

Submission relating to the outline of the Draft General Comment on article 5 of the Convention on the Rights of Persons with Disabilities

Submission by Unia (Interfederal Centre for Equal Opportunities), Belgium

Unia is an independent public institution that fights discrimination and promotes equal opportunities. We have interfederal competence, which means that, in Belgium, we are active at the federal state level as well as the level of the Regions and Communities.

As an Equality body, Unia is responsible for assisting victims of discrimination based on the protected grounds (one of which is disability) of the anti-discrimination laws which implement the European directives 2000/43 and 2000/78.

As an independent mechanism on the basis of article 33.2 of the Convention on the Rights of Persons with Disabilities (CRPD), Unia is also responsible for promoting, protecting and monitoring the implementation of the CRPD in Belgium.

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I. Introduction: Belgium and the CRPD

Belgium is a federal state with three communities (Flemish, French-speaking, German-speaking) and three regions (Flanders, Wallonia and Brussels). Disability policy falls under the remit of a number of different competences essentially at regional or community level.

Belgium signed the CRPD on 30 March 2007 and ratified it on 2 July 2009. All communities and regions also ratified the CRPD in 2009. It came into force at the national level on 1 August 2009. The Committee on the Rights of Persons with Disabilities adopted the concluding observations on the initial report of Belgium in October 2014¹.

Unia warmly welcomes the opportunity to give its input on the outline of the draft General Comment on article 5 of the CRPD.

II. The right of persons with disabilities to equality and non-discrimination in Belgium

Antidiscrimination legislation

The federal state and each of the communities and the regions have their own antidiscrimination legislation². Disability is specifically mentioned as a prohibited ground of discrimination³.

Belgium went further than the requirements of EU Directive 2000/78/EC⁴ (which only applies to employment and occupation) and has extended the **scope** of its legislation to goods and services and to all activities that are open to the public. However, several gaps still exist, for example:

- In the Brussels Region there is still no legislation prohibiting discrimination in goods and services such as transport, businesses, etc.
- The scope of the antidiscrimination legislation does not cover the relations between joint owners. Consequently, joint owners are not obliged to provide reasonable accommodations (e.g. in the common area of a block of flats) if one of the joint owners has a disability⁵.

¹ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Belgium*, 28 October 2014, CRPD/C/BEL/CO/1,

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fBEL%2fCO%2f1&Lang=en.

² For further details on these legislations, please refer to Unia's discrimination lexicon (available in French and Dutch):

<http://www.unia.be/en/law-recommendations/legislation/discrimination-lexicon>

³ The other grounds of discrimination are: presumed race, skin colour, nationality, ancestry (Jewish origin), national or ethnic origin, philosophical or religious beliefs, sexual orientation, age, wealth, civil status, political beliefs, trade union membership, state of health, physical or genetic characteristics, birth, social background.

⁴ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

The various **forms of discrimination** prohibited by the Belgian anti-discrimination legislation are:

- Direct or indirect discrimination
- Order to discriminate
- Discriminatory harassment
- Incitement to discrimination, hate or violence and hate crime
- Lack of reasonable accommodation

In Belgium, the term “**reasonable accommodation**” is interpreted following the principles and indicators of a protocol agreement signed by the federal state, the communities and the regions.⁶ According to the protocol, an accommodation has to:

- be effective, so that the person with a disability can actually participate;
- enable the person with a disability to participate on an equal basis with others;
- enable the person with a disability to participate independently; and
- guarantee the security of the person with a disability.

To determine if an accommodation is reasonable, the following indicators have to be assessed:

- the financial impact of the accommodation, taking into account financial support by public authorities and the financial capacity of the person/organization/... that is obliged to provide reasonable accommodation;
- the organizational impact of the accommodation;
- the expected frequency and duration of the use of the accommodation by persons with disabilities;
- the impact of the accommodation on the quality of life of (an) actual or prospective user(s) with a disability;
- the impact of the accommodation on the environment and on other users;
- the lack of equivalent alternatives;
- non-compliance with self-evident or legally binding standards.

The list of indicators is not exhaustive.

⁵ For further details, please refer to Unia’s assessment report of February 2016 on the federal Anti-Discrimination Law and Anti-Racism Law (available in French and Dutch): <http://unia.be/en/publications-statistics/publications/evaluation-of-federal-anti-discrimination-legislation>.

