then this, by itself, may not constitute a disability for the purposes of non-discrimination law. In contrast, a mental health problem that endures or recurs is likely to constitute a psychological impairment and lead to a disability. In this report, the term ‘psychosocial disability’ has been adopted to refer to those psychological impairments that, in interaction with other barriers, give rise to a disability. Common examples of conditions that may give rise to a psychosocial disability include: depression, anxiety, stress, addictions, phobias, eating disorders, schizophrenia, post-traumatic stress disorder, bipolar disorder and personality disorders.

In some Member States, the term ‘mental disability’ is commonly used. While this may cover persons with psychosocial disabilities, typically it extends to include also those with intellectual disabilities (e.g. persons with Down’s Syndrome). As this report does not focus upon the relevance of the Directive to persons with intellectual disabilities, we have generally not used the term ‘mental disability’.

The information provided in the report is based on questionnaires completed by national experts from the European network of legal experts in gender equality and non-discrimination, as well as desk research by the authors.

The Employment Equality Directive and the UN Convention on the Rights of Persons with Disabilities: how are these instruments relevant to the protection of people with psychosocial disabilities regarding employment?

The UN Convention on the Rights of Persons with Disabilities (hereafter referred to as the CRPD or Convention) is based on the social model of disability. However, it does not define the concept of disability

1 Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

2 Paras 38-39, Joined Cases C-335/11 and 337/11, *HK Danmark v Dansk almennyttigt Boligselskab, HK Danmark v Dansk Arbejdsgiverforening*, EU:C:2013:222.

3 Art 5, Directive 2000/78.

nor does it clearly delineate who falls within the group of 'persons with disabilities'. Instead the Convention includes guidance on the concept of persons with disabilities in Article 1, which provides:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

The use of the term 'mental' makes it clear that persons with psychosocial disabilities are to be covered by the Convention, although the UN CRPD Committee and some Disabled People's Organisations prefer to use the term 'psychosocial disability'.

The EU's conclusion (ratification) of the CRPD and Article 1 of that Convention have been determinant of the definition of disability developed by the CJEU for the purposes of the Employment Equality Directive in *HK Danmark (Ring and Skouboe Werge)* and later cases. A person will qualify as disabled under the Court's definition if they meet the following conditions:

- They have a limitation which results from *inter alia* a psychological impairment;
- The impairment is long-term;
- The impairment, in interaction with various barriers, hinders the participation of the person concerned in professional life on an equal basis with other workers.

Individuals with a psychosocial disability may face a number of challenges in establishing that they fall within the scope of this definition. Given uncertainties regarding the exact diagnosis of psychological impairments or mental health problems, medical documentation confirming the existence of an impairment may be more contentious than in comparison to some physical impairments. Moreover, given the fluctuating and unpredictable nature of many mental health conditions it may be difficult for individuals to establish that their condition is sufficiently long-term to qualify as a disability.

In terms of protection from discrimination, the CRPD contains a broad definition of discrimination on the basis of disability, noting that it includes the denial of reasonable accommodation. The Convention also sets out some employment-specific rights in Article 27. The Employment Equality Directive prohibits employment discrimination which is direct or indirect, as well as discrimination in the form of harassment or an instruction to discriminate. It also imposes a requirement on Member States to establish an obligation to make a reasonable accommodation, although without linking this to the discrimination norm explicitly. In *HK Danmark (Ring and Skouboe Werge)* the CJEU, drawing on the CRPD, found that the concept of reasonable accommodation 'must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers'.

The situation of people with psychosocial disabilities in the labour market

There has been growing international attention to the impact of mental health problems amongst the workforce. The Organisation for Economic Cooperation and Development (OECD) found that typically 5% of the working age population have a 'severe' mental disorder, while 15% have a 'moderate' mental disorder.⁴ The 2010 European Working Conditions Survey reported that 22% of women and 19% of men experienced poor mental well-being.⁵ More than one in five workers said that they were stressed at work always or most of the time.⁶ In 2014, a Eurobarometer survey asked whether, in the past twelve months,

4 OECD, 'Sick on the Job? Myths and Realities about Mental Health and Work' (OECD 2011) 20.

5 Eurofound and EU-OSHA, 'Psychosocial Risks in Europe: Prevalence and Strategies for Prevention' (Publications Office of the European Union 2014) 35.

6 Ibid.

respondents had experienced any health problems that were either caused by or made worse by their work. Stress, depression or anxiety were cited by 27% of respondents in the EU.⁷

Data often shows that those with mental health problems are more likely to be unemployed or economically inactive (i.e. no longer seeking employment). The OECD's research found that 'people with SMD [severe mental disorders] are typically 6-7 times more likely to be unemployed than people with no such disorder, and those with CMD [common mental disorders] 2-3 times'.⁸

There is less international data that focuses upon the role that discrimination plays in creating barriers to finding and remaining in employment. There are, though, academic studies that indicate discrimination is perceived by persons with psychosocial disabilities to be common. In 2009, a study of persons with a clinical diagnosis of schizophrenia across 27 countries found that 29% of respondents said that they had experienced disadvantage in finding a job or keeping a job because of their 'diagnosis of mental illness'.⁹

There is growing evidence of initiatives by some employers to promote the retention in employment of persons with psychosocial disabilities. For example, in the telecommunications sector, employers and trade unions have produced 'good practice guidelines' to improve workers' mental well-being.¹⁰ Research indicates that reasonable accommodation plays a key role where a worker has a psychosocial disability. McDowell and Fossey found that the most common adjustments reported were:

- assistance from an employment support worker (either during recruitment or employment);
- flexible working time (including reduced hours);
- modified training and supervision;
- modified job duties;
- physical accommodations to the workplace (e.g. quieter work space).¹¹

In the **UK**, a survey of over 2000 staff in higher education who had experienced mental health difficulties found that 74% of those who received workplace adjustments found these positive or very positive.¹²

National definitions of disability in non-discrimination law and persons with psychosocial disabilities

Where national non-discrimination legislation contains a definition of disability, that definition is capable of covering persons with psychosocial disabilities, as well as persons with other forms of disabilities. However, simply having a psychological impairment or mental illness is insufficient in itself for a person to have this status, and national definitions of disability set further requirements which must be met in order for an individual to be regarded as disabled. These requirements relate to issues such as providing medical proof of the existence of an impairment which leads to the disability, longevity or permanence of the impairment, or official recognition of disability status by the social security office. Whilst none of these requirements single out people with psychosocial disabilities, it can be more difficult for such people to meet these requirements than is the case for people with other forms of (visible) disabilities, and therefore more difficult for people with psychosocial impairments to fall within the scope of disability non-discrimination law.

7 TNS Political & Social, 'Working Conditions' Flash Eurobarometer 398 (European Union 2014) 72.

8 OECD, 'Sick on the Job? Myths and Realities about Mental Health and Work' (OECD 2011) 12.

9 G. Thornicroft, E. Brohan, D. Rose, N. Sartorius, and M. Leese, 'Global Pattern of Experienced and Anticipated Discrimination Against People with Schizophrenia: A Cross-Sectional Survey' (2009) 373 *The Lancet* 408, 410.

10 ETNO and UNI Europa, 'Good Work, Good Health' (2010): <https://www.etno.eu/datas/publications/studies/etno-goodpracticeguidelines-en.pdf>.

11 C. McDowell and E. Fossey, 'Workplace Accommodations for People with Mental Illness: A Scoping Review' (2015) 25 *Journal of Occupational Rehabilitation* 197, 199.

12 Equality Challenge Unit (ECU), 'Understanding Adjustments: Supporting Staff and Students Who Are Experiencing Mental Health Difficulties' (ECU 2014) 12.

In twelve Member States (**Austria, Bulgaria, Cyprus, Czech Republic, Estonia, Germany, Ireland, Malta, Portugal, Spain, Sweden, UK**) the national non-discrimination legislation contains a definition of disability. In all cases this definition is capable of covering persons with psychosocial disabilities; however, the term psychosocial disability is not used in any of the legislative acts. Instead a variety of alternative terms are used to describe the relevant impairment or disability: 'psychological condition' (**Austria**), 'loss or impairment ...of the psyche of an individual' and 'psychic impairment' (**Bulgaria**), 'psychological limitation' (**Cyprus**), 'psychological...impairment' (**Czech Republic**), 'abnormality in ...mental structure or function' (**Estonia**), 'mental health' which differs from the typical state (**Germany**), 'psychological functions' (**Portugal**), 'mental impairment' (**Spain**), and 'mental limitation' (**Sweden** and **GB**). The **Irish** Employment Equality Acts 1998 to 2015 contain a fairly detailed description of the impairment which can lead to a psychosocial disability, with the focus being on the impact of a 'condition, illness or disease' which should affect thought processes, perceptions of reality, emotions or judgment or lead to disturbed behaviour. **Maltese** law (Equal Opportunities (Persons with Disability) Act 2000) makes a distinction between impairment and disability, and defines both. An impairment includes a loss, restriction or abnormality of 'psychological' structure or function, whilst a disability is a 'mental' impairment which 'in interaction with various barriers may hinder one's full and effective participation in society on an equal basis with others'.

In some instances, the term 'mental' impairment or restriction is used exclusively in the context of psychosocial disabilities (i.e. it does not relate to an intellectual or learning impairment or disability). The term 'mental' is used in this sense in **Maltese, Spanish** and **Swedish** law. In contrast, the definitions of disability in the **Austrian** federal statutes and the **Czech** non-discrimination law seem to use the term 'mental' condition or impairment to relate exclusively to intellectual or learning impairments (with the term 'psychological' relating to psychosocial disabilities). This is also true for the **Cypriot** Law on persons with disability. Lastly the **Estonian** Equal Treatment Act and the **British** Equality Act 2010 use the term 'mental' to cover impairments which contribute to either intellectual disabilities or psychosocial disabilities. This is in spite of the fact that the two forms of disabilities are very different.

Some national definitions reflect the social model of disability as recognised in Article 1 of the CRPD, and require that the impairment, in interaction with various barriers, must hinder the full and effective participation in society on an equal basis with others, whilst others adopt a narrower view, and require that an individual has been officially recognised as having a certain degree of impairment in order to qualify as disabled.

In both **Italy** and **Luxembourg**, the national (disability) non-discrimination legislation does not contain a definition of disability, but the non-discrimination legislation contains a cross-reference to another law which itself contains a definition which is capable of covering persons with psychosocial disabilities. In **France** numerous legislative acts prohibit disability discrimination, but do not define disability. However, the French law setting out the duty to make a reasonable accommodation does contain a definition of disability which covers persons with a psychosocial disability. The situation is the same in **Slovenia**.

National non-discrimination law does not contain a definition of disability in twelve Member States (**Belgium, Croatia, Denmark, Finland, Greece, Hungary, Latvia, Lithuania, the Netherlands, Poland, Romania** and **Slovakia**). However, it must not be assumed that the absence of any kind of definition of disability in non-discrimination legislation implies that people with psychosocial disabilities are not protected from discrimination in these states. Indeed, there is judicial precedent confirming that people with psychosocial disabilities are protected by non-discrimination law in some of the EU Member States referred to above. Whilst non-discrimination legislation may not contain a definition of disability, national legislation addressing other disability-related issues does define the concept, and there may well be a variety of definitions of disability to be found in national law. In the absence of an appropriate legal authority, such as guidance on how to interpret the non-discrimination statute or relevant precedent setting case law, there is a risk that these other definitions, which were not developed with non-discrimination law in mind, may be applied in the context of non-discrimination law.

Non-discrimination law which protects individuals from discrimination on the ground of state of health as well as disability may provide greater protection from discrimination for people with psychosocial disorders. Such legislation exists, for example, in **Croatia, Hungary and Slovakia**. In particular, people who have poor mental health, but who are not regarded as having a psychosocial disability under the law, may find that they are nevertheless protected from discrimination in such situations. Lastly, the CRPD, which provides guidance on the concept of ‘persons with disabilities’ in Article 1, with this guidance explicitly embracing ‘mental impairments’, is directly applicable in some EU Member States and has, in any case, been ratified by 27 of the current 28 EU Member States as well as the EU itself.

In terms of case law, in most Member States only a handful of cases were identified by the European network of legal experts in gender equality and non-discrimination in which courts or tribunals explicitly considered whether a person with a psychosocial disability should be regarded as disabled or not for the purposes of the protection of the law. The **UK and Ireland** appear to be distinct in their experiences because there has been a significant volume of litigation by persons with psychosocial disabilities. Case law concerning employment discrimination has held that people with various psychosocial disabilities (post-traumatic stress disorder, depression, stress, bipolar disorder) are to be regarded as disabled. This case law comes from a variety of Member States. Case law addressing other fields, such as access to disability-related benefits and discrimination at school, has also recognised people with psychological impairments as disabled. In some cases, courts have drawn on the CRPD when considering such matters. On the other hand, national case law has also held that people with psychological impairments do not qualify as disabled in some instances. A **Danish** employment case found that a person with depression was not disabled, as her depression was regarded as being of insufficient duration and insufficiently severe, whilst in **Bulgaria**, in a case not related to employment, a person with a dissocial personality disorder was not regarded as having a psychiatric disorder, but merely a ‘psychological problem’, and was therefore not protected under the ‘mental health status’ ground in the Protection Against Discrimination Act. However, in general, with the exception of Ireland and the United Kingdom, case law exploring such issues is highly limited. In some instances, this may reflect that people with psychological impairments easily qualify as disabled, and courts are not considering their disability status, whilst in other instances it may reflect an overall lack of cases brought by persons with psychosocial disabilities.

Issues of stigma and disclosure in relation to people with psychosocial disabilities

An extensive body of literature has documented how mental health problems are associated with stigma. Stigma can take a variety of forms, including labelling, stereotyping, segregation, and adverse treatment (discrimination).¹³ Amongst prominent stereotypes surrounding mental health problems, there is a fear of dangerousness and a perception that such people are prone to violence.¹⁴ This may result in avoidance and isolation of those with psychosocial disabilities.

Having experienced stigma in the past, persons with mental health problems frequently anticipate the occurrence of stigma in the future. This can lead people to avoid situations where stigma might be encountered. In the context of the labour market, some choose not to seek employment due to an anticipation of stigma and/or not to disclose mental health problems in the workplace. A study in **Ireland** of persons with mental health problems found that 60% of participants had stopped themselves applying for work.¹⁵ In **Denmark**, research found that 87% had hidden their mental disorder in the labour market, while 75% had refrained from applying for jobs for reasons relating to their mental health.¹⁶

13 G. Thornicroft, *Shunned: Discrimination Against People with Mental Illness* (OUP 2006) 180.

14 T. Scheid, ‘Stigma as a Barrier to Employment: Mental Disability and the American with Disabilities Act’ (2005) 28 *International Journal of Law and Psychiatry* 670, 674.

15 L Mac Gabhann, R Lakeman, P McGowan, M Parkinson, M Redmond, I Sibitz, C Stevenson, and J Walsh, ‘Hear My Voice: The Experience of Discrimination of People with Mental Health Problems in Ireland’ (Dublin City University 2010) 64.

16 Pernille Skovbo Rasmussen and Peter Ejbye-Ernst, ‘Oplevet diskrimination og stigmatisering blandt mennesker med psykisk sygdom’ (KORA 2015).

One source of evidence of stigma is surveys of the general public addressing their attitudes towards persons with mental health problems. These often reveal a significant level of antipathy or discomfort towards such persons, although there may also be indications of improving attitudes over time. In 2006, a Special Eurobarometer on Mental Well-Being found that 37% totally agreed or tended to agree with the statement 'people with psychological or emotional health problems constitute a danger to others'.¹⁷ More recent Eurobarometer research concentrated on social relations, asking people whether they would find it difficult to talk to someone with a significant mental health problem. Overall, 67% of respondents said that they would have 'no problem' talking to such a person, while 22% said that they would find this difficult.¹⁸

Anti-stigma campaigns, whether organised by government or by civil society, appear to have grown in recent years. One illustration of this trend was the formation in 2012 of the Global Anti-Stigma Alliance.¹⁹ This brings together major anti-stigma campaigns from **Australia, Canada, Denmark, Ireland, the Netherlands, New Zealand, Spain, Sweden, Switzerland, the UK, and the USA**. For example, in **Sweden**, Hjärmkoll²⁰ is an anti-stigma campaign that includes an ambassador initiative (i.e. testimony from those who have experienced mental health problems). The campaign included activities focused on the workplace, such as training for managers and employees. Relevant initiatives also take place under the auspices of public health policy. For example, in **Latvia**, in 2014-2015, a national public information campaign took place called 'Do Not Turn Away!'.²¹ This sought to reduce stigmatisation and raise awareness about mental illnesses.

Reasonable accommodation and people with psychosocial disabilities

All Member States have introduced the duty of reasonable accommodation into their national legislation and all national experts agreed that people with psychosocial disabilities were, in principle, able to benefit from the duty to provide reasonable accommodation (subject to the requirement that they fell within the relevant definition of disability in national law). Article 5 of the Employment Equality Directive states that 'employers shall take appropriate measures, where needed in a particular case ...'. Given that accommodations are tailored to the needs of a particular individual, logic implies that, at some point, the employer must have knowledge of the barriers experienced by the individual in order to consider whether effective measures can be taken to mitigate or remove these barriers. One of the main consequences of stigma is that many individuals choose not to disclose psychosocial disabilities in the workplace. This means that, in litigation surrounding whether the employer has complied with the duty to provide reasonable accommodation, there may be dispute over whether the employer knew, or ought to have known, of the employee's disability. Failure to disclose, or delay in disclosure, may weaken an employee's claim. Research in the **UK** found delayed or non-disclosure was often interpreted by Tribunals as demonstrating a lack of cooperation on the part of the employee.²²

These difficulties can be compounded by uncertainty in the law concerning the extent of knowledge required on the part of the employer in order to trigger the duty to provide reasonable accommodation. Three states (**Poland, Spain, the UK**) include express requirements relating to knowledge in national legislation. In other states, this is either an implied requirement of the legislation; a requirement that has been recognised through case law; or the legal situation remains ambiguous.

In 22 Member States, there were no examples reported of significant national case law on reasonable accommodation in the workplace for persons with psychosocial disabilities. In **Germany**, the national

17 European Commission, 'Mental Well-Being' Special Eurobarometer 248 / Wave 64.4 (2006) 45.

18 European Commission, 'Mental Health' Special Eurobarometer 345 / Wave 73.2 (2010) 61.

19 <http://www.time-to-change.org.uk/globalalliance> accessed 8 August 2016.

20 <http://www.nsph.se/hjarmkoll/> accessed 8 August 2016.

21 www.nenoversies.lv accessed 5 August 2016.

22 G. Lockwood, C. Henderson and G. Thornicroft, 'Mental Health Disability Discrimination: Law, Policy and Practice' (2014) 14 *International Journal of Discrimination and the Law* 168, 176.

expert reported that psychosocial disability is covered by national non-discrimination law and, without doubt, there is a duty of reasonable accommodation, within the limits provided by the law. Case law was found in **Denmark, France, Ireland, the Netherlands, and the UK**. The case law indicates that courts have accepted that persons with psychosocial disabilities are entitled to rely upon the duty on employers to provide reasonable accommodation. The decisions also provide an indication of the kinds of measures that employers could be expected to consider. For example, in Denmark, the Board of Equal Treatment found a breach of the duty to provide reasonable accommodation in a case where a municipality dismissed an employee who had depression, anxiety and post-traumatic stress disorder. Before taking the decision to dismiss her, the municipality should have explored whether the employee would have been able to perform her duties with permanently reduced working hours.²³

Conclusion

There is a need for better awareness of psychosocial disability and its relevance to non-discrimination legislation. This includes greater awareness of the role that non-discrimination legislation, including the duty to provide a reasonable accommodation, can play in promoting labour market participation of people with psychosocial disabilities.

The different terminology used in national, European and international legislation relating to people with psychosocial disabilities leads to confusion. Given the terminological differences, it is important always to clarify how particular terms are being used. In particular, there exists great scope for confusion regarding the use and understanding of the term ‘mental’ impairment or disability, and legislators, courts and others who use this term should always clarify or explain their understanding of the term.

It is important that policy makers and courts, including the CJEU, are aware of the role that stigma can play in creating disadvantages for people with psychosocial disabilities, and take this into account when interpreting the concept of disability. Whilst the CJEU has to date not considered a case where a person with a psychosocial disability has claimed protection from disability discrimination, its case law (e.g. *Z and Kaltoft*) has revealed a focus on the need for an impairment to limit physically an individual’s ability to work before a person can rely on protection from the Employment Equality Directive. Future case law of the Court should recognise that stigma, prejudice and false assumptions can have a particularly disabling effect on persons with disabilities, and especially persons with psychosocial disabilities. It should not require that an impairment, on its own, must first have an impact on capacity to work, before an individual can be recognised as disabled and / or claim protection from disability discrimination.

There is a role for government and business initiatives to combat stigma related to psychosocial disabilities. At present only a minority of Member States have adopted national or regional programmes to combat such stigma. Concerted action by government and business is needed to build a climate where workers have the confidence to disclose any needs related to a psychosocial disability, and therefore have access to reasonable accommodations. At the level of the individual workplace, employers need to develop a culture where workers feel able to disclose mental health problems knowing that these will be handled with sensitivity and support. At the same time, employers should avoid excessive demands for information from workers who are seeking an accommodation. This can help to circumvent the barriers arising from workers’ reluctance to disclose psychosocial disabilities.

There are strong disparities in the extent to which non-discrimination legislation has been relied upon by people with psychosocial disabilities in the Member States; a minority of states have a developed body of case law in this area (especially the **UK and Ireland**), while in most there is very little. There are a number of possible reasons that could explain this. A more accurate picture of national litigation patterns could aid understanding of why non-discrimination legislation is used more frequently in certain states.

23 Denmark, Board of Equal Treatment, Decision 34/2016 of 2 March 2016.

Résumé

Introduction

Les personnes ayant des problèmes de santé mentale en ressentent souvent les effets dans la vie professionnelle. Une période de santé fragile peut se traduire par une absence du lieu de travail et une difficulté à reprendre l'activité ultérieurement. Si l'occupation d'un emploi peut, de façon générale, favoriser la conservation d'un bon état de santé mentale, de mauvaises conditions de travail peuvent à l'inverse contribuer à la survenance de problèmes à cet égard. Le lieu de travail joue donc un rôle essentiel dans les politiques de santé mentale. Un environnement de travail inclusif contribue en effet à atténuer les conséquences socioéconomiques d'une mauvaise santé mentale en permettant aux personnes concernées de participer au marché du travail et de conserver leur emploi à l'issue d'une absence pour cause de maladie.

La directive relative à l'égalité en matière d'emploi,¹ adoptée en 2000, interdit en matière d'emploi et de travail la discrimination fondée sur la religion ou les convictions, un handicap, l'âge ou l'orientation sexuelle. Elle ne contient aucune définition du handicap, mais la Cour de justice de l'Union européenne (CJUE) a considéré que cette notion inclut les incapacités résultant «d'atteintes psychiques».² Il en découle que les personnes souffrant de troubles mentaux peuvent être considérées comme handicapées et bénéficier dès lors de l'obligation imposée aux employeurs de prévoir des aménagements raisonnables «pour permettre à une personne handicapée d'accéder à un emploi, de l'exercer ou d'y progresser».³

Il est communément admis que tous les cas de maladie mentale ne constituent pas un handicap. De même, une distinction peut être établie entre trouble mental et handicap psychosocial. Lorsqu'une personne rencontre un problème de santé mentale de courte durée et de faible gravité, celui-ci ne peut constituer en soi un handicap aux fins du droit antidiscrimination. À l'inverse, un problème de santé mentale de longue durée ou récurrent constitue probablement une atteinte psychique donnant lieu à un handicap. Le présent rapport a retenu l'expression «handicap psychosocial» pour désigner les atteintes psychiques dont l'interaction avec d'autres barrières engendre un handicap. On peut citer au titre d'exemples d'états susceptibles d'occasionner un handicap psychosocial: la dépression, l'anxiété, le stress, les addictions, les phobies, les troubles de l'alimentation, la schizophrénie, le stress post-traumatique, le trouble bipolaire et les troubles de la personnalité.

L'expression «handicap mental» est couramment utilisée dans plusieurs États membres. Elle peut désigner les personnes atteintes d'un handicap psychosocial tout en s'étendant généralement aussi à celles qui souffrent d'incapacités intellectuelles (personnes présentant le syndrome de Down, par exemple). Étant donné qu'il ne porte pas spécifiquement sur la pertinence de la directive pour les personnes ayant des incapacités intellectuelles, le présent rapport a généralement choisi de ne pas utiliser l'expression «handicap mental».

Les informations fournies ci-après proviennent de questionnaires complétés par les experts nationaux du Réseau européen d'experts juridiques dans le domaine de l'égalité des genres et de la non-discrimination, ainsi que de recherches documentaires effectuées par les auteurs.

1 Directive 2000/78/CE portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail du 27 novembre 2000, JO L 303/16.

2 Points 38 et 39 de l'arrêt rendu dans les affaires jointes C-335/11 et 337/11, *HK Danmark c. Dansk almennyttigt Boligselskab, HK Danmark c. Dansk Arbejdsgiverforening*, ECLI:EU:C:2013:222.

3 Article 5 de la directive 2000/78.

Directive relative à l'égalité en matière d'emploi et convention des Nations unies relative aux droits des personnes handicapées: quelle est la pertinence de ces deux instruments pour assurer en matière d'emploi la protection des personnes souffrant d'un handicap psychosocial?

La convention des Nations unies relative aux droits des personnes handicapées (ci-après la CDPH ou la Convention) se fonde sur le modèle social du handicap. Elle ne définit cependant pas la notion de handicap et ne précise pas clairement qui appartient au groupe des «personnes handicapées». Elle a opté pour une orientation quant à la notion de personnes handicapées en disposant en son article premier:

«Par personnes handicapées on entend des personnes qui présentent des incapacités physiques, mentales, intellectuelles ou sensorielles durables dont l'interaction avec diverses barrières peut faire obstacle à leur pleine et effective participation à la société sur la base de l'égalité avec les autres.»

L'usage du terme «mentales» établit clairement que les personnes atteintes d'un handicap psychosocial relèvent de la Convention, même si le Comité de la CDPH et certaines organisations de personnes handicapées préfèrent utiliser le terme «handicap psychosocial».

La conclusion (ratification) de la CDPH par l'UE et l'article premier de cette convention ont largement déterminé la définition du handicap développée par la CJUE aux fins de la directive relative à l'égalité en matière d'emploi dans son arrêt *HK Danmark (Ring et Skouboe Werge)* et dans des affaires ultérieures. Selon cette définition, une personne est considérée comme handicapée lorsqu'elle remplit les conditions suivantes:

- elle présente une limitation résultant notamment d'une incapacité psychique;
- l'incapacité est de longue durée;
- l'incapacité entrave, en interaction avec diverses barrières, la participation de la personne concernée à la vie professionnelle sur pied d'égalité avec les autres travailleurs.

Les personnes ayant un handicap psychosocial peuvent rencontrer certaines difficultés pour faire valoir qu'elles sont couvertes par cette définition. Étant donné les incertitudes quant au diagnostic précis d'une atteinte psychique ou d'un problème de santé mentale, les documents médicaux attestant l'existence de ce type d'incapacité peuvent s'avérer plus litigieux que ceux qui portent sur des atteintes physiques. De surcroît, le caractère fluctuant et imprévisible de nombreux états de santé mentale fait qu'il est parfois difficile pour l'intéressé de montrer que son état est suffisamment durable pour être considéré comme un handicap.

En ce qui concerne la protection contre la discrimination, la CDPH contient une large définition de la discrimination fondée sur le handicap, laquelle comprend expressément le refus d'aménagement raisonnable. La Convention précise en outre, en son article 27, une série de droits propres à l'emploi. La directive relative à l'égalité en matière d'emploi proscrit la discrimination directe ou indirecte, ainsi que la discrimination prenant la forme d'un harcèlement ou d'une injonction de discriminer. Elle oblige également tous les États membres à prévoir un aménagement raisonnable, tout en n'établissant pas de lien explicite avec le principe de non-discrimination. Dans l'affaire *HK Danmark (Ring et Skouboe Werge)*, la CJUE, s'appuyant sur la CDPH, estime que la notion d'aménagement raisonnable «doit être entendue comme visant l'élimination des diverses barrières qui entravent la pleine et effective participation des personnes handicapées à la vie professionnelle sur la base de l'égalité avec les autres travailleurs».

Situation sur le marché du travail des personnes atteintes de troubles psychosociaux

L'incidence des problèmes de santé mentale parmi les travailleurs mobilise une attention internationale croissante. L'Organisation de coopération et de développement économiques (OCDE) constate que, de façon générale, 5 % de la population d'âge actif souffre d'un trouble mental «grave» et 15 % d'un trouble mental «modéré». ⁴ L'enquête européenne 2010 sur les conditions de travail montre que 22 % des femmes et 19 % des hommes éprouvent un manque de bien-être mental⁵ – plus d'un travailleur sur cinq déclarant être stressé au travail de façon permanente ou la plupart du temps.⁶ En 2014, une enquête Eurobaromètre demandait aux personnes interrogées si elles avaient connu au cours des douze derniers mois des problèmes de santé causés ou aggravés par leur travail: le stress, la dépression ou l'anxiété ont été cités par 27 % des répondants au niveau de l'ensemble de l'UE.⁷

Les chiffres font souvent apparaître que les personnes souffrant de problèmes de santé mentale sont davantage susceptibles d'être au chômage ou économiquement inactives (c'est-à-dire ne recherchant plus d'emploi). L'étude réalisée par l'OCDE constate que «les personnes ayant des TMG [troubles mentaux graves] ont 6 à 7 fois plus de risques d'être sans emploi que celles en bonne santé, contre 2 à 3 fois plus de risques pour les individus souffrant de TMC [troubles mentaux courants]». ⁸

Moins nombreuses sont les données internationales axées sur le rôle de la discrimination dans la création d'entraves à la recherche et à la conservation d'un emploi. Un certain nombre d'études universitaires indiquent cependant que la discrimination est perçue comme courante par les personnes atteintes de troubles psychosociaux. En 2009, une étude portant sur des personnes ayant fait l'objet d'un diagnostic clinique de schizophrénie dans 27 pays constate que 29 % des répondants déclarent avoir été défavorisés lors de la recherche ou de la conservation d'un emploi en raison de leur «diagnostic de maladie mentale». ⁹

Il existe un nombre croissant d'initiatives de la part d'employeurs en vue de promouvoir le maintien dans l'emploi de personnes atteintes de troubles psychosociaux. Ainsi par exemple, les employeurs et syndicats du secteur des télécommunications ont élaboré un guide de bonnes pratiques visant à améliorer le bien-être psychologique des travailleurs.¹⁰ Il ressort des travaux de recherche que les aménagements raisonnables jouent un rôle déterminant lorsqu'un travailleur souffre d'un handicap psychosocial. McDowell et Fossey rapportent que les aménagements les plus couramment signalés sont:

- l'assistance d'un agent de soutien à l'emploi (durant le processus de recrutement ou en cours d'emploi);
- le temps de travail flexible (horaire réduit);
- une formation et une supervision adaptées;
- des tâches adaptées;
- des aménagements physiques sur le lieu de travail (espace plus calme, par exemple).¹¹

4 OCDE, «Mal-être au travail? Mythes et réalités sur la santé mentale et l'emploi» (OCDE 2011), p. 25.

5 Eurofound et EU-OSHA, «Psychosocial Risks in Europe: Prevalence and Strategies for Prevention» (Office des publications de l'Union européenne 2014), p. 35.

6 Ibidem.

7 TNS Political & Social, «Les conditions de travail », Eurobaromètre Flash 398 (Union européenne 2014), p. 72.

8 OCDE, «Mal-être au travail? Mythes et réalités sur la santé mentale et l'emploi» (OCDE 2011), p. 14.

9 G. Thornicroft, E. Brohan, D. Rose, N. Sartorius & M. Leese, «Global Pattern of Experienced and Anticipated Discrimination Against People with Schizophrenia: A Cross-Sectional Survey» (2009) 373 *The Lancet*, p. 408-410.

10 ETNO and UNI Europa, 'Good Work, Good Health' (2010): <https://www.etno.eu/datas/publications/studies/etno-goodpracticeguidelines-en.pdf>.

11 C. McDowell & E. Fossey, «Workplace Accommodations for People with Mental Illness: A Scoping Review» (2015), vol. 25, *Journal of Occupational Rehabilitation*, p. 197, 199.

Au **Royaume-Uni**, une étude couvrant plus de 2 000 membres de personnel de l'enseignement supérieur ayant eu des problèmes de santé mentale révèle que 74 % de ceux qui ont bénéficié d'aménagements sur leur lieu de travail considèrent ceux-ci comme positifs ou très positifs.¹²

Définitions nationales du handicap en droit antidiscrimination et personnes souffrant d'un handicap psychosocial

Lorsqu'une législation nationale antidiscrimination contient une définition du handicap, celle-ci peut couvrir les personnes atteintes de troubles psychosociaux au même titre que des personnes souffrant d'autres formes de handicap. Il ne suffit cependant pas qu'une personne présente une incapacité psychique ou une maladie mentale pour être considérée comme handicapée, et les définitions nationales du handicap fixent d'autres critères à remplir pour qu'elle ait ce statut. Ces exigences portent notamment sur la fourniture d'une attestation médicale de l'existence d'une incapacité à l'origine du handicap; sur la durée ou la permanence de l'incapacité; ou sur la reconnaissance officielle du handicap par la sécurité sociale. Aucune de ces exigences ne vise spécifiquement les personnes atteintes de troubles psychosociaux, mais celles-ci pourraient éprouver davantage de difficulté pour satisfaire aux critères que des personnes souffrant d'autres formes (visibles) de handicap et pour bénéficier dès lors du champ d'application du droit antidiscrimination relatif au handicap.

Dans douze États membres (**Allemagne, Autriche, Bulgarie, Chypre, Espagne, Estonie, Irlande, Malte, Portugal, République tchèque, Royaume-Uni, Suède**), la législation nationale antidiscrimination contient une définition du handicap. Mais alors que cette définition peut, dans tous les cas, couvrir des personnes atteintes de troubles psychosociaux, aucun acte législatif ne fait usage du terme «handicap psychosocial». Une série de termes alternatifs lui sont préférés pour décrire l'incapacité ou le handicap en question: «état psychologique» (**Autriche**), «perte ou déficience [...] de la psyché d'une personne» et «incapacité psychique» (**Bulgarie**), «déficience psychique» (**Chypre**), «incapacité psychique» (**République tchèque**), «anomalie dans la structure mentale ou le fonctionnement mental» (**Estonie**), «santé mentale» s'écartant de l'état normal (**Allemagne**), «fonctionnement psychique» (**Portugal**), «incapacité mentale» (**Espagne**) et «déficience mentale» (**Royaume-Uni** et **Suède**). Les lois **irlandaises** de 1998 à 2015 sur l'égalité en matière d'emploi contiennent une description assez précise de la déficience susceptible d'engendrer un handicap social, l'accent étant mis sur l'incidence d'un état ou une maladie pouvant affecter les processus de réflexion, la perception de la réalité, les émotions ou le jugement, ou donner lieu à une perturbation du comportement. Le droit **maltais** (loi de 2000 sur l'égalité des chances (personnes handicapées)) établit une distinction entre l'incapacité et le handicap, et définit les deux notions. Une incapacité vise une perte, une restriction ou une anomalie de la structure ou du fonctionnement «psychique» alors qu'un handicap est une incapacité «mentale» «dont l'interaction avec diverses barrières peut faire obstacle à une participation pleine et effective à la société sur la base de l'égalité avec les autres.»

Dans certains cas, le terme d'incapacité ou de restriction «mentale» est exclusivement utilisé dans le contexte de troubles psychosociaux (autrement dit sans corrélation avec une déficience ou un handicap sur le plan intellectuel ou de l'apprentissage). L'adjectif «mental» est utilisé dans ce sens en droit **espagnol, maltais** et **suédois**. En revanche, les définitions du handicap figurant dans les lois fédérales **autrichiennes** et dans la législation antidiscrimination **tchèque** semblent utiliser le terme d'état ou d'incapacité mental(e) en référence exclusive aux difficultés intellectuelles ou d'apprentissage (le terme «psychique» s'appliquant aux troubles psychosociaux). Tel est également le cas de la loi **chypriote** relative aux personnes handicapées. Enfin, la loi **estonienne** sur l'égalité de traitement et la loi **britannique** de 2010 sur l'égalité emploient l'adjectif «mental» pour désigner les incapacités à l'origine de troubles intellectuels ou psychosociaux – alors qu'il s'agit de deux formes de handicap très différentes.

12 Equality Challenge Unit (ECU), «*Understanding Adjustments: Supporting Staff and Students Who Are Experiencing Mental Health Difficulties*» (ECU 2014), p. 12.

Certaines définitions nationales reflètent le modèle social du handicap tel que reconnu à l'article premier de la CDPH, et requièrent que l'interaction des incapacités avec diverses barrières fasse obstacle à une participation pleine et effective à la société sur la base de l'égalité avec les autres; tandis que d'autres optent pour une vision plus étroite, et exigent qu'il faille avoir été officiellement reconnu comme présentant un certain degré d'incapacité pour être considéré comme une personne handicapée.

En **Italie** comme au **Luxembourg**, la législation nationale antidiscrimination (handicap) ne contient pas de définition du handicap, mais renvoie à une loi plus spécifique contenant une définition susceptible de couvrir des personnes atteintes de troubles psychosociaux. En France, plusieurs actes législatifs interdisent la discrimination fondée sur le handicap, mais sans définir celui-ci. La loi française établissant l'obligation d'aménagement raisonnable contient toutefois une définition du handicap couvrant les personnes atteintes de troubles psychosociaux. La situation est identique en Slovaquie.

Douze États membres ne définissent pas le handicap dans leur droit national antidiscrimination (**Belgique, Croatie, Danemark, Finlande, Grèce, Hongrie, Lettonie, Lituanie, Pays-Bas, Pologne, Roumanie et Slovaquie**). Il ne faudrait cependant pas supposer pour autant que cette absence de toute définition du handicap dans la législation antidiscrimination a pour corollaire que les personnes atteintes de troubles psychosociaux ne sont pas protégées contre la discrimination dans les États en question. Il existe en effet un précédent jurisprudentiel confirmant que ces personnes sont protégées par la législation antidiscrimination dans certains États membres de l'UE susmentionnés. Alors que la législation antidiscrimination ne contient aucune définition du handicap, il se peut que la législation nationale axée sur d'autres problématiques liées au handicap définisse ce concept – avec pour conséquence que le droit national peut contenir des définitions diverses du handicap. En l'absence d'autorité juridique appropriée, donnant par exemple des orientations quant à la manière d'interpréter la loi antidiscrimination ou le précédent jurisprudentiel pertinent, il existe un risque que ces autres définitions, qui n'ont pas été élaborées dans la perspective du droit antidiscrimination, soient appliquées dans le cadre de ce dernier.

Le droit antidiscrimination protégeant contre la discrimination fondée sur l'état de santé et le handicap peut assurer davantage de protection aux personnes atteintes de troubles psychosociaux. On trouve notamment ce type de législation en **Croatie**, en **Hongrie** et en **Slovaquie**. C'est ainsi que des personnes qui ont une mauvaise santé mentale mais ne sont pas considérées comme atteintes de troubles psychosociaux aux yeux de la loi pourraient s'apercevoir qu'elles bénéficient quand même d'une protection contre la discrimination. Enfin, la CDPH, qui fournit en son article premier des indications quant à la notion de «personnes handicapées» – lesquelles indications englobent explicitement les «incapacités mentales» – est directement applicable dans plusieurs États membres et a de toute façon été ratifiée par 27 des 28 États membres actuels de l'UE ainsi que par l'UE elle-même.

En ce qui concerne la jurisprudence, le Réseau européen d'experts juridiques dans le domaine de l'égalité des genres et de la non-discrimination n'a recensé dans la plupart des États membres qu'une poignée d'affaires dans lesquelles les cours ou tribunaux se sont explicitement posé la question de savoir si une personne atteinte de troubles psychosociaux devait être considérée ou non comme handicapée aux fins de la protection par la loi. Le **Royaume-Uni** et l'**Irlande** semblent avoir une autre expérience à cet égard en raison du volume important d'actions en justice engagées par des personnes souffrant de cette forme de handicap. La jurisprudence relative à une discrimination en matière d'emploi a estimé que des personnes présentant divers troubles psychosociaux (stress post-traumatique, dépression, stress, trouble bipolaire) devaient être considérées comme des personnes handicapées. Cette jurisprudence existe dans divers États membres. La jurisprudence relative à d'autres domaines, tels que l'accès aux prestations d'invalidité et la discrimination en milieu scolaire, a également reconnu les personnes atteintes de troubles psychosociaux en tant que personnes handicapées. Dans certains cas, les juridictions saisies se sont appuyées sur la CDPH pour se prononcer sur ces questions. Par ailleurs, la jurisprudence nationale a également considéré que des personnes atteintes de troubles psychosociaux ne pouvaient dans certains cas être considérées comme des personnes handicapées: dans une affaire **danoise** en matière d'emploi, il a été estimé que la personne en dépression n'était pas handicapée car sa dépression n'avait ni une

durée ni une gravité suffisantes; en **Bulgarie**, dans une affaire ne relevant pas du domaine de l'emploi, une personne souffrant d'un trouble de la personnalité dissociale n'a pas été considérée comme souffrant d'un trouble psychiatrique, mais comme présentant simplement un «problème psychologique», et n'a donc pu bénéficier d'une protection au titre du motif de «l'état de santé mentale» visé par la loi sur la protection contre la discrimination. De façon générale toutefois, hormis en ce qui concerne l'Irlande et le Royaume-Uni, la jurisprudence se penchant sur ce type de questions reste extrêmement rare. Dans un certain nombre de cas, ce constat pourrait signifier que les personnes ayant des incapacités psychiques sont aisément considérées comme handicapées, et que les juridictions n'ont pas à examiner leur statut de personne handicapée; dans d'autres, il pourrait traduire une absence globale d'affaires introduites par des personnes atteintes de troubles psychosociaux.

Problèmes de stigmatisation et de divulgation en rapport avec les personnes atteintes de troubles psychosociaux

Une littérature abondante décrit la manière dont les problèmes de santé mentale sont associés à une stigmatisation, laquelle peut revêtir des formes diverses telles que l'apposition d'une étiquette, la stéréotypie, la ségrégation et un traitement défavorable (discrimination).¹³ On trouve, parmi les stéréotypes prépondérants autour des problèmes de santé mentale, la peur de la dangerosité et une perception selon laquelle les personnes atteintes de troubles psychosociaux sont enclines à la violence¹⁴ – ce qui peut conduire à les éviter et à les isoler.

Les personnes atteintes de troubles de santé mentale ayant vécu une stigmatisation par le passé tendent à anticiper la survenance d'une stigmatisation future, et à éviter dès lors des situations dans lesquelles elle pourrait se produire. Ainsi sur le marché du travail, certaines de ces personnes décident de ne pas chercher d'emploi parce qu'elles s'attendent à une stigmatisation, et/ou de ne pas divulguer leurs problèmes de santé mentale sur leur lieu de travail. Une étude irlandaise consacrée aux personnes ayant des problèmes de santé mentale établit que 60 % des participants ont arrêté leur recherche d'emploi.¹⁵ Au **Danemark**, des travaux montrent que 87 % des sujets ont caché leurs troubles mentaux sur le marché du travail, et que 75 % n'ont pas posé leur candidature à des emplois pour des motifs liés à leur santé.¹⁶

Les enquêtes auprès du grand public à propos de son attitude à l'égard des personnes souffrant de problèmes de santé mentale sont l'une des sources de preuves de ce phénomène de stigmatisation. Ces enquêtes révèlent souvent, en effet, un degré notable d'antipathie ou de malaise vis-à-vis de ces personnes, même si certaines indications semblent attester également d'une amélioration des attitudes au fil du temps. En 2006, un Eurobaromètre spécial consacré à la santé mentale établissait que 37 % des personnes interrogées étaient tout à fait d'accord ou plutôt d'accord avec l'affirmation selon laquelle «les personnes qui souffrent de problèmes psychiques ou psychologiques sont un danger pour les autres».¹⁷ Un Eurobaromètre plus récent s'est concentré sur les relations sociales en demandant aux répondants s'il leur serait difficile de parler à quelqu'un ayant un problème majeur de santé mentale: dans l'ensemble, 67 % ont répondu que cela ne leur poserait «aucun problème» tandis que 22 % déclaraient que cela leur serait difficile.¹⁸

Les campagnes de lutte contre la stigmatisation, qu'elles soient organisées par le gouvernement ou par la société civile, semblent s'être intensifiées ces dernières années. Cette tendance est notamment

13 G. Thornicroft, *Shunned: Discrimination Against People with Mental Illness* (OUP 2006), p. 180.

14 T. Scheid, «Stigma as a Barrier to Employment: Mental Disability and the American with Disabilities Act» (2005), vol. 28, *International Journal of Law and Psychiatry*, p. 670,674.

