Purpose

The purpose of this paper is to explore what is meant by the equal opportunity principle in the context of EU disability law and policy - to highlight its core components, its potential and its limitations.

The Concept of ‘Equality’ and the Demands of the Equal Opportunity Principle

Falling within a range of objectives that each seek to achieve a particular level of social inclusiveness, the equal opportunity principle forms just one element of the wider concept of equality. Whilst there are various labels for these objectives and various interpretations as to their operational remits, a simplified four point classification will be used for the purposes of this paper. Under this classification, the equal opportunity principle sits between the objective of ‘formal equality’ on the one hand (the least demanding objective within this range) and ‘positive action’ on the other, with the objective of ‘compensatory equality’ following thereafter as the most demanding variation under this classification.

These objectives and the extent of their operational remits can be illustrated by applying them to a hypothetical scenario of an employment vacancy for a typist. In this scenario, the objective of ‘formal equality’ would simply require the employer to ensure that both disabled and non-disabled applicants are equally entitled to apply for the vacancy and that their applications are considered on ‘facially’ equal terms - an objective, therefore, that is relatively superficial in its application. Importantly, this objective does not seek to encourage the employer to consider how the physical and organizational environment of the workplace might create disabling barriers to an individual’s participation as a member of their workforce. A so-called standard keyboard (for example) may be inaccessible to individuals with certain impairments and would impede their ability to compete on equal terms, yet this barrier has nothing to do with that individual’s typing ability and thus merits for the job. Instead, this barrier results from the design of the keyboard itself. However, the objective of formal equality would fail to recognize this imbalance and, as a result, fail to preclude the employer’s decision from being influenced by such a barrier.
The objective of ‘equal opportunity’, on the other hand, requires the employer to take an extra step and to make adjustments to the physical and organizational arrangements of the workplace (such as the provision of an adapted keyboard) where such adjustments are effective, necessary and reasonable to enable the merits of applicant to be measured in equal terms. By so doing, the objective of equal opportunity seeks to render the inaccessible keyboard an irrelevant consideration and thus exclude it from the employer’s decision-making process. As before, the determinant in this scenario can still be the applicant’s typing speed but the employer's assessment would be influenced, not by the nature of the keyboard itself, but by the merits of the individual (in particular, the speed and accuracy of their typing). By removing such barriers, the equal opportunity principle seeks to ensure that (at the point of interview) a level playing field exists between disabled and non-disabled applicants and thus enable applicants with impairments to compete on equal terms with their non-disabled counterparts. As explained below, this objective is achieved quite openly in the context of disability via the duty to provide reasonable accommodations (the duty to accommodate).

The objective of positive action (and its application to this scenario) would extend further still and require the employer to take into account the history of systemic discriminatory practices encountered by people with disabilities and exercise a preference in respect of those individuals that apply for this vacancy. The extent of this preference will vary depending on the particular type of positive action being applied but it is important to stress that whichever type of positive action is applied to this scenario its application will not require the employer to select an individual who cannot perform the job - at most, it will discourage the appointment of the ‘best’ qualified individual over a member of the under-represented group where that individual is ‘suitably qualified’ for the post. This should be contrasted with compensatory equality (the most demanding variation of equality) which operates outside market-based notions of meritocracy and its associated boundaries - seeking to achieve its objectives (typically via State redistribution of taxes) by providing financial benefits to those individuals that are either unable to work in the open labour market or require assistance outside the workplace. For the most part, this takes the form of financial benefits and measures under social assistance and insurance-based programmes.

Thus, under the above classification, the principle of equal opportunity offers more than that of ‘formal equality’ but not as much as ‘positive action’ which, in itself, does not go as far as ‘compensatory equality’. However, common to each of these objectives is a desire to achieve a particular level of social inclusion for the protected group. Nonetheless, for the purposes of this paper, it is important to recognize the differences between these objectives and place the operational remit (and thus limits) of the equal opportunity principle within its wider conceptual context. The implications arising from these limits will be returned to later in the paper.