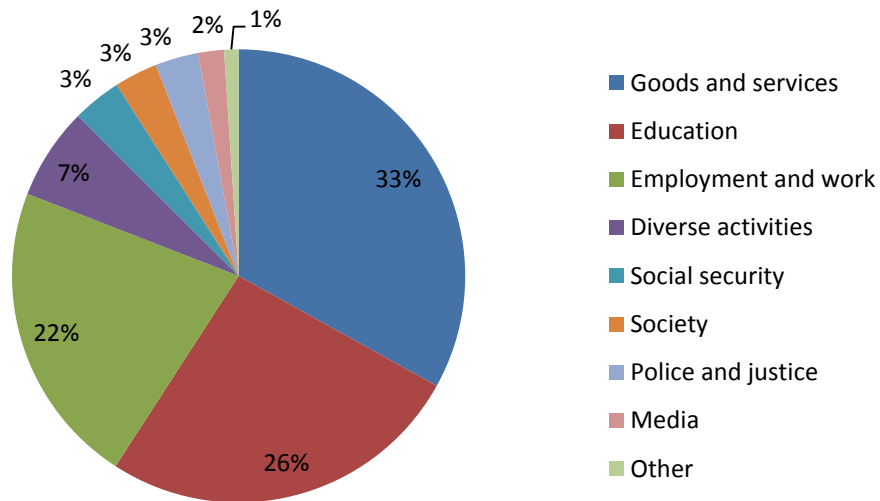
⁶ Protocole du 19 juillet 2007 relatif au concept d'aménagements raisonnables en Belgique en vertu de la loi du 25 février 2003 tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des chances et de lutte contre le racisme.

Unia's data on discrimination on the ground of disability⁷

In 2016, Unia received 5,619 reports regarding potential discrimination, resulting in the opening of 1,907 files. A file will be opened if Unia considers itself competent to deal with a report, and if this report is more than a simple request for information. 493 files opened concerned (potential) discrimination on the grounds of disability, representing 23% of the files. This represents an increase of 27% from 2015.

Looking more closely at the files concerning disability, Unia was contacted most frequently about discrimination in the area of goods and services (33%), mainly in the commercial and horeca sectors. Most of the other reports Unia received were in the areas of education (26%) and work (22%).

Discrimination on the ground of disability: files opened by UNIA in 2016 – by area (n=493)



⁷ Unia's statistical report from 2016 available in French and Dutch, <http://unia.be/en/publications-statistics/publications/unias-work-expressed-in-figures-for-2016>

III. Comments relating to the outline of the Draft General Comment

Heading I – Introduction

Number 3: The human rights model of disability and the notion of equality

Even with a large protection against discrimination for persons with disabilities in the legislation, the protection can remain limited if the notion of disability is restricted to the medical model (for example, if a medical diagnosis is required). It excludes certain people, for example those suffering from a chronic illness, from the right to protection against discrimination and in particular to reasonable accommodation. Confusion can also occur when the legislation protecting the rights of persons with disabilities refers to another notion than disability, for example the notion of “specific needs”.

Unia therefore suggests to recall in the general comment the obligation for States Parties, at every level, to introduce the human rights model of disability and to use the term “disability” in their antidiscrimination legislation.

Number 4 : Legal character of art. 5

Unia’s practice shows that it is important to remind States Parties that the duty to provide reasonable accommodation is immediately applicable.

For example, the French Community of Belgium is adopting a new legislation which introduces the concept of “recommended” reasonable accommodation . As soon as accommodation is reasonable, it’s mandatory to provide it.

Heading II : Normative Content

Number 5 (art. 5 (1)): Being equal before and under the law

Unia is often confronted with people arguing that equality means treating everyone the same way.

It would therefore be relevant to explicitly remind States Parties that equality also means treating people who are in a different situation in a different way.

Number 7 : Discrimination

Before developing the forms, the scope and the grounds of discrimination, Unia suggests to recall the definition of “discrimination on the basis of disability” from article 2.

Number 7a (art. 5 (2)): Forms of discrimination- denial of access?

In the General Comment No. 2 on article 9, the Committee explains several times that denial of access should be defined as a prohibited act of discrimination:

§29: “(...) Denial of access should be clearly defined as a prohibited act of discrimination (...)”;

§13: “(...) denial of access should be considered to constitute a discriminatory act, regardless of whether the perpetrator is a public or private entity”;

§31: “When reviewing their accessibility legislation, States parties must consider and, where necessary, amend their laws to prohibit discrimination on the basis of disability. As a minimum, the following situations in which lack of accessibility has prevented a person with disabilities from accessing a service or facility open to the public should be considered as prohibited acts of disability-based discrimination: (a) Where the service or facility was established after relevant accessibility standards were introduced; (b) Where access could have been granted to the facility or service (when it came into existence) through reasonable accommodation.”;

§34: “(...) Denial of access to the physical environment, transportation, information and communication, and services open to the public constitutes an act of disability-based discrimination that is prohibited by article 5 of the Convention (...)”;

§41: (...) A refusal to adapt the workplace constitutes a prohibited act of disability based discrimination.