15 L Mac Gabhann, R Lakeman, P McGowan, M Parkinson, M Redmond, I Sibitz, C Stevenson et J Walsh, «Hear My Voice: The Experience of Discrimination of People with Mental Health Problems in Ireland» (Dublin City University 2010), p. 64.

16 Pernille Skovbo Rasmussen et Peter Ejbye-Ernst, «Oplevet diskrimination og stigmatisering blandt mennesker med psykisk sygdom» (KORA 2015).

17 Commission européenne, Eurobaromètre spécial 248 «Santé psychique et psychologique» / Vague 64.4 (2006), p. 45.

18 Commission européenne, «Santé mentale», Eurobaromètre spécial 345 / Vague 73.2 (2010), p. 61.

illustrée par la création en 2012 de la *Global Anti-Stigma Alliance*,¹⁹ qui regroupe les grandes campagnes anti-stigmatisation d'**Australie**, du **Canada**, du **Danemark**, d'**Espagne**, des **États-Unis d'Amérique**, d'**Irlande**, de **Nouvelle Zélande**, des **Pays-Bas**, du **Royaume-Uni**, de **Suède** et de **Suisse**. En Suède, par exemple, Hjärnkoll²⁰ est une campagne anti-stigmatisation qui comprend une initiative fondée sur des ambassadeurs (à savoir des témoignages de personnes ayant eu des problèmes de santé mentale) et prévoit des activités axées sur le lieu de travail (formation des cadres et du personnel notamment). Des initiatives pertinentes se déroulent également dans le cadre de la politique de santé publique: ainsi une campagne nationale d'information du public intitulée «Ne vous détournez pas» a-t-elle été organisée en 2014-2015 en **Lettonie**²¹ dans le but de réduire la stigmatisation et d'accroître la sensibilisation à l'égard des maladies mentales.

Aménagement raisonnable et personnes souffrant d'un handicap psychosocial

Tous les États membres ont introduit l'obligation d'aménagement raisonnable dans leur législation nationale et tous les experts nationaux conviennent que les personnes atteintes de troubles sociaux peuvent, en principe, en bénéficier pour autant qu'ils soient couverts par la définition pertinente en droit national. L'article 5 de la directive relative à l'égalité en matière d'emploi dispose que «l'employeur prend les mesures appropriées, en fonction des besoins dans une situation concrète [...]». Étant donné que les aménagements sont adaptés aux besoins d'une personne particulière, la logique commande qu'à un moment donné l'employeur ait connaissance des obstacles rencontrés par la personne en question, afin d'examiner si des mesures efficaces peuvent être prises pour les réduire ou les éliminer. Or l'une des grandes conséquences de la stigmatisation est le choix de nombreuses personnes de ne pas révéler leurs troubles psychosociaux sur leur lieu de travail. Il en résulte que dans les contentieux où il convient de déterminer si l'employeur a respecté l'obligation de fournir un aménagement raisonnable, le litige peut porter sur la question de savoir si l'employeur connaissait, ou aurait dû connaître, le handicap du salarié. Une non-divulgaration ou une divulgation tardive peut affaiblir le recours de ce dernier. Des études **britanniques** montrent en effet qu'une absence de divulgation ou une divulgation tardive est souvent interprétée par les cours et tribunaux comme la preuve d'un manque de coopération de la part du salarié.²²

Ces difficultés se trouvent accrues par une insécurité juridique quant au degré de connaissance exigé de la part de l'employeur pour déclencher l'obligation de fourniture d'un aménagement raisonnable. Trois pays (**Espagne**, **Pologne** et **Royaume-Uni**) prévoient dans leur législation nationale des exigences expresses concernant cette connaissance. Ailleurs, il peut s'agir d'une exigence implicite de la législation ou d'une exigence établie par la jurisprudence; ou bien encore la situation reste ambiguë.

Dans vingt-deux États membres, aucun cas significatif de jurisprudence n'est signalé en rapport avec un aménagement raisonnable sur le lieu de travail à l'intention de personnes atteintes de troubles psychosociaux. L'expert national allemand signale que le handicap psychosocial est couvert par la législation antidiscrimination de l'**Allemagne** et qu'il existe une obligation incontestable d'aménagement raisonnable dans les limites prévues par la loi. On trouve des exemples de jurisprudence au **Danemark**, en **France**, en **Irlande**, aux **Pays-Bas** et au **Royaume-Uni**. Ils montrent que les juridictions ont admis que des personnes atteintes de troubles psychosociaux sont en droit d'invoquer l'obligation des employeurs de fournir un aménagement raisonnable. Les arrêts donnent en outre certaines indications quant aux mesures que les employeurs pourraient envisager. Ainsi au Danemark par exemple, le Conseil pour l'égalité de traitement a conclu au non-respect de l'obligation de fourniture d'un aménagement raisonnable dans une affaire où la municipalité avait licencié une employée souffrant de dépression, d'anxiété et de stress post-traumatique: avant de décider de ce licenciement, la municipalité aurait dû se

19 <http://www.time-to-change.org.uk/globalalliance>, consulté le 8 août 2016.

20 <http://www.nsph.se/hjarnkoll/>, consulté le 8 août 2016.

21 www.nenoversies.lv, consulté le 5 août 2016.

22 G. Lockwood, C. Henderson et G. Thornicroft, «Mental Health Disability Discrimination: Law, Policy and Practice» (2014), vol. 14, *International Journal of Discrimination and the Law* p. 168-176.

demander si l'employée aurait été apte à remplir sa fonction moyennant une diminution permanente de son temps de travail.²³

Conclusion

Il s'impose de veiller à une meilleure sensibilisation au handicap psychosocial et à sa pertinence dans le cadre de la législation antidiscrimination, y compris une sensibilisation accrue quant au rôle que cette dernière peut jouer, au travers de l'obligation d'aménagement raisonnable notamment, dans la promotion d'une participation au marché du travail des personnes atteintes de troubles psychosociaux.

La terminologie différente utilisée par la législation nationale, européenne et internationale à propos des personnes atteintes de troubles psychosociaux est source de confusion et impose de clarifier systématiquement le sens donné à certains termes particuliers. Il existe par exemple forte matière à confusion en ce qui concerne l'utilisation et la compréhension de l'adjectif «mental» associé à une incapacité ou un handicap, et il conviendrait que les législateurs, les juridictions et les autres utilisateurs de ce terme précisent ou expliquent toujours le sens qu'il a pour eux.

Il est important que les décideurs et les juridictions, y compris la CJUE, aient conscience du rôle que la stigmatisation peut avoir dans l'instauration de situations désavantageuses pour les personnes atteintes de troubles psychosociaux, et qu'ils en tiennent compte lorsqu'ils interprètent le concept de handicap. Si la CJUE n'a pas été saisie à ce jour d'une affaire dans laquelle une personne souffrant d'un handicap psychosocial réclame une protection contre une discrimination fondée sur le handicap, sa jurisprudence (*Z* et *Kaltoft* notamment) met en évidence une focalisation sur la nécessité pour une incapacité de limiter physiquement l'aptitude au travail d'une personne avant que celle-ci puisse invoquer une protection au titre de la directive relative à l'égalité en matière d'emploi. La jurisprudence de la Cour devrait reconnaître à l'avenir qu'une stigmatisation, des préjugés et des suppositions erronées peuvent avoir un effet particulièrement invalidant sur des personnes souffrant d'un handicap, et d'un handicap psychosocial plus spécialement. Elle ne devrait pas exiger qu'une incapacité doive, à elle seule, avoir une incidence sur l'aptitude au travail avant qu'une personne puisse être reconnue comme handicapée et/ou réclamer une protection à l'encontre d'une discrimination fondée sur le handicap.

Des initiatives prises au niveau du gouvernement et des entreprises ont un rôle à jouer dans la lutte contre la stigmatisation liée au handicap psychosocial. À l'heure actuelle, seule une minorité d'États membres ont adopté des programmes nationaux ou régionaux pour combattre ce type de stigmatisation. Une action concertée entre les pouvoirs publics et les entreprises s'impose pour instaurer un climat dans lequel les travailleurs ont la confiance nécessaire pour divulguer tout besoin lié à leur handicap psychosocial et pouvoir bénéficier dès lors d'un aménagement raisonnable. Au niveau de chaque lieu de travail, les employeurs doivent développer une culture dans laquelle les membres du personnel se sentent aptes à révéler leurs problèmes de santé mentale en sachant que ceux-ci seront gérés avec sensibilité et soutien. Parallèlement, les employeurs devraient éviter d'adresser des demandes d'information excessives aux travailleurs en quête d'un aménagement, afin de mieux contourner les barrières érigées par la réticence de ces travailleurs à divulguer leurs troubles psychosociaux.

On observe d'importantes disparités quant à la mesure dans laquelle la législation antidiscrimination a été invoquée dans les États membres par des personnes souffrant d'un handicap psychosocial. Une jurisprudence dans ce domaine a été développée dans une minorité de pays (**Royaume-Uni** et **Irlande** en particulier), mais elle reste rare ailleurs. Plusieurs raisons pourraient expliquer ce constat. Un tableau plus précis des schémas contentieux nationaux permettrait de mieux comprendre pourquoi la législation antidiscrimination est plus fréquemment invoquée dans certains pays que dans d'autres.

23 Danemark, Conseil pour l'égalité de traitement, décision 34/2016 du 2 mars 2016.

Zusammenfassung

Einleitung

Wenn Menschen unter psychischen Gesundheitsproblemen leiden, hat dies häufig Auswirkungen auf ihr Arbeitsleben. Eine Phase gesundheitlicher Probleme kann dazu führen, dass Menschen ihrem Arbeitsplatz fernbleiben, und sie vor die Herausforderung stellen, ihre Arbeit zu einem späteren Zeitpunkt erfolgreich wieder aufzunehmen. Einer Erwerbstätigkeit nachzugehen, kann für die Erhaltung der psychischen Gesundheit generell von Vorteil sein. Schlechte Arbeitsbedingungen sind jedoch ein Faktor, der zu psychischen Gesundheitsproblemen beitragen kann. Für die Politik im Bereich psychische Gesundheit ist der Arbeitsplatz daher von entscheidender Bedeutung. Ein integratives Arbeitsumfeld trägt dazu bei, die sozialen und wirtschaftlichen Auswirkungen psychischer Erkrankungen zu reduzieren, indem es den Betroffenen ermöglicht, einer Erwerbstätigkeit nachzugehen und diese nach einer krankheitsbedingten Abwesenheit fortzusetzen.

Die Rahmenrichtlinie Beschäftigung¹ wurde im Jahr 2000 verabschiedet und verbietet Diskriminierung wegen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung in Beschäftigung und Beruf. Eine Definition des Begriffs „Behinderung“ ist in der Richtlinie nicht zu finden, dem Gerichtshof (EuGH) zufolge schließt der Begriff jedoch Behinderungen mit ein, die auf „psychische Beeinträchtigungen“ zurückzuführen sind.² Personen, die unter psychischen Gesundheitsproblemen leiden, können daher als behindert angesehen werden und Anspruch auf angemessene Vorkehrungen haben, die zu treffen Arbeitgeber verpflichtet sind, um Menschen mit Behinderung „den Zugang zur Beschäftigung, die Ausübung eines Berufes [und] den beruflichen Aufstieg“ zu ermöglichen.³

Es ist allgemein bekannt, dass nicht jede körperliche Erkrankung eine Behinderung darstellt. Genauso kann zwischen psychischer Erkrankung und psychosozialer Behinderung unterschieden werden. Leidet eine Person unter einem psychischen Gesundheitsproblem von kurzer Dauer und begrenzter Schwere, so stellt dies allein keine Behinderung im Sinne des Antidiskriminierungsrechts dar. Bei einem psychischen Gesundheitsproblem, das dauerhaft ist oder wiederholt auftritt, ist es hingegen wahrscheinlich, dass es eine psychische Beeinträchtigung darstellt und zu einer Behinderung führt. Mit dem Begriff „psychosoziale Behinderung“ werden in diesem Bericht jene psychischen Beeinträchtigungen bezeichnet, die im Zusammenwirken mit anderen Barrieren zu einer Behinderung führen. Häufige Beispiele für Erkrankungen, die zu einer psychosozialen Behinderung führen können, sind: Depression, Angst, Stress, Sucht, Phobien, Essstörungen, Schizophrenie, posttraumatische Belastungsstörungen, bipolare Störungen und Persönlichkeitsstörungen.

In einigen Mitgliedstaaten wird häufig der Begriff „geistige Behinderung“ verwendet. Normalerweise bezieht sich dieser Begriff auf Personen mit intellektuellen Behinderungen (z. B. Personen mit Down-Syndrom), es kann aber sein, dass auch Personen mit psychosozialen Behinderungen darunter fallen. Da es in diesem Bericht nicht um die Bedeutung der Richtlinie für Personen mit intellektuellen Behinderungen geht, wurde der Begriff „geistige Behinderung“ generell nicht verwendet.

1 Richtlinie 2000/78/EG zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf, [2000], ABl. L303/16.

2 Rn. 38-39, Verbundene Rechtssachen C-335/11 und 337/11, *HK Danmark gegen Dansk almennyttigt Boligselskab* und *HK Danmark gegen Dansk Arbejdsgiverforening*, EU:C:2013:222.

3 Art. 5, Richtlinie 2000/78.

Die in dem Bericht enthaltenen Informationen basieren auf Fragebögen, die von den Länderexpertinnen und -experten des Europäischen Netzwerks von Rechtsexpertinnen und Rechtsexperten für Geschlechtergleichstellung und Nichtdiskriminierung ausgefüllt wurden, sowie auf Sekundärforschung der Autoren.

Die Rahmenrichtlinie Beschäftigung und das Übereinkommen über die Rechte von Menschen mit Behinderungen: Welche Rolle spielen diese Instrumente für den Schutz von Menschen mit psychosozialen Behinderungen im Bereich der Beschäftigung?

Das Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen (im Folgenden: Behindertenrechtskonvention bzw. BRK) basiert auf dem sozialen Behinderungsmodell. In ihm wird jedoch weder der Begriff der Behinderung definiert, noch klar beschrieben, wer zur Gruppe der „Menschen mit Behinderungen“ gehört. Artikel 1 BRK enthält jedoch folgende Hinweise zur Auslegung des Begriffs „Menschen mit Behinderungen“:

Zu Menschen mit Behinderungen zählen Menschen, die langfristige körperliche, geistige, intellektuelle oder sensorische Beeinträchtigungen aufweisen, welche im Zusammenwirken mit verschiedenen Barrieren diese Menschen daran hindern können, voll, wirksam und gleichberechtigt an der Gesellschaft teilzuhaben.

Die Verwendung des Begriffs „geistig“ macht deutlich, dass Menschen mit psychosozialen Behinderungen vom Anwendungsbereich der Behindertenrechtskonvention erfasst werden, obwohl der UN-Fachausschuss für die Rechte von Menschen mit Behinderungen sowie verschiedene Behindertenorganisationen den Begriff „psychosoziale Behinderung“ bevorzugen.

Die Unterzeichnung (Ratifizierung) der Behindertenrechtskonvention seitens der EU und deren Artikel 1 waren entscheidend für die Definition von Behinderung, die der EuGH in *HK Danmark (Ring und Skouboe Werge)* und späteren Rechtssachen im Hinblick auf die Rahmenrichtlinie Beschäftigung entwickelt hat. Nach der Definition des EuGH gilt eine Person als behindert, wenn sie die folgenden Voraussetzungen erfüllt:

- sie weist eine Einschränkung auf, die unter anderem auf eine psychische Beeinträchtigung zurückzuführen ist;
- die Beeinträchtigung ist von langer Dauer;
- im Zusammenwirken mit verschiedenen Barrieren hindert die Beeinträchtigung die betreffende Person daran, gleichberechtigt mit anderen Arbeitnehmern am Erwerbsleben teilzunehmen.

Nachzuweisen, dass sie unter diese Definition fallen, kann Menschen mit einer psychosozialen Behinderung vor einige Herausforderungen stellen. Unsicherheiten bei der genauen Diagnose psychischer Beeinträchtigungen oder psychischer Gesundheitsprobleme können dazu führen, dass medizinische Unterlagen, die das Vorliegen einer solchen Beeinträchtigung bestätigen, mehr Streitfragen aufwerfen als bei manchen körperlichen Beeinträchtigungen. Angesichts des veränderlichen, unvorhersehbaren Charakters vieler psychischer Erkrankungen ist es für Betroffene unter Umständen auch schwierig nachzuweisen, dass ihr Zustand anhaltend genug ist, um als Behinderung anerkannt zu werden.

Was den Schutz vor Diskriminierung angeht, so enthält die Behindertenrechtskonvention eine breite Definition von Diskriminierung aufgrund von Behinderung und legt fest, dass diese auch die Versagung angemessener Vorkehrungen umfasst. In Artikel 27 listet die BRK darüber hinaus einige beschäftigungsspezifische Rechte auf. Die Rahmenrichtlinie Beschäftigung verbietet unmittelbare oder mittelbare Diskriminierung im Bereich der Beschäftigung sowie Diskriminierung in Form von Belästigung oder einer Anweisung zur Diskriminierung. Sie schreibt den Mitgliedstaaten außerdem vor, eine Pflicht zur Einführung angemessener Vorkehrungen zu etablieren, ohne dies jedoch ausdrücklich an die

Nichtdiskriminierungsnorm zu knüpfen. In *HK Danmark (Ring und Skouboe Werge)* stellte der EuGH ausgehend von der BRK fest, der Begriff der „angemessenen Vorkehrungen“ sei dahin zu verstehen, „dass er die Beseitigung der verschiedenen Barrieren umfasst, die die volle und wirksame Teilhabe der Menschen mit Behinderung am Berufsleben, gleichberechtigt mit den anderen Arbeitnehmern, behindern“.

Menschen mit psychosozialen Behinderungen und ihre Situation auf dem Arbeitsmarkt

Die Auswirkungen psychischer Gesundheitsprobleme auf die erwerbstätige Bevölkerung finden zunehmende internationale Beachtung. Die Organisation für wirtschaftliche Zusammenarbeit und Entwicklung (OECD) hat festgestellt, dass normalerweise 5 % der Bevölkerung im erwerbsfähigen Alter eine „schwere“ psychische Störung und 15 % eine „moderate“ psychische Störung aufweisen.⁴ Die Europäische Erhebung über die Arbeitsbedingungen 2010 ergab, dass 22 % der Frauen und 19 % der Männer sich psychisch nicht wohl fühlten.⁵ Mehr als ein Fünftel der Arbeitnehmer gaben an, während der Arbeitszeit immer oder meistens Stress ausgesetzt zu sein.⁶ 2014 wurden Menschen in einer Eurobarometer-Umfrage gefragt, ob sie in den davorliegenden zwölf Monaten gesundheitliche Probleme gehabt hatten, die durch ihre Arbeit verursacht oder verschlechtert wurden. 27 % der Befragten in der EU nannten Stress, Depression oder Angst.⁷

Zahlen belegen häufig, dass Menschen mit psychischen Gesundheitsproblemen eine größere Wahrscheinlichkeit haben, arbeitslos oder nicht erwerbstätig zu sein (also keine Beschäftigung mehr zu suchen). Die Untersuchungen der OECD ergaben, dass Menschen mit einer schweren psychischen Störung (*severe mental disorder*, SMD) im Durchschnitt 6-7 Mal häufiger arbeitslos sind als psychisch gesunde Menschen, Menschen mit einer einfachen psychischen Störung (*common mental disorder*, CMD) 2-3 Mal häufiger.⁸

Zu der Frage, inwieweit Diskriminierung zur Schaffung von Barrieren bei der Suche nach und dem Verbleib in einem Arbeitsplatz beiträgt, liegen weniger internationale Daten vor. Es liegen jedoch wissenschaftliche Studien vor, die zeigen, dass Diskriminierung von Menschen mit psychosozialen Behinderungen als weitverbreitet angesehen wird. In einer Studie von 2009 an Personen mit klinisch diagnostizierter Schizophrenie in 27 Ländern gaben 29 % der Befragten an, sie hätten aufgrund ihrer Diagnose „Psychische Erkrankung“ bei der Suche nach oder dem Verbleib in einem Arbeitsplatz Benachteiligungen erfahren.⁹

Immer häufiger ist zu hören, dass Arbeitgeber Initiativen entwickeln, um den Verbleib von Menschen mit psychosozialen Behinderungen im Erwerbsleben zu unterstützen. Arbeitgeber und Gewerkschaften im Telekommunikationssektor haben zum Beispiel einen „Leitfaden für gute Praxis“ erstellt, um das psychische Wohlbefinden der Beschäftigten zu verbessern.¹⁰ Untersuchungen zeigen, dass angemessene Vorkehrungen für Arbeitnehmer mit psychosozialen Behinderungen eine zentrale Rolle spielen. McDowell und Fossey stellten fest, dass folgende Maßnahmen am häufigsten eingesetzt wurden:

- Unterstützung durch berufsbegleitende Mitarbeiter (während des Einstellungsverfahrens oder während der Beschäftigung)
- flexible Arbeitszeiten (einschließlich Arbeitszeitverkürzung)
- modifizierte Ausbildung und Supervision

4 OECD, „Sick on the Job? Myths and Realities about Mental Health and Work“ (OECD 2011) 20.

5 Eurofound und EU-OSHA, „Psychosoziale Risiken in Europa: Prävalenz und Präventionsstrategien“ (Amt für Veröffentlichungen der Europäischen Union 2014) 35.

6 Ebd.

7 TNS Political & Social, Flash Eurobarometer 398 „Working Conditions“ (Europäische Union 2014) 72.

8 OECD, „Sick on the Job? Myths and Realities about Mental Health and Work“ (OECD 2011) 12.

9 G. Thornicroft, E. Brohan, D. Rose, N. Sartorius und M. Leese, „Global Pattern of Experienced and Anticipated Discrimination Against People with Schizophrenia: A Cross-Sectional Survey“ (2009) 373 *The Lancet* 408, 410.

10 ETNO und UNI Europa, „Good Work, Good Health“ (2010): <https://www.etno.eu/datas/publications/studies/etno-goodpracticeguidelines-en.pdf>.

- modifizierte Arbeitsaufgaben
- praktische Anpassung des Arbeitsplatzes (z. B. ruhigerer Arbeitsbereich)¹¹

Eine im **Vereinigten Königreich** durchgeführte Befragung von mehr als 2000 Mitarbeitern im Hochschulbereich, die von psychischen Gesundheitsproblemen betroffen waren, ergab, dass 74 % derjenigen, deren Arbeitsplatz angepasst wurde, die Anpassungsmaßnahmen als positiv oder sehr positiv bewerteten.¹²

Nationale Definitionen von Behinderung im Antidiskriminierungsrecht und Personen mit psychosozialen Behinderungen

Soweit die nationalen Antidiskriminierungsvorschriften eine Definition von Behinderung enthalten, bezieht diese Personen mit psychosozialen Behinderungen sowie Personen mit anderen Behinderungsformen potenziell mit ein. Eine psychische Beeinträchtigung oder psychische Erkrankung allein reicht jedoch nicht aus, um als behindert zu gelten; die nationalen Definitionen von Behinderung enthalten weitere Bedingungen, die erfüllt sein müssen, damit eine Person diesen Status erhält. Derartige Bedingungen sind zum Beispiel die Beibringung eines medizinischen Nachweises über das Vorliegen einer Beeinträchtigung, die zu der Behinderung führt, sowie über Langfristigkeit bzw. Dauerhaftigkeit der Beeinträchtigung oder die offizielle Anerkennung des Behindertenstatus seitens des Sozialversicherungsträgers. Zwar schließt keine dieser Bedingungen Menschen mit psychosozialen Behinderungen aus, es kann für sie aber schwieriger sein, die Bedingungen zu erfüllen, als für Menschen mit anderen (sichtbaren) Formen von Behinderung, und es kann für Menschen mit psychosozialen Beeinträchtigungen demzufolge schwieriger sein, in den Anwendungsbereich des Antidiskriminierungsrechts für Menschen mit Behinderung zu fallen.

In zwölf Mitgliedstaaten (**Bulgarien, Deutschland, Estland, Irland, Malta, Österreich, Portugal, Schweden, Spanien, Tschechien, Vereinigtes Königreich und Zypern**) enthalten die nationalen Antidiskriminierungsvorschriften eine Definition von Behinderung. In allen Fällen werden Personen mit psychosozialen Behinderungen von der jeweiligen Definition potenziell erfasst; der Begriff „psychosoziale Behinderung“ wird jedoch in keinem dieser Rechtsinstrumente verwendet. Um die entsprechende Beeinträchtigung oder Behinderung zu bezeichnen, werden stattdessen zahlreiche andere Begriffe verwendet: „Verlust oder Beeinträchtigung ... der Psyche einer Person“ und „psychische Beeinträchtigung“ (**Bulgarien**), „seelische Gesundheit“, die vom typischen Zustand abweicht (**Deutschland**), „Anomalie in der ... seelischen Struktur oder Funktion“ (**Estland**), „psychischer Zustand“ (**Österreich**), „psychische Funktionen“ (**Portugal**), „geistige Einschränkung“ (**Schweden** und **GB**), „geistige Beeinträchtigung“ (**Spanien**), „psychische ... Beeinträchtigung“ (**Tschechische Republik**) und „psychische Einschränkung“ (**Zypern**). Das **irische** Gesetz über die Gleichstellung im Beschäftigungsbereich (*Employment Equality Acts 1998–2015*) enthält eine recht detaillierte Beschreibung der Beeinträchtigung, die zu einer psychosozialen Behinderung führen kann; im Vordergrund stehen dabei die Auswirkungen „eines Zustands, einer Erkrankung oder Krankheit“, die Denkprozesse, Realitätswahrnehmung, Emotionen oder Urteilsvermögen beeinträchtigen oder zu gestörtem Verhalten führen. Das **maltesische** Gesetz (*Equal Opportunities [Persons with Disability] Act 2000*) unterscheidet zwischen Beeinträchtigung und Behinderung und definiert beides: Eine Beeinträchtigung beinhaltet einen Verlust, eine Einschränkung oder eine Anomalie der „psychischen“ Struktur oder Funktion; eine Behinderung ist hingegen eine „geistige“ Beeinträchtigung, die „im Zusammenwirken mit verschiedenen Barrieren die volle, wirksame und gleichberechtigte Teilhabe an der Gesellschaft behindern kann“.

In einigen Fällen wird der Begriff „geistige“ Beeinträchtigung oder Einschränkung ausschließlich im Zusammenhang mit psychosozialen Behinderungen verwendet (bezieht sich also nicht auf eine intellektuelle

11 C. McDowell und E. Fossey, „Workplace Accommodations for People with Mental Illness: A Scoping Review“ (2015) 25 *Journal of Occupational Rehabilitation* 197, 199.

12 Equality Challenge Unit (ECU), „Understanding Adjustments: Supporting Staff and Students Who Are Experiencing Mental Health Difficulties“ (ECU 2014) 12.

Beeinträchtigung/Behinderung bzw. Lernbeeinträchtigung/-behinderung). Im **maltesischen, spanischen** und **schwedischen** Recht wird der Begriff „geistig“ in diesem Sinne verwendet. Die Definitionen von Behinderung in den **österreichischen** Bundesgesetzen und im **tschechischen** Antidiskriminierungsrecht scheinen den Begriff „geistig“ (in „geistiger Zustand“ bzw. „geistige Beeinträchtigung“) ausschließlich auf intellektuelle Beeinträchtigungen bzw. Lernbeeinträchtigungen zu beziehen (den Begriff „psychisch“ hingegen auf psychosoziale Behinderungen). Dies gilt auch für das **zyprische** Behindertenrecht. Im **estnischen** Gleichbehandlungsgesetz und im **britischen** Gleichstellungsgesetz *Equality Act 2010* schließlich wird der Begriff „geistig“ verwendet, um Beeinträchtigungen zu bezeichnen, die zu intellektuellen oder psychosozialen Behinderungen beitragen – und das, obwohl die beiden Behinderungsformen sehr unterschiedlich sind.

Manche nationalen Definitionen spiegeln das soziale Behinderungsmodell im Sinne von Artikel 1 der Behindertenrechtskonvention wider und verlangen, dass die Beeinträchtigung im Zusammenwirken mit verschiedenen Barrieren die volle, wirksame und gleichberechtigte Teilhabe an der Gesellschaft behindern muss; andere Definitionen vertreten einen engeren Ansatz und verlangen, dass der betreffenden Person, um als behindert zu gelten, von offizieller Seite ein bestimmter Beeinträchtigungsgrad bestätigt worden sein muss.

In **Italien** und **Luxemburg** enthalten die nationalen Antidiskriminierungsvorschriften (für Menschen mit Behinderungen) keine Definition des Begriffs „Behinderung“, verweisen jedoch auf ein spezifischeres Gesetz, das eine Definition enthält, die Personen mit psychosozialen Behinderungen potenziell erfasst. In **Frankreich** existieren zahlreiche Rechtsakte, die Diskriminierung aufgrund von Behinderung verbieten, den Begriff „Behinderung“ aber nicht definieren. Das französische Gesetz, in dem die Pflicht verankert ist, angemessene Vorkehrungen zu treffen, enthält allerdings eine Definition von Behinderung, die Personen mit psychosozialen Behinderungen erfasst. In Slowenien ist die Situation dieselbe.

In zwölf EU-Mitgliedstaaten (**Belgien, Dänemark, Finnland, Griechenland, Kroatien, Lettland, Litauen, Niederlande, Polen, Rumänien, Slowakei** und **Ungarn**) enthält das nationale Antidiskriminierungsrecht keine Definition von Behinderung. Die Tatsache, dass Behinderung in den Antidiskriminierungsvorschriften nicht definiert ist, bedeutet jedoch nicht, dass Menschen mit psychosozialen Behinderungen in diesen Ländern nicht vor Diskriminierung geschützt sind. Tatsächlich gibt es Präjudizien, die bestätigen, dass Menschen mit psychosozialen Behinderungen in einigen der oben genannten EU-Länder durch das Antidiskriminierungsrecht geschützt sind. Während die Antidiskriminierungsvorschriften unter Umständen keine Definition von Behinderung enthalten, wird der Begriff in anderen Vorschriften, die sich mit behinderungsspezifischen Fragen beschäftigen, definiert, und so kann es durchaus sein, dass das nationale Recht eine Vielzahl von Definitionen des Begriffs „Behinderung“ enthält. Ohne entsprechende rechtliche Grundlagen – Hinweise zur Auslegung des Antidiskriminierungsgesetzes, einschlägige Urteile mit Präzedenzwirkung usw. – besteht die Gefahr, dass diese anderen Definitionen, die nicht mit Blick auf das Antidiskriminierungsrecht entwickelt wurden, im Kontext des Antidiskriminierungsrechts angewandt werden.

Antidiskriminierungsvorschriften, die Menschen vor Diskriminierung aufgrund des Gesundheitszustands und aufgrund von Behinderung schützen, bieten Menschen mit psychosozialen Störungen unter Umständen mehr Schutz vor Diskriminierung. Solche Vorschriften existieren beispielsweise in **Kroatien**, der **Slowakei** und in **Ungarn**. Insbesondere Menschen mit schlechter psychischer Gesundheit, bei denen keine psychosoziale Behinderung im Sinne des Gesetzes vorliegt, können unter solchen Umständen trotzdem vor Diskriminierung geschützt sein. Schließlich ist die Behindertenrechtskonvention, deren Artikel 1 Hinweise zur Auslegung des Begriffs „Menschen mit Behinderungen“ liefert, die „seelische Beeinträchtigungen“ ausdrücklich einschließen, in einigen EU-Mitgliedstaaten unmittelbar anwendbar und wurde ohnehin von 27 der gegenwärtig 28 EU-Mitgliedstaaten sowie von der EU selbst ratifiziert.

Was die Rechtsprechung angeht, so hat das Europäische Netzwerk von Rechtsexpertinnen und Rechtsexperten für Geschlechtergleichstellung und Nichtdiskriminierung in den meisten Mitgliedstaaten

nur wenige Fälle gefunden, in denen Gerichte ausdrücklich geprüft haben, ob Personen, bei denen eine psychosoziale Behinderung vorlag, im Sinne des gesetzlichen Schutzes als behindert anzusehen waren oder nicht. Im **Vereinigten Königreich** und in **Irland** scheint die Situation anders zu sein: Hier haben Personen mit psychosozialen Behinderungen zahlreiche Rechtsstreite geführt. Rechtsprechung zu Diskriminierungen im Beschäftigungsbereich hat festgestellt, dass Menschen mit unterschiedlichen psychosozialen Behinderungen (posttraumatische Belastungsstörungen, Depressionen, Stress, bipolare Störungen) als behindert anzusehen sind. Entsprechende Entscheidungen finden sich in zahlreichen Mitgliedstaaten. Auch Rechtsprechung, in der es um andere Fragen (Ansprüche auf behinderungsspezifische Sozialleistungen, Diskriminierung im Schulbereich usw.) ging, hat Menschen mit psychischen Beeinträchtigungen als behindert anerkannt. In einigen Fällen griffen die Gerichte bei der Prüfung dieser Fragen auf die Behindertenrechtskonvention zurück. Es gab jedoch auch nationale Rechtsprechungsfälle, in denen festgestellt wurde, dass Menschen mit psychischen Beeinträchtigungen manchmal nicht als behindert anerkannt werden können. In einem **dänischen** Arbeitsrechtsstreit kam das Gericht zu dem Ergebnis, dass eine Person mit Depression nicht behindert war, da ihre Depression weder als ausreichend dauerhaft noch als ausreichend schwer angesehen wurde. In einem **bulgarischen** Rechtsstreit, der nichts mit Beschäftigung zu tun hatte, wurde eine dissoziale Persönlichkeitsstörung nicht als psychiatrische Störung, sondern lediglich als „psychisches Problem“ eingestuft, weshalb die betroffene Person keinen Anspruch auf Schutz nach dem im Antidiskriminierungsgesetz vorgesehenen Schutzgrund „psychischer Gesundheitszustand“ hatte. Insgesamt werden, mit Ausnahme Irlands und des Vereinigten Königreichs, diese Fragen in der Rechtsprechung jedoch nur sehr beschränkt behandelt. In manchen Fällen mag dies darauf zurückzuführen sein, dass Menschen mit psychischen Beeinträchtigungen problemlos als behindert eingestuft werden und ihr Behindertenstatus von keinem Gericht geprüft wird; in anderen Fällen kann es aber auch daran liegen, dass insgesamt nur wenige Personen mit psychosozialen Behinderungen vor Gericht ziehen.

Stigmatisierung und Offenlegung im Zusammenhang mit Menschen mit psychosozialen Behinderungen

Es gibt umfangreiche Literatur, die den Zusammenhang zwischen psychischen Gesundheitsproblemen und Stigmatisierung dokumentiert. Stigmatisierung kann in vielen verschiedenen Formen auftreten, zum Beispiel als Etikettierung, Stereotypisierung, Segregation oder nachteilige Behandlung (Diskriminierung).¹³ Herausragende Stereotypen im Zusammenhang mit psychischen Gesundheitsproblemen sind u. a. Angst vor Gefährlichkeit und die Vorstellung, dass die betroffenen Personen anfällig für Gewalt sind.¹⁴ Dies kann dazu führen, dass Menschen mit psychosozialen Behinderungen gemieden und isoliert werden.

Menschen mit psychischen Gesundheitsproblemen, die in der Vergangenheit Stigmatisierung erfahren haben, antizipieren Stigmatisierung in der Zukunft häufig. Dies kann dazu führen, dass diese Menschen Situationen meiden, in denen eine Stigmatisierung stattfinden könnte. Im Kontext des Arbeitsmarktes ziehen es manche Betroffene aufgrund antizipierter Stigmatisierung vor, keine Beschäftigung zu suchen und/oder ihre psychischen Gesundheitsprobleme am Arbeitsplatz nicht offenzulegen. Eine **irische** Studie über Menschen mit psychischen Gesundheitsproblemen stellte fest, dass 60 % der Teilnehmenden aufgehört hatten, sich um eine Stelle zu bewerben.¹⁵ Untersuchungen in **Dänemark** ergaben, dass 87 % ihre psychische Störung im Berufsleben verheimlicht und 75 % aufgrund ihrer psychischen Gesundheit davon Abstand genommen hatten, sich um eine Stelle zu bewerben.¹⁶

13 G. Thornicroft, *Shunned: Discrimination Against People with Mental Illness* (OUP 2006) 180.

14 T. Scheid, "Stigma as a Barrier to Employment: Mental Disability and the American with Disabilities Act" (2005) 28 *International Journal of Law and Psychiatry* 670, 674.

15 L. Mac Gabhann, R. Lakeman, P. McGowan, M. Parkinson, M. Redmond, I. Sibitz, C. Stevenson und J. Walsh, "Hear My Voice: The Experience of Discrimination of People with Mental Health Problems in Ireland" (Dublin City University 2010) 64.

16 Pernille Skovbo Rasmussen und Peter Ejbye-Ernst, "Oplevet diskrimination og stigmatisering blandt mennesker med psykisk sygdom" (KORA 2015).

Eine Beweisquelle für Stigmatisierung sind Befragungen der Bevölkerung zu ihren Einstellungen gegenüber Personen mit psychischen Gesundheitsproblemen. Solche Befragungen lassen häufig ein erhebliches Maß an Antipathie und Unbehagen gegenüber Betroffenen erkennen, enthalten manchmal aber auch Hinweise dafür, dass sich die Einstellungen im Laufe der Zeit verbessern. 2006 gaben im Rahmen eines Eurobarometer Spezial zum Thema „Psychisches Wohlbefinden“ 37 % der Befragten an, dass sie der Aussage „Menschen mit psychischen oder emotionalen Gesundheitsproblemen sind eine Gefahr für andere“ voll und ganz zustimmten.¹⁷ Jüngere Eurobarometer-Umfragen haben soziale Beziehungen untersucht und die Teilnehmenden gefragt, ob sie es schwierig finden würden, sich mit einer Person zu unterhalten, die ein erhebliches psychisches Gesundheitsproblem hat. Insgesamt erklärten 67 % der Befragten, sie hätten „kein Problem“ damit, sich mit einer solchen Person zu unterhalten, 22 % fanden es hingegen schwierig.¹⁸

Anti-Stigma-Kampagnen, ob von staatlichen Stellen oder der Zivilgesellschaft organisiert, scheinen in den letzten Jahren zugenommen zu haben. Ein Beispiel für diese Entwicklung war die Gründung der *Global Anti-Stigma Alliance*¹⁹ im Jahr 2012, die große Anti-Stigma-Kampagnen aus **Australien, Dänemark, Irland, Kanada, Neuseeland, den Niederlanden, Schweden, der Schweiz, Spanien, den USA** und dem **Vereinigten Königreich** zusammenbringt. Die **schwedische** Anti-Stigma-Kampagne *Hjämkoll*²⁰ beinhaltet zum Beispiel eine „Botschafter-Initiative“ (in der Menschen, die von psychischen Gesundheitsproblemen betroffen sind, berichten). Im Rahmen der Kampagne wurden Aktivitäten durchgeführt, die speziell auf die Arbeitswelt abzielten, zum Beispiel Schulungen für Führungskräfte und Personal. Einschlägige Initiativen finden auch im Rahmen der staatlichen Gesundheitspolitik statt. In **Lettland** gab es 2014/2015 beispielsweise eine landesweite Informationskampagne unter dem Motto „Wende Dich nicht ab!“,²¹ deren Ziel es war, Stigmatisierung zu reduzieren und die Öffentlichkeit für psychische Erkrankungen zu sensibilisieren.

Angemessene Vorkehrungen und Menschen mit psychosozialen Behinderungen

Alle Mitgliedstaaten haben die Pflicht, angemessene Vorkehrungen zu treffen, in ihre nationale Gesetzgebung aufgenommen, und alle Länderexpertinnen und -experten waren sich darin einig, dass diese Pflicht grundsätzlich auch von Personen mit psychosozialen Behinderungen geltend gemacht werden kann (vorausgesetzt, sie fallen unter die entsprechende Definition von Behinderung im nationalen Recht). Artikel 5 der Rahmenrichtlinie Beschäftigung legt fest, dass „der Arbeitgeber die geeigneten und im konkreten Fall erforderlichen Maßnahmen ergreift“. Da diese Maßnahmen auf die Bedürfnisse einer bestimmten Person zugeschnitten sind, bedeutet dies logischerweise, dass der Arbeitgeber irgendwann von den Barrieren, mit denen die Person konfrontiert ist, Kenntnis haben muss, um zu prüfen, ob wirksame Maßnahmen zur Entschärfung oder Beseitigung dieser Barrieren ergriffen werden können. Eine der wichtigsten Konsequenzen von Stigmatisierung ist, dass viele Menschen psychosoziale Behinderungen am Arbeitsplatz nicht offenlegen. In einem Rechtsstreit, in dem es um die Frage geht, ob der Arbeitgeber seiner Pflicht, angemessene Vorkehrungen zu treffen, nachgekommen ist, kann es infolgedessen zu Meinungsverschiedenheiten darüber kommen, ob der Arbeitgeber von der Behinderung des Arbeitnehmers wusste oder hätte wissen müssen. Legt ein Arbeitnehmer seine Behinderung nicht oder erst mit Verspätung offen, kann dies seine Ansprüche schwächen. Untersuchungen im **Vereinigten Königreich** haben ergeben, dass eine verspätete oder nicht erfolgte Offenlegung von den Gerichten häufig als Beweis für mangelnde Kooperation seitens des Arbeitnehmers ausgelegt wird.²²

17 Europäische Kommission, „Psychisches Wohlbefinden“ Eurobarometer Spezial 248 / Wave 64.4 (2006) 45.

18 Europäische Kommission, „Mental Health“ Eurobarometer Spezial 345 / Wave 73.2 (2010) 61.

19 <http://www.time-to-change.org.uk/globalalliance> (letzter Zugriff am 8. August 2016).

20 <http://www.nspsh.se/hjarnkoll/> (letzter Zugriff am 8. August 2016).

21 www.nenoversies.lv (letzter Zugriff am 5. August 2016).

22 G. Lockwood, C. Henderson und G. Thornicroft, „Mental Health Disability Discrimination: Law, Policy and Practice“ (2014) 14 *International Journal of Discrimination and the Law* 168, 176.

Rechtsunsicherheit über das Ausmaß der Kenntnisse, die der Arbeitgeber haben muss, damit die Pflicht, angemessene Vorkehrungen zu treffen, zur Anwendung kommt, kann diese Schwierigkeiten weiter verschärfen. Drei Staaten (**Polen, Spanien** und das **Vereinigte Königreich**) haben in ihre nationalen Vorschriften ausdrückliche Vorgaben zu den erforderlichen Kenntnissen aufgenommen. In anderen Staaten leitet sich ein entsprechendes Erfordernis entweder aus den gesetzlichen Vorschriften ab, wurde ein Erfordernis von der Rechtsprechung anerkannt oder ist die Rechtslage nach wie vor ungeklärt.