The Components of the Equal Opportunity Principle

At present, the equal opportunity principle dominates the new policy agenda at EU-level in the context of disability. Emerging during the mid-1990s, this agenda has two core components, namely, the components of ‘anti-discrimination' and ‘design-for-all’. Crucially, both of these components benefit from the strengths of the equal opportunity principle in
effecting policy change, but (if they are to be successful) must be exercised within the boundaries of its operational remit.

Whilst most people recognize the existence of the anti-discrimination component, many fail to fully understand how it fits with the equal opportunity principle (and thus its place within the wider concept of ‘equality’) and consequently fail to fully recognize both its potential and its limitations. The design-for-all component, on the other hand, is often simply overlooked in the sense that many do not know of its existence, or if they do, that it fits within the equal opportunity principle and functions alongside the anti-discrimination component. As a result, the potential (and also the limitations) of this component are often misunderstood. What follows seeks to provide clarification as regards both of these components and thereby address the above misunderstandings.

The New EU Disability Agenda and the Success of the Equal Opportunity Principle

The equal opportunity principle has played a key role in the re-branding of EU disability policy. Reflecting the paradigm shift that has (in some jurisdictions) taken place and continues (in others) to take place globally in this policy field, the equal opportunity principle spearheads the EU’s attempt to put into effect the ethos behind the ‘socio-political model’ of disability. In essence, this model politicizes the impact of the environment on the potential of individuals with impairments to participate in everyday social life. Whilst the interaction between the environment and an individual's impairment was recognised prior to the emergence of this model (rehabilitation practitioners have acknowledged this relationship since the 1970s), it was only through the lens of the 'socio-political model' of disability that many of the physical and organisational barriers created by the environment were seen as inherently ‘discriminatory’ and thus requiring removal as a matter of right. Previously, these barriers were viewed as being inherently neutral and, if removed, would have been removed as a benefit (a special favour) to those who were seen as being and, if removed, incompatible with an environment built and organized around a hypothetical able-bodied norm. In this sense, the ‘socio-political model’ has provided and continues to provide a strong political slogan for change.

Following the approach taken in respect of other minority groups, the disability rights movement adopted anti-discrimination law as the main tool to further the goals of the socio-political model. However, it is important to understand that a credible interpretation of this model would not capture every single barrier to participation - some barriers simply cannot be blamed on the environment. For example, for those individuals in a persistent coma, it is the coma (their impairment) that is preventing them from working, not their physical and organizational environment. To be clear, therefore, in these, albeit limited circumstances, the ‘problem’ lies with the impairment not with the environment. Likewise, it is important to stress that not every barrier that correctly falls within the parameters of the socio-political model can be redressed by anti-discrimination law. This is because anti-discrimination laws are primarily concerned with removing considerations from a decision-making process that are (or should be) irrelevant to the decision at hand. In the employment context, for example, the fact that an individual does not hold the essential qualifications for a job is not an irrelevant consideration and should not therefore trigger the prohibition under the anti-discrimination law - the successful candidate must still be the best person for the job. Anti-
Discrimination laws are not therefore intended to interfere with the employer’s prerogative to put in place the best possible workforce. They are not about securing jobs for people simply because they are part of an under-represented group and thus share the ‘protected’ characteristics. Instead, anti-discrimination laws are concerned with removing any distractions that might be caused by those characteristics and enabling the merits of such individuals to come to the fore. In other words, anti-discrimination laws are about maximizing the potential of individuals to participate in certain aspects of society subject to the limits imposed by meritocratic principles.

More often than not the focus of such laws is on the participation of individuals as workers or consumers and in this sense they can be described as essentially market participation measures. It is for this reason that the equal opportunity principle that underpins such laws can be sustained in jurisdictions such as the United States; jurisdictions that are particularly concerned with the free play of market forces. Likewise, given the market focus of the EU integration project, we can see how this principle resonates with the wider EU agenda and thus attracts the same level of political, legislative and judicial support as other more obviously market-focused EU policies. This is reaffirmed by the reaction of the EU institutions to any departure from the rigour of the meritocratic approach (for example, treating positive action measures as an exception to the prohibition of discrimination rather than as part of that prohibition). Moreover, the resonance between this agenda and that supporting the new EU disability strategy (based on the equal opportunity principle) stands in stark contrast to the low level of support for the previous strategy in this context; a strategy that was largely concerned with state-regulated social policy issues that are underpinned by more intensive notions of equality than that underpinning measures confined to meritocratic principles (such as anti-discrimination laws). Consequently, in order to ensure the continued acceptance and support for an EU disability policy based on the equal opportunity principle, it would appear to be vital that the two key components to that policy operate within the parameters of meritocratic systems. This observation is further explored below but the point to be stressed at this juncture is that any departure from meritocratic principles will undermine the legitimacy of the equal opportunity agenda and its components.

