

**E.U. NETWORK OF EXPERTS ON DISABILITY DISCRIMINATION**

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**Pre-Employment Inquiries and Medical Examinations as Barriers to the Employment of  
Persons with Disabilities :  
Reconciling the Principle of Equal Treatment and Health and Safety Regulations under  
European Union Law**

by  
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## **I. Introduction**

This Report presents a legal analysis of the coexistence between regulations seeking to protect health and safety at work and the requirement of non-discrimination in work and employment against persons with disabilities. It asks whether health and safety regulations may constitute barriers to the employment of persons with disabilities, and, where such barriers exist, which legal responses they call for. It focuses especially on what the right to respect for private life and the rules protecting personal data may contribute to lowering such barriers. Drawing the consequences from the emergence of the principle of equal treatment with regard to persons with disabilities, and from the rise of the civil rights paradigm in disability law generally, it illustrates how the existing regulatory framework may be relied upon in order to effectuate the shift from a « fitness » approach to an « adaptation » approach in the regulation of pre-employment inquiries and medical examinations. It insists in particular on the function of the obligation to provide an effective accommodation to persons with disabilities in alleviating the tension between regulations relating to health and safety at work and the prohibition of discrimination.

Part III of the Report seeks to clarify the rules which apply both to inquiries conducted before a conditional offer of employment is made in order to assess the physical and mental abilities of the prospective employee, and to the medical examinations which may be performed after such an offer has been made. The report develops for that purpose a framework based on the right to respect for private life and the protection of personal data. Indeed, an adequate regulation of pre-employment inquiries and medical examinations has a crucial role to play if we wish to prevent that occupational health and safety requirements, whether too broadly interpreted or not, will erect unjustified barriers to the employment of persons with disabilities. In the cases most significant statistically, the disability will only be revealed by such inquiries or such medical examinations. It is therefore on the basis of such inquiries or examinations that the discrimination may occur ; and it is by better protecting the privacy of the individual, through the strict regulation of the conditions under which information may be substracted from that individual concerning his or her health, physical condition, or impairment, that we may hope to limit the number of circumstances where the disability will be known to the employer under conditions where this may lead to unjustified reactions from his/her part – reactions resulting from fear or prejudice, or from overprotective attitudes, which the employer will seek to justify by a misrepresentation of the obligations of the employer under health and safety regulations.

This Report is essentially concerned with explicitating the rules applicable to the recruitment (and, more marginally, the retainment) of persons with disabilities. If correctly understood and consistently applied, these rules may mitigate the tension between the concerns for an improved protection of health and safety at work and the requirement of equal treatment of persons with disabilities. The principal aim of the Report, indeed, is to guide the national authorities – including the courts – in the implementation of the Directive 2000/78/EC and in the interpretation of its requirements, where these requirements seem to conflict with regulations relating to health and safety at work. In certain cases however, this Report goes further. It makes certain proposals which, inspired by existing good practices and by the experience gained under other jurisdictions, have seemed worth presenting, where no clear answer emerged from European law or where the answers which did emerge appeared unsatisfactory or incomplete.

## II. Occupational Health and Safety Requirements as Barriers to the Employment of Persons with Disabilities

### 1. Prohibited Discriminations Under the Framework Directive

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation<sup>1</sup> seeks to offer a minimal level of protection throughout the European Union to persons with disabilities with regard to their right to have access without discrimination to employment, to self-employment or to occupation, to vocational guidance and training or retraining, and to benefit from equal working conditions and conditions of employment<sup>2</sup>. However the right of persons with disabilities to have equal access to employment could be threatened by the inquiries into the abilities of job applicants or by the imposition of medical examinations seeking to uncover disabilities at the pre-employment stage<sup>3</sup>. Although the employer performing such inquiries or examinations will seek to justify them either by the need to ensure that the job applicant is capable of performing satisfactorily the tasks attributed to him/her or by health and safety considerations linked to the need to protect the individual concerned and others – colleagues and the general public –, such inquiries into the health condition of the prospective employee or the imposition of medical examinations may conflict in two ways with the guarantee of non-discrimination as formulated in the Framework Directive.