In 22 Mitgliedstaaten wurden keine Beispiele richtungsweisender nationaler Rechtsprechung zu angemessenen Vorkehrungen am Arbeitsplatz für Personen mit psychosozialen Behinderungen gemeldet. In **Deutschland** fällt psychosoziale Behinderung nach Angaben des Länderexperten unter das nationale Antidiskriminierungsrecht und existiert zweifellos eine Pflicht, im gesetzlichen Rahmen angemessene Vorkehrungen zu treffen. In **Dänemark, Frankreich, Irland**, den **Niederlanden** und im **Vereinigten Königreich** wurden Rechtsprechungsfälle gefunden. Die Rechtsprechung zeigt, dass Gerichte zu dem Schluss gekommen sind, dass sich Menschen mit psychosozialen Behinderungen auf die Pflicht des Arbeitgebers, angemessene Vorkehrungen zu treffen, berufen können. Die Entscheidungen enthalten auch Hinweise dazu, welche Arten von Maßnahmen von Arbeitgebern gegebenenfalls verlangt werden. In Dänemark kam der Gleichstellungsausschuss im Fall einer Gemeinde, die eine Mitarbeiterin, die unter Depressionen, Angstzuständen und einer posttraumatischen Belastungsstörung litt, entlassen hatte, beispielsweise zu dem Ergebnis, dass ein Verstoß gegen die Pflicht vorlag, angemessene Vorkehrungen zu treffen. Vor der Entscheidung über die Entlassung der Frau hätte die Gemeinde prüfen müssen, ob diese ihre Aufgaben im Rahmen einer dauerhaft reduzierten Arbeitszeit hätte erfüllen können.²³

Schlussfolgerungen

Es bedarf eines stärkeren Bewusstseins für psychosoziale Behinderung und deren Bedeutung für die Antidiskriminierungsvorschriften. Dazu gehört ein größeres Bewusstsein für die Rolle, die Antidiskriminierungsvorschriften – einschließlich der Pflicht, angemessene Vorkehrungen zu treffen – spielen können, um die Erwerbsbeteiligung von Menschen mit psychosozialen Behinderungen zu fördern.

Die unterschiedliche Terminologie, die in nationalen, europäischen und internationalen Rechtsvorschriften im Zusammenhang mit Menschen mit psychosozialen Behinderungen verwendet wird, führt zu Verwirrung. Angesichts der terminologischen Unterschiede ist es wichtig, immer klarzustellen, wie bestimmte Begriffe verwendet werden. Insbesondere die Verwendung und Bedeutung des Begriffs „geistige“ Beeinträchtigung bzw. Behinderung birgt großes Potenzial für Verwirrung. Gesetzgeber, Gerichte und andere, die diesen Begriff verwenden, sollten ihr Verständnis des Begriffs immer darlegen oder erläutern.

Es ist wichtig, dass die politischen Entscheidungsträger und Gerichte, einschließlich des EuGH, sich bewusst sind, wie Stigmatisierung zur Benachteiligung von Menschen mit psychosozialen Behinderungen beiträgt, und dies bei der Auslegung des Begriffs „Behinderung“ berücksichtigen. Obwohl der EuGH bislang noch über keinen Fall entschieden hat, in dem eine Person mit psychosozialer Behinderung Schutz vor Diskriminierung aufgrund von Behinderung einforderte, hat seine Rechtsprechung (z. B. *Z und Kaltoft*) doch gezeigt, dass es seiner Meinung nach erforderlich ist, dass die Beeinträchtigung die betroffene Person in ihrer Arbeitsfähigkeit physisch einschränkt, damit diese Schutz im Sinne der Rahmenrichtlinie Beschäftigung beanspruchen kann. In seiner künftigen Rechtsprechung sollte der Gerichtshof der Tatsache Rechnung tragen, dass Stigmen, Vorurteile und falsche Annahmen Menschen mit Behinderungen, und besonders Menschen mit psychosozialen Behinderungen, stark beeinträchtigen können. Er sollte nicht verlangen, dass eine Beeinträchtigung für sich allein genommen erst Auswirkungen auf die Arbeitsfähigkeit haben muss, bevor eine Person als behindert anerkannt werden und/oder Schutz vor Diskriminierung aufgrund von Behinderung fordern kann.

23 Dänemark, Gleichstellungsausschuss, Entscheidung 34/2016 vom 2. März 2016.

Staatliche und unternehmerische Initiativen können dazu beitragen, Stigmatisierung aufgrund psychosozialer Behinderungen zu bekämpfen. Derzeit hat nur eine Minderheit der Mitgliedstaaten nationale oder regionale Programme zur Bekämpfung dieser Art von Stigmatisierung aufgelegt. Es braucht konzertierte Aktionen von Regierung und Wirtschaft, um ein Klima zu schaffen, in dem Arbeitnehmer den Mut haben offenzulegen, welche Bedürfnisse sie aufgrund ihrer psychosozialen Behinderung haben, und dadurch Zugang zu angemessenen Vorkehrungen bekommen. Auf der Ebene des individuellen Arbeitsplatzes müssen Arbeitgeber eine Kultur entwickeln, die es Arbeitnehmern ermöglicht, psychische Gesundheitsprobleme offenzulegen, weil sie wissen, dass diese mit Sensibilität behandelt werden und auf Unterstützung stoßen. Gleichzeitig sollten Arbeitgeber es vermeiden, von Arbeitnehmern, die Anpassungsmaßnahmen wünschen, zu viele Informationen zu fordern. Dies kann dazu beitragen, die Barrieren zu überwinden, die sich aus der Zurückhaltung der Arbeitnehmer, psychosoziale Behinderungen offenzulegen, ergeben.

In welchem Umfang Menschen mit psychosozialen Behinderungen auf Antidiskriminierungsvorschriften zurückgreifen, ist von Mitgliedstaat zu Mitgliedstaat sehr unterschiedlich. Eine Minderheit von Ländern verfügt in diesem Bereich über eine umfangreiche Rechtsprechung (insbesondere das **Vereinigte Königreich** und **Irland**), in den meisten Ländern ist diese Rechtsprechung jedoch sehr spärlich. Es gibt eine Reihe von Gründen, die dies erklären könnten. Ein genaueres Bild der nationalen Streitregelungsmuster könnte helfen zu verstehen, warum die Antidiskriminierungsvorschriften in manchen Ländern häufiger zur Anwendung kommen als in anderen.

Introduction

There is growing awareness that mental health is a key issue for social and economic policies within the European Union. This was recognised in the European Pact for Mental Health and Well-Being adopted in 2008. It estimated that around 11% of the population experience 'mental disorders', while 'depression is already the most prevalent health problem in many EU Member States'.¹ Internationally, the World Health Organisation (WHO) estimates that 'during their entire lifetime, more than 25% of individuals develop one or more mental or behavioural disorders'.²

For those individuals who experience mental health problems, there is frequently an impact upon their working lives. A period of poor health may lead to absence from the workplace and pose the challenge of managing a successful resumption of work at a later point in time. In general, being in work can be beneficial for maintaining good mental health.³ Yet adverse working conditions can be a contributing factor to experiencing mental health problems. Therefore, the workplace is a crucial site for mental health policy. An inclusive working environment makes a contribution to reducing the social and economic consequences of mental ill-health by enabling people to participate in employment and to remain in jobs after a health-related absence.

There is a range of EU legal and policy measures that are relevant to making the workplace more inclusive. For example, law on occupational safety and health means that employers should identify risks to workers' mental health and take measures to prevent these risks from materialising.⁴ Instruments such as the Working Time Directive⁵ can make a contribution to protecting workers from excessive working hours and ensuring the provision of necessary rest periods. This report will focus on the particular contribution of non-discrimination legislation and specifically the Employment Equality Directive.

The Employment Equality Directive⁶ was adopted in 2000 and it prohibits discrimination in employment and occupation on the grounds of religion or belief, disability, age and sexual orientation. There is no definition of disability found within the Directive, but the Court of Justice has recognised that this includes disabilities arising from 'psychological impairments'.⁷ The legal definition of disability found in EU and national law will be examined in more detail later in this report, but it is sufficient to recognise at the outset that individuals who experience mental health problems may be regarded as disabled, thereby triggering the protection of the Directive. Significantly, this includes the duty on the employer to provide reasonable accommodation to allow the individual to have 'access to, participate in, or advance in employment'.⁸ In keeping with the terminology adopted by the Court of Justice, this report will refer to 'psychological impairments' when describing the underlying impairment that can, in interaction with other barriers, give rise to a psychosocial disability.

0.1 What is psychosocial disability?

It is widely understood that not every instance of physical ill-health constitutes a disability. For example, a temporary illness of short duration and from which the individual fully recovers may not fall within the legal concept of disability. In a similar fashion, a distinction can be drawn between mental ill-health and psychosocial disability. Where an individual experiences a short-term mental health problem of limited

- 1 European Pact for Mental Health and Well-Being, p. 2: http://ec.europa.eu/health/mental_health/docs/mhpact_en.pdf, accessed 14 June 2016.
- 2 WHO, 'The World Health Report 2001. Mental Health: New Understanding, New Hope' (WHO 2011) 23.
- 3 European Pact (n1) 4.
- 4 M. Peruzzi, 'La prevenzione dei rischi psico-sociali nel diritto dell'Unione europea' (2012) XXVI *Lavoro e Diritto* 201.
- 5 Directive 2003/88/EC concerning certain aspects of the organization of working time [2003] OJ L299/9.
- 6 Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.
- 7 Paras 38-39, Joined Cases C-335/11 and 337/11, *HK Danmark v Dansk almennyttigt Boligselskab, HK Danmark v Dansk Arbejdsgiverforening*, EU:C:2013:222.
- 8 Art 5, Directive 2000/78.

severity, then this, by itself, may not constitute a disability for the purposes of non-discrimination law. In contrast, a mental health problem that endures or recurs is likely to constitute a psychological impairment and lead to a disability.

In this report, the term ‘psychosocial disability’ has been adopted to refer to those psychological impairments that, in interaction with other barriers, give rise to a disability. This is an evolving area of law and policy where a variety of terms are currently used,⁹ and there is diversity within the EU around the most appropriate language.¹⁰ The UN Committee on the Rights of Persons with Disabilities uses the term ‘psychosocial disability’,¹¹ and we have chosen to follow this lead. This term has also been supported by some civil society organisations.¹²

This report does not aim to provide an exhaustive list of those conditions that constitute psychosocial disabilities; however, given the emerging terminology in this field, it is valuable to clarify its principal focus. Common examples of conditions that may give rise to a psychosocial disability include: depression, anxiety, stress, addictions, phobias, eating disorders, schizophrenia, post-traumatic stress disorder, bipolar disorder and personality disorders.

0.2 What is mental disability?

In some Member States, it remains common to use the term ‘mental disability’ (or ‘mental impairment’) in law and policy. This may cover conditions that fall under the term ‘psychosocial disability’ as described in the paragraph above. It is likely, though, to embrace other conditions that are not psychosocial disabilities. In particular, ‘mental disability’ is frequently used in connection with those who experience ‘intellectual disabilities’. The latter connotes individuals who, as a result of an impairment, have difficulty with learning and understanding. In many cases, an intellectual disability is associated with a significantly lower than average IQ. In contrast, a psychosocial disability does not impact on intelligence. Common examples of intellectual impairments are Down’s Syndrome, various genetic impairments and, in some cases, brain damage. This report does not specifically address the situation of people with intellectual disabilities. It is, though, important to recognise that such individuals can experience psychosocial disabilities, such as depression or anxiety. Indeed, research has suggested that there may be an increased prevalence of psychosocial disabilities amongst those with intellectual disabilities.¹³

0.3 Psychosocial Disability and Other Types of Disability

For the purposes of clarity, it is useful also to distinguish certain other types of disability that may be confused with psychosocial disability. For example, some people have impairments related to the functioning of the brain, which do not result in a psychosocial disability. Neurological conditions, such as Parkinson’s disease or Chronic Fatigue Syndrome, can have a significant impact on an individual’s life, but are not psychosocial disabilities.

9 European Union Agency for Fundamental Rights (FRA), ‘The Legal Protection of Persons with Mental Health Problems under Non-Discrimination Law – Understanding Disability as Defined by Law and the Duty to Provide Reasonable Accommodation in European Union Member States’ (FRA 2011) 7.

10 E.g. In Sweden, the dominant terminology is ‘cognitive disabilities’. This extends to any condition that impacts upon brain function in areas such as learning skills or organizational skills (information supplied by national expert for this report).

11 E.g. para. 9, General Comment No. 1 (2014), ‘Article 12: Equal Recognition Before the Law’, Committee on the Rights of Persons with Disabilities, 11th session, CRPD/C/GC/1.

12 E.g. the World Network of Users and Survivors of Psychiatry: <http://wnusp.rafus.dk/> accessed 15 June 2016.

13 Longitudinal research in Ireland found that 60% of older adults with intellectual disabilities had been diagnosed with an emotional, nervous or psychiatric disorder at some point: N. Mulryan, E. Cleary, M. McCarron and P. McCallion, ‘Mental Health, Well-Being and Cognitive Function in Older Adults with an Intellectual Disability’ in E. Burke, P. McCallion and M. McCarron (eds), *Advancing Years, Different Challenges: Wave 2 IDS-TILDA. Findings on the Ageing of People with an Intellectual Disability*, p. 127: http://www.idstilda.tcd.ie/assets/pdf/Wave_2_Report_October_2014.pdf accessed 16 June 2016.

There are also neurodevelopmental conditions, such as autism, which can be distinguished from psychosocial disabilities. These conditions do not, *per se*, constitute psychological impairments. Nevertheless, research suggests a higher prevalence of certain mental health problems amongst those with autism, such as anxiety or obsessive compulsive disorder.¹⁴

In summary, psychosocial disability is a label that can helpfully clarify a focus upon those who encounter disabilities arising from, or in connection with, psychological impairments. Many individuals who encounter psychological impairments will experience other impairments, so the reality for individuals is frequently one of multiple disabilities that intersect with each other. The categories described above are not mutually exclusive and it is acknowledged that there continues to be debate around the appropriate classification of certain conditions.

0.4 Structure of the Report

This report examines the following topics:

1. The Employment Equality Directive and the UN Convention on the Rights of Persons with Disabilities: how are these instruments relevant to the protection of people with psychosocial disabilities?
2. The position of people with psychosocial disabilities in the labour market.
3. National definitions of disability in non-discrimination law and people with psychosocial disabilities.
4. Issues of stigma and disclosure in relation to people with psychosocial disabilities.
5. Reasonable accommodation and people with psychosocial disabilities.

The report includes an appendix with a table summarising the position in national law in the 28 Member States. The information provided in the report is based on questionnaires completed by national experts from the European network of legal experts in gender equality and non-discrimination, as well as desk research by the authors.

14 A Russell et al, 'The mental health of individuals referred for assessment of autism spectrum disorder in adulthood: A clinic report' (2016) 20 *Autism* 623.

1 The Employment Equality Directive and the UN Convention on the Rights of Persons with Disabilities: how are these instruments relevant to the protection of people with psychosocial disabilities regarding employment?

Both the EU Employment Equality Directive and the UN Convention on the Rights of Persons with Disabilities (CRPD) prohibit employment discrimination against persons with disabilities. The Convention also imposes a number of other obligations regarding the employment of persons with disabilities on States Parties. The Directive required all Member States to adopt national disability non-discrimination legislation. In most states no such legislation existed prior to the transposition of the Directive. The CRPD, which has been ratified by the EU itself as well as 27 of the 28 Member States,¹⁵ imposes further obligations regarding non-discrimination and employment and, as will be seen below, has already had a significant impact on the definition of disability used for the purposes of the Employment Equality Directive. This section of the report examines the relevance of these two instruments for the protection of persons with psychosocial disabilities in the field of employment. This section first examines the extent to which persons with psychosocial disabilities are protected by the CRPD and the Directive, before discussing the protection from discrimination and employment-related measures found in the two instruments.

1.1 Protection of people with psychosocial disabilities under the CRPD and the Employment Equality Directive

1.1.1 *The CRPD*

The CRPD seeks to ‘promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by *all* persons with disabilities’.¹⁶ The Convention does not define the concept of disability nor does it clearly delineate who falls within the group of ‘persons with disabilities’. Whilst the delegates negotiating the Convention were clearly of the view that it should reflect the social-contextual model of disability, recognising that disability results from the interaction between an impairment and environmentally created barriers, they explicitly rejected the idea of including a definition of disability in the text. Such a definition would be fixed, could become outdated and risked excluding individuals with certain impairments.¹⁷ Instead the Convention includes guidance on the concept of persons with disabilities in Article 1, which provides:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Stefan Trömel has argued that the purpose of Article 1 is not to provide a definition of disability, but ‘to define the group covered by the Convention’.¹⁸ The text is deliberately open-ended, so cannot be regarded as an exhaustive definition of the groups and individuals falling within the scope of the Convention. Trömel also notes that, whilst the International Disability Caucus (IDC), which was made up of international NGOs representing persons with disabilities and which participated in the negotiations leading to the Convention, argued in favour of the inclusion of a long and non-exhaustive list of impairments in the relevant text, the original proposal only referred to three impairment groups: ‘mental, physical and

15 At the time of writing Ireland has not ratified the CRPD.

16 Article 1. Emphasis added.

17 Stefan Trömel, A Personal Perspective on the Drafting History of the United Nations Convention on the Rights of Persons with Disabilities, in Gerard Quinn and Lisa Waddington (eds), *European Yearbook of Disability Law*, Vol. 1, Intersentia 2009, 115 at 121. See also Andrea Broderick, *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, 2015) at 77-79.

18 Ibid.

sensory'.¹⁹ In response, the IDC and others argued that the term 'mental' was no longer used and was grouping together people with very different kinds of disabilities. Ultimately the term 'intellectual' was added alongside 'mental', which 'makes it clear that also people with psychosocial disabilities are to be covered by national definitions of disability'.²⁰ The World Network of Users and Survivors of Psychiatry, a leading Disabled Persons' Organisation (DPO) agreed to the use of the term 'mental' in Article 1, but noted that it prefers to use the term 'psychosocial disability' and the CRPD Committee also uses the term psychosocial disability in its reports.²¹

In brief, according to Article 1, in order to be regarded as a person with a disability who falls within the scope of protection of the CRPD, an individual should have a long-term impairment. This impairment can be of various kinds, including 'mental', and the impairment, in interaction with various barriers, should hinder the person's participation in society on an equal basis with others. However, Article 1 does not provide for an exhaustive definition of persons with disabilities, and individuals not covered by the article could also be regarded as disabled for the purposes of the Convention. Whilst the Convention clearly addresses employment rights, and the Optional Protocol allows for individuals who feel their Convention rights have been breached to submit a complaint to the CRPD Committee in certain circumstances, the Committee has not considered any case (communication) concerning the employment rights of a person with a psychosocial disability, although cases concerning the employment rights of individuals with physical, sensory and intellectual disabilities have been considered.²²

1.1.2 The Employment Equality Directive²³

The Employment Equality Directive prohibits discrimination *inter alia* on the ground of disability, but provides no definition of disability or indeed any of the other protected grounds. This lacuna has been remedied by the Court of Justice of the EU (CJEU) which, in response to a series of preliminary references from national courts asking for guidance on the concept of disability, has developed a definition of disability for the purposes of the Directive. In the first case of this nature, *Chacón Navas*²⁴ (2006), the Court adopted a limited definition of disability which relied on the individual or medical model of disability. In that case the Court defined disability in the context of the Directive as 'a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life' (para. 43). It held that, for any limitation to be regarded as a 'disability', 'it must be probable that it will last for a long time' (para. 45). The Court stressed that for the purposes of the Directive, 'disability' was different from 'sickness' (para. 44), and there was nothing in the Directive 'to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness' (para. 44).

In *HK Danmark (Ring and Skouboe Werge)*²⁵ (2013) the Court had the opportunity, for the first time, to revisit this definition. The Court began by recalling that its judgment in *Chacón Navas* was decided before the EU became a party to the CRPD (para. 37). The Court then proceeded to refer to provisions in the Convention which elaborate on the concept of disability, including Article 1 (para. 37). In light of the Court's obligation under EU law to interpret the Employment Equality Directive in a manner which is

19 Ibid., at 122.

20 Ibid.

21 See further information in the introduction to this report.

22 The 'jurisprudence' of the CRPD Committee can be found at: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Jurisprudence.aspx> (last accessed 29 June 2016).

23 The text in this sub-section draws on Lisa Waddington, 'HK Danmark (Ring and Skouboe Werge), Interpreting EU Equality Law in Light of the UN Convention on the Rights of Persons with Disabilities', *European Anti-Discrimination Law Review*, Issue 17 November 2013, 11-21.

24 Case C-13/05 *Chacón Navas* [2006] ECR I-6467.

25 Joined Cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Jette Ring v. Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (Ring and Skouboe Werge)*, judgment of 11 April 2013.

consistent with the Convention, and drawing closely on Article 1 CRPD, the Court held that the concept of 'disability' must be understood as:

a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers. (para. 38).

The Court confirmed that the impairment must be 'long-term', once again referring to Article 1 CRPD (para. 39) and, following the advice of the Advocate General, held that a curable or incurable illness which led to the required degree of limitation on a long-term basis did fall within the concept of 'disability' within the meaning of the Directive (para. 41). It clarified its ruling in *Chacón Navas*, and stated that an illness which did not entail such a limitation was not covered by the concept of 'disability'.²⁶ The Court also stressed that a disability does 'not necessarily imply complete exclusion from work or professional life' (para. 43). The Court noted that a 'disability' must be understood as a 'hindrance' to the exercise of professional life, and a person with a disability who was only able to work part-time was capable of being covered by the concept (para. 44). The Court also held that there was no requirement that an individual require accommodation measures, such as the use of special equipment, in order to be regarded as disabled (para. 45). It noted that the Directive does provide an obligation to make a reasonable accommodation to disabled individuals, and stated that accommodation measures are 'therefore the consequence, not the constituent element, of the concept of disability' (para. 46).

The CJEU has subsequently repeated the definition of disability developed in *HK Danmark (Ring and Skouboe Werge)* in a number of cases, and the definition seems rather set. In the case of: *Z*²⁷ (2014) the Court had to consider whether a woman who had no uterus and who was unable to become pregnant was to be regarded as disabled, and therefore protected from disability discrimination under the Directive. The Court held: 'the concept of "disability" within the meaning of Directive 2000/78 presupposes that the limitation from which the person suffers, in interaction with various barriers, may hinder that person's full and effective participation in professional life on an equal basis with other workers'.²⁸ The Court then went on to agree with its Advocate General,²⁹ finding that:

the inability to have a child by conventional means does not in itself, in principle, prevent [Ms. Z] from having access to, participating in or advancing in employment. In the present case, it is not apparent from the order for reference that Ms Z's condition by itself made it impossible for her to carry out her work or constituted a hindrance to the exercise of her professional activity.³⁰

As a result, the Court found that Ms Z did not have a 'disability' within the meaning of the Directive.³¹

To date the Court has not been called upon to consider whether a person with a psychological impairment falls within the scope of Directive. Nevertheless, in light of the wording of the Court's definition and the influence of the CRPD, individuals with psychosocial disabilities are not excluded from protection from disability discrimination under the Directive. However, like other claimants, they have to meet the minimum requirements set out in the Court's definition for the CJEU to regard them as disabled.

26 In fact, the judgment states that 'an illness not entailing such a limitation is not covered by the concept of 'discrimination' within the meaning of Directive 2000/78'. Para. 42.

27 Case C-363/12 *Z. v. A Government department, The Board of management of a community school*, EU:C:2014:159.

28 *Ibid.*, para. 80.

29 See Opinion of Advocate General Wahl in Case C-363/12 *Z. v. A Government department, The Board of management of a community school*, para. 82-98.

30 Case C-363/12 *Z. v. A Government department, The Board of management of a community school*, para. 81.

31 *Ibid.*, para. 82.

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1.1.3 Conclusion on protection of persons with psychosocial disabilities under the CRPD and the Directive

The EU's conclusion (ratification) of the CRPD and Article 1 of that Convention have been determinant of the definition of disability developed by the CJEU for the purposes of the Employment Equality Directive. A person will qualify as disabled under that definition if they meet the following conditions:

- They have a limitation which results from *inter alia* a psychological impairment;
- The impairment is long-term;
- The impairment, in interaction with various barriers, hinders the participation of the person concerned in professional life on an equal basis with other workers.

Individuals with a psychosocial disability may face a number of challenges in establishing that they fall within the scope of this definition.

In order to be covered by the definition an individual must have a psychological impairment or mental health problem (illness). However, there is an ongoing debate within psychiatry and psychology on the exact diagnosis of mental illness. This means that medical documentation of an individual's condition may be more contentious than in comparison to some physical impairments. Moreover, since many psychosocial disabilities are invisible, the provision of medical evidence to establish the existence of a disability may be more important than is the case for people with (visible) physical or sensory disabilities.

Secondly, in order to be protected under the Directive an individual must have a (psychological) impairment which, in interaction with various barriers, impacts on their ability to work, and which is long-term. Some psychological impairments are fluctuating with periods of relatively good mental health interspersed with periods of significant impairment and illness. Moreover, the long-term effects and severity of psychological impairments, particularly in the early stages of the illness, can be difficult to predict. Given the fluctuating and unpredictable nature of many mental health conditions it may be difficult for individuals to establish that their condition is sufficiently long-term to qualify as a disability and therefore to benefit from protection under the Directive.

Some of these features of psychological impairments and psychosocial disabilities mean that individuals risk falling outside the legal definition of disability. This is particularly true if the definition adopted in national law focuses upon a 'medical' model of disability and requires evidence from doctors that it reaches a high level of severity or is of an ongoing or permanent nature. In contrast, the guidance on the concept of 'persons with disabilities', which includes persons with 'mental impairments' found in the UN Convention on the Rights of Persons with Disabilities is broader and, to some extent, this is reflected in the case law of the Court of Justice. Moreover, individuals may have a mental health condition which in itself may not result in / be regarded as a disability. Whilst such individuals could benefit from the kind of measures foreseen in the Employment Equality Directive, and particularly reasonable accommodations, they may not meet the 'threshold requirement' of having a long-term (psychosocial) impairment, and therefore be excluded from protection until (and if) their condition deteriorates and becomes a disability. Section 3 of this report examines national definitions of disability and discusses the extent to which psychosocial disabilities fall within the scope of those definitions.

1.2 Protection from employment discrimination and employment rights under the CRPD and the Employment Equality Directive

1.2.1 The CRPD

The CRPD addresses employment rights in Article 27. Before discussing the implications of this article, it is worth reflecting on how the Convention addresses the principles of equality and non-discrimination

generally.³² These principles run through the Convention like a red thread. They find their anchor in Article 3, which Gerard Quinn has described as providing the ‘moral compass for change’³³ which the Convention embraces. This article refers not only to non-discrimination and equality of opportunity, but to 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’ as meaning:

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.³⁴

The article goes on to define reasonable accommodation as meaning:

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.

The principles of equality and non-discrimination also receive specific attention in Article 5.³⁵ This article embraces both a formal approach to equality (‘equal before and under the law’),³⁶ and a more substantive approach (‘prohibit discrimination on the basis of disability’;³⁷ provision of ‘reasonable accommodation’;³⁸ and positive action measures³⁹ ‘shall not be considered discrimination’). States Parties are under an obligation to recognise and ensure protection of these rights. Elsewhere the Convention is ‘sprinkled’ liberally with references to non-discrimination, equality and reasonable accommodation.

Article 27 CRPD focuses specifically on work and employment. It provides:

States Parties recognise the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realisation of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation ...

32 The following paragraphs on the principles of equality and non-discrimination in the CRPD draw on L. Waddington, ‘Equal to the Task? Re-Examining EU Equality Law in Light of the United Nations Convention on the Rights of Persons with Disabilities’, in L. Waddington, G. Quinn and E. Flynn (eds.) *European Yearbook of Disability Law*, Volume 4, 2013, Intersentia, 169-200.

33 G. Quinn, ‘The UN Convention on the Human Rights of Persons with Disabilities’, 10 June 2007, paper on file with author, at 3.

34 For information on the drafting history of this article see: S. Trömel, ‘A Personal Perspective on the Drafting of the United Nations Convention on the Rights of Persons with Disabilities’, in G. Quinn and L. Waddington (eds.), 1 *European Yearbook of Disability Law*, (Intersentia, 2009) 115 at 122-124, and M. Schulze, *Understanding the UN Convention on the Rights of Persons with Disabilities A Handbook on the Human Rights of Persons with Disabilities*, (Handicap International September, 2009), available at: http://iddconsortium.net/sites/default/files/resources-tools/files/hi_crp_d_manual_sept2009_final.pdf at 34-36 (accessed 27 June 2016).

35 See J. Kumpuvuori and M. Scheinin, ‘Treating the Different One Differently – a Vehicle for Equality for Persons with Disabilities? Implications of Article 5 of the Convention on the Rights of Persons with Disabilities’, in J. Kumpuvuori and M. Scheinin (eds.), *United Nations Convention on the Rights of Persons with Disabilities, Multidisciplinary Perspectives*, (The Center for Human Rights of Persons with Disabilities (VIKE), Publications Series of VIKE No. 5, undated), 54.

36 Article 5(1).

37 Article 5(2).

38 Article 5(3).

39 The Convention 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).

The article goes on to set out eleven specific obligations including prohibiting discrimination on the basis of disability with regard to all matters concerning employment (a), protecting the right to just and favourable conditions of work (b), ensuring effective access to vocational training (d), promoting employment opportunities and career advancement (e) and ensuring reasonable accommodation (i). Anna Bruce argues that the aim of Article 27 is 'inclusion', and the focus of the article 'is on creating opportunities to work in the open labour market'.⁴⁰ In brief the article sets out a wide set of obligations, with non-discrimination and equality, including the right to reasonable accommodation, at its core.

1.2.2 The Employment Equality Directive

The Employment Equality Directive prohibits direct discrimination; indirect discrimination; harassment; and an instruction to discriminate and contains an obligation to make a reasonable accommodation.⁴¹ In the context of disability, direct discrimination is defined as occurring:

where one person is treated less favourably than another is, has been, or would be treated in a comparable situation on [the ground of disability].⁴²

Direct discrimination therefore involves adverse treatment that is directly related to the covered ground, *in casu* disability. Comparison is at the heart of the definition of direct discrimination under EU law, and a person who alleges direct discrimination must typically be compared to someone who does not have that characteristic and who experiences more favourable treatment.

The Directive defines indirect discrimination on the ground of disability as occurring when:

an apparently neutral provision, criterion or practice would put persons having ... a particular disability ... at a particular disadvantage compared with other persons unless:

- (i) that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary, or
- (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 [reasonable accommodation] in order to eliminate disadvantages entailed by such provision, criterion or practice.⁴³

Indirect discrimination involves an apparently neutral provision, criterion or practice. The condition of neutrality is met where the measure in question makes no explicit reference to disability. However, where that measure is more likely to lead to a disadvantage for persons with disabilities, or for persons with particular forms of disability, it will be *prima facie* discriminatory. For example, a requirement that all employees are able to drive will be more difficult, or impossible, to comply with for persons with certain psychosocial disabilities than for other persons. This is because it is not safe for individuals to drive if they are taking certain medication to treat psychological impairments. Such measures can nevertheless be permitted, and therefore not amount to indirect discrimination, if they are 'objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'. This is a cumulative requirement, involving an aim which is legitimate, as well as a demonstration that the means of achieving the aim are both appropriate and necessary. Moreover, under the Directive a measure which indirectly discriminates against a disabled person will also be justified if the employer or other covered party

40 A. Bruce, Which Entitlements and for Whom? The Convention on the Rights of Persons with Disabilities and its Ideological Antecedents, Lund University, 2014, Ph.D. thesis, at 203 and 204.

41 Some of the following paragraphs on the Employment Equality Directive draw on L. Waddington, 'Equal to the Task? Re-Examining EU Equality Law in Light of the United Nations Convention on the Rights of Persons with Disabilities', in L. Waddington, G. Quinn and E. Flynn (eds.) *European Yearbook of Disability Law*, Volume 4, 2013, Intersentia, 169-200.

42 Article 2(2)(a).

43 Article 2(2)(b).

provides the affected disabled persons with a reasonable accommodation, and thereby removes the disadvantage for those individuals.

The third form of discrimination which is prohibited under the Employment Equality Directive is harassment. This occurs:

where unwanted conduct related to [the ground of disability] takes place with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.⁴⁴

The conduct in question can take many forms, and include words, actions or pictures. Unlike direct and indirect discrimination, no comparator is needed to establish that harassment has occurred.

Lastly, the Employment Equality Directive prohibits an 'instruction to discriminate against persons [on the ground of disability]'.⁴⁵

The Employment Equality Directive also imposes a requirement on Member States to establish an obligation to make reasonable accommodations to meet the needs of disabled individuals, unless this would amount to a disproportionate burden. This obligation is found in Article 5. The article provides:

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 provide training for such a person, unless such measures would impose a disproportionate burden on the employer. When this burden is, to a sufficient extent, remedied by existing measures as an element of disability policy in the Member State, it should not be considered disproportionate.

Recital 20 of the preamble to the Directive provides further guidance on what is meant by 'appropriate measures' in the context of reasonable accommodation. The recital states:

Appropriate 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.

In *HK Danmark (Ring and Skouboe Werge)* the Court found that the concept of reasonable accommodation 'must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers' (para. 54). In light of this, and noting that the list of accommodation measures in recital 20 of the Directive is not exhaustive (para. 56), the Court found that both the Directive and CRPD 'envisage not only material but also organisational measures' (para. 55). The Court found that, in that case, a reduction in working time could be a form of reasonable accommodation, even though it was not explicitly mentioned in recital 20.

In that case the Court also found that the Directive not only requires that employers are obliged to make a reasonable accommodation, but also that employers are estopped from relying on their own failure to make an accommodation to justify other forms of adverse treatment. This means *inter alia* that an employer cannot dismiss a worker who is absent from work because the employer has failed to make the necessary reasonable accommodation which would have enabled the worker to continue working.

44 Article 2(3).

45 Article 2(4).

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The Court found that in such cases ‘the absences of a worker with a disability are attributable to the employer’s failure to act, not to the worker’s disability’ (para. 66).

Lastly, it is worth noting that, while Article 5 clearly establishes the duty to make a reasonable accommodation, and specifies that this is necessary ‘in order to guarantee compliance with the principle of equal treatment’, it does not state that failure to comply with the duty amounts to a form of discrimination. This can be contrasted with the Convention, which clearly specifies, in Article 2, that denial of a reasonable accommodation amounts to discrimination.

1.2.3 Conclusion on employment rights under the CRPD and the Directive

Both the Directive and the CRPD provide for strong protection from disability discrimination in the field of employment and vocational training. The CRPD prohibits discrimination on the basis of disability ‘with regard to all matters concerning all forms of employment’,⁴⁶ whilst the Directive explicitly prohibits direct and indirect discrimination, harassment and instructions to discriminate. Both instruments also explicitly require that reasonable accommodations are made for individuals with a disability. The CRPD goes beyond a prohibition of discrimination and obliges States Parties to take further steps to promote the right of persons with disabilities to work on an equal basis with others.

46 Article 27 (1).

2 The situation of people with psychosocial disabilities in the labour market

This section of the report aims to provide more information on the experience of persons with psychosocial disabilities in the labour market. It reviews international and European data in order to form a better picture of the prevalence of mental health problems amongst workers and the impact that these can have on working lives. It identifies evidence of the steps that employers are taking to respond to this challenge, including the provision of reasonable accommodation to meet the needs of individual workers.

As discussed in the introduction to this report, 'psychosocial' disability is an evolving way of referring to those disabilities stemming from mental health problems. National systems for data collection on persons with disabilities may be wider (e.g. including also persons with intellectual disabilities) or narrower (e.g. focusing on specific conditions, such as depression or anxiety). It is, therefore, not possible at this point in time to provide definitive statistics for the EU on the numbers of persons affected by psychosocial disabilities or their position in the labour market. Nevertheless, there is evidence that data collection has been increasing and this is yielding insights into the extensive nature of mental health problems amongst the EU workforce.

Another constraint when approaching the existing data is the boundary between mental health problems and psychosocial disability. As explained in the previous section, the definition of disability found in the Employment Equality Directive, and as elaborated by the CJEU, implies that not all mental health problems will constitute disabilities for the purposes of the Directive. This may be particularly significant when approaching data on the prevalence of stress amongst workers. Stress is a common phenomenon, but it does not always imply ill-health; for example, the stress of meeting a short-term work deadline.⁴⁷ In contrast, prolonged work-related stress may give rise to health problems constituting a disability for the purposes of non-discrimination law.⁴⁸

The difficulty of identifying when a mental health problem crosses the threshold into a psychosocial disability (for legal purposes) is also compounded by some of the uncertainties that continue to exist within psychiatry and psychology as to what should be defined as a mental health problem or disorder. This debate often surrounds the distinction between what might be described as 'ordinary' human experiences of distress or sadness, and those regarded as a mental health problem or illness. The most prominent points of reference for diagnosis within psychiatry are the WHO's International Classification of Diseases (ICD)⁴⁹ and the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM).⁵⁰ The parameters of mental/behavioural disorder within these classifications have, though, changed over time, drawing criticism from some commentators in relation to their expansion.⁵¹ As Kelly remarks, 'the evolution of the concept of "mental disorder" has been, and remains, a highly contested process'.⁵² Being cognisant of the debates within the scientific community, and amongst those persons who use mental health services, means that we should approach the categories used within data collection surveys with some caution, particularly in a comparative context where approaches to diagnosis or self-perception may differ. One reflection of this diversity in approach is the wide range of terminology used to describe psychological impairments or psychosocial disabilities. In the interests of accurate communication of the original source, this section of the report normally seeks to use the terminology found in the data collection exercise being cited (e.g. mental disorder, mental illness, mental health problem, etc.).

47 A. Broughton, 'Work-Related Stress' (European Foundation for the Improvement of Living and Working Conditions 2010) 5.

48 Ibid 5-6.

49 WHO, 'International Statistical Classification of Diseases and Related Health Problems' 10th Revision: <http://apps.who.int/classifications/icd10/browse/2015/en> accessed 11 July 2016. Chapter V covers 'mental and behavioural disorders'.

50 The fifth edition (DSM-5) was published in 2013. See further: <http://www.dsm5.org/Pages/Default.aspx> accessed 11 June 2016.

51 J. Cromby, D. Harper, and P. Reavey, *Psychology, Mental Health and Distress* (Palgrave Macmillan 2013) 5.

52 B. Kelly, *Dignity, Mental Health and Human Rights: Coercion and the Law* (Ashgate 2015) 7.

2.1 The prevalence of mental health problems amongst workers

There has been growing international attention to the impact of mental health problems amongst the workforce. In particular, the Organisation for Economic Cooperation and Development (OECD) has been undertaking comparative research into this phenomenon. It found that mental disorders were widespread in many industrialised economies, albeit that prevalence rates vary across states (See Table 1).

Table 1: Prevalence of mental disorders amongst the working age population (%) (OECD 2011)⁵³

Country	Men	Women
Australia	17.4	24.1
Austria	16.9	23.0
Belgium	16.9	22.8
Denmark	16.1	23.5
Netherlands	14.6	26.2
Norway	28.5	40.8
Sweden	14.1	23.6
UK	18.9	25.4
USA	22.6	27.7

National data are not entirely comparable due to differences in methodology, but the OECD's conclusion was that typically 5% of the working age population have a 'severe' mental disorder, while 15% have a 'moderate' mental disorder.⁵⁴ The OECD research was based on conditions that would reach the threshold for clinical diagnosis as a 'mental disorder' according to the international classification systems mentioned above. Examples of severe mental disorders included: schizophrenia; psychotic disorders; bipolar disorders; and severe forms of depression, personality disorder or substance abuse. Moderate mental disorders could include less severe forms of depression or anxiety. Notably, the data presented in Table 1 indicates a higher rate of prevalence amongst women compared to men. This was also found in **French** research on those between the ages of 30 and 55 in employment. 12% of women and 6% of men reported that they had either episodes of depression or generalised anxiety disorder.⁵⁵ In **Slovenia**, women are more likely than men to take sick leave due to mental health problems; this may, however, indicate a greater willingness of women to seek assistance when such problems occur.⁵⁶ OECD data also reveals that people with low educational achievement were consistently over-represented amongst those with mental disorders.⁵⁷

Data gathered by the EU also suggests that mental health problems are widespread amongst workers. The 2010 European Working Conditions Survey reported that 22% of women and 19% of men experienced poor mental well-being.⁵⁸ More than one in five workers said that they were stressed at work always or most of the time.⁵⁹ Data gathered by the EU Labour Force Survey found that the most common source of work-related ill-health is musculo-skeletal disorders (60%), but the second highest category was 'stress, depression, anxiety' (16%). Notably, the proportion of respondents identifying these mental health problems as work-related varied widely across the Member States (See Table 2). Although musculo-skeletal disorders are a more common source of work-related ill-health, research conducted in 2007

53 OECD, 'Sick on the Job? Myths and Realities about Mental Health and Work' (OECD 2011) 25. Background data available at: <http://www.oecd.org/els/mental-health-and-work-9789264124523-en.htm> accessed 9 August 2016.

54 Ibid 20.

55 T. Barnay and E. Defebvre, 'Troubles mentaux: quelles conséquences sur le maintien dans l'emploi?' DREES, Études et résultats No. 885, July 2014, p. 3: <http://drees.social-sante.gouv.fr/IMG/pdf/er885.pdf> accessed 1 July 2016.

56 H. Jeriček Klanšček, M. Zorko, M. Bajt, S. Roškar, 'Duševno Zdravje v Sloveniji' [Mental Health in Slovenia] (National Public Health Institute of the Republic of Slovenia 2009), p. 53 http://www.nijz.si/sites/www.nijz.si/files/datoteke/dusevno_zdravje_publikacija.pdf accessed 1 July 2016.

57 OECD, 'Sick on the Job? Myths and Realities about Mental Health and Work' (OECD 2011) 26.

58 Eurofound and EU-OSHA, 'Psychosocial Risks in Europe: Prevalence and Strategies for Prevention' (Publications Office of the European Union 2014) 35.

59 Ibid.

found that stress, depression or anxiety gave rise to longer periods of sickness absence. 32.2% of those with stress, depression or anxiety had been off work for over one month in the past year, while the figure was 25.3% for those with back problems.⁶⁰ In addition to those who actually experience ill-health, the data reveals that around one-third of workers reported that they had been exposed at work to factors affecting their mental well-being in the past 12 months. Of these, 82.5% cited time pressure or overload of work as a main factor, with lower figures for harassment or bullying (9.7%) and violence or threat of violence (7.8%).⁶¹

In keeping with the OECD data, the evidence suggests that those with severe mental health problems constitute a smaller proportion of the workforce. In 2011, 1.4% of those in the EU between the ages of 15 and 64 reported 'chronic depression'.⁶²

Table 2: Percentage of persons reporting 'stress, depression, anxiety' amongst those experiencing a work-related health problem (2013)⁶³

EU (28 Member States)	15.9
Austria	12.9
Belgium	24.1
Bulgaria	10.3
Croatia	14.9*
Cyprus	3.6*
Czech Republic	8.7
Denmark	26.7
Estonia	5.8*
Finland	7.3
France	21.0
Germany	8.5
Greece	11.2
Hungary	6.2
Ireland	31.4
Italy	15.3
Latvia	12.3
Lithuania	12.8*
Luxembourg	23.7
Malta	N/A
Netherlands	N/A
Poland	5.7
Portugal	23.2
Romania	4.3*
Slovenia	18.7
Slovakia	4.7
Spain	15.2
Sweden	31.4
UK	41.8

* data with low reliability

60 A Venema, S van den Heuvel and G Geuskens, 'Health and Safety at Work. Results of the Labour Force Survey 2007 ad hoc module on accidents at work and work-related health problems' (TNO 2009) 66.

61 Ibid 82.

62 EU Labour Force Survey, 'Employment of Disabled People' (2011). See: 'Prevalence of the main longstanding health problems by sex and age' (hlth_dp030): <http://ec.europa.eu/eurostat/web/health/disability/data/database> accessed 8 July 2016.

63 EU Labour Force Survey, 'Accidents at Work and Other Work-Related Health Problems' (2013) lfs0_13: available at: <http://ec.europa.eu/eurostat/web/lfs/data/database> accessed 17 May 2016. See Table hsw_pb5: 'Persons reporting a work-related health problem by sex, age and type of problem'.

In 2014, Eurobarometer conducted a survey on working conditions in the Member States.⁶⁴ When asked to identify the main health and safety risks in their workplace, 53% of respondents selected 'exposure to stress'.⁶⁵ This was the most common response, significantly ahead of other health and safety risks.⁶⁶ Respondents were also asked whether, in the past twelve months, they had experienced any health problems that were either caused by or made worse by their work. Stress, depression or anxiety were cited by 27% of respondents in the EU.⁶⁷ In 18 Member States, this was the most common form of health problem caused by or made worse by work. Particularly high results were recorded in **Sweden** (47%), **Greece** (38%) and **Latvia** (37%).