The ‘Anti-discrimination’ Component of the Equal Opportunity Principle

The equal opportunity principle is typically associated with the various anti-discrimination law initiatives that have been adopted over the years and their associated rulings from courts and tribunals. However, it was not until the mid 1990s that this principle had any formal connection with disability law and policy within the European Union. Prior to this decade, disability law and policy was dominated by initiatives conferring special or compensatory entitlements, whether through social assistance and insurance programmes or basic employment quotas, and by measures regulating legal capacity. The 1990s therefore constituted a watershed in the development of disability anti-discrimination law - culminating at EU-level in November 2000 with the adoption of the Employment

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1 With the exception of the United State’s Rehabilitation Act 1973 (a measure limited in application to Federal level activities) it was not until the early 1990s - and measures such as the Americans With Disabilities Act 1990 - that the principle of equal opportunity had any formal connection with disability law and policy globally.
Framework Directive (EFD); a directive that prohibits discrimination on a number of ‘prohibited grounds’ (including disability) and as such constitutes the first EC disability anti-discrimination law. For this reason, the EFD is the most significant development to date in EU disability law and policy and it would be no exaggeration to say that the future development of this policy field is likely to be greatly influenced by the success or otherwise of this Directive.

At present, it is the EFD that forms the flagship of the EU’s equal opportunity strategy in the context of disability. This Directive will bring about significant changes to disability laws and policies in the majority of EU Member States, and whilst its provisions on disability are (for many of these countries) still in the process of transposition, a number have already transposed them and (in any event) these provisions must be transposed by all Member States no later than December 2006. This paper does not seek to provide a review of the EFD from a disability rights perspective (reference should be made elsewhere for this purpose) but it is important to stress that (at EU-level at least) some of its provisions on disability are new from a legal perspective and are thus open to legal challenge and interpretation.

Key to the success of the EFD in the context of disability is the manner in which its concept of discrimination is interpreted and applied. It is important to note in this regard that disability anti-discrimination laws are no different in purpose than anti-discrimination laws on other prohibited grounds. As mentioned above, the prohibition of discrimination is essentially concerned with the removal of considerations from a decision-making process that are (or should be) irrelevant to the decision at hand; an observation that is equally applicable in the context of disability. Whilst variations do exist in terms of the mechanics of the prohibition - specifically, the duty to accommodate (a duty synonymous with disability anti-discrimination law) is typically absent from the legal expression of discrimination in respect of the other prohibited grounds - such variations are a matter of form only and in no way affect the purpose of the prohibition. To the extent that there is a difference between disability and the other prohibited grounds, it is in the level of recognition that it is currently afforded as to when certain forms of disability discrimination takes place. For the most part, anti-discrimination laws in respect of the other prohibited grounds are concerned with the removal of considerations that are (or have become via the operation of law) quite obviously irrelevant. Whereas, in the context of disability, the prohibition is typically seeking to remove considerations that, for many in today’s society, would at first glance appear to be relevant and it is here that the duty to accommodate operates to correctly steer the legal analysis and provide the necessary clarification.