First, they may result in a form of *indirect discrimination*, as defined in Article 2(2)(b) of the Directive. This provision states that « indirect discrimination shall be taken to occur where 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 (...) is obliged, under national legislation, to take appropriate measures (...) in order to eliminate disadvantages entailed by such provision, criterion or practice ». Inquiries into the health condition of the prospective employee or pre-employment medical examinations may lead to screening out of persons with disabilities from the potential workforce in circumstances amounting to indirect discrimination under that definition a) either where, by imposing these inquiries or examinations as a condition of employment, the employer seeks to select the fittest from all potential candidates, with a view to limiting the financial risk he or she takes in recruiting a person, b) or where, whilst purporting to seek to comply with health and safety regulations, the employer imposes requirements linked to the physical condition of the employee which are not strictly limited to what is necessary to ensure such compliance, but are instead « overprotective » or « overzealous », or do not take into account that that the risk for health or safety could be avoided by the reassignment of the prospective employee to another working position or the provision of another form of effective accommodation.

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<sup>1</sup> OJ L 303 of 2.12.2000, p. 16.

<sup>2</sup> For the definition of the scope of application *ratione materiae* of the principle of equal treatment implemented by the Framework Directive, see Art. 3(1).

<sup>3</sup> The distinction between *inquiries relating to the health condition* of the prospective employee and *medical examinations* is borrowed from United States federal legislation, specifically section 12112(d) of the American With Disabilities Act (ADA) 1990 (see 42 U.S.C. § 12112(d) (2000)). The *inquiry* is performed by the employer, with a view to ascertaining whether the applicant can perform tasks that will be important for the function to be exercised. The focus here is on abilities, not disabilities. The *medical examination* reveals information, not about the ability of the individual, but about an individual's physical or mental impairments or health. Under the ADA, medical examinations may only be performed after the employer has made a conditional offer of employment, therefore the distinction between inquiries of a non-medical nature (including those which seek to verify the physical or psychological ability of the candidate) and medical examinations have an important strategic role to perform. This report suggests that a similar distinction should be explicitated in the European Union (see in particular hereunder, II.3., Principle 3).

Second, inquiries into the medical condition of the prospective employee or the imposition of medical examinations may lead to *direct discrimination* against job applicants with disabilities. This will occur 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<sup>4</sup>. Where a medical condition or another form of disability which in fact does not result in an impossibility to perform the essential functions of the job, taking into account the obligation to provide reasonable accommodation, is known to the employer, he or she may react to this with fear, prejudice or a stereotypical attitude, and deny the employment. This attitude may be dictated by a fear of adverse reactions from within the workforce or from customers<sup>5</sup>. It may also have its source in ill-founded fears of risks to the health and safety of the individual concerned or of colleagues or the general workforce, arising through ignorance or prejudice. If insufficient safeguards are provided concerning the processing of medical data in the procedure of pre-employment medical examinations, the risk that such a form of discrimination will occur is especially high. A strict prohibition of the transmission of any information of a medical nature to the employer is therefore required. Such guarantees however will not suffice in all cases, as the disability may be known to the employer through other means, with the possibility that such reactions based on fear or prejudice will result. For instance, the disability may be immediately visible, or it may have been revealed spontaneously to the employer by the job applicant, for example when the job applicant requests a form of accommodation. Although the reactions of the employer based on the anticipated negative attitudes of customers or within the workforce do not appear to call for any special measures – except perhaps information about the legal obligation of the employer not to discriminate on that basis –, the reactions based on misinterpretations about the health and safety requirements imposed on the employer suggest a need to clarify better the relationship between health and safety regulations and the principle of non-discrimination on the ground of disability in employment.

## **2. Pre-employment inquiries or medical examinations as unjustified barriers to the employment of persons with disabilities**

In sum, pre-employment inquiries into the physical or mental abilities of the prospective employees or medical examinations seeking to identify any disabilities such prospective employees may have may constitute unjustified barriers to the employment of persons with disabilities in the following cases :

- « *Selective* » inquiries into the physical or mental abilities of the prospective employee or « *selective* » medical examinations. Pre-employment inquiries or medical examinations may seek to identify the individuals who are most physically and mentally fit, and the recruitment of whom, therefore, will present the less financial risk to the employer. In this case, « selective » inquiries about health or medical examinations are imposed by the employer. They go beyond the need, the legitimacy of which the Framework Directive recognizes<sup>6</sup>, to identify whether the prospective employee is capable of performing the essential functions of the post concerned, if necessary after having been provided with the effective accommodation required where it is reasonable to do so. Where such medical examinations are performed, they go beyond the « protective » purposes of occupational medicine<sup>7</sup>. This results in a form of indirect discrimination.