Unia suggests the Committee to clarify three issues regarding the fact that denial of access should be considered as a form of discrimination:

- 1) Should State Parties introduce denial of access as a form of discrimination in their anti-discrimination legislation?
- 2) How to conciliate the requirement of considering denial of access as a discriminatory act with the principle of progressive realization of the right to accessibility?
- 3) How to conciliate the fact that accessibility is related to groups and therefore the duty to provide accessibility is an ex ante duty with the fact that discrimination, as reasonable accommodation, is related to individuals and therefore the duty to non-discrimination is an ex nunc duty?⁸

Number 7b (art. 5 (2)): Personal scope : associates

In the Belgian anti-discrimination legislation, discrimination by association is only protected by the Flemish decree on equal opportunities and equal treatment.⁹

⁸ Committee on the Rights of persons with Disabilities, *General Comment No. 2 (2014) on accessibility*, 22 May 2014, CRPD/C/GC/2, pp. 7-8, §§25-26

⁹ Decree of 10 July 2008 on a framework for the Flemish policy on equal opportunities and equal treatment, <http://www.ejustice.just.fgov.be/eli/decreet/2008/07/10/2008203387/justel>.

At the federal level and in the other communities and regions, people have to rely on the jurisprudence of the Court of Justice of the European Union.¹⁰ On this basis, the manager of a gym who fired an employee because of the disability of his daughter was found guilty of discrimination by association.¹¹

According to Unia, States Parties should introduce the protection against discrimination by association in their anti-discrimination legislation for a better protection of persons who are discriminated because of their association with a person with a disability.

Number 8 (art. 5 (3)): Duty to provide reasonable accommodation

- Definition

For a comprehensive text, Unia suggests to recall the definition of “reasonable accommodation” from article 2.

Furthermore, it would be relevant to reiterate the link with the concept of Universal Design and to recall the distinction between the general accessibility duty and the duty to provide reasonable accommodation, as in General Comment No. 4 on article 24.¹²

- Scope of the protection:

Persons with disabilities have the right to reasonable accommodation not only in employment and education but also for example in justice, goods and services or housing sectors.

The general comment should emphasise that as the right to reasonable accommodation is the corollary of the principle of equality and non-discrimination (see article 2), it must transversally apply, like the principle of non-discrimination, to all domains covered by the CRPD.

- Indicators

It is regularly brought to Unia’s attention that all actors involved in the provision of reasonable accommodation need clear indicators in order to determine whether the accommodation is reasonable. These indicators should be fixed according to a collective method involving persons with disabilities.

¹⁰ Court of Justice of the European Union 17 July 2008, nr. C-303/06, ECLI:EU:C:2008:415, *S. Coleman v. Attridge Law and Steve Law*.

¹¹ Arbrb. Leuven 10 December 2013, <http://www.unia.be/nl/rechtspraak-alternatieven/rechtspraak/arbeidsrechtbank-leuven-12-december-2013>.

¹² Committee on the Rights of persons with Disabilities, *General Comment No. 4 (2016) on the right to inclusive education*, 25 November 2016, CRPD/C/GC/4, p. 8, §29.

- Financial aspect

In Unia's experience, it is relevant to mention that:

- a) the accommodation should not be paid by the person with disabilities or family members.
- b) States Parties have a responsibility to take measures to help schools, SMEs,... to provide reasonable accommodation. If not, accommodations could too easily be denied because of their disproportionate burden. For the same reason, States Parties must work on improving accessibility.

- Protection

It is relevant to mention that States Parties have the obligation to ensure, in all fields, that "independent systems are in place to monitor the appropriateness and effectiveness of accommodations and provide safe, timely, and accessible mechanisms for redress" when people with disabilities have experienced denial of reasonable accommodation, as explained in General Comment No. 4 on article 24.13

[Number 9 \(art. 5 \(4\)\): Specific measures](#)

Article 5 (4) refers to affirmative action measures which are also discussed in number 22.

Unia recommends to explicitly mention the link between both parts of the general comment.

Heading IV : State Party obligations

[Number 19 : Legislative obligations: anti-discrimination laws](#)

As mentioned above¹⁴, a third of the files opened by Unia concerning potential discrimination on the ground of disability is related to the area of goods and services. A quarter of the files is related to education. Since 2003, the number of reports and files in these fields have been constantly rising.

This demonstrates the relevance of not limiting the scope of anti-discrimination legislation to employment.

Unia recommends the Committee to highlight the need for States Parties to adopt comprehensive legislation prohibiting discrimination on the ground of disability in all areas of society, including goods and services, education, housing and social protection.

¹³ *Idem*, p. 9, §31.

¹⁴ See p. 5.

Number 20: Institutional obligations: equality courts, bodies, ombudspersons

In case of discrimination, persons with disabilities must have access to independent, effective and accessible complaint mechanisms. Discrimination has to lead to effective, proportionate and dissuasive sanctions.