The above observation is best explained by way of illustration. Imagine an employment vacancy for a telephonist in which two candidates apply (one is black, the other is a wheelchair user) and both of these applicants have the necessary qualifications for the job. In this scenario, the black candidate’s skin colour is quite obviously an irrelevant...
consideration and should have no part to play in the employer’s decision-making process. However, the scenario involving the wheelchair user might not be so straightforward because the vacancy may be situated on the top floor of the office complex which has narrow corridors, ‘standard’ sized desks and one (temperamental) elevator. The dependency on the wheelchair in this scenario is (at least initially) a relevant consideration and, prior to the socio-political model of disability, would likely have generated a sympathetic rejection from the employer who may genuinely have felt that (given the practicalities of the situation) their decision was the only realistic response - a view that would have been shared by the majority of the employer’s peers. Nonetheless, the purpose of disability anti-discrimination laws (and in particular the duty to accommodate) is to remove any camouflage that may be created by these physical and organisational barriers and to allow the merits of the individual to become the focus of the assessment. Where effective and reasonable accommodations can be made to remove such barriers (an assessment that is based on the particular circumstances of the case), the employer’s decision has to be made on the basis that they will be removed because these barriers (which by now are recognised as being socially imposed as a result of exclusionary design) are in themselves discriminatory. In the above scenario, for example, it may simply be a case of moving the vacancy to the ground floor of the office complex (where the corridors may be wider and thus removing any dependency on the elevator) and providing an adjustable desk. If so, a failure to make a decision on this basis would (in effect) be taking into account an individual’s impairment in circumstances where it is an irrelevant consideration and thus trigger the prohibition of disability discrimination.

As the implications arising from the socio-political model of disability become better understood by society and it in turn becomes better equipped to see the discriminatory physical and organisational barriers that are often created, one can expect the distinction between considerations that ‘are’ obviously relevant and those that ‘should be’ irrelevant for the purposes of disability anti-discrimination law to erode. However, whilst there will be short-to-medium term challenges in conveying this understanding of the physical and organisational environment and enabling society to understand why the duty to accommodate is about removing discriminatory barriers (as opposed to providing special treatment for people with impairments) there will also be challenges to ensure that the application of this duty does not exceed its intended boundaries; boundaries that are set by meritocratic principles. The responsibility in this regard lies primarily with disability rights advocates and interest groups; advocates and groups that understandably want to get as much out of the anti-discrimination law as possible. However, sometimes this desire extends too far and leads to contradictory stances being taken (for example, we want equal treatment irrespective of our disabilities, we want jobs etc because of our disabilities). Given the history and nature of disability policy (particularly in European society), the public and consequently the judiciary and government find it difficult not to sympathise with this contradictory stance and may lean towards an approach based on compensatory equality rather than that of equal opportunity. I should stress that I am not saying that an approach

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4 It is important to highlight in this context that claims of disability discrimination can be similarly straightforward. For example, an individual’s facial disfigurement is also quite obviously an irrelevant consideration for this position. The duty to accommodate does not need to be triggered in this scenario - the employer is simply being asked to question and ignore any negative reaction he/she may have towards the impairment.

5 These circumstances will often include (i) the technology available at the time of the complaint (ii) the resources of the employer and (iii) the benefits likely to accrue from the accommodation beyond those to the individual complainant.
based on compensatory equality has no place in disability policy but rather that it manifests (or should manifest itself) in a different legal mechanism based on a different notion of equality and consequently a different policy aim to that of equal opportunity. If they are to be effective, these mechanisms and policy aims should be kept distinct.

This conflation of aims and principles is most readily apparent (and temptingly convincing) in the majority decision of the House of Lords in Archibald v. Fife Council, where the duty to accommodate under the UK’s Disability Discrimination Act (1995) was used to ensure the appointment of a disabled applicant who - whilst qualified for the job in question - would not have otherwise been appointed on the basis of a competitive interview. In other words, this individual simply was not the best person for the job on the basis of merit. The duty to accommodate was therefore used in this scenario to put into effect a form of positive action in favour of the disabled applicant - an objective that constitutes an exception to the principle of equal opportunity and thus demanding a more intensive type of equality than that invoked by anti-discrimination laws. Whilst it is beyond the scope of this paper of to provide a critical review of the majority opinion in Archibald, the significance of this decision (in particular the fact that it comes from the highest appellate court in the United Kingdom) and its implications for the interpretation of the equivalent duty under the EFD should not be underestimated. Archibald is an example that should not be followed in other jurisdictions.