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<sup>4</sup> Art. 2(2)(a) of the Framework Directive.

<sup>5</sup> For a well-known example, *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).

<sup>6</sup> The Preamble of the Directive states that it “does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities” (Recital 17).

<sup>7</sup> Pre-employment medical examinations having a “protective” aim are instituted for the benefit of the individual worker (or prospective employee) and the collectivity of workers. They relate to the health and safety objectives of occupational medicine as generally understood. By contrast, “selective” pre-employment medical examinations are understood in this report to work to the benefit of the employer, as they seek to screen out the less productive or

- *Irrational reactions of the employer to an information concerning the medical condition of a prospective employee.* The employer may learn about the disability of a prospective employee in different ways. In some cases, the disability will be apparent. In other cases, it will be spontaneously revealed by the job applicant, for example when the job applicant wishes to request a specific accommodation from the employer and states not only that there exists such a need, but also what the reasons are for this need. In still other cases, the confidentiality of the information concerning the hidden disability has not been respected, and the employer receives such information, which is of a medical nature, in violation of the rules normally applicable to the processing of such data. Whatever the circumstances in which the employer receives such an information, one reaction the employer could have is to deny the employment to the person with a disability, because he or she is moved by prejudice against persons with disabilities, or fears the reactions of customers or the workforce. This would constitute a form of direct discrimination on the ground of disability. It would be in clear violation of the Framework Directive if such discrimination were left unpunished or, at least, unremedied. Part II of this report identifies which rules concerning the protection of personal data may constitute one guarantee against this form of discrimination.

- *« Overprotective » interpretation of the requirements imposed on the employer by health and safety regulations.* On the basis either of inquiries into the physical or psychological abilities of the applicant or of a medical examination, the employer may be led to deny the employment to the job applicant because the employer believes that he/she would not be acting as a reasonable and prudent employer, as by recruiting the individual concerned he/she would not be reducing the risk in the workplace to the minimal level possible, or that he/she would be violating applicable health and safety regulations. In this case, the obligations imposed on the employer by specific health and safety regulations or under the general duty of care may serve as a « false excuse » to deny employment to a person who has a disability. Under the Framework Directive, where the employer would violate his/her legal obligations to ensure that the working environment is safe and does not endanger the health of the employees or the general public by recruiting a person with a disability, the employer will be justified from not making that recruitment, unless the employer could have reasonably provided a form of accommodation eliminating the conflict between health and safety requirements and non-discrimination. However, where the employer is being overzealous in this regard, or overprotective, – or of course, where the employer does not provide the reasonable accommodation which could avoid the conflict – , this would be an instance of indirect discrimination, or possibly even of direct discrimination. This constitutes at once the most important and the most delicate instance of discrimination against persons with disabilities resulting from inquiries about the abilities of the individual job applicant or the imposition of medical examinations. Therefore the following sections of part I of the report (I.3. to I.5.) shall develop the intricacies of this situation in further detail.

### **3. Reconciling the Principle of Equal Treatment and Health and Safety Regulations under the Framework Directive**

Where, either at the stage of the pre-employment inquiry into the physical and mental abilities of the individual, or at the later stage (after a conditional job offer has been made), as a result of a medical examination performed on the prospective employee, the individual appears to present a physical or a mental disability, the reaction of the employer may be to consider that the obligations imposed by health and safety regulations make it impossible to recruit the job applicant. Such a situation is both statistically significant and underexplored in the available

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robust employees, and to limit the financial risk the employer takes in the process of recruitment. On this distinction, see F. Hendrickx, *Privacy en Arbeidsrecht*, Brugge, Die Keure, 1999, p. 234 and pp. 241 ff.