2.2 The impact of mental health problems on workers

The WHO has identified the following as the main areas where mental health problems can have a consequence in the workplace:

- absenteeism;
- work performance;
- staff attitude and behaviour;
- relationships at work.⁶⁸

A range of data indicates that experiencing mental health problems is associated with sickness absence. For example, the OECD's data on 21 European countries found that, in the previous four week period, 19% of workers without a mental disorder had lost time to sickness absence. The rate for those with moderate mental disorders was 28%, rising to 42% for those with severe disorders.⁶⁹ Research on workers in Europe indicates that 10% have taken time off for depression; on average 36 days were lost to each episode of depression.⁷⁰ Research for a Special Eurobarometer on Mental Health in 2010 concluded:

We have seen that about one in seven EU citizens (15%) have sought help for a psychological or emotional problem in the past 12 months and 7% have admitted to taking antidepressants in the past 12 months. Employees who have sought help and who have taken antidepressants tend to take two to three more days absent from work than the average employee.⁷¹

In some countries, mental health problems are the leading cause of sickness absence from work. For example, in the **UK**, data from general medical practitioners indicate that, between 2012 and 2014, 60% of certified days of sickness absence were due to mental ill-health.⁷² In the **Netherlands**, 'psychosocial risks at work are estimated to cost €2.7 billion, about 58% of all work-related costs of absenteeism'.⁷³ Although mental health problems frequently lead to absence from work, they have also been associated with the phenomenon of *presenteeism*; this arises where individuals continue to work despite ill-health, with negative impacts upon productivity.⁷⁴ As discussed later in this report, stigma exercises a major

64 TNS Political & Social, 'Working Conditions' Flash Eurobarometer 398 (European Union 2014).

65 Ibid 70.

66 The second most common response was 'repetitive movements or tiring or painful positions' cited by 28% of respondents (ibid).

67 Ibid 72.

68 G. Harnois and P. Gabriel, 'Mental Health and Work: Impact, Issues and Good Practices' (WHO 2002) 8-9.

69 OECD, 'Sick on the Job? Myths and Realities about Mental Health and Work' (OECD 2011) 73.

70 HR Leadership Forum to Target Depression in the Workplace, 'Depression in the Workplace in Europe: A Report Featuring New Insights from Business Leaders', 3: <http://targetdepression.com> accessed 30 June 2016.

71 TNS Opinion & Social, 'Mental Health', Special Eurobarometer 345 (European Union 2010) 64.

72 Health and Safety Executive (HSE), 'THORGP01-Ill-health: number of diagnoses and associated sickness absence by diagnostic category, 3 year average': <http://www.hse.gov.uk/Statistics/tables/index.htm#thor> accessed 12 July 2016.

73 European Observatory of Working Life, 'Psychosocial Work Environment: Health and Well-Being at Work' Q2 2014 – Q1 2015: <http://www.eurofound.europa.eu/observatories/eurwork/articles/working-conditions/psychosocial-work-environment-health-and-well-being-at-work-q2-2014-q1-2015-eurwork-topical-update> accessed 8 July 2016.

74 HR Leadership Forum to Target Depression in the Workplace, 'Depression in the Workplace in Europe: A Report Featuring New Insights from Business Leaders', 3: <http://targetdepression.com> accessed 30 June 2016.

influence on how individuals respond to encountering mental health problems. Many are reluctant to disclose this to their employer due to the risk of facing discrimination as a result. For instance, a survey of over 1,000 employees in a **Danish** pharmaceutical firm found that 47% of employees who had experienced psychological difficulties did not tell their supervisor.⁷⁵ In order to avoid disclosure, employees may continue attending work, but their ability to do their job may be negatively affected by mental ill-health.

Ultimately, mental health problems can result in workers losing their jobs. This may be due to extended sickness absence, negative impacts on their performance at work, or – as discussed later – because of discrimination by employers and/or colleagues. For example, research in **France** compared the employment situation of workers over a four year period, according to state of health. In general, over 90% of workers remained in employment between 2006 and 2010, but the figures were lower amongst those with mental health problems. In particular, only 79% of men with generalised anxiety disorder were still in employment, whereas the average figure for men was 93%.⁷⁶

Data often shows that those with mental health problems are more likely to be unemployed or economically inactive (i.e. no longer seeking employment). The OECD's research found that:

people with SMD [severe mental disorders] are typically 6-7 times more likely to be unemployed than people with no such disorder, and those with CMD [common mental disorders] 2-3 times.⁷⁷

Other data from the Member States confirms the picture of lower employment participation rates for people with mental health problems:

- In **Denmark**, data suggests that only one in four persons with a mental health problem are employed.⁷⁸ Moreover, those with mental health problems work less hours per week than the average for people with disabilities.⁷⁹
- In **Estonia**, the 2011 Labour Force Survey found lower rates of employment participation and higher unemployment rates amongst those with psychosocial and intellectual impairments.⁸⁰
- In **Hungary**, the employment rate of those with 'altered labour suitability' was 18.1% compared to 60.8% for those 'without altered labour suitability'.⁸¹ It is estimated that around one-third of those with 'altered labour suitability' have mental and psychosocial disabilities.⁸²
- In **Ireland**, the 2011 census reported that 78% of men and 64% of women were participating in the labour market. Yet for those with a psychological or emotional condition, labour market participation rates were 49% of men and 39% of women.⁸³
- In **Poland**, research found that only 17% of those with mental impairments (i.e. psychosocial disabilities) were currently in employment and 37% had never worked.⁸⁴

75 Ibid 5.

76 T. Barnay and E. Defebvre, 'Troubles mentaux: quelles conséquences sur le maintien dans l'emploi?' DREES, Études et résultats No. 885, July 2014, pp 4-5: <http://drees.social-sante.gouv.fr/IMG/pdf/er885.pdf> accessed 1 July 2016.

77 OECD, 'Sick on the Job? Myths and Realities about Mental Health and Work' (OECD 2011) 12.

78 M. Rode Larsen and J. Høgelund, 'Handicap og Beskæftigelse – Udviklingen mellem 2002 og 2014' (SFI 2015): <http://www.sfi.dk/publikationer/handicap-og-beskaeftigelse-udviklingen-mellem-2002-og-2014-3068/> accessed 1 July 2016.

79 23 hours compared to 30 hours; *ibid*.

80 V. Veldre, M. Masso, and L. Osila, 'Vaimse tervise häirega inimesed tööturul' (Praxis 2015) p.16: https://www.sm.ee/sites/default/files/content-editors/Ministeerium_kontaktid/Uuringu_ja_analuusid/Toovaldkond/tp_f-too_loppraport_praxis_v_1505.pdf accessed 1 July 2016.

81 Központi Statisztikai Hivatal, 'Megváltozott munkaképességűek a munkaerőpiacon, 2011' [Persons with altered labour suitability on the labour market, 2011] (2012): <http://www.ksh.hu/docs/hun/xftp/idoszaki/pdf/megvaltmunkakep.pdf> accessed on 18 May 2016.

82 Z. Nagy, D. Bari, B. Borza, I. Forra, Á. Pakot, O. Prókai, A. Sörös, N. Szabó, A. Szerepi, 'Helyzetfeltárás az „Átvezetés módszertanához” [Mapping exercise for the 'Methodology of leading through'] (2014) p. 87, available at: http://revprojekt.hu/ckfinder/userfiles/files/helyzetfeltaras_atvezetes%20modszertanhoz.pdf accessed 19 May 2016.

83 Central Statistics Office, 'Profile 8. Our Bill of Health' (2012) 14.

84 Rzecznik Praw Obywatelskich, 'Zasada równego traktowania. Prawo i praktyka. Wsparcie osób chorujących psychicznie na rynku pracy. Analiza i zalecenia' [The principle of equal treatment – law and practice. Support for people with mental

- In **Spain**, the employment rate of all persons with disabilities is 25.7%, but it is 15.8% for those with psychosocial disabilities.⁸⁵

A key risk is that a period of unemployment consolidates into reliance on social welfare payments and a complete exit from the labour market. The OECD found a significant increase in the proportion of persons being awarded disability benefits due to mental health problems. This was 15-25% of those receiving disability benefits in the mid-1990s, but had risen to 30-50% by 2010.⁸⁶ In **Austria**, psychosocial disabilities are reported to be the leading cause of early retirement for white collar workers, while in **Denmark** 18.9% of early retirements are attributed to work-related stress.⁸⁷ In **Belgium**, the scale of this challenge has been recognised by the creation of a job integration scheme specifically directed towards those with a ‘medical, mental, psychic or psychiatric’ impairment.⁸⁸

Evidence also suggests that it is very difficult to reverse this transition and to return someone to labour market activity.⁸⁹ This has obvious consequences in terms of additional pressure on public finances, but it is also likely to be negative for individual health in many cases:

Employment provides much more than income; it can provide a sense of dignity and purpose, along with opportunities to interact with others, develop social support networks, acquire skills and be useful. All of these boost confidence and self-esteem. It is not surprising therefore, that being out of work is associated with poor mental health.⁹⁰

While there is a strong argument in favour of taking steps to keep people in employment or to enable their return to work after a period of sickness absence, it must also be acknowledged that the nature and quality of work is connected to the impact on a person’s mental health. Some forms of working conditions may be detrimental to health, so it would be wrong to assume that being in *any* form of employment is preferable. In the field of occupational safety and health, there is an extensive body of literature examining psychosocial risks to workers’ health.⁹¹ This indicates that mental health problems are frequently connected to experiences in the workplace. Cottini and Lucifora conducted analysis of the results of the European Working Conditions Survey over the period 1995 to 2005. They found that ‘approximately one-third of workers report at least one mental health problem connected to their jobs’.⁹² The most commonly reported problems were stress (26%); irritability (11%); sleeping problems (8%); and anxiety (7%).⁹³ Job demands were identified as a key factor influencing workers’ mental health, such as working at a high pace, being overcommitted, or performing long working hours.⁹⁴ Research also indicates that work-related stress is linked to organisational change, poor relations in the workplace and job insecurity.⁹⁵ Such data provide a reminder that the quality of the working environment (in its broadest sense) is a key variable when exploring how persons with psychosocial disabilities can be retained in employment.

impairments in the labour market. Analysis and recommendations] (2014) pp 5-6: https://www.rpo.gov.pl/sites/default/files/Wsparcie_osob.pdf accessed 1 July 2016

85 Data derived from resources available at: INE, ‘El empleo de las personas con discapacidad’ (2014): http://www.ine.es/dyngs/INEbase/es/operacion.htm?c=Estadistica_C&cid=1254736055502&menu=ultiDatos&idp=1254735976595 accessed 1 July 2016.

86 OECD, ‘Sick on the Job? Myths and Realities about Mental Health and Work’ (OECD 2011) 132.

87 A. Broughton, ‘Work-Related Stress’ (European Foundation for the Improvement of Living and Working Conditions 2010) 22.

88 See further, V. De Greef, ‘La catégorie des chômeurs MM PP, boîte aux trésors ou boîte de Pandore ?’ (2015) 10 *Pauvreté, Trimestriel du Forum bruxellois de lutte contre la pauvreté*: http://www.fblp.be/IMG/pdf/fblp-pauve_rite_-10-web.pdf accessed 9 August 2015.

89 OECD, ‘Sickness, Disability and Work: Breaking the Barriers. A Synthesis of Findings Across OECD Countries’ (OECD 2010) 67.

90 The Expert Group on Mental Health Policy, ‘A Vision for Change?’ (The Stationery Office 2006) 38.

91 See further: Eurofound and EU-OSHA, ‘Psychosocial Risks in Europe: Prevalence and Strategies for Prevention’ (Publications Office of the European Union 2014).

92 E. Cottini and C. Lucifora, ‘Mental Health and Working Conditions in Europe’ (2013) 66 *ILR Review – Journal of Work and Policy* 958, 964.

93 Ibid 965.

94 Ibid 967-969.

95 A. Broughton, ‘Work-Related Stress’ (European Foundation for the Improvement of Living and Working Conditions 2010) 15-17.

2.3 Discrimination in the labour market

Insofar as public bodies have gathered data on the labour market experiences of persons with mental health problems, this has mostly been addressed towards rates of labour market activity and statistics relating to temporary or long-term absence from work. In contrast, there is relatively little data on the role that discrimination plays in creating barriers to finding and remaining in employment. There are, though, academic studies that indicate discrimination is perceived by persons with psychosocial disabilities to be common. Much of the existing research has focused on the concept of *stigma* rather than *discrimination*. Stigma, and the national measures adopted in response, will be explored later in section 4 of this report. Frequently, the concept of stigma is associated with negative public attitudes towards persons with mental health problems, as well as the self-perception of such individuals. Critics have, though, argued that this is a narrow outlook and it can distract attention from actual treatment experienced by persons with mental health problems in the labour market, such as being refused a job or being dismissed from a job.⁹⁶ As a concept, *discrimination* tends to focus less on personal attitudes and more on specific forms of behaviour. It also embraces shortcomings in the organisation of the working environment, such as failure to provide reasonable accommodation.

Most studies on discrimination are confined to a single country. In 2009, however, the results were published of a study of 732 people with a clinical diagnosis of schizophrenia; participants were based in 27 countries, including 18 in the EU.⁹⁷ 29% of respondents said that they had experienced disadvantage in finding a job or keeping a job because of their 'diagnosis of mental illness'.⁹⁸ Moreover, 42% anticipated that they would encounter 'a lot' of discrimination in applying for work, training or education.⁹⁹ Despite the variety of countries included in the study, the researchers concluded that 'rates of experienced discrimination are high and consistent across countries'.¹⁰⁰

Studies at national level also provide evidence of discrimination. In **Denmark**, research involving interviews with 1269 persons found that 9 out of 10 had experienced discrimination due to their mental illness.¹⁰¹ In the **UK**, 3579 persons who had received a mental health diagnosis and support from specialist mental health services were interviewed.¹⁰² In 2011, 18.6% reported experiencing discrimination in finding a job, while 16.6% reported discrimination in keeping a job.¹⁰³ The anticipation of discrimination was a key concern for participants; 72% concealed their mental health status to some extent.¹⁰⁴ In Ireland, 306 people were interviewed in a study of those who experience, or who had experienced, mental health problems.¹⁰⁵ 36% said that they had been treated unfairly in finding a job, while 43% reported unfair treatment in keeping a job.¹⁰⁶ Some of the quotations from participants provide a graphic illustration of the kinds of discrimination encountered:

Staff found out I was bi-polar and started to ignore me and to call me retard and rehab man. I complained to the manager, nothing was done. I left after that.

96 L. Sayce, 'Stigma, Discrimination and Social Exclusion: What's in a Word?' (1998) *Journal of Mental Health* 331, 333.

97 G. Thornicroft, E. Brohan, D. Rose, N. Sartorius, and M. Leese, 'Global Pattern of Experienced and Anticipated Discrimination Against People with Schizophrenia: A Cross-Sectional Survey' (2009) 373 *The Lancet* 408.

98 Ibid 410.

99 Ibid 411.

100 Ibid 414.

101 P. Skovbo Rasmussen and P. Ejbye-Ernst, 'Oplevet diskrimination og stigmatisering blandt mennesker med psykisk sygdom' (KORA 2015).

102 E. Corker, S. Hamilton, C. Henderson, C. Weeks, V. Pinfold, D. Rose, P. Williams, C. Flach, V. Gill, E. Lewis-Holmes and G. Thornicroft, 'Experiences of Discrimination Among People Using Mental Health Services in England 2008-2011' (2013) 202 *The British Journal of Psychiatry* s58.

103 Ibid s61.

104 Ibid.

105 L. Mac Gabhann, R. Lakeman, P. McGowan, M. Parkinson, M. Redmond, I. Sibitz, C. Stevenson, and J. Walsh, 'Hear My Voice: The Experience of Discrimination of People with Mental Health Problems in Ireland' (Dublin City University 2010) 16.

106 Ibid 50-51.

I was told when I applied for my job as a teacher that the stress would kill me because I had been mentally ill.¹⁰⁷

In **Belgium**, wide-ranging research on diversity in the labour market concluded that employers were reluctant to hire persons with mental health problems.¹⁰⁸

2.4 Actions by employers to support persons with psychosocial disabilities

The data cited above on the prevalence of person with psychosocial disabilities in the labour market indicate that most employers are likely to have workers who experience mental health problems. Research is beginning to offer examples of innovative responses by companies that go beyond merely reacting on a case-by-case basis. In the telecommunications sector, employers and trade unions produced 'good practice guidelines' to improve workers' mental well-being.¹⁰⁹ These identify the need for companies to address measures to the workforce as a whole (e.g. managing workloads, implementing change in a fair manner), as well as responding to the needs of workers with mental health problems (e.g. providing counselling, phased return to work from absence). In a similar vein, 'Target Depression in the Workplace' brings together European businesses to provide advice on how to respond effectively to workers with depression.¹¹⁰ It has developed a Business Charter of key principles for managing depression, emphasising the need for an open and supportive environment where workers can seek assistance.

Research indicates that reasonable accommodation plays a key role where a worker has a psychosocial disability. McDowell and Fossey conducted a survey of empirical research on 'workplace accommodations for people with mental illness'.¹¹¹ The most common adjustments reported were:

- assistance from an employment support worker (either during recruitment or employment);
- flexible working time (including reduced hours);
- modified training and supervision;
- modified job duties;
- physical accommodations to the workplace (e.g. quieter work space).¹¹²

Existing literature suggested that those with psychosocial disabilities had greater difficulty obtaining accommodations than those with physical disabilities.¹¹³ Most accommodations provided had no direct cost, but there was no evidence of quantification of any indirect costs to the employer.¹¹⁴

A study in **Sweden** tracked the progress of a cohort of persons on sick leave, including over 300 participants with 'mental disorders'.¹¹⁵ This concluded that the best results in terms of improving working ability occurred where work-related interventions (i.e. accommodations) were combined with support outside the workplace (e.g. clinical rehabilitation). The most common work-related interventions were adjustments to the working environment; adaptation of working hours; and rehabilitation.

107 Ibid.

108 Centre pour l'égalité des chances et la lutte contre le racisme, 'Baromètre de la diversité: emploi' (2012) 125: http://unia.be/files/legacy/le_barometre_de_la_diversite_emploi.pdf accessed 8 July 2016.

109 ETNO and UNI Europa, 'Good Work, Good Health' (2010): <https://www.etno.eu/datas/publications/studies/etno-goodpracticeguidelines-en.pdf> accessed 11 July 2016.

110 <http://targetdepression.com> accessed 11 July 2016.

111 C. McDowell and E. Fossey, 'Workplace Accommodations for People with Mental Illness: A Scoping Review' (2015) 25 *Journal of Occupational Rehabilitation* 197.

112 Ibid 199.

113 Ibid 200.

114 Ibid.

115 C. Wählin, K. Ekberg, J. Persson, L. Bernfort, B. Öberg, 'Evaluation of Self-reported Work Ability and Usefulness of Interventions Among Sick-Listed Patients' (2013) 23 *Journal of Occupational Rehabilitation* 32.

In the **UK**, research involving 500 senior managers/directors found that 44% were currently employing people with mental health problems.¹¹⁶ A large majority had already provided accommodations for employees with mental health problems. 86% of the senior managers/directors had reduced workload/working hours; 80% had made adjustments to the job role; 71% had provided access to counselling.¹¹⁷ Notably, the experience of these respondents in providing accommodations appeared to affirm their belief in the potential for recovery by workers. Only 8% agreed with the statement 'employees who have been off work with a mental illness for more than a few weeks are unlikely to ever fully recover'.¹¹⁸ From the standpoint of workers, research has also indicated support for the utility of workplace accommodations. A survey of over 2000 staff in higher education who had experienced mental health difficulties found that 74% of those who received workplace adjustments found these positive or very positive.¹¹⁹ Amongst the examples given, one respondent cited the following:

Flexible hours where necessary to allow me to attend medical appointments and also to allow me to avoid the worst of the peak rush hour bus journeys (these left me very stressed and led to panic attacks at times) by coming into work slightly later and leaving slightly later (ten to six instead of nine to five).¹²⁰

2.5 Conclusion on person with psychosocial disabilities and the labour market

This section has examined the position of persons with psychosocial disabilities within the labour market. The combination of debate over how we categorise mental health problems and the limited comparative research in this field means that it is difficult to provide a precise statistical portrait of the labour market position of those with psychosocial disabilities across the Member States. Nevertheless, there is sufficient data to indicate that such persons typically have significantly lower rates of labour market activity than those without disabilities and that psychosocial disability is a prominent cause of sickness absence. It is, therefore, clearly in the interest of governments and employers to take steps to support workers in order to minimise absences and to improve the chances of retention in employment. Research suggests that providing reasonable accommodation is an effective and pragmatic means through which support can be offered. Yet studies involving persons with psychosocial disabilities also reveal the frequency with which they encounter discrimination in the labour market. Such experiences, and the perceived likelihood that they will occur in the future, exercise a chilling effect, often leading individuals to conceal mental health problems from their employers. This creates an obstacle to workers seeking support or relying upon their rights under non-discrimination legislation.

116 C. Henderson, P. Williams, K. Little, and G. Thornicroft, 'Mental Health Problems in the Workplace: Changes in Employers' Knowledge, Attitudes and Practices in England 2006-2010' (2013) 202 *British Journal of Psychiatry* s70, s72.

117 Ibid s73.

118 Ibid s74.

119 Equality Challenge Unit (ECU), 'Understanding Adjustments: Supporting Staff and Students Who Are Experiencing Mental Health Difficulties' (ECU 2014) 12.

120 Ibid 15.

3 National definitions of disability in non-discrimination law and persons with psychosocial disabilities

This section of the report considers how national non-discrimination law, which transposes the Directive, defines disability. The report also discusses case law in which courts have considered whether a psychological impairment amounts to a disability for the purposes of national non-discrimination law or not. Case law covering areas beyond employment are also considered where relevant. Lastly, this section of the report discusses examples of case law concerning people with psychosocial disabilities which has drawn on the CRPD. In some instances, these judgments concern employment, but important case law addressing other fields covered by the CRPD, such as legal capacity, are also discussed in order to illustrate how national courts are taking the Convention into account when assessing whether an individual with a psychological impairment has a psychosocial disability or not.

3.1 Legislative definitions of disability

In general, where national non-discrimination legislation contains a definition of disability, that definition is capable of covering persons with psychosocial disabilities, as well as persons with other forms of disabilities. However, as noted above, simply having a psychological impairment or mental illness is insufficient in itself for a person to have this status, and national definitions of disability set out further requirements which must be met in order for an individual to be regarded as disabled. These requirements relate to issues such as providing medical proof of the existence of an impairment which leads to the disability, longevity or permanence of the impairment, or official recognition of disability status by the social security office. Whilst none of these requirements single out people with psychosocial disabilities, it can be more difficult for such people to meet these requirements than is the case for people with other forms of (visible) disabilities, and therefore more difficult for people with psychosocial impairments to fall within the scope of disability non-discrimination law.¹²¹ This is explored further in section 3.2 which discusses national case law in which courts have considered whether individuals with a psychosocial impairment qualify as disabled. As will be seen, this case law presents a mixed picture, with courts not always being willing to recognise an individual with a psychosocial disability as disabled.

This sub-section of the report first examines national non-discrimination law which contains a definition of disability which is capable of covering persons with psychosocial disabilities. It then proceeds to discuss non-discrimination legislation which does not contain a definition of disability, but which contains a cross-reference to another law which contains such a definition which is capable of covering persons with psychosocial disabilities, and non-discrimination legislation which contains such a definition of disability with regard to only part of its scope. Lastly the sub-section discusses national non-discrimination legislation which does not contain a definition of disability, and also considers any guidance in non-legislative instruments on the applicability of that legislation to persons with psychosocial disabilities.

3.1.1 National non-discrimination legislation contains a definition of disability which is capable of covering persons with psychosocial disabilities

In twelve Member States (**Austria, Bulgaria, Cyprus, Czech Republic, Estonia, Germany, Ireland, Malta, Portugal, Spain, Sweden, UK**) the national non-discrimination legislation contains a definition of disability which is capable of covering persons with psychosocial disabilities. However, it is worth noting that a variety of different terms and phrases are used to indicate that this group, in principle, falls within the scope of the non-discrimination law and is regarded as disabled.

In **Austria** disability discrimination is prohibited in a series of legislative instruments adopted at the federal and regional level. The two key pieces of non-discrimination legislation at the federal level, the Act

¹²¹ See comment on this in sub-section 1.1.3.

on the Employment of People with Disabilities and the Federal Disability Equality Act, contain definitions of disability which cover persons with psychosocial disabilities. § 3 of the Act on the Employment of People with Disabilities defines disability as:

the result of a deficiency of functions that is not just temporary and based on a physiological, mental, or *psychological* condition or an impairment of sensual functions which constitutes a possible complication for the participation in the labour market. Such a condition is not deemed temporary if it is likely to last for more than 6 months. [emphasis added]¹²²

§ 3 of the Federal Disability Equality Act contains a comparable definition, although in the case of this Act the (psychological) condition must constitute ‘a possible complication for the participation in society’ rather than ‘a possible complication for the participation in the labour market’.

In **Bulgaria** the Integration of Persons with Disabilities Act (IPDA) defines disability in §1.1 as ‘any loss or impairment of the anatomical structure, of the physiology or of the *psyche* of an individual’ [emphasis added].¹²³ § 1.2 IPDA goes on to define long-term disability as ‘anatomical, physiological, or *psychic* impairment resulting in a long-term reduction of an individual’s abilities to perform activities in a manner and to an extent possible for a healthy individual, where the medical authorities have certified a reduction in working ability or have stipulated a type and degree of disability of 50 per cent or more’ [emphasis added]. These definitions are also applicable for purposes of the Protection Against Discrimination Act (PADA).

In **Cyprus**, the Law on persons with disability which prohibits disability discrimination defines disability in the following way:

‘Disability’ in relation to a person means any form of impairment or disability which causes permanent or indefinite physical, mental or *psychological* limitation to the person which, taking into account the history and other personal information of the person, substantially decreases or excludes the possibility of executing one or more activities or functions that are considered normal and essential to the quality of life of each individual of the same age who does not have such an impairment or disability.[emphasis added]¹²⁴

In the **Czech Republic** Section 5 (6) of the Law No. 198/2009 Coll., Anti-discrimination Law contains the relevant definition of disability. It provides: ‘[f]or the purposes of this Law, a disability shall mean a physical, sensory, mental, *psychological* or some other impairment which precludes or may preclude the right of persons to equal treatment in the areas defined by this Law; it must be a long term disability which lasts, or according to the findings of medical science should last, for at least one year’. [emphasis added]¹²⁵ In this context the term ‘mental’ relates to an impairment which leads to an intellectual disability, while the term ‘psychological’ relates to an impairment linked to a psychosocial disability.

In **Estonia** Article 5 of the Equal Treatment Act sets out a definition of ‘disability’ which provides:

122 Austria, Act on the employment of people with disabilities (Behinderteneinstellungsgesetz), 11 August 2005.

123 Bulgaria, IPDA available at: <http://lex.bg/laws/ldoc/2135491478>.

124 Cyprus, Law on persons with disability (Ο περί ατόμων με αναπηρίες νόμος) N. 127(I)/2000, article 2, available at http://cyllaw.org/nomoi/enop/non-ind/2000_1_127/full.html last accessed on 20 May 2016. Translation into English by Cypriot expert from the European network of legal experts in gender equality and non-discrimination.

125 Czech Republic, Law No. 198/2009 Coll., Anti-discrimination Law (*Zákon č. 198/2009 Sb., antidiskriminační zákon*), 1 September 2009 / 1 December 2009. Available in Czech: <https://portal.gov.cz/app/zakony/zakonPar.jsp?idBiblio=68893&nr=198~2F2009&rpp=15#local-content>, in English: http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Antidiscrimination_Act.pdf.

For the purposes of this act, disability is the loss of or an abnormality in an anatomical, physiological or *mental* structure or function of a person which has a substantial and long-term adverse effect on the performance of everyday activities.[emphasis added]¹²⁶

In **Germany** the General Act on Equal Treatment (*Allgemeines Gleichbehandlungsrecht, AGG*)¹²⁷ does not contain a definition of disability. Instead Section 2 of the Social Code IX (*Sozialgesetzbuch IX, SGB IX*)¹²⁸ and Section 3 of the Equal Opportunities for Disabled People Act (*Behindertengleichstellungsgesetz, BGG*)¹²⁹ provide the most important legal definitions of disability. The former Act provides for a number of reasonable accommodation duties whilst the latter Act prohibits disability discrimination. These Acts specify:

People are disabled if their physical functions, intellectual abilities or *mental health* have a high probability of differing from the state typical for their age for longer than six months and if, in consequence, their participation in society is impaired. [emphasis added]

The *BGG* has recently been revised and the definition of disability has been adapted to the CRPD.¹³⁰ However, the reference to ‘mental health’ remains. The revised act is not yet in force.

The **Irish** Employment Equality Act 1998 to 2015 lists a number of conditions which are to be regarded as a disability in Section 2.¹³¹ This includes in sub-section (e):

a condition, illness or disease which affects a person’s thought processes, perception of reality, emotions or judgement or which results in disturbed behavior.

In **Malta** the Equal Opportunities (Persons with Disability) Act, 2000 defines disability as ‘a long-term physical, *mental*, intellectual or sensory impairment which in interaction with various barriers may hinder one’s full and effective participation in society on an equal basis with others’ [emphasis added].¹³² The Act further defines impairment in the context of disability as meaning ‘any loss, restriction or abnormality of *psychological*, physiological, or anatomical structure or function’ [emphasis added].¹³³

In **Portugal** the Labour Code,¹³⁴ which *inter alia* transposes the Employment Equality Directive, and Law 46/2006 of 28 August 2006,¹³⁵ which prohibits and punishes discrimination based on disability and on a pre-existing risk to health (*risco agravado para a saúde*) do not contain definitions of disability. However, Law 38/2004, of 18 August 2004, which sets out the general legal basis for the prevention of the causes of disability, and the training, rehabilitation and participation of people with disabilities expressly defines a disabled person, in Article 2:

someone who, because of loss or irregularity, whether congenital or acquired, of bodily functions or structures, including *psychological functions*, has specific difficulties that are likely, in combination with environmental factors, to limit or hinder their activity and participation on equal terms with others. [emphasis added]

126 Estonia, Equal Treatment Act (*Võrdse kohtlemise seadus*), 11 December 2008, RT I 2008, 56, 315, available at: <https://www.riigiteataja.ee/akt/106072012022> (Estonian); <https://www.riigiteataja.ee/en/eli/530102013066/consolide> (English).

127 Germany, The General Act on Equal Treatment (*Allgemeines Gleichbehandlungsrecht, AGG*) of 14.08.2006 (BGBl. I, 1897)

128 https://dejure.org/gesetze/SGB_I/2.html.

129 https://www.gesetze-im-internet.de/bgg/_3.html.

130 Germany, Federal Law on Participation (*Bundesteilhabegesetz*), Drucksache 18/7824; Drs. 18/8428.

131 Ireland, <http://www.irishstatutebook.ie/eli/1998/act/21/section/2/enacted/en/html>.

132 Malta, Equal Opportunities (Persons with Disability Act), 2000, Part 1 (2). <http://www.justiceservices.gov.mt/downloaddocument.aspx?app=lom&itemid=8879>.

133 Ibid.

134 Portugal, available at: http://www.dgaep.gov.pt/upload/Legis/2009_I_07_12_02.pdf.

135 Portugal, available at: <https://dre.pt/application/dir/pdf1sdip/2006/08/16500/62106213.pdf>.

This law recognises non-discrimination as a fundamental principle. In addition, it is a Basic Law which means that it constitutes the framework for the interpretation of other laws and decree-laws.

The **Spanish** General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013),¹³⁶ which *inter alia* prohibits discrimination, provides in Article 4 that:

Are persons with disabilities who have physical, *mental*, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others (...) For the purposes of this law, persons with a disability shall be deemed to be those with a recognised degree of impairment equal to or greater than 33 %. [emphasis added]

In **Sweden** Ch.1 Sec 5 p. 4. of the Discrimination Act¹³⁷ defines disability as a:

[D]urable¹³⁸ physical, *mental* or intellectual limitation of a person's functional capacity that as a consequence of an injury or illness that existed at birth, has arisen since then or can be expected. [emphasis added]

In **Great Britain** the Equality Act 2010 protects 'a person who has a physical or *mental* impairment which has a substantial and long-term adverse effect on ability to carry out normal day-to-day activities' from disability discrimination [emphasis added].¹³⁹ The term 'mental impairment' covers a range of conditions, including psychiatric impairments and intellectual impairments.

3.1.1.1 Conclusion

The term psychosocial disability is not used in any of the legislative acts considered above. Nevertheless, they are all capable of including individuals with this form of disability within the definition of disability given. As has been seen, a variety of alternative terms are used to describe the relevant impairment or disability: 'psychological condition' (**Austria**), 'loss or impairment ...of the psyche of an individual' and 'psychic impairment' (**Bulgaria**), 'psychological limitation' (**Cyprus**), 'psychological...impairment' (**Czech Republic**), 'abnormality in ...mental structure or function' (**Estonia**), 'mental health' which differs from the typical state (**Germany**), 'psychological functions' (**Portugal**), 'mental impairment' (**Spain**), and 'mental limitation' (**Sweden** and **GB**). The Irish Employment Equality Act 1998 to 2015 is unusual in that it contains a fairly detailed description of the impairment which can lead to a psychosocial disability, with the focus being on the impact of a 'condition, illness or disease' which should affect thought processes, perceptions of reality, emotions or judgment or lead to disturbed behaviour. **Maltese** law (Equal Opportunities (Persons with Disability) Act 2000) is also unusual in that it makes a distinction between impairment and disability, and defines both. An impairment includes a loss, restriction or abnormality of 'psychological' structure or function, whilst a disability is a 'mental' impairment which 'in interaction with various barriers may hinder one's full and effective participation in society on an equal basis with others'.

It is notable that in some instances, the term 'mental' impairment or restriction is used exclusively in the context of psychosocial disabilities (i.e. it does not relate to an intellectual or learning impairment or

136 Spain, 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. <http://www.boe.es/boe/dias/2013/12/03/pdfs/BOE-A-2013-12632.pdf>.

137 Diskrimineringslag (2008:567). The Act can be downloaded in a constantly updated Swedish version at: <https://www.notisum.se/Pub/Doc.aspx?url=/rnp/sls/lag/20080567.htm>. It can be downloaded in English in an unofficial version that is currently up-to-date (May 2016), but which is not updated regularly like the Swedish version at: http://www.government.se/contentassets/6732121a2cb54ee3b21da9c628b6bdc7/oversattning-diskrimineringslagen_eng.pdf.

138 The unofficial translation cited in the footnote above uses the word permanent. The Swedish expert from the European network of legal experts in gender equality and non-discrimination notes that 'durable' is a better translation of the Swedish word 'varaktig'.

139 GB, Section 6 Equality Act 2010.

disability). The term 'mental' is used in this sense in **Maltese**, **Spanish** and **Swedish** law. In contrast, the definitions of disability in the **Austrian** federal statutes and the **Czech** non-discrimination law cited above seem to use the term 'mental' condition or impairment to relate exclusively to intellectual or learning impairments (with the term 'psychological' relating to psychosocial disabilities). This is also true for the **Cypriot** Law on persons with disability. Lastly the Estonian Equal Treatment Act and the **British** Equality Act 2010 use the term 'mental' to cover impairments which contribute to either intellectual disabilities or psychosocial disabilities. This is in spite of the fact that the two forms of disabilities are very different.

Moreover, as noted above, in order to be regarded as disabled an individual must not only have a psychological impairment, but must also meet a number of conditions set out in national definitions of disability. A condition common to all definitions is that the impairment must be long-term or permanent. It is beyond the scope of this report to examine all elements of national definitions of disability, but is worth noting that this overview has revealed a variety of further requirements. Some definitions reflect the social model of disability as recognised in Article 1 of the CRPD, and require that the impairment, in interaction with various barriers, must hinder the full and effective participation in society on an equal basis with others, whilst others adopt a narrower view, and require that an individual has been officially recognised as having a certain degree of impairment in order to qualify as disabled.

In conclusion this overview has revealed both that a variety of different terms are used in national non-discrimination to describe impairments and conditions which lead to psychosocial disabilities, and that the term 'mental' impairment or condition is not used in a consistent way in national non-discrimination legislation from a comparative perspective. All definitions of disability also set out additional requirements, beyond having an impairment, which must be met if an individual is to qualify as disabled.

3.1.2 National non-discrimination legislation does not contain a definition of disability, but contains a cross-reference to a definition in another law which is capable of covering persons with psychosocial disabilities

In both **Italy** and **Luxembourg** the national (disability) non-discrimination legislation does not contain a definition of disability, but the non-discrimination legislation contains a cross-reference to another law which itself contains a definition which is capable of covering persons with psychosocial disabilities.

In **Italy** Legislative Decree 216/2003 on the implementation of Directive 2000/78/EC for equal treatment in employment and occupation¹⁴⁰ does not contain a definition of disability. However, Article 1 of Law no. 67/2006 on judicial protection for persons with disability against discrimination¹⁴¹ refers to Law no. 104/1992 as far as the definition of disability is concerned. According to Article 3, paragraph 2, of Law no. 104/1992 (Framework law on care, social integration and rights of people with disability):

A person with disability is anyone who has a physical, *mental* or sensory impairment, of a stable or progressive nature, that causes difficulty in learning, establishing relationships or obtaining employment and is such as to place the person in a situation of social disadvantage or exclusion. [emphasis added]¹⁴²

140 Italy, Legislative Decree 216/2003 on the implementation of Directive 2000/78/EC for equal treatment in employment and occupation (*Decreto Legislativo 9 luglio 2003, n. 216 Attuazione della direttiva 2000/78/CE per la parità di trattamento in materia di occupazione e di condizioni di lavoro*), available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2003-07-09;216vig>.

141 Italy, Provisions for judicial protection for persons with disability against discrimination (*Misure per la tutela giudiziaria delle persone con disabilità vittime di discriminazioni*), 1 March 2006, no. 67, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2006-03-01;67vig>.

142 Italy, Framework Law on the care, social integration and rights of disabled persons (*Legge-quadro per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate*), 5 February 1992 no. 104, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1992-02-05;104vig>.

Moreover, **Italy** has ratified the CRPD through Law no. 18/2009¹⁴³ and the CRPD now forms part of the domestic legal order. As a result, the guidance on the concept of persons with disabilities found in Article 1 CRPD may be applied at national level, despite the lack of explicit implementation.

In **Luxembourg** the Law of 28 November 2006¹⁴⁴ which is the general non-discrimination law transposing *inter alia* the Employment Equality Directive, does not define disability. However, §20 of the Law of 28 November 2006 refers to the Law on Disabled Persons of 12 September 2003.¹⁴⁵ The latter law provides a definition of disability which relates to reduced working capacity, whether the cause is natural or accidental, due to a work-related accident or war-related events. The Law of 12 September 2003 also confers the status of 'disabled worker' on persons who have a physical, mental, sensory or *psychological* impairment and *for psychosocial difficulties* aggravating this impairment [emphasis added]. This definition should also apply for the purpose of non-discrimination law.

3.1.3 Parts of national non-discrimination legislation contain a definition of disability which is capable of covering persons with psychosocial disabilities, and persons with psychosocial disabilities are covered by the broad scope of non-discrimination law

In **France** numerous legislative acts prohibit disability discrimination. However, for the most part, these instruments do not define disability.¹⁴⁶ In contrast, the provisions setting out the obligation to make a reasonable accommodation refer to the definition of disability found in Article 114 of the Code of social action and families resulting from Article 2 of the Law n° 2005-102 of 11 February 2005. This provides:

Constitutes a disability, for the purpose of this legislation, all limitation of activity or restriction to the participation to life in society to which a person is subjected in his or her environment by reason of a substantial alteration, durable or definitive of one or many physical, sensorial, mental, cognitive or *psychic* functions, of poly-handicap or of an invalidating health problem. [emphasis added]¹⁴⁷

In spite of the lack of definition of disability in other provisions addressing discrimination, case law (discussed below in sub-section 3.2.1) makes it clear that persons with psychosocial disabilities are protected by disability non-discrimination law. In addition, **French** law expressly prohibits discrimination on the ground of health, including mental health, and also provides for an obligation on employers to protect the mental safety and mental and physical health of employees under Article L4121-1 of the Labour code.

In **Slovenia** the Protection Against Discrimination Act¹⁴⁸ does not contain a definition of disability. However, the 2010 Act on Equal Opportunities for People with Disabilities¹⁴⁹ which sets out obligations concerning reasonable accommodation, defines persons with disabilities in line with Article 1 CRPD:

143 Italy, Ratification and execution of UNCRPD (*Ratifica ed esecuzione della Convenzione delle Nazioni Unite sui diritti delle persone con disabilità, con Protocollo opzionale, fatta a New York il 13 dicembre 2006 e istituzione dell'Osservatorio nazionale sulla condizione delle persone con disabilità*), 3 March 2009, no. 18, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2009-03-03:18!vig>.

144 Luxembourg, <http://www.legilux.public.lu/leg/a/archives/2006/0207/a207.pdf#>.

145 Luxembourg, Law of 12 September 2003 on disabled persons <http://www.legilux.public.lu/leg/a/archives/2011/0150/a150.pdf>.

146 See France, Article 1 and 2 of the Law no 2008-497 of 27 May 2008; Articles L 1132-1 and L 5213-6 of the Labour Code; Article 6 sexes of the Law 83-634; Article 27 of the of Law 84-16; and Article 225-1 of the Penal Code.

147 France, original available at: https://www.legifrance.gouv.fr/affichCode.do?sessionId=A0A0E828ECE9925F4BEDBE0C3F9E14B0.tpdila18v_2?idSectionTA=LEGISCTA000006157554&cidTexte=LEGITEXT000006074069&dateTexte=20160516

English translation provided by French expert from the European network of legal experts in gender equality and non-discrimination.

148 Slovenia, Protection Against Discrimination Act (*Zakon o varstvu pred diskriminacijo*), 21 April 2016, <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7273>. Unofficial translation.

149 Slovenia, Act on Equal Opportunities for People with Disabilities (*Zakon o izenačevanju možnosti invalidov*), 16 November 2010, <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4342>. Unofficial translation.

people with disabilities are those who have long-term physical, mental or sensory impairments or impairments in their mental development which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.

Other legal instruments also contain various definitions of disability.¹⁵⁰ However, it is not clear if these definitions can be used for the purposes of defining disability under the Act Implementing the Principle of Equal Treatment and other laws prohibiting discrimination.

3.1.4 National non-discrimination legislation does not contain a definition of disability

National non-discrimination law does not contain a definition of disability in twelve Member States (**Belgium, Croatia, Denmark, Finland, Greece, Hungary, Latvia, Lithuania, the Netherlands, Poland, Romania and Slovakia**).

In **Belgium** non-discrimination provisions are contained in numerous pieces of legislation at the federal, regional and community level. The Federal Act of 10 May 2007 which prohibits direct and indirect discrimination and includes the duty of reasonable accommodation¹⁵¹ does not contain a definition of disability, and this is the case for most of the relevant regional level legislation.¹⁵² Nevertheless, academics have argued that the concept of disability referred to in non-discrimination legislation is

150 Under Article 63(2) of the Pension and Disability Insurance Act, disability status is granted if the impairment of the insured individual cannot be reversed by medical treatment or medical rehabilitation. These impairments are determined in accordance with the Pension and Disability Insurance Act and result in decreased ability to obtain or retain a job or to be promoted. Employees with disabilities are classed in one of three categories, according to their capacity for work. Those in Category I are not capable of working, while those in Categories II and III are able to work, but subject to certain limitations or after rehabilitation. Slovenia, Pension and Disability Insurance Act (*Zakon o pokojninskem in invalidskem zavarovanju*), 10 December 1999, <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO6280>.