To be clear, a failure to keep the duty to accommodate within the rigours of meritocratic systems (and thus the principle of equal opportunity) will undermine the credibility of the law and will likely generate a socio-legal backlash against it. As a minimum, if the duty to accommodate is seen as providing disabled people with something ‘special’, something beyond the principle of equal treatment, then the application of the anti-discrimination law will be limited to those individuals that are considered to be most deserving of it (thus generating complex legal problems with the definition of disability). These concerns are aptly illustrated by the experience in the United States under the Americans with Disabilities Act 1990. Disabled Europeans and their associated interest groups should be active to ensure that such confusion does not take root within the European Union.

The ‘Design-For-All’ Component of the Equal Opportunity Principle

This component originates from, and is currently most clearly articulated in, the non-binding declaration that is attached to Article 95 EC; a legal basis that is concerned with the approximation of national laws affecting the functioning of the internal market. In other words, Article 95 provides a legal basis that enables the adoption of EU measures to regulate products and service provision across the EU (including technical and construction standards) with a view to furthering the market goals of the EU integration project.

The declaration, which was appended to the EC Treaty by the amending Treaty of Amsterdam in 1997, ‘encourages’ the EU institutions to take into account the needs of

\[Archibald\text{(Appellant) v. Fife Council (Respondents) (Scotland) [2004] UKHL 32.}\]

people with impairments when they are adopting measures on the basis of Article 95. At best a procedural obligation, this declaration articulates a principle that could be expanded to all areas of EU activity. Indeed, recent EU measures adopted under the legal bases for transport (such as rules governing air passenger rights and the inter-operability of rail travel) arguably demonstrate such an expansion.

At its heart, the principle underpinning the declaration can be said to represent high-level political recognition that goods and services can be designed and performed in such a way as to better open up the EU market to all its potential consumers. By recognizing human difference, and thus taking into account the needs of people with impairments at the design stage of the process, this principle seeks to avoid exclusionary design and thus fully exploit the consumer base within the EU. In this sense, the declaration can be said to articulate a principle of ‘design for all’; a principle that fully complements the EU’s policy priority of market participation.

Crucially, the ‘design for all’ principle is concerned with providing ‘equal’ access to all groups where commercially viable - not ‘special’ access for any particular group. It is in this sense that we can see how the design for all component of the EU disability strategy fits with the principle of equal opportunity. Specifically, the operation of this component is market-governed - it does not require a change to the essence of the products or services, neither does it necessitate the manufacturer or service provider to bear commercially unviable costs. Thus, like the duty to accommodate, the ‘design for all’ principle is intended to operate within meritocratic systems - to ensure a level playing field of access where physical and organisational barriers can be reasonably removed.

The importance of the ‘design for all’ component to EU disability policy cannot be overstated. In particular, there are now few aspects of our day-to-day lives that are not affected in some way by EU-level activity (especially the functioning of the internal market). This activity includes measures governing matters such as construction, transportation, environmental design and communications (to name but a few). The application of this component therefore has huge potential to effect concrete change to the everyday lives of people with disabilities living within the European Union. In order to fully exploit this potential, people with disabilities and their associated interest groups have to be able to operate effectively at both national and EU levels with a view to influencing the EU policy agenda. At stake here is the opportunity to ensure that any harmonisation of current designs and standards, as well as the development of new technologies (e.g. internet-related applications), takes place in a manner that facilitates the integration of people with disabilities. Conversely, should this opportunity be missed, there is an equal chance that the harmonisation process of the very products and services that ought to promote inclusion will instead operate in a manner than further marginalises people with disabilities.

**Concluding Observation**

There are two key points that should be taken from this paper. The first is that those components of EU disability policy based on the principle of equal opportunity fit best with the overall EU agenda and its policy priority of market participation. It is on these components therefore that people with disabilities and their associated interest groups
should focus in their efforts to effect positive change. The second point is that in order to maximize the use of these components, it is necessary to understand the operational boundaries of the equal opportunity principle, i.e. that it operates within the confines of a meritocratic system. It is these boundaries that make the equal opportunity principle widely acceptable from a market-oriented point of view and thus attractive to business, employers and wider society. Any departure from a meritocratic approach would therefore severely limit the ‘take-up’ from the very actors necessary to deliver the positive changes that are sought under these components.