literature<sup>8</sup>. For instance<sup>9</sup>, a study conducted in the United Kingdom on 996 cases which, between the entry into force of the employment provisions of the Disability Discrimination Act on 2 December 1996 and 1 September 2000, reached a main hearing at tribunal, showed that employers sought to rely on the defence of justification in 385 (38.7 %) of those cases, and that in 79 (20.5 %) of these cases, employers cited health and safety reasons for justifying their actions<sup>10</sup>. In a May 2002 telephone survey of 501 SME employers constituting a representative national sample of employers with less than 250 employees, over a third (35 %) stated that they had health and safety concerns regarding the employment of people with a disability, ill-health condition or injury, with the highest proportions being in the sectors of construction (56 % organisations expressed concerns), agriculture and forestry (44 %), manufacturing (42 %) and public administration and defence (40 %)<sup>11</sup>.

The available data show that, in many cases where employers invoke health and safety reasons in defence of their allegedly discriminatory action, their justification defence has been successful<sup>12</sup>. The question of how such a defence would fare under the principles established by the Framework Directive deserves a close analysis. In principle, the employer will be justified in invoking the obligations imposed by health and safety regulations to avoid the accusation of having committed a discrimination as prohibited under the national rules implementing the Framework Directive. The employer may rely for this either on the very definition of indirect discrimination under this instrument, which excludes from this notion provisions, criteria or practices which – although they may result in putting persons having a particular disability at a particular disadvantage compared with other persons – appear « objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary »<sup>13</sup>. Or, alternatively, the employer may rely on Article 7(2) of the Framework Directive, which states that

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.

It will be noted with respect to health and safety measures adopted at the national level that the Member States are authorized under the Framework Directive to adopt measures « which, in a democratic society, are necessary for public security, for the maintenance of public order and

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<sup>8</sup> See however the IRS research mentioned hereunder and S. Leverton, *Monitoring the Disability Discrimination Act 1995 (phase 2)*, In-house Report n° 91, Department for Work and Pensions, London, [www.dwp.gov.uk/asd5/IH91.pdf](http://www.dwp.gov.uk/asd5/IH91.pdf); J. Davies and W. Davies, « Reconciling Risk and the Employment of Disabled Persons in a Reformed Welfare State », *Industrial Law Journal*, vol. 29, n°4, December 2000, pp. 347-377.

<sup>9</sup> But see also the figures collected by S. Dench, N. Meager, and S. Morris, *The recruitment and retention of people with disabilities*, Institute of Employment Studies Report n° 301, IES, Brighton, 1996.

<sup>10</sup> Figures from the Department for Work and Pensions cited by *The extent of use of health and safety requirements as a false excuse for not employing sick of disabled persons*, study prepared by IRS Research for the Health and Safety Executive and the Disability Rights Commission, HSE Research Report 167, 2003, at p. 37. This research (hereafter referred to as the « 2003 IRS Research ») was conducted between April 2002 and February 2003 and was based on a combination of methodologies, including a literature review, a review of the UK case law, surveys of different stakeholders, and case studies. The data mentioned result from the review of the UK case law which the researchers have conducted.

<sup>11</sup> *Id.*, pp. 48-49.

<sup>12</sup> For instance, under part II of the United Kingdom Disability Discrimination Act 1995, in 134 cases where this justification defence was invoked, the employer succeeded on 92 occasions, representing a success rate of 68.6 % of the cases. The success rate is notably higher when the health and safety justification is advanced as a defence for not recruiting a disabled person (84.6 %) than when it is advanced as a defence for not retaining a disabled person (60.7 %). The study included also other employment detriments such as supplying a poor reference for a reason related to disability, refusing a promotion, denying 'top up' payments to sickness benefits, failing to discuss redundancy plans with a disabled employee, or transferring a disabled employee to another branch. The success rate of the health and safety justification put forward by the employer in these cases was, on the average, 79.1 %. These data are collected in the context of the 2003 IRS research mentioned above (see pp. 40-41).