According to the Vocational Rehabilitation and Employment of Persons with Disabilities Act, the term 'persons with disabilities' applies to an individual who has been granted the status of a person with disabilities in accordance with the Pension and Disability Insurance Act, or any other regulation, and to an individual for whom the consequences of a permanent physical or mental impairment or disease have been ascertained by an administrative decision, and whose chances of obtaining or retaining a job or obtaining promotion are substantially reduced. Slovenia, Vocational Rehabilitation and Employment of Persons with Disabilities Act (*Zakon o zaposlitveni rehabilitaciji in zaposlovanju invalidov*), 21 May 2004, <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO3841>.

The Social Care Act defines a person with disabilities as 'an adult with a severe disorder in their mental development or with severe physical impairments who needs assistance in performing all the basic functions of life'. Slovenia, Social Care Act (*Zakon o socialnem varstvu*), 4 November 1992, <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO869>.

151 Belgium, 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, hereinafter "MB") of 30 May 2007.

152 Belgium, Flemish Region / Community: Framework Decree of 10 July 2008 (*Decreet houdende een kader voor het Vlaamse gelijkheidskansen en gelijkebehandelingsbeleid*, (MB 23 September 2008); Decree of 8 May 2002 on proportionate participation in the employment market concerning professional orientation, vocational training, career guidance and the action of intermediaries on the labour market (MB 26 July 2002), (*Decreet van 8 mei 2002 houdende evenredige participatie op de arbeidsmarkt wat betreft de beroepskeuzevoorlichting, beroepsopleiding, loopbaanbegeleiding en arbeidsbemiddeling*); French Community: Decree of the French Community adopted on 12 December 2008 on the fight against certain forms of discrimination *Décret de la Communauté française du 12 décembre 2008 relatif à la lutte contre certaines formes de discrimination* (MB 13 January 2009); Walloon Region: Decree on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training of 6 November 2008 *Décret de la Région wallonne du 6 novembre 2008 relatif à la lutte contre certaines formes de discrimination, en ce compris la discrimination entre les femmes et les hommes, en matière d'économie, d'emploi et de formation professionnelle* (MB 19 December 2008); German-speaking Community: Decree aimed at fighting certain forms of discrimination of 19 March 2012 *Dekret zur bekämpfung bestimmter formen von diskriminierung*, (MB 05 June 2012); Region of Brussels Capital: Ordinance related to the fight against discrimination and equal treatment in the employment field of 4 September 2008, *Ordonnance relative à la lutte contre la discrimination et à l'égalité de traitement en matière d'emploi* of 4 September 2008, (MB 16 September 2008); Ordinance related to the promotion of diversity and the fight against discrimination in the civil service of the Region of Brussels-Capital of 4 September 2008, *Ordonnance visant à promouvoir la diversité et à lutter contre la discrimination dans la fonction publique régionale bruxelloise* (MB 16 September 2008); The Commission communautaire Française (Cocof): Decree on equal treatment between persons in vocational training of the COCOF (*Commission communautaire française*) of 22 March 2007, Decree of 22 mars 2007. *Décret relatif à l'égalité de traitement entre les personnes dans la formation professionnelle* (MB 24 January 2008); Decree of the COCOF on the fight against certain forms of discrimination of 9 July 2010, *Décret relatif à la lutte contre certaines formes de discrimination et à la mise en oeuvre du principe de l'égalité de traitement*, (MB 3 September 2010).

intended to be interpreted in a very broad way.¹⁵³ The only piece of legislation in Belgium which is related to equality and non-discrimination that includes a definition of disability is the Executive regulation of the Government of the Region of Brussels-Capital of 7 May 2009 on diversity plans and diversity label.¹⁵⁴ This explicitly refers to a 'psychic' impairment when defining a worker with disabilities.¹⁵⁵ In addition, whilst the Flemish Decree on proportionate participation in the labour market of 8 May 2002,¹⁵⁶ which prohibits direct and indirect discrimination, including the duty of reasonable accommodation, and encourages the integration of persons with disabilities in the labour market by positive action measures, does not contain a definition of disability, an accompanying Executive regulation¹⁵⁷ is relevant. This contains a definition of disability which provides: 'persons with a physical, sensory, intellectual or *psychological disturbance* or limitation which may constitute a disadvantage for an equitable participation in the employment market' [emphasis added]. This definition contains the relevant definition of disability for the purpose of applying the concept of reasonable accommodation under the Decree. Lastly, whilst the Cooperation Agreement of 9 July 2007 between the three Communities (Flemish, French and German-speaking), the Region of Wallonia, the Region of Brussels-Capital, the *Commission communautaire commune* and the *Commission communautaire française* and relating to reasonable accommodation¹⁵⁸ also does not contain a definition of disability, the accompanying explanatory memorandum does. This provides for guidance on the way 'disability' should be understood, i.e. 'as any lasting and important limitation of a person's participation, due to the dynamic interaction between 1) intellectual, physical, *psychic* or sensory deficiencies; 2) limitations during the execution of activities and 3) personal and environmental factors contextual factors' [emphasis added].

In **Croatia** disability is not defined in the Anti-discrimination Act,¹⁵⁹ although special laws dealing with social care, professional rehabilitation and the employment of persons with disability do contain definitions of disability which can be interpreted as covering psychosocial disabilities.¹⁶⁰ The Anti-discrimination Act prohibits discrimination on the basis of health condition as well as disability, meaning that an individual cannot be denied protection if their condition is regarded as a mental health condition rather than a psychosocial disability.

In **Denmark** the Act on the Prohibition of Discrimination in the Labour Market¹⁶¹ does not contain a definition of disability, although case law (discussed below in sub-section 3.2.1) confirms that individuals with psychosocial disabilities are eligible for protection under the Act.

In **Finland** Section 8 of the Non-Discrimination Act (1325/2014)¹⁶² lists disability and state of health as prohibited grounds of discrimination, but does not define them in the text of the statute. However, some

153 V. Flohimont and V. van der Plancke, *Travail et protection sociale au prisme du 'handicap psychique'*, in *Transformation économique et sociales en Europe : quelles sorties de crise ? Regards interdisciplinaires*, Presses universitaires de Louvain, 2010, p. 415-429.

154 Belgium, Arrêté du Gouvernement de la Région de Bruxelles-Capitale relatif aux plans de diversité et au label de diversité, 7 mai 2009 (MB 2 June 2009).

155 At Article 1, 7^o, a.

156 Belgium, Decree of 8 May 2002 on proportionate participation in the employment market concerning professional orientation, vocational training, career guidance and the action of intermediaries on the labour market (MB 26 July 2006), (*Decreet van 8 mei 2002 houdende evenredige participatie op de arbeidsmarkt wat betreft de beroepskeuzevoorlichting, beroepsopleiding, loopbaanbegeleiding en arbeidsbemiddeling*).

157 Belgium, Executive Regulation of 30 January 2004, *Besluit van 30 Januari 2004 van de Vlaamse regering tot uitvoering* (MB 4 March 2004).

158 Belgium, *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* (MB, 20 September 2007).

159 Croatia, Anti-discrimination Act, 9 July 2008, Official Gazette 85/2008, 112/2012, *Zakon o suzbijanju diskriminacije*.

160 See e.g. Croatia, Article 4(1)(9) of the Social Care Act (Official Gazette 157/2013, 152/2014, 99/2015) and Article 3(1) of the Act on Professional Rehabilitation and Employment of Persons with Disability (Official Gazette 157/2013, 152/2014).

161 Denmark, Act on the Prohibition of Discrimination in the Labour Market etc. [*Lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.*, Consolidated Act No. 1349 of 16 December 2008 with later amendments.

162 Finland, The Non-Discrimination Act (1325/2014) [*Yhdenvertaisuuslaki*], date of adoption 30 December 2014 <http://www.finlex.fi/fi/laki/ajantasa/2014/20141325>. There is no official translation of Finnish legislation except in Finnish and Swedish. The Ministry of Justice maintains a legislative data bank (Finlex) which has unofficial translations of legislative act when

guidance can be found in the government proposal for the Act. This notes that there is no unambiguous definition of disability in Finnish legislation and refers to Article 1 CRPD.¹⁶³ The government proposal also explains that the concept of health in the Non-Discrimination Act covers both physical and mental health. The proposal makes reference to the CJEU's decision in *HK Danmark (Ring and Skouboe Werge)* and explains that an illness which has long-lasting effects which prevent participation in employment can also be considered a disability.¹⁶⁴

In **Greece** Law 3304/2005,¹⁶⁵ which transposes *inter alia* the Employment Equality Directive, does not contain a definition of disability, although definitions are found in other legal instruments.¹⁶⁶ Moreover, following the adoption of Law 4074/2012¹⁶⁷ by the Greek Parliament on 11 April 2012, Article 1 of the CRPD can be regarded as having been officially transposed into Greek law.

In **Hungary** the term 'disability' is not defined in Act CXXV on Equal Treatment and Promotion on Equal Opportunities.¹⁶⁸ However, the list of protected grounds covered by the Act is open ended, and persons with psychosocial disabilities therefore fall within the personal scope of the Act. Definitions of disability are found in other statutes which do not relate to discrimination.¹⁶⁹

In **Latvia** disability is not defined in the various non-discrimination statutes, including the Labour Law.¹⁷⁰ However, the term is defined in the Disability Law as a long-term or non-transitional (permanent) very severe, severe or moderate level of limited functioning, which affects a person's mental or physical abilities, ability to work, self-care and integration into society.¹⁷¹ The reference to mental abilities covers impairments leading to either intellectual or psychosocial disabilities. People can be classified as having one of three possible degrees of disability, in accordance with the provisions of the law, depending on the severity of the impairment. The law classifies moderate disability as the loss of 25-59 % of the capacity to work, severe disability as the loss of 60-79 % of the capacity to work, and very severe disability as the loss of 80-100 % of the capacity to work. The purpose of the Disability Law is to determine the procedure for granting the disability status and provide for the necessary support services for persons with disabilities. Section 71 of the Medical Treatment law provides that in cases of persistent or permanent restrictions of physical or mental capacity and in cases of functional restrictions of the body, at the activity and participation level, a health and work disability expert-examination shall be performed and disability shall be determined by the Medical Commission for Expert-Examination of Health and Working

available. The Non-Discrimination Act has been translated by the Ministry of Justice and the unofficial translation can be found at <https://www.finlex.fi/fi/laki/kaannokset/2014/en20141325.pdf>.

163 Finland, Page 67 in Government's Proposal on Non-Discrimination Act 19/2014.

164 Finland, *Ibid*.

165 Greece, Law 3304 /2005 On the application of the principle of equal treatment irrespective of racial or ethnic origin, religious or other beliefs, disability, age or sexual orientation (Νόμος 3304/2005 «Εφαρμογή της αρχής της ίσης μεταχείρισης ανεξαρτήτως φυλετικής ή εθνοτικής καταγωγής, θρησκευτικών ή άλλων πεποιθήσεων, αναπηρίας, ηλικίας ή γενετήσιου προσανατολισμού»). Abbreviation: Anti-discrimination Law (OJ 16 A /27.07.2005).

166 Greece, for example Articles 1666–1668 of the Civil Code regulate legal caring/guardianship for adults who are incapable (partially or totally) of administrating their own affairs due to a psychological or mental disorder or physical disability (Article 1666(1)).

167 Greece, Law 4074/2012 on the Ratification of the Convention on the Rights of Persons with Disabilities and the Optional Protocol (Νόμος 4074/2012 «Κύρωση της Σύμβασης για τα δικαιώματα των ατόμων με αναπηρίες και του Προαιρετικού Πρωτοκόλλου στη Σύμβαση για τα δικαιώματα των ατόμων με αναπηρίες») (OJ 88 A/11.04.2012).

168 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion on Equal Opportunities (2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról), 28 December 2003, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0300125.TV.

169 Hungary, for instance, one definition of disability is to be found in Article 4 of Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities (RPD Act): 'persons with disabilities are those who have irreversible or long-lasting sensory, communication-related, physical, intellectual, psychosocial impairments or the accumulation thereof, which in interaction with significant environmental, societal or other barriers restrict or hinder their full and effective participation in society on an equal basis with others'. http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99800026.TV (accessed on 18 May 2016).

170 Latvia, Labour Law (*Darba likums*), 20.06.2001, <http://likumi.lv/doc.php?id=26019>.

171 Latvia, Article 5(1) of the Disability Law (*Invaliditātes likums*) 25.05.2010., Article 5(1), at <http://likumi.lv/doc.php?id=88966>.

Ability (MCEEHWA) authorised by the State.¹⁷² However, the same definition of disability is used for the purposes of non-discrimination legislation. This is also confirmed by case law.¹⁷³

In **Lithuania** the Law on Equal Treatment¹⁷⁴ does not contain a definition of disability. The only legal definition of this term is found in the Law on the Social Integration of Persons with Disabilities, which determines who is eligible to receive disability-related benefits.¹⁷⁵ This definition is not relevant for the purposes of non-discrimination law.

In the **Netherlands**, disability discrimination is prohibited by the Act on Equal Treatment on the Ground of Disability or Chronic Disease.¹⁷⁶ This law does not explicitly define disability. However, according to the Explanatory Memorandum which accompanies the Act, the concept of disability covers not only physical, but also intellectual and psychological impairments.¹⁷⁷

In **Poland** non-discrimination law, including the Equal Treatment Act,¹⁷⁸ does not define disability or any of the other protected grounds. Poland has ratified the CRPD and has produced an official Polish translation of the Convention.¹⁷⁹ This has now been published in the Journal of Laws (*Dziennik Ustaw*) and has therefore become a source of domestic law which can be applied by the courts. However, the translation incorrectly fails to refer to 'mental impairment', and only mentions 'intellectual impairments.' Specifically, both terms included in the Polish translation (*sprawność umysłowa*, *sprawność intelektualna*) relate to intellectual impairments. The Ombud has highlighted this and noted that this omission may be an obstacle to the protection of people with psychosocial disabilities under the Convention in Poland.¹⁸⁰

172 Latvia, Medical Treatment Law (*Ārstniecības likums*), 12.06.1997, Article 71: <http://likumi.lv/doc.php?id=44108>.

173 Latvia, Kurzeme Regional Court (Kurzemes apgabaltiesas Civillietu tiesas kolēģija), case No. C40066110 (V.Trusēvičs v. SIA Bio-Venta [Bio-Venta Ltd]), 21 September 2011; Supreme Court (*Augstākā tiesa*), case No. SKC-268 (R.S. v. Riga New St.Gertrude's Church Evangelical Lutheran Congregation), 11 April 2007. The claimants involved persons with physical disability who had been granted category I disability.

174 Lithuania, *Lietuvos Respublikos Lygių galimybių įstatymas*. (Law on Equal Treatment), 2003, No.114-5115. Available in Lithuanian at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=324132.

175 Lithuania, *Lietuvos Respublikos Neįgaliųjų socialinės integracijos įstatymas*, (Law on the Social Integration of Persons with Disabilities), 2004, Nr. 83-2983. Available in Lithuanian at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=454193. The definition in this law is: 'Disability is a long-term worsening reduction of the state of health, diminution of participation in public life and possibilities for activity, resulting from disorder of persons' bodily functions and detrimental environmental factors' (unofficial translation).

176 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*), Staatsblad 2003, 206, available at <http://wetten.overheid.nl/BWBR0014915/2015-07-01>, accessed 13 May 2016.

177 Netherlands, Explanatory Memorandum to the Act on equal treatment on grounds of disability or chronic illness (*Memorie van Toelichting bij de Wet gelijke behandeling op grond van handicap of chronische ziekte*), Tweede Kamer, 2001-2002, 28 169, no. 3, p. 9 and p. 24. Available at <https://zoek.officielebekendmakingen.nl/kst-28169-3.html>, accessed 13 May 2016.

178 Poland, the Act of 03 December 2010 on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (*Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*), further as Equal Treatment Act or ETA.

179 Poland, <https://www.rpo.gov.pl/konwencja-o-prawach-osob-niepelnosprawnych>.

180 Poland, Rzecznik Praw Obywatelskich (2015), *Realizacja przez Polskę zobowiązań wynikających z Konwencji o prawach osób niepełnosprawnych. Sprawozdanie Rzecznika Praw Obywatelskich 2012-2014* (Implementation of Poland's obligations under the Convention on the Rights of Persons with Disabilities. Report of the Ombudsman 2012-2014), <https://www.rpo.gov.pl/pl/content/realizacja-przez-polske-zobowiazania-wynikajacych-z-konwencji-o-prawach-osob-niepelnosprawnych>, p. 14.

In **Romania** no definition of disability is included in non-discrimination legislation.¹⁸¹ However, as in other Member States, definitions of this term are found in other legislative acts which do not address discrimination.¹⁸²

In **Slovakia** neither the Anti-discrimination Act¹⁸³ nor other acts set out a definition of disability that is to be used in the field of non-discrimination. Disability (or some aspects of it) is defined in other statutes addressing social security, employment and school legislation for the purposes of those areas.¹⁸⁴ The duty to apply the principle of equal treatment in relation to disability applies to all of these fields. It is also

181 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*), 30 August 2000 was published in *Monitorul Oficial al României* No. 431 of September 2000. See also: Romania, Law 48/2002 concerning the adoption of Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 31 January 2002; see also Romania, Government Ordinance 77/2003 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30 August 2003; see also Romania, Law 27/2004 concerning the adoption of the Government Ordinance 77/2003 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 11 April 2004. See also: Romania, Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 20 July 2006; Romania, Law 61/2013 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 21 March 2013; and Romania, Emergency Ordinance 19/2013 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 27 March 2013.

182 The special legislation on the promotion and protection of the rights of persons with disabilities (the actual term used in Romanian legislation is '*handicap*') provides a definition in Art. 2 of Law 448/2006: 'disabled persons shall be those persons who, due to a physical, mental or sensorial affection, do not have the abilities for normally performing the day to-day activities, requiring protection measures in support of their social recovery, integration and inclusion'. Romania, Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap, 6 December 2006, Art. 5 (4). Art. 5 (16) of the same law defines disability as 'the generic term for affections /deficiencies, limitations of activity and participation restrictions, defined according to the International classification of operation, disability and health, adopted and approved by the World Health Organization and which reveals the negative aspect of the individual-context interaction'. No specific definition of 'psychosocial disability' or 'mental disability' is provided. An unofficial translation of the law is available at <http://www.equalrightstrust.org/ertdocumentbank/LEGE%20448%20engleza.pdf>.

An Order of the Ministry of Labour and Ministry of Health on establishing the medico-psychosocial criteria used in assessing the degree of disability (*handicap*) provides detailed indicators on mental functions without a general definition. Romania, Order 692/982 from 23 May 2013 amending Chapter 1 of the annex in the Order of the Ministry of Labour, Family and Equal Opportunities and of the Ministry of Health no. 762/1.992/2007 approving the medico-psychosocial criteria for establishing the degree of handicap. Text available in Romanian at: http://www.decidentrumine.ro/resurse/legislatie/ordinul_692_functiile_mentale.html.

The Law on Mental Health defines in Art. 5 a person with psychic diseases as 'the person with a psychic unbalance or insufficiently developed from the psychological perspective or dependent on psychoactive substances, whose manifestations fall under the criteria of diagnostic currently in force in psychiatric practice'. The same Law defines 'psychic handicap' as 'the incapacity of the person with psychic diseases to cope with life in society, the situation being directly triggered by the presence of the psychic disease'. Romania, Law 487 from 11 July 2002 on mental health and the protection of persons with psychic diseases.

183 Slovakia, 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)*), available at <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2004/365/20160102> (Slovak version) and at http://www.snslp.sk/CCMS/files/AntidiskriminacnyZakon_ENG-1.1.2015.pdf (English version).

184 For example the Labour Code defines an 'employee with a disability' as an 'employee recognised as an invalid [i. e. disabled] under special regulations [i. e. on the basis of the Social Insurance Act], who submits a decision on invalid[ity] pension [issued by the Social Insurance Agency] [to their employer]'. See Section 40(8) of the Act No. 311/2001 Coll. Labour Code (*zákon č. 311/2001 Z. z. Zákonník práce*), available at <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2001/311/20160102> (Slovak version), <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/61871/60966/F-506442866/SVK61871.pdf> (English version) and Act No 461/2003 Coll. on Social Insurance as amended (*Zákon č. 461/2003 Z. z. o sociálnom poistení v znení neskorších predpisov*), available at <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2003/461/20160305> (Slovak version). The Social Insurance Act defines the following requirements to qualify for a disability pension: at least 40 % loss of the ability to work (when compared to a 'healthy' person); attainment of a sufficient number of years of pension insurance; long-term unfavourable state of health, i.e. state of health causing a loss of ability to perform gainful activities, which is expected, on the basis of medical assessment, to last at least one year. See Sections 70-72 of the Social Insurance Act. A similar test for determining whether someone has a disability is used under the Act on Employment Services, which regulates the system of institutions and measures to support and help participants in the labour market. This act considers a person with a disability to be a citizen who is 'officially registered disabled in accordance with special regulations [i. e. the Social Insurance Act]'. See Section 9(1) Act No 5/2004 Coll. on employment services and on changing and supplementing other laws, as amended (*Zákon č. 5/2004 Z. z. o službách zamestnanosti a o zmene a doplnení niektorých zákonov v znení neskorších predpisov*), available at <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2004/5/20160102>.

worth noting that Article 1 of the Basic Principles of the Labour Code and Section 13(2) of the Labour Code prohibit discrimination on the ground of unfavourable state of health and on the ground of genetic characteristics. The Anti-discrimination Act also prohibits discrimination on the grounds of past disability and presumed disability ('discrimination against a person who could be presumed, based on external signs, to have a disability').¹⁸⁵ Lastly, Slovakia has signed and ratified CRPD, which, in conjunction with Article 7(5) of the Slovak Constitution, takes precedence over Slovak laws.

3.1.4.1 Conclusion

A number of themes emerge from this overview of national non-discrimination legislation which does not contain a definition of disability. Firstly, it must not be assumed that the absence of any kind of definition of disability in non-discrimination legislation implies that people with psychosocial disabilities are not protected from discrimination. Indeed, in **Finland** and the **Netherlands** documents accompanying the relevant non-discrimination legislation, which provide guidance on how to interpret the statutes, make it clear that people with psychosocial disabilities are, in principle, protected from discrimination under the relevant statutes. Moreover, as will be seen from case law discussed in sub-section 3.2 below, there is judicial precedent confirming that people with psychosocial disabilities are protected by non-discrimination law in some of the EU Member States referred to in this sub-section.

Secondly, whilst non-discrimination legislation may not contain a definition of disability, national legislation addressing other disability-related issues does define the concept, and there may well be a variety of definitions of disability to be found in national law. In the absence of an appropriate legal authority, such as guidance on how to interpret the non-discrimination statute or relevant precedent setting case law, there is a risk that these other definitions, which were not developed with non-discrimination law in mind, may be applied in the context of non-discrimination law. This is particularly problematic where the definition of disability applied to determine eligibility for disability-related social security or social assistance benefits is also used in the context of non-discrimination law, and where the definition is consequently rather narrow. In principle this does not raise particular issues in the context of people with psychosocial disabilities. However, in practice it may be more difficult for people with any kind of invisible disability, including psychosocial disabilities, to establish that they are disabled when they are assessed in terms of degree of incapacity or (partial) inability to work. In such cases establishing the underlying impairment and evaluating the degree of its impact on the individual can be more contentious than in the case of people with (visible) physical impairments. In any case this approach can result in an unduly narrow protection from disability discrimination for people with all forms of disabilities.

Thirdly, non-discrimination law which protects individuals from discrimination on the ground of state of health as well as disability may provide greater protection from discrimination for people with psychosocial disorders. Such legislation exists, for example, in **Croatia, Hungary** and **Slovakia**. In particular, people who have poor mental health, but who are not regarded as having a psychosocial disability under the law,¹⁸⁶ may find that they are nevertheless protected from discrimination in such situations.

Lastly, the CRPD, which provides guidance on the concept of 'persons with disabilities' in Article 1, with this guidance explicitly embracing 'mental impairments', is directly applicable in some EU Member States and has, in any case, been ratified by 27 of the current 28 EU Member States as well as the EU itself. This has the potential to influence the interpretation of national non-discrimination law and the concept of disability for the purposes of that law. Experts from the European network of legal experts in gender equality and non-discrimination explicitly drew attention to this fact in the context of **Greece, Italy** and **Slovakia**, but this principle may well be of relevance in other Member States as well.

¹⁸⁵ Slovakia, Section 2a(11)(d) of the Anti-discrimination Act.

¹⁸⁶ For example, because their underlying condition is not regarded as an impairment, or the consequences of the impairment are not regarded as sufficiently severe or long-term so as to lead to a disability.

3.2 Case law relevant to non-discrimination legislation and people with psychosocial disabilities

3.2.1 Case law in which individuals with psychosocial disabilities have been regarded as disabled

In most Member States, only a handful of cases were identified by the European network of legal experts in gender equality and non-discrimination in which courts or tribunals explicitly considered whether a person with a psychosocial disability should be regarded as disabled or not for the purposes of the protection of the law. The **UK** and **Ireland** appear to be distinct in their experiences because there has been a significant volume of litigation by persons with psychosocial disabilities. In the UK, there has frequently been dispute within litigation as to whether an individual who has experienced mental health problems falls within the legal definition of disability.¹⁸⁷ Research on cases reaching the Employment Appeals Tribunal between 2005 and 2012 found 100 that involved discrimination related to mental health.¹⁸⁸ Of those disability discrimination cases reaching the appeal stage, issues linked to mental health form the largest proportion.¹⁸⁹ In Ireland, it has proven less difficult for litigants to establish that mental health problems fall within the legal definition of disability. Irish case law has confirmed that, *inter alia*, the following conditions can constitute disabilities for the purposes of the Employment Equality Acts 1998-2015: depression, anxiety, alcohol addiction, schizophrenia, and anorexia.¹⁹⁰

The cases identified for this report did not always concern employment discrimination. Some cases dealt with issues such as discrimination outside employment and entitlement to disability-related benefits. This sub-section explores the relevant case law, focusing first on cases concerning employment discrimination and then going on to consider cases concerning other areas of law. The section concludes by examining a handful of cases in which national courts have drawn on the CRPD to help them find that an individual with a psychosocial condition is disabled for the purposes of the law.

3.2.1.1 Employment discrimination

This sub-section considers a number of cases involving employment discrimination claims on the ground of disability. All cases involve individuals with a psychosocial disability who were regarded as disabled for the purposes of non-discrimination law. The cases are classified according to the kind of psychosocial disability of the claimant.

Post-Traumatic Stress Disorder

In **Denmark** case law confirms that a person with a psychosocial disability is to be regarded as a person with a disability falling within the scope of the Act on the Prohibition of Discrimination in the Labour Market. In 2015 the Board of Equal Treatment found that Post Traumatic Stress Disorder (PTSD) was a disability covered by the Act.¹⁹¹ The case concerned a lawyer with PTSD who was dismissed from her position by a local municipality. However, it is clear that the Board carries out an individualised assessment in deciding whether any particular person is disabled or not. Therefore, in a separate case, it found that an individual with depression was not to be regarded as disabled for the purposes of the Act on Prohibition of Discrimination in the Labour Market (see section 3.2.2 below).

187 G. James, 'An Unquiet Mind in the Workplace: Mental Illness and the Disability Discrimination Act 1995' (2004) 24 *Legal Studies* 516, 521.

188 G. Lockwood, C. Henderson and G. Thornicroft, 'Mental Health Disability Discrimination: Law, Policy and Practice' (2014) 14 *International Journal of Discrimination and the Law* 168, 170.

189 *Ibid* 179.

190 E. Barry, 'Case Law Review on Mental Health in the Workplace' (See Change 2014): <http://www.seechange.ie/wp-content/uploads/2015/04/Final-Case-Law-Review-on-Mental-Health-in-the-Workplace.pdf> accessed 9 August 2016.

191 Board of Equal Treatment, Decision No. 168/2015 of 21 October 2015.

Depression

Case law in **Ireland** and the **UK** has explored the boundary between depression, which can constitute a disability for legal purposes in both jurisdictions, and other human emotions, which may not reach the level of severity required to be treated as a disability.

In **Ireland**, these issues were explored in the case of *Government Department v A Worker*.¹⁹² The claimant had been absent from work on sick leave during her probationary period and, as a consequence, the length of her probationary period was extended. She argued that this constituted discrimination because her absence was for a reason relating to disability. One issue in the litigation was whether the reason for her absence constituted a disability; her doctor had described her condition as ‘work-related depression/stress’. Expert medical evidence differed in its assessment of the severity of her condition. The Labour Court held that the definition of disability should be interpreted ‘as widely and as liberally as possible consistent with fairness’. At the same time, ‘if the statute were to be construed so as to blur the distinction between emotional upset, unhappiness or the ordinary human reaction to stressful situations or the vicissitudes of life on the one hand, and recognised psychiatric illness on the other, it could be fairly described as an absurdity’. On the facts, there was sufficient information to conclude that the claimant had experienced a ‘depressive illness’ and this covered by the definition of disability in the Employment Equality Acts 1998-2015.

In the **UK**, similar issues arose in the case of *J v DLA Piper*, which concerned a claimant who was offered a job, but, following her disclosure of a history of depression, the offer was withdrawn.¹⁹³ A preliminary legal issue was whether she met the statutory definition of disability (at that time found in the Disability Discrimination Act 1995). It was accepted that she had several episodes of depression in the period 2005–2007, but the medical evidence was divided over whether she was again experiencing depression in 2008 or whether her low mood was an adverse reaction to problems at work. The Employment Appeals Tribunal (EAT) drew a distinction between clinical depression, which is clearly an impairment for the purposes of the statutory definition of disability, and a reaction to adverse circumstances, which does not amount to a disability.¹⁹⁴ The EAT accepted that the borderline between the two states is often blurred in practice and noted that ‘the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as “depression” (“clinical” or otherwise), “anxiety” and “stress”’.¹⁹⁵

On the issue of recurrent illnesses, the EAT referred to two examples.¹⁹⁶ The first concerned a hypothetical person who suffers a serious depressive illness, makes a full recovery, and then suffers a second episode 30 years later. The EAT took the view that although the two episodes may be related, and the individual may be vulnerable to depression, it would nonetheless be incorrect to classify that person as disabled during the 30 year period of good mental health. The person would instead be seen as having had two episodes of disability. The second example concerned a hypothetical person who suffers short episodes of depression over a five-year period. In this case it could be appropriate to classify that person as disabled throughout the period, as they could be seen to have a single condition producing recurrent symptomatic episodes. Even if each individual episode was too short for its adverse effects to be regarded as ‘long-term’, in the second case the claimant could show that she was disabled on the basis that the condition was ‘likely’ to recur. Ultimately, the case was remitted to the Employment Tribunal for a fresh consideration of whether her condition met the legal definition of disability in the light of the EAT interpretation of the law.¹⁹⁷

192 EDA 094, 25 March 2009 (Labour Court).

193 *J v DLA Piper UK LLP* [2010] IRLR 936 (EAT).

194 *Ibid* para. 42.

195 *Ibid*.

196 *Ibid* para. 45.

197 Employment Tribunal decisions are not systematically published, so it is unclear what the eventual outcome of the case was for the claimant (or whether it was settled out of court).

In contrast to these two cases is the decision of the **Danish** Board of Equal Treatment of June 2015 which found that an individual with depression did not qualify as disabled for the purposes of employment non-discrimination law. This case is discussed below in sub-section 3.2.2.

Stress

As mentioned in section 2 of this report, stress is a common phenomenon in the workplace. It varies in its severity and its duration, meaning that not every incident of stress is likely to meet the legal definition of disability. This may pose a challenge for national tribunals and courts as they seek to determine when experiences of stress may cross the threshold and constitute a disability. Some case law from **Ireland** provides an illustration of how this question may be approached.

In *A v A Charitable Organisation*,¹⁹⁸ an employee brought a claim that she had experienced harassment and denial of reasonable accommodation. She was initially absent from work due to work-related stress. In considering whether she met the definition of disability found in the Employment Equality Acts 1998-2015, the adjudicator observed: 'I am also not satisfied that the submission of a medical certificate indicated that an individual is suffering from "work-related stress" in and of itself comes within the meaning of section 2 of the Employment Equality Acts'.¹⁹⁹ However, later medical certificates indicated that the employee subsequently developed an adjustment disorder, depression and anxiety; it was held that these satisfied the definition of disability.²⁰⁰

In *An Employee v A Retailer*,²⁰¹ an employee was absent from work with a stress-related illness for a period of around 10 weeks. Although his doctor then confirmed that he was fit to return to work, his employer did not allow him to resume work. This situation persisted despite efforts by the employee to be allowed to return to work; ultimately, the employee brought a claim of discriminatory dismissal. The Equality Tribunal held that the evidence did not establish that the employee's condition constituted a disability according to the statutory definition. However, it concluded that the employer had 'imputed a disability' to the employee following his stress-related illness and, on this basis, held that his dismissal was discrimination on grounds of disability. This approach by the Tribunal is permitted in Irish law because section 6(1)(a)(iv) of the Employment Equality Acts 1998-2015 includes within the prohibition of direct discrimination situations where a discrimination ground 'is imputed to the person concerned'.

Bipolar disorder

The **Bulgarian** Supreme Administrative Court (SAC) has referred a preliminary reference to the CJEU concerning the application of the Employment Equality Directive and the CRPD to an individual who has bipolar disorder.²⁰² The preliminary reference concerns the acceptability of providing lower levels of protection from dismissal for persons with disabilities who are employed as public servants in comparison with persons with disabilities employed under standard labour agreements. The individual who brought the case before the SAC was dismissed from her position as a public servant. The court described her as having a 'psychic disease', namely bipolar disorder. The SAC clearly regarded this individual as disabled, and this was not an issue raised in the preliminary reference.

198 DEC-E2011-49, 11 March 2011 (Equality Tribunal).

199 Ibid para. 5.4. Section 2 contains the definition of disability.

200 The claimant was, though, unsuccessful in establishing her claim that she had been subject to harassment or denied reasonable accommodation.

201 DEC-E2011-229, 7 December 2011 (Equality Tribunal).

202 Bulgaria, Decision No 8771 of 16 July 2015 in administrative case No 12369/2014, Petya Milkova v. the Privatisation and Post-Privatisation Agency. Available at: <http://www.sac.government.bg/court22.nsf/d038edcf49190344c2256b7600367606/e8204a2d6e811432c2257e8400317137?OpenDocument> (in BG). Last accessed 16 May 2016.

Psychosocial disability linked to anti-social behaviour

In some circumstances, persons with psychosocial disabilities may behave in an unconventional or even anti-social manner, particularly during a period of ill-health. Non-discrimination legislation does not mean that an individual cannot be disciplined or dismissed by their employer for inappropriate conduct in the workplace, such as harassment or violence. It can imply, however, that the employer needs to take into account whether any anti-social behaviour might be related to an underlying psychological impairment. This can be seen in several cases reported in **France**, the **UK** and **Ireland**.

In **France** a 2009 decision of the Court of Cassation found that an employee with a history of mental illness, who was dismissed as result of behaviour linked to this illness, was disabled.²⁰³ The claimant in the case was suspended from work after having hit a colleague. Her employer and colleagues were aware that the claimant had a history of mental illness; she had been absent from work on sick leave on several occasions and had been frequently referred to the occupational health doctor. At the time of the incident, the occupational health doctor had declared her fit for work, subject to the condition that she be supervised and have regular reviews of her ability to work. After being suspended, the claimant received intensive treatment and her personal doctor indicated she was not able to carry out her work. A number of psychiatrists attributed the violent incident to her illness, declared her temporarily incapable of work, and recommended the implementation of a particular protocol and follow up of her illness. However, the occupational doctor did not agree with this assessment and declared her fit for work without reservation. The employer subsequently dismissed the claimant. The employer argued in court that the claimant was accountable for her behaviour which could be considered as a fault and reason for dismissal. The employer noted that the occupational doctor had assessed the claimant as fit for work, that he had a duty to protect other employees, and that he did not officially know of her disability. The Court held that the files showed that the employer knew of her condition and that it was established that her behaviour was directly related to her mental illness. As a result, the employer could not dismiss her for a fault where her adverse behaviour was related to her disability. The Court declared the dismissal to be null and void. This decision is interesting in that it reveals an individual with a psychosocial disability can benefit from protection from non-discrimination law even if their disability renders them unable to work for long periods and leads to aggressive behaviour at the workplace.

The **British** case of *Goodwin v. The Patent Office*²⁰⁴ also concerned an individual who displayed anti-social behaviour at work. Goodwin was dismissed from his post as a patent examiner after complaints from female staff of disturbing behaviour. He had paranoid schizophrenia, and brought a complaint under the Disability Discrimination Act 1995 (now repealed and replaced by the Equality Act 2010) alleging disability discrimination. The Employment Tribunal rejected his complaint on the preliminary issue of whether he had a disability for the purposes of the legislation. It held that the effects of the impairments on his normal day-to-day activities were not substantial, and that he was able to 'perform his domestic activities without the need for assistance, to get to work efficiently and to carry out his work to a satisfactory standard'. The Employment Appeal Tribunal (EAT) upheld an appeal, finding that Goodwin was a disabled person. The original tribunal had failed to look at the effect which the applicant's disability had on his abilities. The applicant was unable to carry on a normal day-to-day conversation with work colleagues, which was good evidence that his capacity to concentrate and communicate had been adversely affected in a significant manner. The EAT confirmed that the focus of attention should be on the things that the applicant either cannot do or can only do with difficulty, rather than on the things that the person can do. The case was remitted to the Employment Tribunal to consider the substantive issue in his complaint, i.e. whether the employer was justified in deciding to dismiss him in these circumstances.

203 France, Court of Cassation, Social Chamber, n° 08-41659, 5 May 2009, <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000020599235&fastReqId=1920807921&fastPos=1>.

204 GB, *Goodwin v. The Patent Office* [1999] IRLR 4, http://www.bailii.org/uk/cases/UKCAT/1998/57_98_2110.html.

In **Ireland**, the case of *An Employee v A Company*,²⁰⁵ concerned an individual who was absent from work on sick leave related to his mental health; depression and anxiety are mentioned in the judgment.²⁰⁶ He was dismissed following several incidents of intimidating and inappropriate conduct towards female colleagues that occurred during his sick leave.²⁰⁷ The Equality Tribunal held that he did have a disability for the purposes of the Employment Equality Acts 1998-2015 and that he was ill during these incidents. Nevertheless, the employer was justified in deciding to dismiss the complainant. It conducted a reasonable investigation before reaching this decision and it was reasonable, in the light of the available medical evidence, to conclude that the complainant was incapable of returning to work. There were no reasonable accommodations that the employer could have been made to enable his return to work.

3.2.1.2 Other fields of law

Disability-related benefits

In general people who have a reduced capacity to work as a result of a psychosocial disability are entitled to disability-related benefits and courts across the EU have had to consider cases in which individuals with psychosocial disabilities have challenged administrative decisions refusing to grant them such benefits. Two examples of such case law come from **Cyprus** and **Slovenia**.

In **Cyprus** depression has been repeatedly cited by applicants as a reason for 'incapacity to work' generating an entitlement to an 'incapacity pension' and the Courts have generally accepted this argument and annulled administrative decisions which failed to consider depression as a factor hampering a person's ability to work and giving entitlement to a pension.²⁰⁸

In **Slovenia** courts have also recognised people with psychosocial disabilities as having a disability for the purposes of disability-related benefits. Under the Slovenian Disability Insurance Act individuals can be classified as having a category I, II or III level of disability. People in category I are not able to work, whilst people in categories II and III are able to work subject to certain limitations or are entitled to receive rehabilitation.

In case No. Psp 217/2013 of 12 September 2013 the Higher Labour and Social Court heard a case brought by a claimant who was already recognised as having a Category III disability due to psychological and physical impairments, but who requested that her disability be classified as Category I. The court relied on expert witnesses, including a psychiatrist, who found that the claimant did not show symptoms of a severe depressive disorder. The claimant stressed that he had already been recognised as disabled in Canada, but the court rejected this argument stating that this does not mean that he needs to be granted Category I disability in the Republic of Slovenia as well.²⁰⁹ Even though the claimant was not successful before the Court, the Slovenian expert from the European network of legal experts in gender equality and non-discrimination believes the case indicates that severe depressive disorder is a valid reason for granting Category I disability.

Similarly in case Psp 129/2012 of 12 April 2012 Higher Labour and Social Court decided an appeal filed by a claimant who had been granted Category III disability (due to both orthopaedic and psychological impairments), but who claimed Category I disability. The court relied on the expert witnesses who were heard in the first instance court and stated that for the last few years the claimant had been suffering

205 DEC-E2010-62, 6 May 2010 (Equality Tribunal).

206 Para. 2.5.

207 Paras 4.6 and 4.7.

208 Cyprus, Supreme Court, Eleni Apostolou v the Republic of Cyprus, Case No. 1196/2013, 17 September 2014, available at http://cyllaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2014/4-201409-1196-2013.htm&qstring=%EA%E1%F4%E1%E8%EB%E9%F8%2A; Cyprus, Supreme Court, Marios Frangos v The Republic of Cyprus, Case no. 1165/2011, 4 June 2013, available at http://cyllaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2013/4-201306-1165-11.htm&qstring=%EA%E1%F4%E1%E8%EB%E9%F8%2A.

209 Slovenia, Higher Labour and Social Court, No. Psp 217/2013 of 12 September 2013, www.sodnapraksa.si/.

from anxiety and depression, and was having difficulties coping with psychosocial pressure. However, the court found that these factors combined with the orthopaedic problems did not mean that the claimant lost the ability to work completely and the court agreed that Category II disability, which gave the claimant the right to be transferred to another work position (with less stress, no contact with clients, no norms, no night work), was appropriate. The judgment dealt extensively with the psychosocial condition of the claimant and indicates that a psychosocial disability is a reason for granting disability status.²¹⁰

Education

In **Italy** court decisions concerning discrimination at school involving lack of access to support teachers²¹¹ and harassment²¹² have concerned pupils with psychosocial disabilities and mental health problems.

3.2.1.3 Case law in which national courts have drawn on the CRPD and regarded persons with psychosocial disabilities as disabled

In this sub-section reference is made to a number of national judgments in which courts have drawn on the CRPD to find that a person with a 'psychological impairment' is disabled. It is recalled that Article 1 CRPD provides '[p]ersons with disabilities include those who have long-term ... mental ... impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'. None of the cases discussed below concern employment discrimination,²¹³ but they do illustrate how national courts are able to take the CRPD into account in defining the concept of disability for the purposes of domestic law.

The **Croatian** Constitutional court drew on the CRPD in a case in which a person who had been diagnosed with 'chronic schizophrenic psychosis' challenged a lower courts' decisions to deprive her of legal capacity. The Constitutional court did not explicitly state that the applicant was a person with a disability but held that the relevant legal provisions included Article 12 of the CRPD on equal recognition before the law and legal capacity, thereby indicating that it regarded the applicant as a person with a disability covered by the Convention.²¹⁴

Legal capacity was also at issue in a **Slovakian** case. The case concerned an individual with both psychosocial and intellectual disabilities. The Constitutional Court took it as a given that the complainant had a disability, without examining the complainant's circumstances in relation to national, EU and international legal definitions of disability. However, it was not clear from the decision what kind of disability the complainant was regarded as having – 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.²¹⁵ The expert opinions given during the proceedings, and to which the courts of first and second instance referred, used the terms 'psychiatric/mental disorder' and 'mental retardation', with the latter meaning 'intellectual disability'.

The lower courts handed down decisions fully depriving the complainant of legal capacity. The Constitutional Court held this breached various articles of the Constitution, the European Convention on

210 Slovenia, Higher Labour and Social Court, No. 129/2012 of 12 April 2012, www.sodnapraksa.si/

211 Italy, Supreme Court, 25 November 2014, *X. v. Italian Ministry of Education and the School of X.*, available at: http://dirittocivilecontemporaneo.com/wp-content/uploads/2014/11/Cass-sez-un-25011_2014.pdf.

212 Italy, Court of Livorno, 16 June 2015, *P.S. v. C.F.*, available at: http://www.personaedanno.it/attachments/article/48309/9003182_livorno.pdf.

213 Although in Decision 8771 of 16 July 2015 in administrative case No 12369/2014 *Petya Milkova v. the Privatisation and Post-Privatisation Agency* the Bulgarian Supreme Administrative Court referred to the CRPD in an employment case concerning a person with a psychosocial disability. This case is discussed above in sub-section 3.2.1.1.