Accessibility requires that persons with disabilities can report violations to an equality body, an independent mechanism or an ombudsperson free of charge. Accessibility also requires that access to judicial and administrative proceedings is affordable. States Parties must adopt specific measures which enable persons with disabilities to participate in judicial and administrative proceedings. For example, States parties should guarantee the right to legal assistance for persons with disabilities who need it.¹⁵

Number 22 : Other positive obligations: affirmative action measures

At the level of the European Union, Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation contains a specific provision on positive action.¹⁶ According to the jurisprudence of the Court of Justice of the European Union, affirmative action measures have to respect the principle of proportionality. They have to (1) serve a legitimate aim, (2) be appropriate to achieve that aim, and (3) be necessary to achieve that aim.¹⁷

At the Belgian level, the Constitutional Court has also held that affirmative action measures must respect the principle of proportionality. Such measures are only admissible if (1) a manifest inequality exists, (2) the legislator has identified the need to remedy the inequality, (3) the measures are temporary and disappear when the objective has been reached, and (4) the measures do not go further than is necessary to reach the objective.¹⁸ These conditions are reflected in the anti-discrimination legislation of the federal state, the regions and the communities.

¹⁵ In Belgium, there is a regression on this point. Until 2016, a specific rule aimed to ensure the right to legal assistance for persons with disabilities who receive income substitution allowances. Fully free legal assistance and legal aid were automatically available for those persons. However, since 2016, a person who receives income substitution allowances for disabled people has to prove that he or she does not have adequate means of subsistence. The person may receive legal aid only if the average of his combined resources does not exceed a certain threshold set by statute. Are included in the combined resources: cohabitant's income, potential property income but also the integration allowance. However, the integration allowance is intended to offset costs related to the disability. See: Royal Decree of 18 december 2003 relating to « les conditions de la gratuité totale ou partielle du bénéfice de l'aide juridique de deuxième ligne et de l'assistance judiciaire » as amended by Royal Decree of 3 August 2016, art. 1, §2, 2°, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2003121833&table_name=loi.

¹⁶ "Article 7 - Positive action. 1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.

2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment."

¹⁷ *Commission v. France*, C-312/86; *Kalanke*, C-450/93; *Marschall*, C-409/95; *Abdoulaye*, C-218/98; *Badeck*, C-158/97; *Abrahamsson*, C-407/98; *Griesmar*, 366/99; *Lommers*, C-476/99; *Briheche*, C-319/03; *Commission v. Greece*, C-559/07; *Commission v. Italy*, C-46/07; *Leone*, C-173/13; *Roca Álvarez*, C-104/09; *Maïstrellis*, C-222/14.

¹⁸ Constitutional Court, nr. 17/2009.

The CRPD also seems to contain a proportionality test, as article 5 (4) provides that “Specific measures *which are necessary* to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.”

For some positive action measures, it is clear that they satisfy the proportionality test. For others, this is less clear. The latter is the case, for example, with reserved jobs for persons with disabilities. While it is clear that measures are needed in order to improve their opportunities of access to employment, it is open to debate whether reserving jobs for persons with disabilities is appropriate and necessary to achieve that aim.

The Office of the High Commissioner for Human Rights has already questioned the appropriateness of the measure: “while quota systems are desirable to promote equality, they should not include reserved working positions or tasks exclusive to persons with disabilities, which reproduce stereotypes and stigmatization, lead to an impasse in career development and do not value the skills of the employee”.¹⁹

To Unia’s knowledge, the Committee on the Rights of Persons with Disabilities has only briefly addressed this issue in its concluding observations on the initial report of China.²⁰

Unia therefore invites the Committee to explain its position in more detail in this general comment.

Proposed additional number (Heading IV - State party obligations or Heading III - interrelation with article 8) : Awareness and education

Persons with disabilities, family members, teachers, employers, doctors, authorities, associations for persons with disabilities, lawyers, judges, police officers, prosecutors, social workers, legal aid centres, other judicial and administrative bodies intervening in judicial or quasi-judicial proceedings,... have to know:

- To whom we are referring when we speak of “persons with disabilities” (social model);
- That these persons with disabilities have human rights, in particular the right to equality and non-discrimination which is protected by the CRPD;
- That this right to non-discrimination includes various forms among which the right to reasonable accommodation.

States Parties have to conduct a broad awareness raising process throughout society in order to effectively guarantee the protection of persons with disabilities against discrimination

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¹⁹ Office of the United Nations High Commissioner for Human Rights, *Equality and non-discrimination under article 5 of the Convention on the Rights of Persons with Disabilities*, A/HRC/34/26, 9 December 2016, p. 7, nr. 20.

²⁰ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of China, adopted by the Committee at its eighth session (17–28 September 2012)*, CRPD/C/CHN/CO/1, p. 6, §41, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fCHN%2fCO%2f1&Lang=en.