<sup>13</sup> Art. 2(2)(i), of the Framework Directive.

the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others »<sup>14</sup>. Provided certain conditions are satisfied<sup>15</sup>, health and safety regulations may be immune, under this clause, from being challenged as in violation of the non-discrimination requirements of the Directive, and as having therefore to be abolished<sup>16</sup>. Despite the fact that the Framework Directive, while authorizing the member States to introduce or maintain measures more favourable to the realization the principle of equal treatment – as it lays down minimum requirements for combating discrimination, based *inter alia* on disability, as regards employment and occupation –, specifically states that the implementation of the Directive « should not serve to justify any regression in relation to the situation which already prevails in each Member State »<sup>17</sup>, it is clear from both Article 7(2) and Article 2(5) of the Directive that the Member States may introduce further requirements aiming at the protection of health and safety at work even though such measures may impact negatively upon the access to employment of persons with disabilities.

However, an employer seeking to rely on the exception provided by the existence of health and safety regulations to escape liability for alleged discrimination following a refusal to hire a person with a disability, will only be able to do so provided two conditions are satisfied.

First, such a defence will only be successful if *no measure could have been taken by the employer to effectively accommodate the situation of the disabled worker so as to avoid any conflict with the existing requirements in the fields of health and safety at work, without this imposing a disproportionate burden on the employer*<sup>18</sup>. It is crucial to recall that the requirement of reasonable accommodation extends to situations where such accommodation would facilitate overcoming barriers to the employment of persons with disabilities which are attributable to requirements imposed by health and safety regulations. Indeed, there is some evidence that employers do not spontaneously think of this option when confronted to a situation where health and safety reasons seem to constitute an obstacle to the recruitment of a person with a disability, resulting in a conflict between health and safety regulations and the prohibition of discrimination in employment<sup>19</sup>. There are, however, a number of possibilities where such a conflict can be eliminated, so as to authorize the recruitment of the person with a disability : the person may be allowed to be absent during working hours for rehabilitation, assessment or treatment ; he or she could be given training ; adequate equipment may be acquired or adapted ; the working hours of the person may be modified ; he or she may be provided supervision ; he or she could be assigned to a different place of work, or transferred to fill an existing vacancy ; the instructions or reference manuals could be modified ; the working premises could be adjusted ; the procedures for testing or assessment could be modified ; a reader or interpreter could be provided<sup>20</sup>.

Secondly, *only where the employer would not be able to comply with requirements imposed by health and safety regulations, or with the general duty of care to reduce the health and safety risk in the employment, will it be possible for the employer to justify a refusal to hire a person with a disability*. Any less requiring standard would create the risk that, under the pretext of

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<sup>14</sup> Art. 2(5) of the Framework Directive.

<sup>15</sup> In particular, conditions relating to the proportionality of the interferences with the right to equal treatment and the health and safety aims pursued by such regulations : see, *mutatis mutandis*, the decisions of the European Court in the cases of *Madsen* and *Wretlund* discussed hereunder (in part II.3. of this report, under Principle 3).

<sup>16</sup> Art. 16 of the Framework Directive.

<sup>17</sup> Preamble, Recital 28.

<sup>18</sup> Art. 5 of the Framework Directive.

<sup>19</sup> See esp. Goldstone and Meager, Barriers to employment for disabled people, in-house report 95, Department for Work and Pensions, London, 2002, [www.dwp.gov.uk/asd/asd5/IH95.pdf](http://www.dwp.gov.uk/asd/asd5/IH95.pdf) (employers « do not volunteer evidence that adjustments were made to remove health and safety barriers to employment or retention » : 2003 IRS research, p. 12).

<sup>20</sup> These are the adjustments, ordered from the most commonly resorted to to the most rarely used, which 73 organisations having made adjustments to recruit individuals with a disability, ill-health condition or injury mentioned to interviewers from the 2003 IRS Research mentioned above (see p. 46 of the study).

protecting health and safety at work, the employer will obfuscate his or her discriminatory attitudes towards prospective employees with disabilities.