214 Croatia, Constitutional court of the Republic of Croatia, decision no. U-III/4536/2012, U-III/4536/2012; <http://sljeme.usud.hr/usud/praksaw.nsf/Praksa/C12570D30061CE54C1257F3A00456E76?OpenDocument>.

215 In a literal translation, the courts of first and second instance used the terms 'psychiatric/mental disorder' and 'mental disability', with the latter meaning intellectual disability.

Human Rights and Article 12 of the UN Convention on the Rights of Persons with Disabilities,²¹⁶ thereby indicating that the complainant was regarded as a person with disability. The Court noted that the CRPD took precedence over national laws pursuant to Article 7(5) of the **Slovak** Constitution. The Constitutional Court also included an *obiter dictum* in its judgment, which, while not defining disability, provided some hints on the court's perception of the legal definition of disability as a social concept. In particular, the Constitutional Court stated:

Experts nowadays (and in Slovakia, it is more jurisprudence and legal theory – a [court's] note) perceive disability as well as the rights of people with disabilities differently from in the past. 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 (...).²¹⁷

3.2.2 *Case law in which individuals with psychosocial disabilities have not been regarded as disabled*

Experts from the network have identified a small number of cases in which persons who seemingly have a psychosocial disability have not been regarded as disabled for the purposes of the law.

Employment discrimination – depression

In a **Danish** case decided in June 2015 the Board of Equal Treatment concluded that depression, in the case at hand, was not a disability. The case concerned a physiotherapist who had depression and was dismissed from her job. With the exception of a couple of weeks of part-time work, the physiotherapist had been absent from work because of illness from March 2013 until her dismissal at the end of September 2013. She argued that the depression amounted to a disability and that the dismissal constituted discrimination on account of disability. The Board found that the 'depression did not have such a scope and nature that for a longer period of time she was limited in fully and effectively carrying out her job as a physiotherapist on an equal footing with her colleagues'.²¹⁸ It seems that the Board regarded the claimant's depression as being of both insufficient duration and insufficiently severe in terms of its limiting impacts in order to qualify as a disability.

Discrimination outside employment – dissocial personality disorder

In **Bulgaria**, in a decision implementing the Protection Against Discrimination Act (PADA), a court ruled that a self-harming prison inmate with an established dissocial personality disorder was not a victim of discrimination based on his mental health status because he did not have a psychiatric disorder but merely 'a psychological problem'.²¹⁹ The inmate, who was also certified as having an intellectual disability, regularly sewed up his lips and eyelids, and banged nails into his hand. He claimed that he had been the victim of indirect discrimination in that he was treated without regard for his special vulnerability and denied the special care he claimed he required. In addition, he claimed that he had been the victim of harassment as prison staff treated him rudely and subjected him to offensive language when he self-harmed.

The court held that the inmate self-harmed because he was 'manipulative' and 'attention seeking'. The court found that the man's condition involved a 'deformed' personality of the 'asocial' category, with 'markedly deviant' behaviour, required 'socio-psychological consultations and supporting medication' due

216 Slovakia, finding of the Constitutional Court of the Slovak Republic of 28 November 2012, ref. No I. ÚS 313/2012-52, available at www.zpmpvsr.sk/dokumenty/I_US_313_2012.pdf.

217 Slovakia, finding of the Constitutional Court of 28 November 2012, ref. No I. ÚS 313/2012-52, Paragraph 34.

218 Denmark, Board of Equal Treatment, Decision No. 107/2015 of 24 June 2015.

219 Bulgaria, Decision No 1222 of 7 July 2015 of the Bourgas Administrative Court in administrative case No 1700/2014.

to 'substantially higher needs of mental health care'. Based on an expert report, the judge, however, held that this condition did not amount to a 'mental illness' as his numerous self-harming acts were not the result of 'behaviour that excludes *compos mentis*, i.e. [they were not] carried out with a lack of control of one's conscience requiring psychiatric intervention'. 'On the contrary', the judge held, the man 'purposefully (willfully) hurt himself in the clear understanding that he would in that way attract the attention of the [prison] staff and benefit from improvements in his fixed [prison] regime'. The judge further held: 'As opposed to a psychiatric ailment which can, if needed, be treated compulsorily, in cases of a psychological problem the [affected] person's cooperation (collaboration and willingness) is of determinative importance for the achievement of a positive result'. The judge considered that the man's 'deviant behaviour was conditioned by a psychological problem but considering his failure to cooperate with the [prison] psychologists and the impossibility of his being helped in another way, the court [found] that [his discrimination case fails]'. The court therefore implied that the individual was not a victim of discrimination because the treatment he received was not based on a protected ground, namely mental health status, and that, in order to be regarded as based on mental health status²²⁰ for the purposes of PADA, the impugned treatment must be based on a psychiatric disorder, which involved a condition which would 'exclude ...*compos mentis*' and would result in actions 'with a lack of control of one's conscience'.²²¹ This judgment was based on the particular facts of the case and cannot be regarded as providing a general overview of the conditions which must be met in order for an individual to be regarded as having a (psychosocial) disability under PADA. The judgment was also given by a first instance court and is under appeal. There is no indication that this reflects a general attitude amongst the Bulgarian judiciary.

3.2.3 No relevant case law, as issue has not arisen in practice

In a number of jurisdictions, the issue of whether persons with psychosocial disabilities are to be regarded as disabled under non-discrimination law does not seem to have been an issue in practice. The assumption is that in these jurisdictions courts take a broad view of the concept of disability, and do not question whether individuals with psychosocial disabilities fall within the scope of the protection of non-discrimination law. This appears to be the situation in **Austria, Belgium, Germany and Malta**. Similarly, in **Italy** courts have accepted that persons with psychosocial disabilities are covered by non-discrimination legislation, and this has not been an issue of contention. This also appears to be the case in **Sweden**. A relevant issue in Sweden is that the law requires that the focus is on the perception of the alleged discriminator, meaning that it is immaterial whether or not a disability is as severe as the discriminator believes. Similarly, the perceived nature of the disability (e.g. psychosocial or of some other nature) is also immaterial. No relevant case law was reported by experts from the European network of legal experts in gender equality and non-discrimination in these jurisdictions.

3.2.4 No relevant case law, as persons with psychosocial disabilities have not brought cases or no information is available

In a number of EU Member States there is no information on relevant case law, in that persons with psychosocial disabilities do not seem to have brought cases alleging employment discrimination or searches of relevant databases revealed so such reported cases. This is the case in the **Czech Republic, Estonia, Finland, Greece, Hungary, Latvia, Lithuania, Luxembourg, Portugal and Spain**. The absence of information or case law on this point should not be taken as meaning that persons with psychosocial disabilities are likely to experience difficulties in claiming protection under disability non-discrimination law. The issue is simply untested, or at least relevant information on case law is unavailable, meaning that further comment and analysis is not possible.

220 The judgment does not use the term 'psychosocial disability' and the term 'psychosocial disability' is not used in the PADA as such.

221 Quotations from judgment.

In **Romania** there is also no case law in which the courts or the national equality body the National Council for Combating Discrimination (NCCD) have discussed whether persons with psychosocial disabilities are protected by non-discrimination legislation.²²² However, it is highly likely that courts and the NCCD would regard such persons as disabled for the purposes of that law in light of a 2012 decision in which the NCCD discussed the meanings of ‘handicap’ and ‘disability’, which are the two terms used in Romanian legislation. The NCCD explicitly stated that it favoured interpreting the term ‘disability in an inclusive manner’ and clarifying that ‘to the extent that an illness is not a non-contagious chronic disease (meaning being covered in another protected criterion), it becomes a disability depending on the duration, nature or severity of the disease’.²²³

3.2.5 Conclusion

In most Member States, the European network of legal experts in gender equality and non-discrimination reported only a handful of cases in which courts have considered whether a person with a psychosocial disability is to be regarded as disabled for the purposes of non-discrimination law. In addition, a small number of cases in which this issue was considered for the purposes of other kinds of legislation were identified. However, it is to be expected that this issue has frequently arisen in particular in cases concerning access to disability-related benefits (where a particular and limited definition of disability applies). In a few cases courts have given specific reasons for finding that an individual with a psychosocial disability qualifies as disabled. This seems to be the case for some judgments of the Employment Appeal Tribunal in **Great Britain**. However, generally there seems to be little discussion of why a person with a psychosocial disability qualifies as disabled. In contrast, one case in **Denmark** provided an example of a person who seemingly had quite significant psychosocial disabilities, but who was not found to be disabled. The example from **Bulgaria** showed a judge distinguishing psychiatric disorders from psychological problems, with the latter falling outside ‘mental health status’ for the purposes of national non-discrimination legislation. Reasons given for these findings by the relevant bodies hearing these cases related to insufficient duration of the condition and insufficient severity of the condition – although in both cases the conditions described seemed to involve a significant degree of impairment and disability.

222 Focused research of the case law database of the NCCD had been carried out at by the Romanian expert from the European network of legal experts in gender equality and non-discrimination: http://nediscriminare.ro/jurisprudenta_ro?op=docsearch&criteriu=11&domeniu=1&dosar=&petitie=&textsrc=&submit=cautare.

223 Romania, National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*), Decision 509, file no. 433/2012, *FEDRA v. SC SECOM SRL*, 26 November 2012.

4 Issues of stigma and disclosure in relation to people with psychosocial disabilities

A prominent theme in any discussion of psychosocial disabilities is the impact of stigma. This section of the report examines what is meant by stigma and the different ways in which it can be manifested. It explores evidence from the Member States of negative public attitudes towards persons with psychosocial disabilities, as well as the initiatives that have been taken to address this phenomenon. In most cases, anti-stigma initiatives aim broadly at any form of mental health problem and are not limited to those constituting a psychosocial disability (for the purposes of non-discrimination legislation). For this reason, references in this section are often to mental health problems rather than psychosocial disability. When discussing national examples of anti-stigma campaigns, the terminology used normally reflects that found in the original source.

4.1 What is stigma?

a characteristic that individuals possess (or are believed to possess) that conveys a social identity that is devalued, or a mark of disgrace associated with a particular circumstance, quality, or person.²²⁴

An extensive body of literature has documented how mental health problems are associated with stigma, both historically and internationally.²²⁵ Stigma can take a variety of forms, including labelling, stereotyping, segregation, and adverse treatment (discrimination).²²⁶ Amongst prominent stereotypes surrounding mental health problems, there is a fear of dangerousness and a perception that such people are prone to violence.²²⁷ Unlike some physical health problems, there can be a tendency to blame individuals for mental health problems and their supposed failure to control their own emotions or behaviour.²²⁸ Individuals can feel discomfort or uncertainty around others who are experiencing negative emotions or whose social behaviour is unconventional.²²⁹ This may result in avoidance and isolation of those with psychosocial disabilities.

A distinction can be drawn between stigma that is *enacted* and that which is *anticipated*. Enacted stigma entails situations where individuals are subjected to adverse treatment because of mental health problems (whether real or assumed). This encompasses overt conduct, such as acts of discrimination or harassment. Stigma can also take more subtle forms. Thornicroft identifies the return to work after an absence related to mental health problems as a difficult juncture for relationships with other workers. Stigma can mean that 'many co-workers will be unsure about what to say if anything about the period of absence, perhaps from embarrassment, but also from a concern not to say anything to upset their colleague who has returned to work.'²³⁰

Having experienced stigma in the past, persons with mental health problems frequently anticipate the occurrence of stigma in the future. This can lead people to avoid situations where stigma might be encountered. In the context of the labour market, some choose not to seek employment due to an anticipation of stigma. For example, a study in **Ireland** of persons with mental health problems found that 60% of participants had stopped themselves applying for work, rising to 76% amongst those prescribed anti-anxiety medication.²³¹ One participant explained why in the following words:

224 G. Thornicroft, *Shunned: Discrimination Against People with Mental Illness* (OUP 2006) 171.

225 Ibid 171-180.

226 Ibid 180.

227 T. Scheid, 'Stigma as a Barrier to Employment: Mental Disability and the American with Disabilities Act' (2005) 28 *International Journal of Law and Psychiatry* 670, 674.

228 E. Emens, 'The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA' (2005-2006) 94 *Georgetown Law Journal* 399, 414.

229 Ibid 420-422, 444.

230 G. Thornicroft, *Shunned: Discrimination Against People with Mental Illness* (OUP 2006) 57.

231 L Mac Gabhann, R Lakeman, P McGowan, M Parkinson, M Redmond, I Sibitz, C Stevenson, and J Walsh, 'Hear My Voice: The Experience of Discrimination of People with Mental Health Problems in Ireland' (Dublin City University 2010) 64.

I have wanted to go for jobs but I have known that if they know of my mental health, they wouldn't employ me and would only see my difficulties not my capabilities.²³²

Another response when stigma is anticipated is to conceal mental health problems from others, including hiding any record of mental health problems in the past. This is a common reaction to any form of stigma because it allows the individual to 'pass' in social situations without the negative effects that might otherwise be encountered. Yet it gives rise to anxiety about the risk of future disclosure, especially if this happens beyond the control of the individual. Goffman summed up the daily dilemmas that this poses as:

to display or not to display; to tell or not to tell; to let on or not to let on; to lie or not to lie; and in each case, to whom, how, when and where.²³³

4.2 What evidence is there of stigma in the labour market?

Research provides us with evidence that stigma remains prevalent and that this affects how persons with mental health problems behave in the labour market. Section 2 of this report has already presented examples of research on discrimination, particularly with regard to that encountered in finding or keeping a job. This section will consider data relating to: public attitudes towards persons with mental health problems; attitudes of employers and co-workers; and responses to anticipated stigma by persons with mental health problems.

4.2.1 Public attitudes to persons with mental health problems

One source of evidence of stigma is surveys of the general public addressing their attitudes towards persons with mental health problems. These often reveal a significant level of antipathy or discomfort towards such persons, although there may also be indications of improving attitudes over time.

Several Eurobarometer surveys have explored public attitudes. In 2006, a Special Eurobarometer on Mental Well-Being gave respondents several statements and asked if they agreed or disagreed (See Table 4.1).

Table 4.3: Findings from Eurobarometer on mental well-being²³⁴

Statement	% responding 'totally agree' or 'tend to agree'
People with psychological or emotional health problems are unpredictable	63%
People with psychological or emotional health problems constitute a danger to others	37%
People with psychological or emotional health problems never recover	21%
People with psychological or emotional health problems have themselves to blame	14%

Notably, there were wide variations amongst the Member States in the responses provided. With regard to whether people with psychological or emotional health problems constitute a danger to others, 68% of respondents in **Lithuania** agreed with this statement, whereas only 25% of those in **Ireland** and the **Netherlands** agreed.²³⁵ Almost one-third of respondents in **Italy** and **Germany** felt that people with psychological or emotional health problems never recover, but this view was shared by only 10% of respondents in **Ireland** and **Finland**.²³⁶

232 Ibid.

233 E. Goffman, *Stigma – Notes on the Management of Spoiled Identity* (Penguin 1963) 57.

234 European Commission, 'Mental Well-Being' Special Eurobarometer 248 / Wave 64.4 (2006).

235 Ibid 45.

236 Ibid.

More recent Eurobarometer research concentrated on social relations, asking people whether they would find it difficult to talk to someone with a significant mental health problem. Overall, 67% of respondents said that they would have 'no problem' talking to such a person, while 22% said that they would find this difficult.²³⁷ Respondents in **Lithuania** indicated the greatest discomfort in talking to someone with a significant mental health problem; 52% said they would find this difficult, in comparison to just 6% of those in **Cyprus**.²³⁸

Some Member States have conducted occasional or recurrent public attitude surveys on mental health. In **Finland**, a survey of around 10,000 persons in 2005 found that 60% of respondents 'shared the idea that depression can be considered as a shameful and stigmatizing disease'.²³⁹ In a similar vein, a comparative research study of attitudes amongst pharmacy students found that, in Finland, 43.8% agreed that persons with severe depression had themselves to blame.²⁴⁰ In contrast, within the same study, this view was only expressed by 9.8% of respondents in Belgium.²⁴¹ The Finnish Central Association for Mental Health conducts an annual Mental Health Barometer on public attitudes. This has indicated improvements over time; in 2010, 9% thought that persons with mental disorders had themselves to blame.²⁴²

In the **Czech Republic**, a 2004 public opinion survey found that 36% of people think that schizophrenic persons are not able to live and work in a normal way.²⁴³ Research published in 2014 found that 35.8% of people said it would bother them to work with someone with a mental illness.²⁴⁴

In **Latvia**, research on public attitudes conducted for the Ombudsman's Office found that 60% of respondents would feel discomfort if working or studying with persons with a mental illness.²⁴⁵ Evidence of stigma was also found in a survey where 41% of respondents stated that they would hide the fact of a family member having a mental illness from others, including colleagues.²⁴⁶

In **Lithuania**, public attitude surveys conducted by the Institute for Ethnic Studies have revealed adverse attitudes towards persons with psychosocial and intellectual disabilities. In 2015,²⁴⁷ 44% of respondents indicated that they would not like to work with someone who is mentally disabled. This was the most disliked group of colleagues, followed by Roma (42%) and ex-convicts (40%). More than half of the respondents would not like to rent housing facilities to mentally disabled persons and 46% would not like to live in the same neighbourhood.

In the **UK**, there is an annual 'Attitudes to Mental Illness' survey. This indicates that stigma may have declined. In 2014, 11% of people agreed with the statement: 'people with mental illness should not be

237 European Commission, 'Mental Health' Special Eurobarometer 345 / Wave 73.2 (2010) 61.

238 Ibid 62.

239 K. Wahlbeck, 'Research on Stigma Related to Mental Disorders in Finland' (2011) 42 *Psychiatria Fennica* 87, 97.

240 Ibid 102.

241 Ibid.

242 Ibid 109.

243 M. Janoušková and P. Winkler, 'Stigma a psychiatrie' [Stigma and psychiatry] (2015) 19 *Psychiatrie* 30-36: http://www.tigis.cz/images/stories/psychiatrie/2015/01/06_janouškova_psych_1-15.pdf accessed 4 August 2016.

244 P. Winkler, L. Csemy, M. Janoušková, L. Motlová, 'Stigmatizující jednání vůči duševně nemocným v Česku a Anglii: dotazníkové šetření na reprezentativním vzorku populace' [Stigmatizing behaviour towards those with mental health problems in Czechia and England: Survey on representative sample of the population] (2014) 18 *Psychiatrie* 54-59: http://www.tigis.cz/images/stories/psychiatrie/2014/02/02_winkler_psych_2-14.pdf accessed 4 August 2016.

245 Ombudsman, 'Materials of the conference "Aspects of the Implementation of UN Convention on the Rights of Persons with Disabilities in Latvia"' (2015): <http://www.tiesibsargs.lv/sakumlapa/konferences-ano-konvencijas-par-personu-ar-invaliditati-tiesibam-aspekti-latvija-materiali> accessed 4 August 2016.

246 Ministry of Health (Veselības ministrija), Centre for Disease Prevention and Control (Slimību profilakses un kontroles centrs) (2014-2015). Campaign "Do Not Turn Away!" (kampanja „Nenovērsies!") www.nenoversies.lv accessed 4 August 2016.

247 Public attitude survey of 2015: <http://www.ces.lt/wp-content/uploads/2010/02/Visuomen%C4%97s-nuostatos-2015.pdf> accessed 5 August 2016.

given any responsibility’, whereas this figure had been 20% in 1995.²⁴⁸ Nevertheless, there remains evidence of persistent stereotypes; for example, 39% said that usually someone who is mentally ill ‘is prone to violence’.²⁴⁹

Some public opinion surveys have included questions that focus on the situation in the labour market. For example, a 2012 survey in **Ireland** found that 57% of respondents believed that being open about a mental health problem at work would have a negative impact on job and career prospects, while 47% believed that being open about a mental health problem at work would have a negative effect on a person’s relationship with colleagues.²⁵⁰ The **UK** Attitudes to Mental Illness survey has included questions on the labour market, which also indicate the impact of stigma. In 2014, 48% of respondents said that they would be uncomfortable talking to an employer about their mental health.²⁵¹

4.2.2 Attitudes of employers and co-workers

Although it is revealing to consider evidence about public attitudes such as that discussed above, it is even more pertinent to examine data on the attitudes held by employers and co-workers. There were less examples found of studies in EU Member States that have focused upon this dimension, but the information available indicates enduring difficulties. In **Croatia**, for example, the Ombudsman identified stigma on return to work after absence for psychiatric treatment as a problem. There was evidence of a lack of awareness about the support required in this situation.²⁵² Research published by the Ombudsman in **Poland** also found that stigmatisation of persons with mental disorders was widespread.²⁵³

In **Denmark**, surveys indicate an improvement in the attitudes of co-workers. In 2005, around two-thirds of employees said that they would be concerned about having a colleague who had bipolar disorder or who had serious mood swings; this figure had declined to around one-half by 2014.²⁵⁴

In **Hungary**, a 2014 empirical study concluded that employers were reluctant to hire those with psychosocial impairments to a greater extent than in relation to other persons with a disability.²⁵⁵ This led some people to conceal mental health problems that they had.

In **Ireland**, a 2006 survey found that ‘almost a quarter of employers would be reluctant to employ someone with a history of mental health difficulties, while more than half of employees (52%) thought that negative attitudes from co-workers was a major barrier to employing people with mental health difficulties’.²⁵⁶ Another survey in 2010 reported that 47% of people thought that ‘diagnosis of a mental health problem would have a negative effect on their job’.²⁵⁷

248 TNS BRMB, ‘Attitudes to Mental Illness 2014 Research Report’ (2015), p. 9: http://www.time-to-change.org.uk/sites/default/files/Attitudes_to_mental_illness_2014_report_final_0.pdf accessed 13 July 2016.

249 Ibid 24.

250 See Change, ‘Irish Attitudes Towards Mental Health Problems’ (2012): http://www.seechange.ie/wp-content/themes/seechange/images/stories/pdf/See_Change_Research_2012_Irish_attitudes_towards_mental_health_problems.pdf accessed 13 July 2016.

251 TNS BRMB, ‘Attitudes to Mental Illness 2014 Research Report’ (2015), p. 41: http://www.time-to-change.org.uk/sites/default/files/Attitudes_to_mental_illness_2014_report_final_0.pdf accessed 13 July 2016.

252 Disability Ombudsperson, ‘Parallel report on the implementation of the UN Convention on the Rights of Persons with Disabilities in the Republic of Croatia’ (2014): <http://www.posi.hr/attachments/article/817/Croatia-Parallel%20report-Disability%20Ombudswoman.pdf> accessed 8 August 2016.

253 Rzecznik Praw Obywatelskich, ‘Ochrona zdrowia psychicznego w Polsce: wyzwania, plany, bariery, dobre praktyki. Raport RPO’ [Mental Health Protection in Poland: Challenges, Plans, Barriers, Good Practices. Ombudsman report] (2014): https://www.rpo.gov.pl/sites/default/files/Ochrona_zdrowia_psychicznego.pdf accessed 1 July 2016.

254 M. Rode Larsen and J. Høgelund, ‘Handicap og Beskæftigelse – Udviklingen mellem 2002 og 2014’ (SFI 2015): <http://www.sfi.dk/publikationer/handicap-og-beskaeftigelse-udviklingen-mellem-2002-og-2014-3068/> accessed 1 July 2016.

255 Z. Nagy, D. Bari, B. Borza, I. Forra, Á. Pakot, O. Prókai, A. Sörös, N. Szabó, A. Szerepi, ‘Helyzetfeltárás az „Átvezetés módszertanához” [Mapping exercise for the ‘Methodology of leading through’] (2014) p. 91, available at: http://revprojekt.hu/ckfinder/userfiles/files/helyzetfeltaras_atvezetes%20modszertanhoz.pdf accessed on 19 May 2016.

256 Amnesty International Ireland, ‘Employment and Mental Health: A Briefing Paper’, p. 22: <https://www.amnesty.ie/wp-content/uploads/2016/05/Employment-and-Mental-Health-Briefing-Paper.pdf> accessed 13 July 2016.

257 Ibid 21.

Empirical research in Spain, conducted in 2009, entailed interviews with people with mental illnesses, their families and the professionals involved in their care. The researchers found that ‘in the workplace there is a stigma towards severe and persistent mental illness as a result of negative stereotypes about the disease, especially those related to incompetence, lack of competitiveness and the fear of possible conflicts’.²⁵⁸ Moreover, discrimination in the hiring process was a frequent experience.²⁵⁹

In the **UK**, research involving 500 senior managers/directors found that 39% reported negative attitudes by co-workers towards workers with mental health problems.²⁶⁰ While this research revealed generally positive attitudes by employers towards accommodating employees with mental health problems, there remained some evidence of concerns about the type of work that such persons could perform. 33% said that an organisation takes a risk when employing people with mental health problems in public roles.²⁶¹

4.2.3 Responses to anticipated stigma by persons with mental health problems

The available data provides a clear indication that stigma remains widespread in many states. As discussed in the second section of this report, there is also evidence that this can take the form of discrimination within the labour market against persons with psychosocial disabilities. The predictability of stigma being encountered means that individuals adopt strategies to minimise their exposure to such behaviour. Frequently, this means that people choose not to disclose mental health problems in the workplace, both those experienced at present and those that have been experienced in the past.

There is also evidence, however, that individuals can feel compelled to restrict their labour market activity in order to safeguard themselves against the risk of encountering stigma. In **Denmark**, research involving interviews with 1269 persons found that 87% had hidden their mental disorder in the labour market, while 75% of respondents had refrained from applying for jobs for reasons relating to their mental health.²⁶² Research in **England** has also uncovered this phenomenon: a 2011 study found that 46% of mental health service users reported not looking for work due to anticipated discrimination.²⁶³ In **Ireland**, analysis of the National Disability Survey showed that 39% of those with an emotional, psychological or mental health disability sometimes or frequently avoided doing things because of other people’s reactions.²⁶⁴

4.3 Measures to tackle stigma in the Member States

According to Article 8 of the CRPD, there is a duty on all parties to the Convention to take measures to improve awareness regarding persons with disabilities. In particular, Article 8(1)(b) refers to the need for measures ‘to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life’. Article 8(2) identifies ‘public awareness campaigns’ as one mechanism for pursuing this objective. In the context of psychosocial disabilities, the goals found in the CRPD are keeping with the gradual increase in anti-stigma initiatives. While these have been developed on a voluntary basis, Article 8 implies that there is now an obligation on parties to the Convention to take measures to address the stigma that often surrounds psychosocial disabilities. This was specifically raised by the Committee in its Concluding Observations on the European Union:

258 M. Muñoz et al, *Estigma y enfermedad mental* (Complutense 2009) 290.

259 Ibid.

260 C. Henderson, P. Williams, K. Little, and G. Thornicroft, ‘Mental Health Problems in the Workplace: Changes in Employers’ Knowledge, Attitudes and Practices in England 2006-2010’ (2013) 202 *British Journal of Psychiatry* s70, s74.

261 Ibid.

262 P. Skovbo Rasmussen and P. Ejbye-Ernst, ‘Oplevet diskrimination og stigmatisering blandt mennesker med psykisk sygdom’ (KORA 2015).

263 G. Thornicroft, S. Evans-Lacko, and C. Henderson, ‘Stigma and Discrimination’ in S. Davies (ed.), *Annual Report of the Chief Medical Officer 2013, Public Mental Health Priorities: Investing in the Evidence* (Department of Health 2014) 179, 180. See also, L. Sayce, ‘Stigma, Discrimination and Social Exclusion: What’s in a Word?’ (1998) 7 *Journal of Mental Health* 331, 334.

264 D Watson and B Maître, ‘Emotional, Psychological and Mental Health Disability’ (Economic and Social Research Institute/ National Disability Authority 2014) 27.

The Committee recommends that the European Union develop a comprehensive campaign to raise awareness about the Convention on the Rights of Persons with Disabilities and combat prejudice against persons with disabilities, including women and girls, and especially persons with psychosocial disabilities, intellectual disabilities and older persons with disabilities.²⁶⁵

The Committee has also identified the need for individual Member States to take more action to address stereotypes. For example, its report on Austria stated: 'The Committee notes with concern that there appears to be very few awareness raising campaigns being conducted in **Austria** to counter negative and out-dated stereotypes about persons with disabilities which foment discrimination'.²⁶⁶

Anti-stigma campaigns, whether organised by government or by civil society, appear to have grown in recent years. One illustration of this trend was the formation in 2012 of the Global Anti-Stigma Alliance.²⁶⁷ This brings together major anti-stigma campaigns from **Australia, Canada, Denmark, Ireland, the Netherlands, New Zealand, Spain, Sweden, Switzerland, the UK, and the USA**. The aim is to share learning between these campaigns. The Alliance has identified employers as one of the key audiences for anti-stigma campaigns.²⁶⁸ It has developed a set of key principles that should inform anti-stigma programmes:

- lived experience leadership and empowerment (e.g. people with mental health problems should be ambassadors to challenge stigma);
- hope, recovery, dignity;
- effective, evidence-based delivery approaches;
- dual focus on wider-public audience and people with lived experience (this includes tackling self stigma, where persons with mental health problems internalise and come to believe negative stereotypes about what it means to have a mental health problem);
- equality and human rights;
- long-term commitment (one-off campaigns have limited impact).

While it is difficult to compile a comprehensive inventory of all anti-stigma campaigns that have occurred within the Member States, the following are prominent examples of such initiatives.

In **Denmark**, the 'One of Us campaign'²⁶⁹ has five focus areas: young people, the labour market, service users and their relatives, the staff of health services, media and the public. The campaign ran from 2011 and it includes a range of regional initiatives. Online resources, such as video were created, as well as a programme of ambassadors to speak at events (i.e. people who have experienced mental health problems).

In **Ireland**, 'See Change'²⁷⁰ is the national programme to reduce stigma and discrimination affecting persons with mental health problems. Founded in 2010, it works in partnership with over 70 organisations. Public initiatives include an annual campaign to wear a green ribbon to encourage visibility and conversations about mental health problems.²⁷¹ See Change has a six-step workplace programme that consists of: training managers; reviewing workplace policies; training employees; promoting mental health within the workplace; engaging with local communities and stakeholders; signing the See Change Workplace Pledge. Organisations that join the programme draw up an action plan to implement the six-steps. See Change provides support by offering training for managers.

265 Para. 27, Concluding Observations on the initial report of the European Union, CRPD/C/EU/CO/1.

266 Para. 21, Concluding observations on the initial report of Austria, CRPD/C/AUT/CO/1.

267 <http://www.time-to-change.org.uk/globalalliance> accessed 8 August 2016.

268 <http://www.time-to-change.org.uk/sites/default/files/gasa%20leaflet.pdf> accessed 8 August 2016.

269 <http://en-af-os.dk/English/Focus%20areas.aspx> accessed 8 August 2016.

270 <http://www.seechange.ie> accessed 8 August 2016.

271 <http://www.greenribbon.ie> accessed 8 August 2016.

In the **Netherlands**, 'Together Strong Without Stigma'²⁷² is an association that brings together several organisations, including health insurance companies, the Dutch Association of Mental Health and Addiction Care and the Dutch Psychiatric Association. Amongst its initiatives, there are specific resources addressing stigma in the workplace. There is also a national campaign in the Netherlands against work-related stress,²⁷³ as well as a campaign called 'People with Possibilities', which aims to increase the employment participation rates of people with a psychosocial disability.²⁷⁴

In **Spain**, there are several examples of regional anti-stigma campaigns. In Andalusia, the regional government launched an anti-stigma programme in 2007, called '1 in 4'.²⁷⁵ This is coordinated by a combination of public health bodies and associations representing mental health service users and their families. It has a wide range of initiatives, including some targeted at the workplace.²⁷⁶ There is also an anti-stigma campaign in Catalonia.²⁷⁷

In **Sweden**, Hjärnkoll²⁷⁸ was an anti-stigma campaign (2009-2014) that included an ambassador initiative (i.e. testimony from those who have experienced mental health problems). There were activities focused on the workplace, including training for managers and employees. Its evaluation provided evidence of significant improvements in attitudes in those regions where the campaign was active.²⁷⁹

In the **UK**, there are several examples of anti-stigma campaigns. In England, 'Time to Change'²⁸⁰ is a campaign that has been running since 2008. It is led by two mental health charities, with funding from the Department of Health and other sources. It focuses on encouraging people to speak openly about mental health problems and evaluates its progress through annual surveys. Amongst its activities is an 'Employer Pledge' signed by over 400 organisations. This public commitment to improving mental health in the workplace is complemented by an 'Employer Accelerator Programme'. This provides employers with briefings and training, as well as access to a network where they can learn from the experience of other employers. In Scotland, 'See Me'²⁸¹ is funded by the Scottish Government and Comic Relief (a charitable organisation), this campaign aims to tackle self-stigma amongst persons with mental health problems and stigmatising attitudes in the wider community. It also seeks to improve understanding about recovery from mental health problems. It includes a specific programme aimed at supporting employers (See Me in Work). This includes helping employers to review the position in their workplaces and providing guidance on the requirements of anti-discrimination legislation.

4.3.1 Initiatives by civil society

In several Member States, there was no national anti-stigma campaign, but there was evidence of initiatives to combat stigma, normally via civil society and NGOs. This was reported to be the situation in **Croatia**, the **Czech Republic**, **Finland**,²⁸² **Germany**,²⁸³ **Greece**, **Hungary**, **Lithuania**, **Malta**, **Romania**, **Slovakia**, and **Spain**. Some examples of such initiatives including the following:

272 <http://www.samensterkzonderstigma.nl/over-ons/> accessed 5 August 2016.

273 <http://www.arboportaal.nl/onderwerpen/check-je-werkstress> accessed 5 August 2016.

274 <http://www.mmm-mensenmetmogelijkheden.nl/> accessed 5 August 2016.

275 <http://www.1decada4.es> accessed 5 August 2016.

276 <http://www.1decada4.es/course/view.php?id=12#lugares> accessed 5 August 2016.

277 <https://obertament.org/ca> accessed 8 August 2016.

278 <http://www.nsph.se/hjarnkoll/> accessed 8 August 2016. 'Hjärnkoll' can be literally translated as 'brain awareness', but it is also used to indicate that someone has 'full awareness' of a particular issue.

279 Hjärnkoll – Psykiska olikheter lika rättigheter, Redovisning av resultat och effekter av regeringsuppdraget 2009-2014, Myndigheten för delaktighet (2014) p. 7. Today the campaign has evolved into an organisation that currently works with four projects (not stigmatization).

280 <http://www.time-to-change.org.uk> accessed 8 August 2016. There is a separate campaign that operates in Wales: <http://www.timetochangewales.org.uk/en/> accessed 8 August 2016.

281 <https://www.seemescotland.org> accessed 8 August 2016.

282 See further: The Finnish Association for Mental Health: <http://www.mielenterveysseura.fi/en/home/development-programs> accessed 13 July 2016.

283 E.g. initiatives had been taken by the German Society of Psychiatry, Psychotherapy, Psychosomatics and Neurology: <http://www.dgppn.de/presse/pressemitteilungen/detailansicht/article//die-gewinner.html> accessed 13 July 2016.

In the **Czech Republic**, 'Fokus Praha' has organised 'Mental Health Weeks',²⁸⁴ while the Centre for Mental Health Care Development has a 'Stop Stigma' initiative.²⁸⁵

In **Hungary**, the Hungarian Civil Liberties Union launched an anti-stigma campaign via Facebook,²⁸⁶ and initiatives have been supported by the Awakenings Foundation.²⁸⁷

In **Greece**, measures to combat stigma have taken place under the 'Action Platform for Rights in Mental Health' programme,²⁸⁸ which brings together a variety of healthcare and human rights organisations.

In **Spain**, there has been an initiative within the Basque Country by the Basque Federation of Associations of Families and Persons with Mental Illness. This project resulted in a wide-ranging report on 'the reality of social stigma among people with mental illness in the Basque Country'.²⁸⁹ The report identifies recommendations for future reforms, including in relation to the workplace.

At the EU level, the EU network of non-government organizations Mental Health Europe (financially supported by the European Commission) carries out activities aimed at promotion and protection of rights of persons with mental health problems and psychosocial disability. It is active also in the field of employment and fighting stigmatization.²⁹⁰

4.3.2 Initiatives to improve public health

In some Member States, there was evidence of national strategies on mental health under the aegis of public health policy. These had multiple dimensions, often being focused upon the medical care provided for those experiencing mental health problems. There were examples, however, of anti-stigma initiatives being taken as part of broader health policies.

In **Bulgaria**, activities were planned under National Health Strategy 2014-2020, but these are yet to be implemented.

In the **Czech Republic**, the Ministry of Health adopted a 'Strategy for Reform of Psychiatric Care' for the period 2014-2020, which includes combating stigma as a key goal.²⁹¹

In **France**, a national 'Psychiatric and Mental Health Plan' was adopted for the period 2011-2015.²⁹² One of the key themes of the plan was preventing and reducing problems between psychiatry and the social environment. This included measures to combat stigmatisation and discrimination.

In **Italy**, the Ministry of Health, in conjunction with the Ministry for Education, University and Scientific Research, implemented a National Programme for Information and Communication Against Stigma and Prejudice Relating to Mental Health with the Involvement of Schools. This included an information brochure that sought to challenge some of the stereotypes that exist about people with mental health

284 <http://www.tdz.cz/index.php?co=0> accessed 4 August 2016.

285 <http://www.cmhcd.cz/stopstigma/introduction/> accessed 4 August 2016.

286 See: <https://www.facebook.com/hullamvasut?fref=photo> accessed 13 July 2016.

287 <http://ebredesek.hu/our-mission/> accessed 13 July 2016.

288 <http://psy-dikaionata.gr/en/what-we-do-2/> accessed 13 July 2016.

289 FEDEAFES (Federación de Euskadi de Asociaciones de Familiares y Personas con Enfermedad Mental), 'La realidad del estigma social entre las personas con enfermedad mental en la CAPV' (Llodio, FEDEAFES, 2013): http://www.fedeafes.org/wp-content/uploads/2014/03/FEDEAFES_Estigma-Social-en-Euskadi_entre-las-personas-con-enfermedad-mental_estudio2013_web-reducido.pdf accessed 5 August 2016.

290 <http://www.mhe-sme.org/index.php>, <http://www.mhe-sme.org/news-events/news/news-details/article/mhe-becomes-official-partner-of-the-eu-osha-campaign-healthy-workplaces-for-all-ages/>

291 Ministry of Health of the Czech Republic, 'Strategie reformy psychiatrické péče' [Strategy for Reform of Psychiatric Care] (2013): <http://www.reformapsychiatrie.cz/> accessed 4 August 2016.

292 Plan psychiatrie et santé mentale: http://www.cnsa.fr/documentation/plan_psychiatrie_et_sante_mentale_2011-2015.pdf accessed 13 July 2016. This followed an earlier plan for the period 2005-2010.

problems, including their ability to work.²⁹³ The regional authorities in Italy enjoy responsibility for health services. Accordingly, there are some examples of regional initiatives to conduct research on stigma against persons with mental health problems.²⁹⁴

In **Latvia**, in 2014-2015, the Ministry of Health and the Disease Prevention and Control Centre conducted the first ever national public information campaign called 'Do Not Turn Away!'.²⁹⁵ This sought to reduce stigmatisation and raise awareness about mental illnesses. The campaign included initiatives in the media and online resources providing accessible information about mental illnesses, where to seek help, and types of support services.

In **Lithuania**, the Ministry of Health has adopted an 'Action plan for the implementation of national mental health strategy and prevention of suicide' for the period 2014 – 2016. This includes an allocation in 2016 of EUR 86 000 for programmes to tackle stigma related to mental health.²⁹⁶

In **Poland**, a National Programme for the Protection of Mental Health was adopted in 2010, which included initiatives around the integration of people with psychosocial disabilities.²⁹⁷ There have also been individual campaigns over time, such as one in 2006 called 'Mentally Ill Can Work'.²⁹⁸

In **Spain**, the Mental Health Strategy of the National Health System, approved in 2006, and renewed in 2009, includes the aim of eradicating stigma attached to mental illness.²⁹⁹

4.4 Conclusion

The evidence reviewed in this section indicates that stigma is frequently identified as a phenomenon affecting the working lives of persons with psychosocial disabilities. While there is no comprehensive set of comparative data, this appears to be a challenge across the EU Member States. The effects of stigma need to be taken into account when understanding how non-discrimination legislation functions in practice. If individuals are reluctant to disclose psychosocial disabilities to their employers, then this will often constrain their ability to rely upon the rights found in non-discrimination legislation. In particular, it can be a practical barrier for those who could otherwise benefit from the provision of reasonable accommodation in the workplace. Awareness of the need to take measures to combat stigma seems to be growing in the Member States; a wide-range of campaigns and initiatives can be identified. In most cases, however, these appear to be ad hoc, temporary and not embedded in a long-term national programme. This raises questions about whether Member States, and the European Union itself, are fully compliant with their obligations arising under Article 8 of the CRPD.

293 http://www.salute.gov.it/servizio/documenti/opuscolo_stigma.pdf accessed 4 August 2016.

294 'Salute mentale e stigma sociale' (2004): http://www.regione.veneto.it/c/document_library/get_file?uuid=cd4343e0-ffe9-4f98-bb31-8e4b2bc0033a&groupId=10793 accessed 4 August 2016; 'Lavoro e psiche: l'esperienza della Provincia di Sondrio': http://www.solcosondrio.it/portal/images/LeP/indagine_light.pdf accessed 4 August 2016.

295 www.nenoversies.lv accessed 5 August 2016.

296 <https://www.e-tar.lt/portal/lt/legalAct/658a1ab0ba4b11e38766a859941f6073> accessed 5 August 2016.

297 Rozporządzenie Rady Ministrów z dnia 28 grudnia 2010 r. w sprawie Narodowego Programu Ochrony Zdrowia Psychicznego [Regulation of the Council of Ministers of 28 December 2010 on the National Programme for the Mental Health], in force in the years 2011-2015): <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20110240128> accessed 5 August 2016.

298 <http://rynekpracy.org/wiadomosc/200704.html> accessed 5 August 2016.

299 2006 Strategy: http://www.msc.es/organizacion/sns/planCalidadSNS/pdf/excelencia/salud_mental/ESTRATEGIA_SALUD_MENTAL_SNS_PAG_WEB.pdf accessed 5 August 2016. The 2009 Strategy is available at: <http://www.msssi.gob.es/organizacion/sns/planCalidadSNS/docs/saludmental/MentalHealthStrategySpanishNationalHS.pdf> accessed 5 August 2016.

5 Reasonable accommodation and people with psychosocial disabilities

As described in section 1 of this report, one of the most notable features of the Employment Equality Directive is the duty on employers to provide reasonable accommodation for persons with disabilities. Moreover, the CRPD strengthens the conceptual understanding of the duty by explicitly providing that denial of reasonable accommodation is a form of discrimination. Section 2.4 of this report provided evidence from the Member States of the practical utility of reasonable accommodation as a means of including and retaining people with psychosocial disabilities in the labour market. Nevertheless, experience in some jurisdictions suggests that people with psychosocial disabilities can encounter barriers when they seek to rely upon the reasonable accommodation duty. As awareness of disability rights has risen, employers are likely to have a general understanding of the types of reasonable accommodation that can be provided for those with common forms of physical disability, such as making buildings accessible for wheelchair users or adapting workstations for those with musculoskeletal impairments. In contrast, the invisible nature of many psychosocial disabilities means that employers may find it more difficult to anticipate what steps are required. Lawson comments: ‘for the vast majority of social actors ...the barriers which people with psychosocial impairments might encounter are far less easily identified’.³⁰⁰

Uncertainty over how to apply the reasonable accommodation duty in relation to people with psychosocial disabilities may extend into the courts. In the **UK**, an analysis of 100 cases of ‘mental health discrimination’ that reached the Employment Appeals Tribunal found that the way in which the reasonable accommodation duty had been interpreted by the (first instance) Employment Tribunal was a common source of grounds for appeal.³⁰¹ Difficulties have also been observed in the **USA**, where courts have differed over how much knowledge the employer needs to have of the employee’s psychological impairment and whether the onus lies on the employee to identify the type of accommodation required.³⁰²

This section of the report examines national law and practice on the duty to provide reasonable accommodation as applied to people with psychosocial disabilities. It does not attempt to provide a comprehensive survey of how, in general, the duty to provide reasonable accommodation has been implemented in national law. For a detailed analysis of national law, readers are recommended to consult D. Ferri and A. Lawson, *Reasonable Accommodation for Disabled People in Employment – a Legal Analysis of the Situation in EU Member States, Iceland, Liechtenstein and Norway* (European Commission 2016).³⁰³

This section will focus on the following key issues:

- knowledge requirements and the reasonable accommodation duty;
- accommodating people with psychosocial disabilities and national legislation;
- accommodating people with psychosocial disabilities and national case law.