Despite these caveats, there still exists a tension between the authorization which the Member States receive to adopt measures protecting the safety and health of workers at work, beyond the minimal requirements laid down under the applicable EC directives<sup>21</sup>, and the objectives of Council Directive 2000/78/EC of 27 November 2002 establishing a general framework for equal treatment in employment and occupation. In fact, it could be argued that the rise of the requirement of non-discrimination vis-à-vis persons with disabilities – what has been called the emergence of the civil rights model in the area of disability law – should lead to scrutinizing more strictly, for their compatibility with the principle of equal treatment of persons with disabilities<sup>22</sup>, the health and safety regulations which Member States have adopted before that new paradigm emerged. Indeed, despite this paradigm shift in the treatment of disability, European Union law currently still privileges a protective model above an autonomy model : the Member States are free, within certain limits examined hereafter, to place the protection of health and safety at work above the requirement to open up certain employment positions to persons with disabilities, where these two goals conflict – where, in other terms, the access of those persons to certain working positions would put others (their colleagues or the general public) or even themselves at risk. Indeed, as explained above, the Framework Directive on equal treatment in employment and occupation does not impose an obligation on the Member States to abolish whichever protective health and safety legislations are in force, although it requires in principle the abolition of any laws, regulations and administrative provisions contrary to the principle of equal treatment<sup>23</sup> : Article 7(2) of the Framework Directive in effect immunizes health and safety regulations from the general screening out of potentially discriminatory national measures which the Directive requires Member States to undertake. When confronted with apparently conflicting requirements from health and safety regulations on the one hand, non-discrimination rules implementing Directive 2000/78/EC on the other hand, the employer will therefore be justified in invoking an obligation to comply with the former set of rules even if this results in limiting the scope of his obligations under the latter set.

#### **4. The Role of the Member States in Striking the Balance between the Principle of Equal Treatment in relation to Persons with Disabilities and the Protection of Health and Safety at Work**

In accordance with the general framework set out above, it will be in principle for the Member States to decide how to balance non-discrimination against protection, according to their national sensibilities and traditions. However, the Member States are not left a completely free rein in this regard. Two situations may be distinguished, depending on whether the Member States seek (1°) to give priority to the principle of equal treatment above health and safety considerations, or whether they intend, instead, (2°) to develop their national provisions on the protection of health and safety at work despite the adverse consequences it may produce on the access to employment of persons with disabilities.

*(1°) Where the Member States seek to give a priority to the principle of equal treatment, and to the correlative need to remove all barriers to the access to employment of persons with disabilities, including those which result from regulations seeking to protect health and safety at work, they remain bound by the minimal requirements set by European Community law for the*

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<sup>21</sup> See, in particular, Article 1(3) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183 , 29.6.1989, p. 1 (stating that the directive « shall be without prejudice to existing or future national and Community provisions which are more favourable to protection of the safety and health of workers at work »).

<sup>22</sup> For such a proposition formulated in the context of the United Kingdom, where the Disability Discrimination Act 1995 followed the adoption of the Health and Safety at Work Act 1974, see J. Davies and W. Davies, « Reconciling Risk and the Employment of Disabled Persons in a Reformed Welfare State », cited above.

<sup>23</sup> Art. 16 of the Framework Directive.

*protection of health and safety at work.* The achievements of the Community in this area are important, and it not possible in the context of the present report to offer more than a synthetic overview of the *acquis*. Community action for the protection of health and safety at work began with the creation of the Advisory Committee on Safety, Hygiene and Health Protection at Work, set up through Decision 74/325/EEC of 27 June 1974<sup>24</sup>. The first action programme in the field of health and safety at work, adopted in 1978, was followed by the adoption of Framework Directive 80/1107/EEC concerning the protection of workers from the risks of exposure to chemical, physical and biological agents at the workplace<sup>25</sup>. This instrument was aimed at harmonising national provisions, and defined common specifications for regulations related to exposure to dangerous agents (information and training of workers, limit values for exposure, methods for sampling, measuring and evaluating results, control of the kind and level of exposure of workers, collective protection measures, etc.). Amended in 1982 and 1988, this framework directive has been implemented or supplemented with specific directives concerning the establishment of limit values or protection against specific risks, for instance exposure to lead, exposure to metallic lead and its ionic compounds<sup>26</sup>, exposure to asbestos<sup>27</sup>, or the banning of certain agents and/or activities when appropriate protection cannot be provided<sup>28</sup>. Directive 98/24/EC on the protection of the health and safety of workers from the risks related to chemical agents at work<sup>29</sup>, which the Member States should have implemented by 5 May 2001, simultaneously incorporated and repealed the 1980 directive, directives amending it and the directives related to exposure to lead and the banning of certain agents and/or activities.

On the basis of former Article 118A (now, after modifications, Article 138 EC) introduced by the Single European Act, new directives were adopted, setting minimum health and safety requirements for the workplace, in pursuit of the objective of reducing as far as possible the risks of occupational diseases and accidents. The first of these was Framework Directive 89/391/EEC of 12 June 1989, on the introduction of measures to encourage improvements in the safety and health of workers at work<sup>30</sup>. This Framework Directive contains the structural principles of protection applicable to all sectors of activity: general rules to be respected by employers, obligations and responsibilities of workers, information, consultation, participation and training of workers and their representatives. These framework provisions served as a basis for the different implementing directives adopted for certain sectors of activity, risks or specific groups of workers (e.g. protection of temporary workers<sup>31</sup> and pregnant women)<sup>32</sup>.

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<sup>24</sup> Decision 74/325/EEC of the Council of 27 June 1974, on the setting up of an Advisory Committee on Safety, Hygiene and Health Protection at Work, OJ L 185 of 9.7.1974.

<sup>25</sup> OJ L 328, of 1980. This Directive was supplemented by Directive 96/94/EC of 18 December 1996 establishing a second list of indicative limit values in implementation of Council Directive 80/1107/EEC on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work, OJ L 338 of 28.12.1996.

<sup>26</sup> Council Directive 82/605/EEC of 28 July 1982 on the protection of workers from the risks related to exposure to metallic lead and its ionic compounds at work (first individual Directive within the meaning of Article 8 of Directive 80/1107/EEC), OJ L 247, 23. 8. 1982, p. 12.

<sup>27</sup> Council Directive 83/477/EEC of 19 September 1983 on the protection of workers from the risks related to exposure to asbestos at work (second individual Directive within the meaning of Article 8 of Directive 80/1107/EEC), OJ L 263, 24. 9. 1983, p. 25, later amended by Directive 91/382/EEC (OJ L 206, 29. 7. 1991, p. 16).

<sup>28</sup> Council Directive 88/364/EEC of 9 June 1988 on the protection of workers by the banning of certain specific agents and/or certain work activities (fourth individual Directive within the meaning of Article 8 of Directive 80/1107/EEC), OJ L 179, 9. 7. 1988, p. 44.

<sup>29</sup> Directive 98/24/EC of 7 April 1998 on the protection of the health and safety of workers from the risks related to chemical agents at work, OJ L 131 of 5.5.1998.

<sup>30</sup> OJ L 183 of 29.6.1989.

<sup>31</sup> Directive 91/383/EEC of the Council of 25 June 1991, supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed- duration employment relationship or a temporary employment relationship, OJ L 206 of 29.7.1991.

<sup>32</sup> E.g., Directive 89/654/EEC of the Council of 30 November 1989, concerning the minimum safety and health requirements for the workplace (first individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ L 393 of 30 December 1989 ; Directive 93/104/EC of the Council of 23 November 1993 concerning certain aspects of the organization of working time, OJ L 307 of 13.12.1993, later supplemented by Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC

Moreover, all the Member States are bound either by the European Social Charter<sup>33</sup> or by the Revised European Social Charter<sup>34</sup>. Both instruments contain similarly worded provisions imposing a duty on the States parties to « eliminate risks in inherently dangerous or unhealthy occupations, and where it has not yet been possible to eliminate or reduce sufficiently these risks, to provide for either a reduction of working hours or additional paid holidays for workers engaged in such occupations » (Art. 2(4) of the Revised European Social Charter, concerning the right to just conditions of work). Article 3 of the Revised European Social Charter, which concerns the right to safe and healthy working conditions<sup>35</sup>, stipulates that

With a view to ensuring the effective exercise of the right to safe and healthy working conditions, the Parties undertake, in consultation with employers' and workers' organisations:

1. to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment. The primary aim of this policy shall be to improve occupational safety and health and to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, particularly by minimising the causes of hazards inherent in the working environment;
2. to issue safety and health regulations;
3. to provide for the enforcement of such regulations by measures of supervision;
4. to promote the progressive development of occupational health services for all workers with essentially preventive and advisory functions.