5.1 Knowledge requirements and the reasonable accommodation duty

The concept of reasonable accommodation found in the Employment Equality Directive focuses upon adjustments to the working environment that respond to the needs of the individual. Article 5 states:

300 A. Lawson, ‘People with Psychosocial Impairments or Conditions, Reasonable Accommodation and the Convention on the Rights of Persons with Disabilities’ in B. McSherry (ed), *International Trends in Mental Health Laws* (Federation Press 2008) 62, 68.

301 G. Lockwood, C. Henderson and G. Thornicroft, ‘Mental Health Disability Discrimination: Law, Policy and Practice’ (2014) 14 *International Journal of Discrimination and the Law* 168, 178.

302 E. Emens, ‘The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA’ (2005-2006) 94 *Georgetown Law Journal* 399, 460.

303 http://ec.europa.eu/justice/discrimination/files/reasonable_accommodation_in_employment_final2_en.pdf accessed 16 August 2016.

... 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 provide training for such a person, unless such measures would impose a disproportionate burden on the employer.

Given that accommodations are tailored to the needs of a particular individual, logic implies that, at some point, the employer must have knowledge of the barriers experienced by the individual in order to consider whether effective measures can be taken to mitigate or remove these barriers. In contrast, other legal duties found in the Employment Equality Directive, such as the prohibition of indirect discrimination, may not require the employer to have prior knowledge of individual impairment or disability.³⁰⁴

The principle that the employer must have acquired some knowledge of the needs of the individual is relatively simple to grasp. A closer analysis, however, reveals that knowledge can take a variety of forms and it may be more difficult to establish exactly what the law requires. Two key questions can be identified:

- (i) Does the employer know that the individual has a disability?
- (ii) Does the employer know that the individual needs a reasonable accommodation in relation to that disability?

In relation to the first question, this does not imply that the employer needs to know the precise kind of impairment (i.e. whether it is physical, psychological, intellectual etc.); it is sufficient that the employer has knowledge that the employee has an impairment that could give rise to a disability. The factual circumstances of specific cases may give rise to more subtle issues; for example, where an individual has multiple disabilities, did the employer know of the disability that relates to the accommodation required?

A distinction may also be drawn between what the employer knows and what the employer ought to know. This is sometimes referred to as the difference between *actual* knowledge and *constructive* knowledge. In the former case, actual knowledge implies that the employer explicitly possesses information meaning that he/she is aware that an individual has a disability and/or the need for a reasonable accommodation. For example, this would happen where an individual tells her employer that she has depression and, for that reason, would like flexibility about the time that she starts work. *Constructive* knowledge encompasses situations where the employer had sufficient information in order to conclude that he/she ought to have known that the individual had a disability, even though the employer may not have drawn that conclusion. For example, an employee may not have directly disclosed a psychosocial disability to his employer, but he has had several periods of extended sickness absence over the past 18 months. The medical certificates stated that the reason for the sickness absence was 'stress and anxiety'. In such circumstances, it may be reasonable to conclude that the employer had constructive knowledge of the employee's disability, even if the employee did not register or declare his disability with his employer. The employer could be expected to explore whether any reasonable accommodation could assist the employee to return to work.

As discussed in section 4 of this report, one of the main consequences of stigma is that many individuals choose not to disclose psychosocial disabilities in the workplace. This means that, in litigation surrounding whether the employer has complied with the duty to provide reasonable accommodation, there may be dispute over whether the employer had actual or constructive knowledge of the employee's disability. Failure to disclose, or delay in disclosure, may weaken an employee's claim. Research in the **UK** found delayed or non-disclosure was often interpreted by Tribunals as demonstrating a lack of cooperation on

304 E.g. in para. 76, Joined Cases C-335/11 and C-337/11, *HK Danmark (Ring and Skouboe Werge)*, judgment of 11 April 2013, the Court of Justice held that the possibility in Danish law for dismissal after 120 days of paid sickness absence in a 12 month period could potentially constitute indirect discrimination because it could place workers with disabilities at a particular disadvantage compared to those without disabilities. The potential for indirect discrimination in the application of such a rule arose, in the view of the Court, for workers with disabilities in general; the specific impairment of an individual worker was not critical to this finding.

the part of the employee.³⁰⁵ The following examples from **Ireland** illustrate the practical problems that can arise.

In *Connacht Gold Co-operative Society v A Worker*,³⁰⁶ the complainant had been employed for almost four months when he took sick leave. Around one month later, he was dismissed. The worker had been receiving treatment for depression for around six months prior to taking up the job, and continued to see his psychiatrist during his sick leave. Nevertheless, his doctor avoided mentioning depression on his medical certificates sent to the employer, while his wife told his employer that he was having stomach trouble. The Labour Court held that there was no breach of the duty to provide reasonable accommodation because the employer had no knowledge of the worker's depression. A similar scenario arose in *An Employee v A Logistics Company*,³⁰⁷ where an employee had frequent days of sick leave over a 14 month period, culminating in his dismissal. For most of this period, the employee told the employer that he was experiencing stomach problems. He finally informed his employer that he had depression in a meeting that culminated in his dismissal. While the Equality Tribunal held his dismissal to be discriminatory, it limited the compensation awarded to 2 months of salary (€5,000) on the basis that his failure to disclose his disability at an earlier point in time had 'exasperated the situation'.³⁰⁸

Given employees' reticence when it comes to discussing psychosocial disabilities with their employers, the approach of national law to the question of knowledge will be an important factor in litigation around reasonable accommodation for people with psychosocial disabilities. As described below, a variety of approaches can be identified in national law.

5.1.1 Knowledge is required in national non-discrimination legislation

It appears that in many Member States there is a requirement that the employer has knowledge of the person's disability in order to trigger the duty to provide reasonable accommodation. However, this is often based upon an interpretation of what is implied by national legislation, rather than an express requirement. As a result, national law is often ambiguous with regard to the type or extent of knowledge that is required on the part of the employer.

Three examples were found of Member States where the legislation expressly indicates the need for knowledge of disability on the part of the employer. In **Poland**, the legislation indicates a duty on the individual to inform the employer about any need for accommodation; reasonable accommodation is defined as 'necessary changes and adjustments in line with the specific needs reported to the employer, stemming from somebody's disability'.³⁰⁹ In **Spain**, persons with disabilities do not have a general obligation to inform their employer about their disability; however, if a person requests a reasonable accommodation, then they must notify their disability to the employer.³¹⁰ In both of these states, there is a clear onus on the individual to trigger the duty to provide reasonable accommodation by providing the employer with the relevant information.

In the **UK**, the Equality Act 2010 applies to Great Britain.³¹¹ Paragraph 20(1) of Schedule 8 states that:

A³¹² is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

305 G. Lockwood, C. Henderson and G. Thornicroft, 'Mental Health Disability Discrimination: Law, Policy and Practice' (2014) 14 *International Journal of Discrimination and the Law* 168, 176.

306 Ireland, EDA0822, 23 December 2008 (Labour Court).

307 Ireland, DEC-E2012-11, 6 February 2012 (Equality Tribunal).

308 Ireland, *Ibid* para. 5.4

309 Poland, Article 23a, the Act of 27 August 1997 on the Vocational and Social Rehabilitation and Employment of Disabled Persons (*Ustawa z 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych*).

310 Spain, RDL 1/2013, Article 66.2.

311 An equivalent requirement is found in s. 4A(3) Disability Discrimination Act 1995, which applies in Northern Ireland.

312 'A' refers to the employer and certain other persons/organizations under a duty to provide a reasonable adjustment.

- (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;
- (b) ... that an interested disabled person has a disability and is likely to be placed at the disadvantage ...

This requirement has generated a significant volume of case law over time, some of which relates to people with psychosocial disabilities. For example, in *Gallop v Newport City Council*,³¹³ the claimant's doctor documented that he had anxiety and depression brought on by work-related stress. Although this had extended over a period of three years, the employer's occupational health advisor concluded that he was not covered by the legal definition of disability; the employer sought to rely on this advice as evidence that it did not have knowledge of his disability and hence it was not under a duty to provide reasonable accommodation. The Court of Appeal held that the ultimate responsibility for making a factual judgment on whether the employee has a disability lies with the employer; it could not 'simply rubber stamp the [occupational health] advisor's opinion'.³¹⁴

In addition to those states where national legislation expressly includes a knowledge requirement, there are others where national experts take the view that this may be an implied requirement. This was reported to be the situation in **Austria, Cyprus, Estonia, Finland, France, Hungary, Malta, the Netherlands, Portugal, and Slovenia**.

In **Finland**, there is no reference to knowledge in the legislation, but the government proposal accompanying the law stated that the need for reasonable accommodation usually appears when the person with a disability asks for it.³¹⁵

In **France**, the starting point is the employer's duty to consult an occupational health doctor; it is a question of fact as to whether the employer had sufficient knowledge to imply a duty to refer the employee to the occupational health doctor (irrespective of any official recognition that the employee has a disability). If an employer fails to make a reference, then he/she can be held liable to the disabled employee.³¹⁶

In **Hungary**, non-discrimination legislation is silent on this point, but the Labour Code includes general duties of acting in good faith and with cooperation that apply to employers and employees. The national expert concluded that these imply that if there are circumstances on the basis of which the employer suspects that reasonable accommodation may be necessary, he/she will be under the obligation to take measures in order to find out whether this is the case. At the same time, the employee is also under the obligation to inform the employer as soon as possible when the need for reasonable accommodation arises.

In the **Netherlands**, the Explanatory Memorandum to the Act on equal treatment on grounds of disability or chronic illness indicates that the duty to provide reasonable accommodation arises 'upon request' ['desgevraagd'], which implies that normally the employee must bring their need for an accommodation to the attention of the employer.³¹⁷ However, 'if employers become aware of the disability or chronic illness of one of their employees, they are under a best efforts obligation (*inspanningsverplichting*) to

313 [2014] IRLR 211 (CA).

314 Ibid para. 43. The case was remitted to the (first instance) Employment Tribunal, but ultimately it rejected his complaint of disability discrimination and this finding was upheld on appeal: *Gallop v Newport City Council* [2016] IRLR 395 (EAT).

315 Finland, Page 81, government proposal on the Non-Discrimination Act 19/2014. In relation to goods and services, the proposal indicated that providers could need to anticipate in advance common accommodation requirements, e.g. for those with vision impairments.

316 France, Court of Cassation, Social Chamber, n° 14-20377, 9 December 2015: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000031613501&fastReqId=1412787265&fastPos=1>.

317 Netherlands, Explanatory Memorandum to the Act on equal treatment on grounds of disability or chronic illness (*Memorie van Toelichting bij de Wet gelijke behandeling op grond van handicap of chronische ziekte*), Tweede Kamer, 2001-2002, 28 169, no. 3. Available at <https://zoek.officielebekendmakingen.nl/kst-28169-3.html> accessed 13 May 2016.

investigate the nature of the sickness absence of the disabled/chronically-ill employee and to find out whether reasonable accommodations are needed.³¹⁸

5.1.2 Knowledge is required by national case law

In three states, case law has established that knowledge is required to trigger the employer's duty to provide reasonable accommodation.

In **Denmark**, national legislation does not address the issue of knowledge, but the Supreme Court has held that an employer must actually know or ought to know about an employee's disability in order for the obligation to provide reasonable accommodation to apply.³¹⁹

In **Ireland**, there is no express requirement for knowledge in the legislation, but tribunals and courts have consistently held that the employer must have actual or constructive knowledge of the person's disability in order to trigger the duty to provide reasonable accommodation (e.g. the decision in *Connacht Gold Co-operative Society v A Worker*³²⁰ discussed above). Case law has further clarified that mere knowledge that the worker has a disability may not be sufficient. For example, in *A Worker v An Employer*,³²¹ the complainant had multiple sclerosis and became unable to drive a vehicle unless it had adapted hand controls fitted. The employer provided an accommodation in the form of relieving him from driving duties in the course of his employment. The complainant argued that his inability to drive at work caused him anxiety and stress, culminating in extended sick leave and his resignation. The Labour Court rejected his claim that the employer had failed to comply with the duty to provide reasonable accommodation. It held that the evidence did not show that the employer 'had any actual or constructive knowledge that the arrangements in place whereby he was not required to drive were a source of difficulty or distress for the complainant'.³²² This indicates that, in some circumstances, the worker needs to communicate clearly to their employer the type of reasonable accommodation that he or she is seeking.

In **Sweden**, case law has held that a mistaken assumption can be a defence to an alleged breach of the Discrimination Act. The point arose in a case where a restaurant had rejected a person with disability because of a perception that the person was drunk.³²³ The individual's impairment led the person displaying behaviour which was misinterpreted as intoxication. There was no breach of the Act because the restaurant did not know that the person had a disability. Consequently, if an employer believes (without negligence) that a worker does not need any reasonable accommodation because he or she has no disability, there is no violation of the Discrimination Act.

5.1.3 No knowledge requirement in national law

In some states, the question of whether knowledge is required in order to trigger the duty to provide reasonable accommodation is not expressly addressed within national legislation, nor has there been case law on this point. This was the case in **Belgium, the Czech Republic, Germany, Greece, Latvia, Lithuania, Luxembourg, Romania, and Slovakia**.

In some states, the silence of national legislation or case law was attributed to the way in which disability rights are organised in the national system. Where employees need official recognition of disability status in order to enjoy protections in labour law that extend to people with disabilities (e.g. quota systems),

318 D. Ferri and A. Lawson, *Reasonable Accommodation for Disabled People in Employment – a Legal Analysis of the Situation in EU Member States, Iceland, Liechtenstein and Norway* (European Commission 2016) 68-69.

319 Denmark, Supreme Court, Judgment in case No. 104/2014 of 11 August 2015. Printed in U2015.3827H. The case concerned reasonable accommodation for a person with arthritis.

320 Ireland, EDA0822, 23 December 2008 (Labour Court).

321 Ireland, [2005] 16 ELR 159 (Labour Court).

322 Ireland, *Ibid* 169.

323 Sweden, Svea Court of Appeal, case T 7752-08 (judgement 2009-06-02).

an employer is likely to have knowledge via this mechanism. This was reported to be the situation in **Bulgaria** and **Croatia**. In **Italy**, it was emphasized that data on disability is treated as sensitive personal data and the employer would only be permitted to process such data if strictly necessary. Handling such data can be justified in connection with the application of quota systems for the employment of people with disabilities; as above, this would give rise to knowledge on the part of the employer of the employee's disability.

5.1.4 Conclusion on knowledge requirements

The enduring reality of stigma means that many people with psychosocial disabilities, or who have experienced psychological impairments in the past, will be cautious about disclosing this information in the workplace. This can create practical obstacles for those employers who are keen to provide the best possible support for employees; clearly, it is difficult to understand what accommodations may be necessary and appropriate where the individual affected is reticent about sharing personal information with their employer. Having an appreciation of the deeply-rooted experiences of stigma underscores the need for employers to engender a working environment in which individuals have the confidence to be open about any mental health problems that they experience. For example, employers may need to consider adopting a specific policy on supporting workers who experience mental health problems and take steps to publicise this to their workforce.

Overall, the position in national law with regard to the type or extent of knowledge needed by the employer in order to trigger the duty to provide reasonable accommodation remains ambiguous. Most Member States have no explicit legislative provisions on knowledge and case law remains very limited. Considering the different types of knowledge described at the beginning of this section, there were no examples clearly identified where law requires the employer to know the exact type of disability (i.e. whether it was a psychosocial disability or another type of disability). It was also unclear whether national law implies that the employer has to know both of the disability and of the need for reasonable accommodation. In practice, this seems likely to depend upon the factual circumstances of the case. For example, where an employee is on long-term sickness leave due to a psychosocial disability, then it seems reasonable that the employer investigates whether a reasonable accommodation could aid the employee to return to work, even if the employee has not made any specific request. In contrast, an employer might be aware that an employee has experienced depression in the past. If the employee is currently performing their job without any apparent difficulty, then the employer would have no specific reason to contemplate the provision of accommodation. Evidently, this is a sensitive area where a balance needs to be struck. On the one hand, employers should be alert to any possible need for accommodation, taking into account that workers may be reticent about making a request. On the other hand, it may be inappropriate to ask repeatedly an employee if he/she needs an accommodation where there is no evidence that the employee is actually encountering any barriers in his/her performance at work.

If the law imposes demanding requirements for disclosure by individuals, then some people with psychosocial disabilities will not benefit from the duty to provide reasonable accommodation. For this reason, it would be helpful to develop clear guidance on what information employers need in order to prompt the provision of reasonable accommodation. In Canada, for example, the Ontario Human Rights Commission has adopted a detailed 'Policy on Preventing Discrimination Based on Mental Health Disabilities and Addictions'.³²⁴ This recommends that employers 'should limit requests for information to those reasonably related to the nature of the limitation or restriction, to assess needs and make the accommodation.'³²⁵ For example, in many cases, the employer only needs to know about limitations experienced at the current time and there is no need for full disclosure of the employee's medical history. More generally, it will often be sufficient for medical evidence to identify the functional limitation experienced by the employee

324 <http://www.ohrc.on.ca/en/policy-preventing-discrimination-based-mental-health-disabilities-and-addictions> accessed 18 August 2016.

325 Ibid para. 13.7.

without disclosing the underlying diagnosis. For example, a medical certificate could indicate that the employee needs accommodation at work for elevated levels of fatigue due to medication that she is taking. This is sufficient information for the employer then to investigate what accommodations could be granted, such as more regular rest-breaks, working from home, or temporary reduction in working time. In many occupations, the employer does not need to know the underlying condition that the medication is designed to treat. Such an approach can help to reassure employees with psychosocial disabilities who may be concerned about the stigma that would follow disclosure of their condition to an employer. In a similar vein, the Canadian guidance also emphasizes the need for employers to have procedures for the handling of medical information within the organisation in order to ensure that confidentiality is fully protected.

5.2 Accommodating people with psychosocial disabilities and national legislation

All Member States have introduced the duty of reasonable accommodation into their national legislation. A preliminary issue is the definition of disability; if an individual is not regarded as having a disability for the purposes of national non-discrimination legislation, then typically he/she will not be covered by the duty to provide reasonable accommodation. As discussed in section 3 of this report, there is considerable variation in how national law approaches psychological impairments and the extent to which these may, in combination with other barriers, give rise to the person being treated as having a disability. In principle, though, people with psychosocial disabilities are protected in all Member States.

Where an individual is treated as having a disability and falling within the scope of the duty to provide reasonable accommodation, national law can vary on key issues relating to the implementation of the duty. These include procedural requirements (e.g. is there an onus on the employer to investigate possible modifications that could allow the person to remain in employment) and substantive requirements (e.g. what circumstances will be treated as giving rise to a disproportionate burden and thus alleviating the employer from the duty to provide a particular accommodation). National law also differs on the consequences of an employer failing to comply with the duty; this may be treated as a form of direct discrimination, indirect discrimination, or a separate form of legal wrong. These issues are explored in depth in the 2016 Thematic Report on Reasonable Accommodation in Employment.³²⁶

In all Member States, national experts were of the opinion that people with psychosocial disabilities were, in principle, able to benefit from the duty to provide reasonable accommodation (subject to the requirement that they fell within the relevant definition of disability in national law).

5.3 Accommodating people with psychosocial disabilities and national case law

This section concentrates on examples in the Member States of case law on reasonable accommodation involving people with psychosocial disabilities. In 22 Member States, national experts did not report any such case law: **Austria, Belgium, Bulgaria,**³²⁷ **Croatia, Cyprus, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia,**³²⁸ **Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain**³²⁹ and **Sweden**. In **Germany**, the national expert reported that

326 D. Ferri and A. Lawson, *Reasonable Accommodation for Disabled People in Employment – a Legal Analysis of the Situation in EU Member States, Iceland, Liechtenstein and Norway* (European Commission 2016).

327 One case of a claim for reasonable accommodation failed because the claimant was held not to have a disability for the purposes of the applicable legislation: see section 3.2.2. of this report.

328 Case law has provided an example of reasonable accommodation being applied in relation to a person with an intellectual disability: *B v State Social Insurance Agency*, Administrative Regional Court, 27 September 2013, no. A420528911.

329 Case law in Spain has applied the duty of reasonable accommodation to persons with intellectual disabilities or neurodevelopmental disorders, such as autism: Constitutional Court Decision, 10/2014, 27 January 2014: <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/23770> accessed 22 August 2016; Constitutional Court Decision, 77/2014, 22 May 2014. <http://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-A-2014-6651.pdf> accessed 22 August 2016.

psychosocial disability is covered by national non-discrimination law and, without doubt, there is a duty of reasonable accommodation, within the limits provided by the law.

It should be noted, however, that court decisions are often unreported, especially at first instance, so it is possible that cases have occurred in these states. Moreover, in some states, there have been decisions on reasonable accommodation for people with intellectual disabilities (e.g. **Spain**),³³⁰ or people with an impairment that impacts on their cognitive abilities (e.g. **Sweden**).³³¹ While these are distinct from the focus of this report, national experts viewed these examples as possible indications that courts would be willing to apply the reasonable accommodation duty to people with psychosocial disabilities. The remainder of this section examines the case law found in **Denmark, France, Ireland, the Netherlands, and the UK**.

In **Denmark**, case law of the Board of Equal Treatment has explored the application of reasonable accommodation to people with psychosocial disabilities.³³² Some examples include the following decisions. In 2013, it held that disability discrimination had occurred following the dismissal of a teacher with paranoid psychosis. The teacher was working for 40% of a full-time contract and had special arrangements to teach only classes with fewer pupils and to teach as few age groups as possible. Following the closure of the school, she was not redeployed on the basis that another school could not meet her accommodation requirements and she was therefore amongst those suitable to be selected for dismissal. The Board held that the municipality had not established that accommodation could not be provided at the new school, nor that it would be unduly burdensome.³³³

In 2015, the Board of Equal Treatment held that reasonable accommodation had not been provided prior to the dismissal of a woman who was on sick leave due to stress. This was connected to difficulties in performing her job flowing from a visual impairment. Although the employer had been advised at the time of her appointment that she would require a personal assistant, and that this would be funded by the local municipality, it failed to put in place such arrangements.³³⁴

In 2016, the Board of Equal Treatment found a breach of the duty to provide reasonable accommodation in a case where a municipality dismissed an employee. Following a traffic accident in 2012, the employee had periods of sickness absence and working reduced hours as a result of complications of infection, depression, anxiety and post-traumatic stress disorder. At the time of her dismissal in 2014, she was following a plan for a phased increase in her working hours. The Board of Equal Treatment accepted that she had a disability and held that the municipality had not complied with its obligation to provide reasonable accommodation. It had not been tested if the employee would have been able to perform her duties with permanently reduced working hours.³³⁵

In **France**, a case before the Administrative Appeal Court concerned a claimant who was not appointed to a position with the tax authorities.³³⁶ He successfully completed the admission test, but a doctor found that he should not be appointed due to a psychiatric medical condition for which he received medication. A subsequent evaluation by a psychiatrist held his rate of disability to be 10% and that he was capable of executing the expected functions in the position. Nevertheless, the first doctor maintained that he was not suitable for appointment. Further assessment by another psychiatrist affirmed his capability to work, but he was not appointed. The relevant legislation specified that the evaluation of health should relate

330 Ibid.

331 Sweden, Labour Court 2013 no. 78, *Equality Ombudsman v Veolia and the Swedish Bus and Coach Federation* (judgment of 23 October 2013).

332 The summary of the Danish case law was provided by the national expert for this project.

333 Denmark, Board of Equal Treatment, Decision 230/2013 of 23 October 2013.

334 Denmark, Board of Equal Treatment, Decision 117/2015 of 12 August 2015.

335 Denmark, Board of Equal Treatment, Decision 34/2016 of 2 March 2016.

336 France, Paris, Administrative Appeal Court, 4th Chamber, 13 June 2014, n° 11PA01543: <http://www.juricaf.org/arret/FRANCE-COURADMINISTRATIVEAPPELDEPARIS-20140613-11PA01543> accessed 22 August 2016. Summary provided by national expert for this project.

to the time of appointment. With regard to foreseeable future developments in health, these are subject in all cases to the possibility of providing reasonable accommodation. The Court quashed the decision to refuse the appointment.

In **Ireland**, claims from persons with psychosocial disabilities have featured prominently in the body of case law on reasonable accommodation.³³⁷ The key obligations on employers were established in *Humphries v Westwood Fitness Club*.³³⁸ This case involved a child-care assistant with anorexia and bulimia. When she sought time off for treatment for depression, she was dismissed because of the employer's belief that she posed a risk to herself and the children. The Circuit Court upheld the decision of the Labour Court that the duty to provide reasonable accommodation includes procedural obligations. In terms of process, the employer must establish the factual position concerning the employee's condition, which would include seeking medical evidence. The employer must consider what steps can be taken to render the employee fully capable of performing his/her duties. In this process, the employee must be granted a 'full opportunity to participate at each level'. On the facts, the employer had breached the duty to provide reasonable accommodation because he dismissed her without gathering accurate information on her condition and failed to consider whether any reasonable accommodation could have permitted her to continue in her job.

Alongside the procedural obligations on an employer, the accommodation duty also requires an employer to act in a reasonable manner. In *Mr. O v A Named Company*,³³⁹ the claimant had been off work for around six months due to an anxiety-related illness. He was refused permission to resume work on a phased basis by increasing his duties over several weeks. On the day he returned to work, he attended a meeting with his managers. He was informed that he would not be permitted to deal with clients because of his illness and he was given a deadline of 15.00 that day to complete a task. He subsequently resigned. The Equality Tribunal held that the employer should have allowed him to return to work with a gradual increase in duties. It was not reasonable to give him a deadline on the first day that he returned to the office. The employer knew that stress aggravated his condition and it would have been reasonable to allow him several days to adapt to returning to work before allocating tasks.

Case law in **Ireland** has also clarified the limits to the employer's duty. In *An Employee v A Government Department*,³⁴⁰ the claimant experienced panic attacks and depression leading to substantial sick leave; she was absent from work for 802 days during the period 2004 to 2008. Consequently, her annual incremental pay increase was suspended, in accordance with policy for government employees. She argued that it would have been a reasonable accommodation for the policy not to be applied to her because her absences were related to her (psychosocial) disability. This was rejected by the Equality Tribunal:

reasonable accommodation does not extend to more favourable treatment, that is, it is about different treatment that is justified because the person's disability necessitates such different treatment. Reasonable accommodation refers to the necessary provision/alteration of a role/workplace in order to enable a person who but for his/her disability would otherwise be fully competent in undertaking.³⁴¹

There was no evidence to show that reasonable accommodation in the form of granting her annual pay increases would have rendered her fully competent to return to work.

337 See further, E. Barry, 'Case Law Review on Mental Health in the Workplace' (See Change 2014): <http://www.seechange.ie/resources-and-support-services/> accessed 9 August 2016.

338 Ireland, [2004] 15 ELR 296 (Circuit Court).

339 Ireland, DEC-E2003-052, 20 November 2003 (Equality Tribunal).

340 Ireland, DEC-E2012-063, 29 May 2012 (Equality Tribunal).

341 Ireland, *Ibid* para 5.6.

In the **Netherlands**, there have been several examples of decisions of the Dutch equality body, the Netherlands Institute for Human Rights (NIHR), holding that persons with psychosocial disabilities are, in principle, able to rely upon the duty to provide reasonable accommodation. The first case concerned a man **who was vulnerable to psychosis. After several months of his internship, he told his employer (a day care for children)** about this illness; his internship was then terminated for security reasons.³⁴² In the second case, an employment contract was not extended by a veterinarian practice because the employee had experienced depression.³⁴³ In both cases, the NIHR found that the refusal to provide the employee with a reasonable accommodation constituted a prohibited distinction on the ground of disability.

Amongst EU Member States, the **UK** has the most extensive body of case law on reasonable accommodation for people with psychosocial disabilities. This includes examples of case law recognising the particular needs of such people. For example, in *Croft Vets*, the claimant was off work with depression and anxiety, triggered by work-related stress.³⁴⁴ There was some medical evidence that her prospects for returning to work could have been improved by the employer providing funding for psychiatric sessions and cognitive behavioural therapy. The Employment Appeals Tribunal held where such treatment was specifically designed to enable the claimant to return to work, then it could constitute a reasonable adjustment.³⁴⁵ Other kinds of workplace adjustments entail expenditure by the employer, so the costs incurred by an employer providing funding for counselling were not a reason to reject the possibility of such an adjustment. It would, though, be subject to the limit of what would be a reasonable cost for the employer to bear in the circumstances of the case.

A recurrent issue in the case law on reasonable accommodation for people with psychosocial disabilities is the manner in which tribunals and courts have interpreted the statutory duty on employers.³⁴⁶ The tendency in the case law has been to adopt a relatively strict approach that requires tribunals and courts normally to address a series of questions. These are based around the identification of a provision, criterion or practice (PCP) in respect of which accommodation is needed. For example, the PCP could be that employees are all required to work 40 hours per week, which might create a difficulty for an employee who needs to work less hours due to a psychosocial disability. Tribunals and courts will normally explore the following questions:

- (i) What is the employer's provision, criterion or practice (PCP)?
- (ii) Is the disabled person placed at a substantial disadvantage due to the application of the PCP in comparison with persons who are not disabled?
- (iii) Can reasonable steps be taken to prevent the PCP creating that disadvantage?³⁴⁷

This test applies to claims for reasonable adjustments by people with all types of disabilities, but difficulties with its rigidity can be witnessed in some case law affecting people with psychosocial disabilities. In *Sanders*,³⁴⁸ the claimant was dismissed for poor time-keeping. She had depression and there was medical evidence that this affected her ability to get up in the mornings. She had informed her employer in writing that she had depression and that this was affecting her ability to perform day-to-day activities, but she had not specifically sought an adjustment to the time that she started work. The Court of Appeal held

342 Netherlands, Netherlands Institute for Human Rights (NIHR), Opinion 2012-167, <https://mensenrechten.nl/publicaties/oordelen/2012-167>, accessed 13 May 2016.

343 Netherlands, NIHR Opinion 2007-24, <https://mensenrechten.nl/publicaties/oordelen/2007-24>, accessed 13 May 2016.

344 United Kingdom, *Croft Vets and others v Butcher* [2013] Eq LR 1170 (EAT).

345 United Kingdom, *Ibid* para. 40.

346 For more detailed analysis, see M. Bell, 'Mental Health at Work and the Duty to Make Reasonable Adjustments' (2015) 44 *Industrial Law Journal* 194.

347 United Kingdom, *Royal Bank of Scotland Plc v Ashton* [2011] ICR 632 (EAT), paras. 13-15.

348 United Kingdom, *Newham Sixth Form College v Sanders* [2014] EWCA Civ 734.

that the employer did not have sufficient information to know that a requirement to attend work on time placed her at a substantial disadvantage in comparison with a non-disabled person.³⁴⁹

A second theme found in the case law is identifying possible forms of reasonable accommodation in the context of conflict in the workplace. People with psychosocial disabilities can, at times, find social interactions more difficult.³⁵⁰ This can have the effect of giving heightened sensitivity to how disputes in the workplace are handled. In their analysis of **UK** case law on mental health discrimination, Lockwood et al found that:

in cases that were lost by the employer, it was evident that there was a culpable want of care on the part of either a line manager or a human resources department. There was evidence of a failure to address long-standing problems or a failure to undertake investigations into grievances when complaints were made.³⁵¹

In one case, it was held that dealing promptly with a grievance raised by an employee could constitute a reasonable adjustment on the basis that it could have mitigated the employee's situational anxiety (and thereby aided his return from stress-related sick leave).³⁵²

Finally, it should be noted that **UK** case law has also addressed the provision of reasonable adjustments in the organisation of social security. In *Secretary of State for Work and Pensions v R (on the application of MM and DM)*,³⁵³ reforms to incapacity and disability benefits required individuals to be assessed for their capability to work. This normally entailed completion of a questionnaire and a face-to-face interview, whereas organisations representing persons with psychosocial and intellectual disabilities argued that there should have been greater reliance on seeking evidence from medical professionals. The Court of Appeal upheld the finding of the Upper Tribunal that there was a breach of the duty to provide reasonable adjustments because the system adopted created disadvantage for persons with psychosocial and intellectual disabilities. They may not be able to communicate in person the true extent of their illness and the procedure involved placed 'greater stress and anxiety on this group than others'.³⁵⁴

5.4 Conclusion

All Member States have a duty of reasonable accommodation in their national legislation. National experts agreed that, in principle, this duty could be relied upon by people with psychosocial disabilities once they satisfied the relevant legal definition of disability. Yet a review of national case law indicates that in most Member States there are very few examples of individuals with psychosocial disabilities seeking to rely upon the reasonable accommodation duty before national judicial or administrative bodies.

One factor that plays a part in use of the law is the extent to which an employer is required to have knowledge of the person's psychosocial disability in order to trigger the duty to provide reasonable accommodation. As many psychosocial disabilities are invisible in nature, establishing that the employer knew or ought to have known the person had disability can prove difficult in some cases. This is compounded by the effects of stigma that make people often reluctant to disclose such disabilities. In many national legal systems, the approach of national law to the question of knowledge and the duty of reasonable accommodation remains ambiguous.

349 United Kingdom, *Ibid* paras 18-19. The case was remitted to the Employment Tribunal for application of the legal guidance of the Court of Appeal to the facts of the case.

350 T. Scheid, 'Stigma as a Barrier to Employment: Mental Disability and the American with Disabilities Act' (2005) 28 *International Journal of Law and Psychiatry* 670, 676.

351 G. Lockwood, C. Henderson and G. Thornicroft, 'Mental Health Disability Discrimination: Law, Policy and Practice' (2014) 14 *International Journal of Discrimination and the Law* 168, 175.

352 United Kingdom, *Tameside Hospital NHS Foundation Trust v Mylott* [2011] Appeal No. UKEAT/0352/09/DM, UKEAT/0399/10/DM.

353 United Kingdom, [2013] EWCA Civ 1565.

354 United Kingdom, *Ibid* para. 60.

6 Conclusion

6.1 The need for better awareness of psychosocial disability and its relevance to non-discrimination legislation.

This report indicates that, in many Member States, there remains a limited body of knowledge on the situation of people with psychosocial disabilities in relation to the labour market. Differences in terminology mean that it is difficult to compare data across the Member States. Labour market data and sociological research are often based upon categories that relate, in a general sense, to psychosocial disability, but which vary as to the exact range of conditions included. As discussed below, this may give rise to difficulties in the application of the law, but it also hinders a comparative analysis of people's experience of the labour market.

Notwithstanding these constraints, it is clear that there has been growing attention to this issue in the past decade. In many industrialised economies, it is evident that mental health problems are now a leading source of sickness absence from work, as well as a main cause of persons exiting the labour market and relying upon social welfare benefits. While the scale of these phenomena may vary across the Member States, there can be little doubt that reduced labour market participation for people with psychosocial disabilities entails major social and economic costs.

There has been relatively little analysis in the EU of the role that non-discrimination legislation can play in promoting labour market participation for people with psychosocial disabilities.³⁵⁵ The duty to provide reasonable accommodation holds considerable potential as a means of finding pragmatic ways of adapting the working environment to keep people with psychosocial disabilities in employment. Section 2.4 described evidence of good practices emerging in response to the reasonable accommodation duty, but there is a need for better awareness of the variety of effective measures that employers can take.

6.2 Differences in terminology and resulting confusion.

Section three of this report has revealed that, whilst persons with psychosocial disabilities are, in principle, protected from disability discrimination in all EU Member States, there are significant differences in how the concept of disability is defined in non-discrimination law. The term 'psychosocial disability' is not used in any of the legislative definitions of disability identified in this report. However, a variety of other terms are used to describe the relevant impairment or disability. In some cases reference is made to a 'psychological' impairment / limitation / condition. The term 'mental [impairment]' is also frequently used. This term is used in a variety of ways in national non-discrimination legislation, as meaning a 'psychological', an 'intellectual', or both a 'psychological and intellectual' impairment or disability. It is to be expected that case law which interprets or applies the concept of disability, in both those Member States which have a statutory definition of disability and those which do not, also displays many variations in the terms used, and, in particular, the meaning attributed to the term 'mental'.

It is naturally worth recalling that all national disability non-discrimination law and national definitions of disability must be interpreted in light of the CJEU case law and the CRPD, and the definitions or guidance which these provide on the concept of disability. The Court of Justice, in its definition of disability, refers to a 'psychological impairment', whilst the CRPD refers to a 'mental impairment' in Article 1. The CJEU's definition of disability also refers to mental impairments, but this seems to relate exclusively to impairments which contribute to intellectual disabilities rather than psychosocial disabilities. Different uses of the same terms are therefore apparent at EU / UN level as well as amongst the Member States.

355 Early comparative research on this topic was conducted by the FRA: 'The Legal Protection of Persons with Mental Health Problems under Non-Discrimination Law – Understanding Disability as Defined by Law and the Duty to Provide Reasonable Accommodation in European Union Member States' (FRA 2011).

Differences in the use of terminology and national definitions of disability for the purposes of non-discrimination law will continue to exist and a harmonised definition of disability for these purposes is not feasible – notwithstanding that, national definitions must be interpreted in light of EU law and, if domestic law requires, the CRPD. However, given the terminological differences, it is important always to clarify how particular terms are being used. In particular, there exists great scope for confusion regarding the use and understanding of the term ‘mental’ impairment or disability, and legislators, courts and others who use this term should always clarify or explain their understanding of the term. Otherwise there exists significant scope for misunderstandings.

6.3 Awareness of the role that stigma can play in creating disadvantages for people with psychosocial disabilities, and taking this into account when interpreting the concept of disability

The CRPD embraces the social model of disability. This is also reflected in some definitions of disability found in national non-discrimination law. Significantly the CJEU has attempted to adapt its definition of disability for the purposes of the Employment Equality Directive so that it is in line with the CRPD and follows the social model. In *HK Danmark (Ring and Skouboe Werge)* the Court, taking the lead from Article 1 CRPD, held that the concept of ‘disability’ must be understood as ‘a limitation which results ... from ...psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers’.³⁵⁶ The definition therefore clearly recognises that environmentally created barriers, in interaction with impairments, lead to disability. These barriers can naturally be physical in nature, such as a multilevel building without lifts, which is impossible for someone who uses a wheelchair to access, or information which is only available in printed form, which cannot be read by a blind person who uses a computer or Braille to read. However, these barriers can also be attitudinal – such as the assumption that someone with a psychological impairment is dangerous or unreliable, and therefore not suitable to take up or continue employment.

The CJEU has to date not considered a case where a person with a psychosocial disability has claimed protection from disability discrimination. However, as section four of this report has identified, people with psychosocial disabilities often face stigma and prejudice and this in itself can restrict their employment opportunities. In some cases, people with psychosocial disabilities are available and qualified to work, but are discriminated against because of the false assumptions of employers and fellow workers and this limits their opportunities. Whilst the Court has not considered a case involving a person with psychosocial disabilities who has found themselves in this position, in *Z* it considered a case where the individual’s impairment (‘inability to have a child by conventional means’) had no impact on her ability to work. In that case the Court focused on the impact of the impairment, rather than reflecting on environmental factors and the social model of disability more generally. Whilst employment-related rules regarding access to paid maternity or adoption leave clearly disadvantaged *Z*, the Court found that she was not disabled for the purposes of the Employment Equality Directive since her impairment did not restrict her ability to work in any way. In the later case of *Kaltoft*³⁵⁷ the Court found that obesity did not in itself constitute a ‘disability’ since it does not necessarily involve a limitation which results from an impairment and which, in interaction with various barriers, hinders participation in professional life.³⁵⁸ However, where obesity does lead to such a limitation, it should be regarded as a disability.

These two cases reveal a focus by the Court on the need for an impairment physically to limit an individual’s ability to work before they can rely on protection from the Employment Equality Directive. As such, the Court fails to take into account the degree of stigma and prejudice which persons with disabilities, and particularly persons with psychosocial disabilities, face. In light of the social model of disability embodied

356 *HK Danmark (Ring and Skouboe Werge)*, para. 38.

357 Case C-354/13 *FOA v Kommunernes Landsforening (KL) (Kaltoft)*, EU:C:2014:2463, para 85.

358 *Ibid* para 58.

by the CRPD, which has ostensibly been embraced by the CJEU, it is important for future case law of the Court to recognise that stigma, prejudice and false assumptions can have a particularly disabling effect on persons with disabilities, and especially persons with psychosocial disabilities. The barriers which, in interaction with an impairment, can lead to disability can be attitudinal as well as physical. There is a need for European and national case law to recognise this and not to require that an impairment, on its own, must first have an impact on capacity to work, before an individual can be recognised as disabled and / or claim protection from disability discrimination.³⁵⁹

6.4 The role for initiatives by government and business to combat stigma related to psychosocial disabilities.

The evidence of low participation in the labour market, combined with stigma, indicates the need for positive action measures to overcome disadvantage. While the duty to provide reasonable accommodation is a valuable mechanism to assist individual workers, its effectiveness in practice can be hindered by workers' reluctance to disclose psychosocial disabilities to their employers. As discussed in section 5.1 of this report, employers typically need some degree of knowledge of the worker's impairment or disability in order to trigger the duty to provide accommodation. National law is often ambiguous with regard to the extent of knowledge required.

Concerted action by government and business is needed to build a climate where workers have the confidence to disclose any needs related to a psychosocial disability. Breaking the entrenched effects of stigma is likely to be difficult and to demand persistent efforts sustained over time. As described in section 4.3, there are many examples of ad hoc anti-stigma initiatives, but only a minority of Member States have adopted national or regional programmes to combat stigma. At the level of the individual workplace, employers need to develop a culture where workers feel able to disclose mental health problems knowing that these will be handled with sensitivity and support. Some examples were identified of transnational projects on good workplace practices,³⁶⁰ but further exchange of experience could be productive.

Section 5 of this report indicated that employers should avoid excessive demands for information from workers who are seeking an accommodation. This can help to circumvent the barriers arising from workers' reluctance to disclose psychosocial disabilities. For example, employers should focus on understanding the functional limitations that the employee is experiencing, e.g. decreased ability to concentrate, and identifying any reasonable accommodation that can be taken in response. In many occupational contexts, it is not necessary for the employer to seek information from the worker or medical professionals on the underlying condition causing the limitation.

6.5 Improving understanding of litigation patterns in the Member States

There are strong disparities in the extent to which non-discrimination legislation has been relied upon by people with psychosocial disabilities in the Member States; a minority of states have a developed body of case law in this area (especially the UK and Ireland), while in most there is very little.

A number of potential explanations can be identified and that warrant additional investigation. First, a possible reason for the differences may lie in the prevalence of psychological impairments across the Member States. Section 2 of this report indicated that some sets of data suggest that the prevalence of conditions such as stress, depression or anxiety varies significantly. Table 2 in section 2.1 revealed data that indicated that the UK and Ireland had the highest rates of stress, depression and anxiety amongst

359 For a discussion of CJEU case law on this point see Lisa Waddington, "Saying All the Right Things and Still Getting it Wrong: The Court of Justice's Definition of Disability and Non-Discrimination Law", 22 *Maastricht Journal of European and Comparative Law* 4 (2015), 576.

360 E.g. ETNO and UNI Europa, 'Good Work, Good Health' (2010): <https://www.etno.eu/datas/publications/studies/etno-goodpracticeguidelines-en.pdf> accessed 11 July 2016. See also, Joint Action on Mental Health and Wellbeing: <http://www.mentalhealthandwellbeing.eu/mental-health-at-workplaces> accessed 13 September 2016.

those who experienced a work-related health problem. These are also the two Member States with the greatest volume of case law on reasonable accommodation in employment and psychosocial disability. Other data-sets, however, suggest more similarity in the prevalence of psychological impairments across OECD countries (see Table 1 in section 2.1).

A second factor is the extent to which stigma inhibits individuals from disclosing a need for reasonable accommodation. Evidence from Eurostat cited in section 4.2.1 of this report suggests that public attitudes towards people with mental health problems differ across the Member States. Prominent examples of anti-stigma campaigns were found in **Denmark**, **Ireland**, the **Netherlands**, certain regions of **Spain**, **Sweden**, and the **UK**. One hypothesis could be that levels of stigma are lower in certain countries and that this creates an environment that empowers people with psychosocial disabilities to seek accommodations in the workplace, or to bring legal proceedings where these are not provided.

Finally, barriers to access to justice and limits in data collection are also factors that need to be taken into account. Evidence suggests that many people with disabilities encounter significant obstacles when seeking to enforce their rights.³⁶¹ In some Member States, there are few examples of reported case law on reasonable accommodation, whether concerning people with psychosocial disabilities or other types of disability.³⁶² Furthermore, in most states, data collection systems do not provide comprehensive monitoring of national case law in order to provide a reliable picture of the number of reasonable accommodation claims, let alone more detailed information on the types of disability of claimants.³⁶³ A more accurate picture of national litigation patterns could aid understanding of why non-discrimination legislation is used more frequently in certain states.

361 See further, section 2.4.8(c), D. Ferri and A. Lawson, *Reasonable Accommodation for Disabled People in Employment – a Legal Analysis of the Situation in EU Member States, Iceland, Liechtenstein and Norway* (European Commission 2016).

362 Ibid.

363 Ibid section 4.3.

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II. Legislation

A. International

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

B. European

- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (*Employment Equality Directive*), OJ 2000 L 303/16.
- Council Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time (*Working Time Directive*), OJ 2003 L 299/9.

C. National

Austria

- Act on the employment of people with disabilities (*Behinderteneinstellungsgesetz*), 11 August 2005.
- Federal Disability Equality Act (*Behindertengleichstellungsgesetz*), 1 January 2006.

Belgium

- Federal Act of 10 May 2007 on the fight against certain forms of discrimination (*Loi tendant à lutter contre certaines formes de discrimination*) *Moniteur Belge* (MB), 30 May 2007.
- Cooperation Agreement of 19 July 2007 between the three Communities (Flemish, French and German-speaking), the Region of Wallonia, the Region of Brussels-Capital, the *Commission communautaire commune* and the *Commission communautaire française* (*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*), MB, 20 September 2007.

Flemish Region / Community:

- Decree of 8 May 2002 on proportionate participation in the employment market concerning professional orientation, vocational training, career guidance and the action of intermediaries on the labour market (*Decreet van 8 mei 2002 houdende evenredige participatie op de arbeidsmarkt wat betreft de beroepskeuzevoorlichting, beroepsopleiding, loopbaanbegeleiding en arbeidsbemiddeling*), MB, 26 July 2002.
- Executive Regulation of 30 January 2004 (*Besluit van 30 Januari 2004 van de Vlaamse regering tot uitvoering*), MB, 4 March 2004.

- Framework Decree of 10 July 2008 (*Decreet houdende een kader voor het Vlaamse gelijkheids- en gelijkebehandelingsbeleid*), MB, 23 September 2008.

French Community:

- Decree of the French Community adopted on 12 December 2008 on the fight against certain forms of discrimination (*Décret de la Communauté française du 12 décembre 2008 relatif à la lutte contre certaines formes de discrimination*), MB, 13 January 2009.

Walloon Region:

- Decree on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training of 6 November 2008 (*Décret de la Région wallonne du 6 novembre 2008 relatif à la lutte contre certaines formes de discrimination, en ce compris la discrimination entre les femmes et les hommes, en matière d'économie, d'emploi et de formation professionnelle*), MB, 19 December 2008.

German-speaking Community:

- Decree aimed at fighting certain forms of discrimination of 19 March 2012 (*Dekret zur bekämpfung bestimmter formen von diskriminierung*), MB, 5 June 2012.

Region of Brussels Capital:

- Order related to the fight against discrimination and equal treatment in the employment field of 4 September 2008 (*Ordonnance relative à la lutte contre la discrimination et à l'égalité de traitement en matière d'emploi* of 4 September 2008), MB, 16 September 2008.
- Executive regulation of the Government of the Region of Brussels-Capital of 7 May 2009 on diversity plans and diversity label (*Arrêté du Gouvernement de la Région de Bruxelles-Capitale relatif aux plans de diversité et au label de diversité*), MB, 2 June 2009.

The Commission communautaire Française (Cocof):

- Decree on equal treatment between persons in vocational training of 22 March 2007 (*Décret relatif à l'égalité de traitement entre les personnes dans la formation professionnelle - Commission communautaire française*), MB, 24 January 2008.
- Decree on the fight against certain forms of discrimination and on the implementation of equal treatment of 9 July 2010 (*Décret relatif à la lutte contre certaines formes de discrimination et à la mise en oeuvre du principe de l'égalité de traitement*), MB, 3 September 2010.

Bulgaria

- Integration of Persons with Disabilities Act, (Закон за интеграция на хората с увреждания), 2004.
- Protection Against Discrimination Act (Закон за защита от дискриминация), 2004.

Croatia

- Anti-discrimination Act (*Zakon o suzbijanju diskriminacije*) 9 July 2008, Official Gazette 85/2008, 112/2012.
- Act on the professional rehabilitation and employment of persons with disability (*Zakon o profesionalnoj rehabilitaciji i zapošljavanju osoba s invaliditetom*), 13 December 2013, Official Gazette 157/2013, 152/2014.
- Social Care Act (*Zakon o socijalnoj skrbi*), 13 December 2013, Official Gazette 157/2013, 152/2014, 99/2015.

Cyprus

- Law on persons with disability (Ο περί ατόμων με αναπηρίες νόμος) N. 127(I)/2000.

Czech Republic

- Law No. 198/2009, Anti-discrimination Law (*Zákon č. 198/2009 Sb., antidiskriminační zákon*), 1 September 2009 / 1 December 2009.

Denmark

- Act on the prohibition of discrimination in the labour market etc. (*Lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.*), Consolidated Act No. 1349 of 16 December 2008 with later amendments.

Estonia

- Equal Treatment Act (*Võrdse kohtlemise seadus*), 11 December 2008, RT I 2008, 56, 315.

Finland

- Non-Discrimination Act (*Yhdenvertaisuuslaki*), 30 December 2014, (1325/2014) .

France

- Law 83-634 on the rights and obligations of civil servants, 13 July 1983.
- Law 84-16 on the State civil service, 11 January 1984.
- Law 2005-102 on equal opportunities and the integration of disabled persons, 11 February 2005.
- Law 2008-496 relating to the adaptation of National Law to Community Law in matters of discrimination, 27 May 2008.
- Labour Code.
- Penal Code.
- Social Action and Families Code.

Germany

- General Act on Equal Treatment (*Allgemeines Gleichbehandlungsrecht, AGG*) of 14.08.2006 (BGBl. I, 1897).
- Social Code IX (*Sozialgesetzbuch IX, SGB IX*).
- Equal Opportunities for Disabled People Act (*Behindertengleichstellungsgesetz, BGG*).
- Federal Law on Participation (*Bundesteilhabegesetz*), Drucksache 18/7824; Drs. 18/8428.

Greece

- Law 3304 /2005 on the application of the principle of equal treatment irrespective of racial or ethnic origin, religious or other beliefs, disability, age or sexual orientation (Νόμος 3304/2005 «Εφαρμογή της αρχής της ίσης μεταχείρισης ανεξαρτήτως φυλετικής ή εθνικής καταγωγής, θρησκευτικών ή άλλων πεποιθήσεων, αναπηρίας, ηλικίας ή γενετήσιου προσανατολισμού»). Abbreviation: Anti-discrimination Law (OJ 16 A /27.07.2005).
- Law 4074/2012 on the ratification of the Convention on the Rights of Persons with Disabilities and the Optional Protocol (Νόμος 4074/2012 «Κύρωση της Σύμβασης για τα δικαιώματα των ατόμων με αναπηρίες και του Προαιρετικού Πρωτοκόλλου στη Σύμβαση για τα δικαιώματα των ατόμων με αναπηρίες») (OJ 88 A/11.04.2012).
- Civil Code.

Hungary

- Act XXVI of 1998 on the rights of persons with disabilities and the guaranteeing of their equal opportunities.
- Act CXXV of 2003 on equal treatment and the promotion on equal opportunities (*évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról*), 28 December 2003.

Ireland

- Employment Equality Acts 1998 to 2015.

Italy

- Framework Law on the care, social integration and rights of disabled persons (*Legge-quadro per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate*), 5 February 1992 no. 104.
- Legislative Decree 216/2003 on the implementation of Directive 2000/78/EC for equal treatment in employment and occupation (*Decreto Legislativo 9 luglio 2003, n. 216 Attuazione della direttiva 2000/78/CE per la parità di trattamento in materia di occupazione e di condizioni di lavoro*).
- Provisions for judicial protection for persons with disability against discrimination (*Misure per la tutela giudiziaria delle persone con disabilità vittime di discriminazioni*), 1 March 2006, no. 67.
- Ratification and execution of UNCRPD (*Ratifica ed esecuzione della Convenzione delle Nazioni Unite sui diritti delle persone con disabilità, con Protocollo opzionale, fatta a New York il 13 dicembre 2006 e istituzione dell'Osservatorio nazionale sulla condizione delle persone con disabilità*), 3 March 2009, no. 18.

Latvia

- Medical Treatment Law (*Ārstniecības likums*), 12.06.1997.
- Labour Law (*Darba likums*), 20.06.2001.
- Disability Law (*Invalitātes likums*) 25.05.2010.

Lithuania

- Law on Equal Treatment (*Lietuvos Respublikos Lygių galimybių įstatymas*) 2003, No.114-5115.
- Law on the Social Integration of Persons with Disabilities (*Lietuvos Respublikos Neįgalųjų socialinės integracijos įstatymas*) 2004, Nr. 83-2983.

Luxembourg

- Law of 12 September 2003 on disabled persons.
- Law of 28 November 2006 (equality of treatment).

Malta

- Equal Opportunities (Persons with Disability) Act 2000.

Netherlands

- Act on equal treatment on the grounds of disability or chronic disease (*Wet Gelijke Behandeling op grond van Handicap of Chronische Ziekte*), 3 April 2003.

Poland

- Act on the vocational and social rehabilitation and employment of disabled persons (*Ustawa z 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych*), 27 August 1997.
- Act on the implementation of certain provisions of the European Union in the field of equal treatment (*Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*), 3 December 2010.

Portugal

- Law 38/2004, of 18 August 2004.
- Law 46/2006 of 28 August 2006.
- Labour Code.

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*), 30 August 2000, *Monitorul Oficial al României* No. 431 of September 2000.
- Law 48/2002 concerning the adoption of Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 31 January 2002.

- Law 487 on mental health and the protection of persons with psychic diseases, 11 July 2002.
- Government Ordinance 77/2003 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30 August 2003.
- Law 27/2004 concerning the adoption of the Government Ordinance 77/2003 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 11 April 2004.
- Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 20 July 2006.
- Law 448/2006 on the protection and promotion of the rights of persons with a handicap, 6 December 2006.
- Law 61/2013 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 21 March 2013.
- Emergency Ordinance 19/2013 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 27 March 2013.
- Order 692/982 from 23 May 2013 amending Chapter 1 of the annex in the Order of the Ministry of Labour, Family and Equal Opportunities and of the Ministry of Health no. 762/1.992/2007 approving the medico-psychosocial criteria for establishing the degree of handicap.

Slovakia

- Act No. 311/2001 Labour Code (*zákon č. 311/2001 Z. z. Zákonník práce*).
- Act. No 461/2003 on Social Insurance, as amended (*Zákon č. 461/2003 Z. z. o sociálnom poistení v znení neskorších predpisov*).
- Act No 5/2004 on employment services and on changing and supplementing other laws, as amended (*Zákon č. 5/2004 Z. z. o službách zamestnanosti a o zmene a doplnení niektorých zákonov v znení neskorších predpisov*).
- Act No. 365/2004 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)*).

Slovenia

- Social Care Act (*Zakon o socialnem varstvu*), 4 November 1992.
- Pension and Disability Insurance Act (*Zakon o pokojninskem in invalidskem zavarovanju*), 10 December 1999.
- Vocational Rehabilitation and Employment of Persons with Disabilities Act (*Zakon o zaposlitveni rehabilitaciji in zaposlovanju invalidov*), 21 May 2004.
- Equal Opportunities for People with Disabilities Act, (*Zakon o izenačevanju možnosti invalidov*), 16 November 2010.
- Protection from Discrimination Act (*Zakon o varstvu pred diskriminacijo*) 21 April 2016.

Spain

- General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013).

Sweden

- Discrimination Act (*Diskrimineringslag*), 2008, (2008:567).

United Kingdom

- Disability Discrimination Act, 1995.
- Equality Act, 2010.

III. Case law

A. European Union

- Court of Justice of the European Union (CJEU), Case C-13/05, *Chacón Navas v Eurest Colectividades SA*, EU:C:2006:456.
- CJEU, Joined Cases C-335/11 and 337/11, *HK Danmark v Dansk almennyttigt Boligselskab, HK Danmark v Dansk Arbejdsgiverforening*, EU:C:2013:222.
- CJEU, Case C-363/12, *Z. v. A Government department, The Board of management of a community school*, EU:C:2014:159.
- CJEU, Case C-354/13, *FOA v Kommunernes Landsforening (KL) (Kaltoft)*, EU:C:2014:2463.

B. National

Bulgaria

- Bourgas Administrative Court, case no. 1700/2014, decision no. 1222 of 7 July 2015
- Bulgarian Supreme Administrative Court, *Petya Milkova v. the Privatisation and Post-Privatisation Agency*, case no. 12369/2014, decision no. 8771 of 16 July 2015.

Croatia

- Constitutional Court of the Republic of Croatia, decision no. U-III/4536/2012, U-III/4536/2012.

Cyprus

- Supreme Court, *Eleni Apostolou v the Republic of Cyprus*, case no. 1196/2013, 17 September 2014.
- Supreme Court, *Marios Frangos v The Republic of Cyprus*, case no. 1165/2011, 4 June 2013.

Denmark

- Board of Equal Treatment, decision 230/2013 of 23 October 2013.
- Board of Equal Treatment, decision 107/2015 of 24 June 2015.
- Supreme Court, Judgment in case no. 104/2014 of 11 August 2015 (U2015.3827H).
- Board of Equal Treatment, decision 117/2015 of 12 August 2015.
- Board of Equal Treatment, decision 168/2015 of 21 October 2015.

France

- Court of Cassation, Social Chamber, no. 08-41659, 5 May 2009.
- Paris, Administrative Appeal Court, 4th Chamber, no. 11PA01543, 13 June 2014.
- Court of Cassation, Social Chamber, no. 14-20377, 9 December 2015.

Ireland

- Equality Tribunal, *Mr. O v A Named Company*, DEC-E2003-052, 20 November 2003.
- Circuit Court, *Humphries v Westwood Fitness Club*, [2004] 15 ELR 296.
- Labour Court, *A Worker v An Employer* [2005] 16 ELR 159.
- Labour Court, *Connacht Gold Co-operative Society v A Worker*, EDA0822, 23 December 2008.
- Labour Court, *Government Department v A Worker*, EDA 094, 25 March 2009.
- Equality Tribunal, *An Employee v A Company*, DEC-E2010-62, 6 May 2010.
- Equality Tribunal, *A v A Charitable Organisation*, DEC-E2011-49, 11 March 2011.
- Equality Tribunal, *An Employee v A Retailer*, DEC-E2011-229, 7 December 2011.
- Equality Tribunal, *An Employee v A Logistics Company*, DEC-E2012-11, 6 February 2012.
- Equality Tribunal, *An Employee v A Government Department*, DEC-E2012-063, 29 May 2012.

Italy

- Court of Livorno, *P.S. v. C.F.*, 16 June 2015.

Latvia

- Supreme Court, *R.S. v. Riga New St. Gertrude's Church Evangelical Lutheran Congregation*, no. SKC-268, 11 April 2007.
- Kurzeme Regional Court, *V.Trusēvičs v. SIA Bio-Venta [Bio-Venta Ltd]*, no. C40066110, 21 September 2011.
- Administrative Regional Court, *B v State Social Insurance Agency*, no. A420528911, 27 September 2013.

The Netherlands

- Netherlands Institute for Human Rights (NIHR), Opinion 2007-24.
- NIHR, Opinion 2012-167.

Slovakia

- Constitutional Court of the Slovak Republic, no I. ÚS 313/2012-52, 28 November 2012.

Slovenia

- Higher Labour and Social Court, no. 129/2012, 12 April 2012.
- Higher Labour and Social Court, no. Psp 217/2013, 12 September 2013.

Spain

- Constitutional Court Decision, 10/2014, 27 January 2014.
- Constitutional Court Decision, 77/2014, 22 May 2014.

Sweden

- Svea Court of Appeal, case T 7752-08, judgment 2009-06-02.
- Labour Court 2013 no. 78, *Equality Ombudsman v Veolia and the Swedish Bus and Coach Federation* (judgment of 23 October 2013).

Romania

- National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*), *Fedra V. Sc Secom Srl*, Decision 509, file no. 433/2012, 26 November 2012.

United Kingdom

- Employment Appeal Tribunal, *Goodwin v. The Patent Office*, [1999], IRLR 4 (EAT).
- Employment Appeal Tribunal, *J v DLA Piper UK LLP*, [2010] IRLR 936 (EAT).
- Employment Appeal Tribunal, *Royal Bank of Scotland Plc v Ashton*, [2011] ICR 632 (EAT).
- Employment Appeal Tribunal, *Tameside Hospital NHS Foundation Trust v Mylott* [2011] Appeal No. UKEAT/0352/09/DM, UKEAT/0399/10/DM.
- Employment Appeal Tribunal, *Croft Vets and others v Butcher* [2013] Eq LR 1170 (EAT).
- Court of Appeal, *Secretary of State for Work and Pensions v R (on the application of MM and DM)* [2013] EWCA Civ 1565.
- Court of Appeal, *Gallop v Newport City Council* [2014] IRLR 211 (CA).
- Court of Appeal, *Newham Sixth Form College v Sanders* [2014] EWCA Civ 734.

Annex

Compilation of country fiches

Austria

1. Scope of National Non-Discrimination Law

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
X		

Main definitions are to be found in

- § 3 Act on the Employment of People with Disabilities¹
- § 3 of the Federal Disability Equality Act²

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
	X	

If the health problem is not temporary (lasts longer than 6 months) there is no doubt that it constitutes disability.

Case law:

Austria, Supreme Court (Oberster Gerichtshof), 80bA48/09f, 18 February 2010

Austria, Supreme Court (Oberster Gerichtshof), 100bS99/10x, 27 July 2010

Austria, Supreme Court (Oberster Gerichtshof), 80B16/04t, 29 March 2004

2. Stigma and Disclosure

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
	X

The only instrument coming close to this is the National Action Plan Disability, which generally includes the idea of awareness raising, while failing to clearly address the issue of stigmatisation at all.³

3. Reasonable Accommodation

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
X			

Main definitions (also building the basis for the duty to reasonable accommodation) are to be found in

- § 3 Act on the Employment of People with Disabilities⁴
- § 3 of the Federal Disability Equality Act⁵

¹ Austria, Act on the employment of people with disabilities (Behinderteneinstellungsgesetz), 11 August 2005.

² Austria, Federal disability equality act (Behindertengleichstellungsgesetz), 11 August 2005.

³ Austria, Bundesministerium für Arbeit, Soziales und Konsumentenschutz (Federal Ministry of Labour, Social Affairs and Consumer Protection), (2013), National Action Plan on Disability, pp. 101-108
https://www.sozialministerium.at/cms/site/attachments/4/9/3/CH3434/CMS1461828446367/nap_behinderung-web_2013-01-30_eng.pdf.

⁴ Austria, Act on the employment of people with disabilities (Behinderteneinstellungsgesetz), 11 August 2005.

⁵ Austria, Federal disability equality act (Behindertengleichstellungsgesetz), 11 August 2005.

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

There is no case law on that subject directly, but there is no doubt that the duty to provide reasonable accommodation encompasses psychosocial disability.

Belgium

1. Scope of National Non-Discrimination Law

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

There is no definition in non-discrimination legislation.

Yes	No	No definition of disability in legislation
		X

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X ⁶		

2. Stigma and Disclosure

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
	X

3. Reasonable Accommodation

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
No restriction in this regard has been found in the relevant Acts.			

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

⁶ To our knowledge, there is no relevant case law in Belgium where the question as to whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act has been expressly discussed.

Bulgaria

1. Scope of National Non-Discrimination Law

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
X		

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
		X ⁷

2. Stigma and Disclosure

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
	X

3. Reasonable Accommodation

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
X ⁸			

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
		X ⁹

Croatia

1. Scope of National Non-Discrimination Law

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
		X

⁷ A court has in one case held that a man with a dissocial personality disorder was not a victim of discrimination based on mental health status/ mental disability because his "psychological problem" did not amount to a "psychiatric ailment". However, this single decision is not indicative of the law.

⁸ A court has in one case held that a man with a dissocial personality disorder was not a victim of discrimination based on mental health status/ mental disability because his "psychological problem" did not amount to a "psychiatric ailment". However, this single decision is not indicative of the law.

⁹ A court has in one case rejected a claim by a self-harming inmate that he was the victim of discrimination and of a denial of reasonable accommodation because his personality disorder was only "a psychological problem" and did not amount to "a psychiatric ailment". However, this single decision is not indicative of the law.

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
	X	

2. Stigma and Disclosure

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
x National Strategy of Equalization of Possibilities for Persons with Disabilities 2007-2015 ¹⁰	
x Day of Persons with Mental Disabilities 6 th June ¹¹	

3. Reasonable Accommodation

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
x			

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
x		

Cyprus

1. Scope of National Non-Discrimination Law

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
X ¹²		

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X ¹³		

2. Stigma and Disclosure

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
	x

¹⁰ Official Gazette 63/2007;

http://www.posi.hr/index.php?option=com_joomdoc&view=docman&gid=133&task=cat_view&Itemid=195

¹¹ Official Gazette 64/2012; <http://narodne-novine.nn.hr/>.

¹² Cyprus, Law on persons with disabilities (Ο περί ατόμων με αναπηρία νόμος) N. 127(I)/2000, article 2, available at http://cyllaw.org/nomoi/enop/non-ind/2000_1_127/full.html.

¹³ There is no case law as regards the law transposing the disability component of the Employment Framework Directive (Law on persons with disabilities N. 127(I)/2000). However, there is case law concerning other laws regulating the rights of persons with psychosocial disabilities, which use an almost identical definition of disability as the law transposing the EU equality acquis, e.g. the Law on public benefit and services N.95(I)/2006.

3. Reasonable Accommodation

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
x ¹⁴			

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
x		

Czech Republic

1. Scope of National Non-Discrimination Law

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
x		

Section 5 (6) of the Law No. 198/2009 Coll., Anti-discrimination Law¹⁵

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
x		

2. Stigma and Disclosure

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
x	

In October 2013 the Ministry of Health adopted a 'Strategy for Reform of Psychiatric Care' for the period 2014-2020. Main goal of the strategy is to increase quality of life of persons with psychiatric illness. Of the specific goals of the strategy aims at combating stigma related to mental health.¹⁶ Updated version of the strategy is planned to be published in October 2016.

¹⁴ Cyprus, Law on persons with disabilities (Ο περί ατόμων με αναπηρία νόμος) N. 127(I)/2000, article 5(1)A, available at http://cylaw.org/nomoi/enop/non-ind/2000_1_127/full.html.

¹⁵ Czech Republic, Law No. 198/2009 Coll., Anti-discrimination Law (Zákon č. 198/2009 Sb., antidiskriminační zákon), 1 September 2009 / 1 December 2009. Available in Czech: <https://portal.gov.cz/app/zakony/zakonPar.jsp?idBiblio=68893&nr=198~2F2009&rpp=15#local-content>, in English: http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Antidiscrimination_Act.pdf.

¹⁶ Ministry of Health of the Czech Republic (2013), Strategy for Reform of Psychiatric Care) Strategie reformy psychiatrické péče), available online in Czech at: http://www.reformapsychiatrie.cz/wp-content/uploads/2012/11/SRPP_publicace_web_9-10-2013.pdf.

3. *Reasonable Accommodation*

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
x			

Section 5 (6) of the Law No. 198/2009 Coll., Anti-discrimination Law

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
x		

Denmark1. *Scope of National Non-Discrimination Law*

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
		X

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
	X	

2. *Stigma and Disclosure*

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
X Campaign ONE OF US: http://en-af-os.dk/English/About_us.aspx	

3. *Reasonable Accommodation*

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
X			

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
	X	

Estonia

1. Scope of National Non-Discrimination Law

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
X		

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

2. Stigma and Disclosure

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
	X?

3. Reasonable Accommodation

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
x			

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

Finland

1. Scope of National Non-Discrimination Law

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
		x

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

2. *Stigma and Disclosure*

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
	x ¹⁷

3. *Reasonable Accommodation*

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
x			

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

France1. *Scope of National Non-Discrimination Law*

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
		x ¹⁸

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
	X Psychosocial and mental health: Court of Cassation, Social Chamber, n° 08-41659, 5 May 2009 https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000020599235&fastReqlid=1920807921&fastPos=1 Paris, Administrative Appeal Court, 4 th Chamber, 13 June 2014, n° 11PA01543 http://www.juricaf.org/arrêt/FRANCE-COURADMINISTRATIVEDAPPELDEPARIS-20140613-11PA01543	

¹⁷ The Director of Development for The Finnish Association for Mental Health Kristian Wahlbeck has stated (Mielenterveys 5/2014) that the lack of national anti-stigma project in Finland is exceptional from Nordic perspective. Available at: <http://www.mielenterveysseura.fi/fi/mielenterveys/mielenterveyden-h%C3%A4iri%C3%B6t/kohtaaminen-haastaa-mielenterveysongelmien-stigmaa>.

¹⁸ However, Article 114 of the Code of social action and families defines disability as explicitly covering, *inter alia*, mental, cognitive and psychic functions.

2. Stigma and Disclosure

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
<p>X</p> <p>A psychiatry and mental health plan 2011-2015 http://social-sante.gouv.fr/IMG/pdf/Plan_Psychiatrie_et_Sante_Mentale_2011-2015.pdf</p> <p>A national Campaign associating the UNAPEI (Union nationale des association de parents et amis des personnes handicapées mentales), first NGO representing families of mentally disabled persons and operator of specialized centres, the SISEP (Service d'insertion sociale et professionnelle), social and professional insertion service for the mentally disabled, and the MDPH (Maison départementale des personnes handicapées), departmental administrative body coordinating access to rights and of disabled persons, and both agencies financing reasonable accommodation measures accessibility investments with the tax imposed on employers who do not meet the 6% quota obligation to employ disabled persons: AGEFIPH (Association de Gestion du Fonds pour l'Insertion Professionnelle des personnes Handicapées) and FIPHFP (Fonds pour l'Insertion des Personnes Handicapées dans la Fonction Publique).</p> <p>http://www.unapei.org/IMG/pdf/unapei_livre_blanc_polyhandicap_et_citoyennete.pdf</p> <p>National Conference on Disability of 19 May 2016 announcement of implementation of recommendations of Senator Annie Le Houerou's report to the Prime Minister of September 2014, Dynamiser l'emploi des personnes handicapées en milieu ordinaire, Aménager les postes et accompagner les personnes (Facilitating employment of disabled persons, accommodating the work profile and accompanying persons) regarding the introduction in the law of the concept of accompanied employment for disabled persons specifically targeting psychosocial disability. It proposes a monitoring and tutorship adapted to each person, in order to support the person in the process of integration in employment:</p> <p>National Conference on Disability of 19 May 2016: http://www.elysee.fr/assets/Confrence-nationale-du-Handicap/11.12-CNH-Relev-des-conclusions.pdf</p> <p>Senator Annie Le Houerou's report to the Prime Minister of September 2014: http://social-sante.gouv.fr/IMG/pdf/ALH_RAPPORT_DEFINITIF_3-11-14-1.pdf</p>	

3. Reasonable Accommodation

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
<p>X</p> <p>As covered with regard to health and disability: - Articles L 1132-1 and L 5213-6 of the Labour Code, article 6 sexes of the Law 83-634 and article 27 of the of Law 84-16</p> <p>Also the employer has a general obligation to protect the mental safety and mental and physical health of his employees.</p> <p>Article L4121-1 of the Labour code</p>			

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
	<p>X</p> <p>Reasonable accommodation in private employment relating to intellectual disability: Orléans Court of Appeal, 15 November 2011, n° 10/01990, X. vs La poste http://www.defenseurdesdroits.fr/fr/actions/protection-des-droits-libertes/decision/deliberation-ndeq2011-86-du-28-mars-2011-relative</p> <p>Reasonable accommodation in private employment relating to mental illness: Court of Cassation, Social Chamber, n° 08-41659, 5 May 2009, https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEX T000020599235&fastReqId=1920807921&fastPos=1</p> <p>Reasonable accommodation in the public sector covers a person with mental health problems: Paris, Administrative Appeal Court, 4th Chamber, 13 June 2014, n° 11PA01543 http://www.juricaf.org/arret/FRANCE-COURADMINISTRATIVEDAPPELDEPARIS-20140613-11PA01543</p> <p>Psychosocial health: Paris Court of Appeal, 13 December 2012, n° 12/00303, FNAC, http://www.asso-henri-pezerat.org/wp-content/uploads/2013/01/Arr%C3%AAt-CA-Paris-FNAC-du-13-d%C3%A9cembre-2012.pdf</p> <p>Cass. Soc., 19 November 2014, n° 13-21523, Auchan https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEX T000029793874&fastReqId=1651218084&fastPos=3</p>	

Germany

1. Scope of National Non-Discrimination Law

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
X ¹⁹		

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X ²⁰		

¹⁹ Section 2 Social Code IX (Sozialgesetzbuch IX, SGB IX) and Section 3 of the Equal Opportunities for Disabled People Act (Behindertengleichstellungsgesetz, BGG) provide the most important legal definition of disability. According to these provisions, people are disabled if their physical functions, intellectual abilities or mental health have a high probability of differing from the state typical for their age for longer than six months and if, in consequence, their participation in society is impaired. This definition is close to the findings of the ECJ in C-13/05 (Chacón Navas) and further developed in C-335/11 (Ring and Skouboe Werge). According to the explanatory report, disability is to be understood as in Section 2 SGB IX and Section 3 BGG. This reference was upheld by the BAG, see: Federal Labour Court (Bundesarbeitsgericht, BAG), 22.10.2009, 8 AZR 642/08. The BGG has been recently reformed, the new act is not in force yet.

²⁰ There is no need to clarify this issue since it is directly included in the definition of Section 2 Social Code IX. However there are plenty of decisions regarding the so-called "Eingliederungshilfe" (integration aid) including among others inclusion in the labour market under Section 53 ff. SGB XII and for children and teenagers Section 35 a SGB VIII related to this matter.

2. *Stigma and Disclosure*

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
E.g. the "Aktionsbündnis seelische Gesundheit" sponsored by the German Ministry of Health, which provides an extensive study on this issue. Available at: http://www.bmg.bund.de/fileadmin/redaktion/pdf_presse-meldungen/2010/pm-10-08-22-seelische-erkrankungen.pdf	

3. *Reasonable Accommodation*

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
X			

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
	X	

Greece

1. *Scope of National Non-Discrimination Law*

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
		X

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

2. *Stigma and Disclosure*

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
	X

3. *Reasonable Accommodation*

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
X			

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

Hungary

1. *Scope of National Non-Discrimination Law*

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation ²¹
		X

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

2. *Stigma and Disclosure*

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
	X

3. *Reasonable Accommodation*

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
X ²²			

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

Ireland

1. *Scope of National Non-Discrimination Law*

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
X	X	

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
	X	

²¹ But there is definition in other legislation.

²² There may be uncertainty whether certain less severe or episodic conditions would qualify as disability triggering reasonable accommodation duty.

2. *Stigma and Disclosure*

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
X National Mental Health Stigma Reduction Partnership http://www.seechange.ie/the-national-mental-health-stigma-reduction-partnership/	

3. *Reasonable Accommodation*

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
X			

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
	X	

Italy

1. *Scope of National Non-Discrimination Law*

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
		X ²⁵

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
	X	

2. *Stigma and Disclosure*

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
X, http://www.salute.gov.it/servizio/documenti/opuscolo_stigma.pdf	

3. *Reasonable Accommodation*

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
X			

²⁵ However, a definition which can cover people with psychosocial disabilities can be found in Article 3, para 2, of Law No. 104/1992, Framework law on care, social integration and rights of people with disability. Article 1 of Law No. 67/2006, Provisions for judicial protection for persons with disability against discrimination, refers explicitly to this definition.

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

Latvia

1. Scope of National Non-Discrimination Law

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
X		X

There is no definition of disability in non-discrimination legislation. Disability is defined however in the Disability Law as a long-term or non-transitional (permanent) very severe, severe or moderate level of limited functioning, which affects a person's mental or physical abilities, ability to work, self-care and integration into society.²⁴ It is divided into three possible degrees of disability, in accordance with the provisions of the law, depending on the gravity of the impairment. The law specifies moderate disability as the loss of 25-59 % of the capacity to work, severe disability as the loss of 60-79 % of the capacity to work, and very severe disability as the loss of 80-100 % of the capacity to work. A list of diseases, including those from the International statistical classification of diseases (ICD-10), supplements the Cabinet of Ministers' Regulations No 805 Regarding the Criteria, Time Periods and Procedures Determining Predictable Disability, Disability, and the Loss of Ability to Work. The definition contained in the Disability Law is also used for the purposes of non-discrimination legislation.

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

2. Stigma and Disclosure

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
X (2014-2015) Do Not Turn Away www.nenoversies.lv	

3. Reasonable Accommodation

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
X			X

The duty in national law to provide reasonable accommodation apply to persons with psychosocial disability/mental health problems if he/she is conferred one of the three degrees of disability (see above, under 1).

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

²⁴ Latvia, Disability Law of 25 May 2010, Article 5(1), available at <http://likumi.lv/doc.php?id=88966>.

Lithuania

1. Scope of National Non-Discrimination Law

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
	x	

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
x		

2. Stigma and Disclosure

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
<p>Yes. Action plan for the implementation of national mental health strategy and prevention of suicide 2014 – 2016, ordered by the Minister of Health, March 28, 2014.</p> <p>According to the Plan, 300 000 LTL (EUR 86 000) had to be allocated in 2016 for the preparation of programs, aimed at tackling stigma, related to mental health.</p> <p>Available in Lithuanian at: https://www.e-tar.lt/portal/lt/legalAct/658a1ab0ba4b11e38766a859941f6073</p>	

3. Reasonable Accommodation

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
x			

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
x		

Luxembourg

1. Scope of National Non-Discrimination Law

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?²⁵

Yes	No	No definition of disability in legislation
		x ²⁵

²⁵ However, the Law of 12 September 2003 on disabled persons contains a definition which can cover people with psychosocial disabilities. The anti-discrimination law of 28 November 2006 explicitly refers to this definition.

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

2. *Stigma and Disclosure*

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
	X

3. *Reasonable Accommodation*

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
			X ²⁶

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

Malta

1. *Scope of National Non-Discrimination Law*

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
X		

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

2. *Stigma and Disclosure*

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
X ²⁷	

²⁶ Only people who have a 30 % disability and have been officially recognised as such are entitled to claim a reasonable accommodation.

²⁷ There is no one official strategy but various initiatives on a national and individual association level.

3. Reasonable Accommodation

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
X			

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

The Netherlands

1. Scope of National Non-Discrimination Law

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
		X

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

2. Stigma and Disclosure

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
X ²⁸	

3. Reasonable Accommodation

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
X			

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
	X ²⁹	

²⁸ There is a campaign against work-related stress. See <http://www.arboportaal.nl/onderwerpen/check-je-werkstress>, accessed 13 May 2016. There is, moreover, a campaign called "People with Possibilities" (Mensen met mogelijkheden), which aims to increase employment participation rates of people with a psychosocial disability. See <http://www.mmm-mensenmetmogelijkheden.nl/>, accessed 13 May 2016.

²⁹ Netherlands Institute for Human Rights (NIHR), Opinion 2012-167, <https://mensenrechten.nl/publicaties/oordelen/2012-167>, accessed 13 May 2016; NIHR Opinion 2007-24, <https://mensenrechten.nl/publicaties/oordelen/2007-24>, accessed 13 May 2016.

Poland

1. Scope of National Non-Discrimination Law

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
		x

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
x		

2. Stigma and Disclosure

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
Partially only: The National Programme for the [protection of] Mental Health ³⁰	

Reasonable Accommodation

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
x		x	

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
x		

Portugal

1. Scope of National Non-Discrimination Law

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
x		

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
x		

³⁰ Poland, Rozporządzenie Rady Ministrów z dnia 28 grudnia 2010 r. w sprawie Narodowego Programu Ochrony Zdrowia Psychicznego (Regulation of the Council of Ministers of 28 December 2010 on the National Programme for the Mental Health), <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20110240128> (in force in the years 2011-2015). All hyperlinks in the report accessed 20 June 2016.

2. *Stigma and Disclosure*

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
	x

3. *Reasonable Accommodation*

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
x			

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
x		

Romania

1. *Scope of National Non-Discrimination Law*

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
		X

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X	X	

There is no directly relevant case law, although it is to be expected that the national equality body, the National Council for Combating Discrimination, would consider that a person with a psychosocial disability or mental health problems should be regarded as disabled for the purposes of the Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination of 30 August 2000 as an inclusive approach is used by the NCCD in defining protected grounds in general and disability in particular.

2. *Stigma and Disclosure*

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
	X

The Ministry of Health has a legal obligation to produce a Plan of Measures for Mental Health according to the secondary legislation adopted for the implementation of Law 487 from 11 July 2002 on mental health and the protection of persons with psychic diseases. The Ministry adopted on 10 April 2006 a National Strategy for Mental Health.³¹ The 2006 Strategy mentions the need to address and reduce stigma related to mental health challenges but no other follow up was identified. On 6 January 2016 the Ministry of Health proposed for public debates a more focused National Strategy for the Mental Health of the Child and Teenager for 2016-2020 which, however, has not yet been adopted at the time of writing (October 2016).³²

³¹ Ministerul Sănătății, Strategia Națională pentru Sănătatea Mintală from 10 April 2006 available at: <http://www.ms.ro/?pag=136>

³² Ministerul Sănătății, Strategia Națională pentru Sănătatea Mintală a Copilului și Adolescentului, available at:

3. *Reasonable Accommodation*

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
X			

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

Slovakia1. *Scope of National Non-Discrimination Law*

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
		X

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
	X	

2. *Stigma and Disclosure*

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
X Národný program duševného zdravia (<i>National Mental Health Programme</i>), available at http://www.uvzsr.sk/docs/info/podpora/NPDZ.pdf (year of the adoption of the programme is not known) ³³	

3. *Reasonable Accommodation*

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
X			

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

<http://www.juridice.ro/418563/strategia-nationala-pentru-sanatatea-mintala-a-copilului-si-a-adolescentului-2015-2020-proiect.html>.

³³ However, the government only declares the need to combat stigma related to psychosocial disability / mental health in the national programme, and then refers to NGOs and other organisations (not belonging to the government) as implementing bodies. The government co-funded some of these NGO initiatives, but the funding is far from being systemic and sufficient.

Slovenia

1. Scope of National Non-Discrimination Law

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
X ³⁴		

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

2. Stigma and Disclosure

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
X (EU project, but it ended on 15 December 2015) http://www.mddsz.gov.si/si/delovna_podrocja/invalidi_vzv/zmoremo_spodbujanje_enakosti_in_preprecevanje_diskriminacije_invalidov/	

3. Reasonable Accommodation

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
X			

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

Spain

1. Scope of National Non-Discrimination Law

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
X		

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

³⁴ The relevant definition is contained in the Act on Equal Opportunities for People with Disabilities of 16 November 2010, which implements the UN Convention on the Rights of Persons with Disabilities. The main non-discrimination act however, the Protection Against Discrimination Act, does not contain a definition of disability.

2. Stigma and Disclosure

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
X	

The Mental Health Strategy of the National Health System (*Estrategia en Salud Mental del Sistema Nacional de Salud*) approved in 2006 aims, among others, to eradicate the stigma attached to mental illness. The first strategic line of the Plan is "Promoting the mental health of the population, prevention of mental illness and eradication of the stigma attached to people with mental disorder." In the latter objective, it is proposed that actions are preferably directed to health professionals, media professionals, education professionals and students, entrepreneurs and social agents, associations of persons with mental disorders and their families.

http://www.msc.es/organizacion/sns/planCalidadSNS/pdf/excelencia/salud_mental/ESTRATEGIA_SALUD_MENTAL_SNS_PAG_WEB.pdf

The Mental Health Strategy of the National Health System was renewed for 2009-2013 (*Estrategia en Salud Mental del Sistema Nacional de Salud 2009-2013*). (English version available at: <http://www.msssi.gob.es/organizacion/sns/planCalidadSNS/docs/saludmental/MentalHealthStrategySpanishNationalHS.pdf>)

In 2014 has been approved a plan for "Dissemination Strategy on Mental Health of the National Health System and professional training" ("Difusión de la Estrategia en Salud Mental del Sistema Nacional de Salud y formación a profesionales").

[http://www.msps.es/organizacion/sns/planCalidadSNS/docs/saludmental/DIFUSION_ESTATEGIA_SALUD_MENTAL\(accessibilidad\).pdf](http://www.msps.es/organizacion/sns/planCalidadSNS/docs/saludmental/DIFUSION_ESTATEGIA_SALUD_MENTAL(accessibilidad).pdf)

3. Reasonable Accommodation

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
X			

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X		

Sweden

1. Scope of National Non-Discrimination Law

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
X		

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
X ³⁵		

³⁵ There is no case law were the concept of disability was a contested issue.

2. *Stigma and Disclosure*

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
X http://www.mfd.se/other-languages/ ³⁶ previous media campaign ³⁷	

3. *Reasonable Accommodation*

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
X			

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
	X ³⁸	

United Kingdom

1. *Scope of National Non-Discrimination Law*

(i) Does the definition of disability in the non-discrimination legislation refer to "psychosocial disability" or a related term e.g. "mental disability" "mental impairment"?

Yes	No	No definition of disability in legislation
X		

(ii) Is there case law in which courts have considered whether or not a person with a psychosocial disability / mental health problem should be regarded as disabled for the purposes of the national non-discrimination act?

No relevant case law	Yes, case law confirms this	No, case law rejects this
	X	

2. *Stigma and Disclosure*

(iii) Is there an official strategy to combat stigma related to psychosocial disability / mental health? (e.g. a government-sponsored campaign, whether national or regional).

Yes (including title and web link if available)	No
National campaign – "Time to change" Government funded. Significant additional charitable funding. http://www.time-to-change.org.uk/	

³⁶ There is a State Agency dedicated to the task of promoting participation of persons with disabilities. Overall reduced cognitive capacity (which is the Swedish term) is integrated on equal footing with for instance reduced eyesight, hearing or movability See Riktlinjer för ökad tillgänglighet - Riv hindren, Myndigheten för delaktighet (2015) p. 17. When it comes to for instance building standards, persons with reduced capacity to assess their surroundings (nedsatt orienteringsförmåga) is a term that catches the needs of persons with psychosocial disabilities (p. 13).

³⁷ The media campaign aimed at combating stigmatization and covered a number of counties. Hjärnkoll – Psykiska olikheter lika rättigheter, redovisning av resultat och effekter av regeringsuppdraget 2009-2014, Myndigheten för delaktighet (2014) p. 7.

³⁸ Labour Court 2013 nr 78, Equality Ombudsman v. Veolia and the Swedish Bus and Coach Federation (judgement 2013-10-23).

3. *Reasonable Accommodation*

(iv) Does the duty in national law to provide reasonable accommodation apply to persons with psychosocial disability / mental health problems?

Yes	No	Legal situation is unclear	Some persons with psychosocial disability/mental health problems are not covered.
X			

(v) Is there case law in which courts have held that persons with psychosocial disability / mental health problems are able to rely upon the duty to provide reasonable accommodation?

No relevant case law	Yes, case law confirms this	No, case law rejects this
	x	

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