(2°) *Where the Member States seek, instead, to develop their national provisions on the protection of health and safety at work despite the adverse consequences it may produce on the access to employment of persons with disabilities, it is suggested that a number of limits should apply.* These limits are identified on the basis of the general understanding, presented above, of the relationship between national measures seeking to protect health and safety at work, and the principle of equal treatment of persons with disabilities in employment and occupation. The formulations chosen also seek inspiration from the interpretation given by the United States federal jurisdictions and by the regulations of the Equal Employment Opportunities Commission (EEOC) of the « direct threat » defence provided for under different titles of the American With Disabilities Act 1990. Title I of the ADA in particular permits certain employer defenses to a charge of discrimination based on qualification standards to the extent that these are job-related and consistent with business necessity. § 12113(a) states that

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter<sup>36</sup>.

§ 12113(b) then goes on to say that

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concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive, OJ L 195 of 1.8.2000.

<sup>33</sup> Opened for signature on 18 October 1961, ETS 35.

<sup>34</sup> Opened for signature on 3 May 1996, ETS 163.

<sup>35</sup> Article 3 of the 1961 European Social Charter is less detailed. It refers to the consultation, « as appropriate », of employers' and workers' organisations (Art. 3(3) ESC), but it lacks both the reference to the need to develop a national policy on health and safety at work and to the progressive development of occupational health services, mentioned respectively in Art. 3(1) and Art. 3(4) of the 1996 Revised ESC.

<sup>36</sup> 32 U.S.C. § 12113(a)(2000).

The term ‘qualification standards’ may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

In agreement with the EEOC, the U.S. courts have insisted in particular that where the defendant facing a discrimination claim alleges the existence of a direct threat to the health or safety of others which the challenged act or omission sought to avoid, it is not enough that the defendant believes in good faith that a significant risk exists or proceeds on the basis of generalized assumptions : any « direct threat » determination should be based instead on an individualized assessment and must rely on current medical knowledge or on the best available objective evidence ; the risk itself, moreover, should be significant : its nature, duration and severity must be considered, as well as the probability that the potential injury actually will occur<sup>37</sup>.

Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation does not contain clauses addressing in such detail the relationship between the principle of equal treatment, invoked in respect to persons with disabilities, and occupational health and safety. Of course, neither could such a specification be found either in the Directives adopted by the European Community in that area, as the concern for health and safety largely predates the rise of the requirement of non-discrimination in disability law. But this is simply a supplementary reason to seek guidance from other jurisdictions where the problem has been addressed more explicitly. Moreover, the approach suggested in the context of the ADA is perfectly compatible with the general approach the European Community has adopted in the field of occupational health and safety, which also combines obligations imposed on the employer to protect workers from occupational health and safety risks by making general risk assessments and taking the measures necessary to eliminate or reduce the risk, with the possibility that specific protective measures may be adopted to ensure the protection of particularly sensitive risk groups<sup>38</sup> or that individual protection measures may be taken. The box hereunder offers an illustration, in the particular field of risk related to chemicals at work.

**The example of the protection of the health and safety of workers from the risks related to chemical agents at work**

Council Directive 98/24/EC of 7 April 1998 on the protection of the health and safety of workers from the risks related to chemical agents at work prescribes that employers must assess any risk to the safety and health of workers arising from the presence of those chemical agents (Art. 4), reduce these risks to a minimum for instance by the design and organisation of systems of work at the workplace or the provision of suitable equipment for work with chemical agents and maintenance procedures which ensure the health and safety of workers at work (Art. 5), and, « where exposure cannot be prevented by other means, application of individual protection measures including personal protective equipment » (Art. 6(3)). The Directive prescribes a specific form of health surveillance for workers with respect to whom this risk assessment has revealed that specific risks exist. Article 10 of the Directive states :

Health surveillance

<sup>37</sup> *Bragdon v. Abbott*, 524 U.S. 624 (1998) (dentist having refused to fill a cavity for a patient with HIV in his office, and sued on the basis of Title III of the ADA : on remand, using the standard set by the Supreme Court, the Court of Appeals for the 1st Circuit considered that no « direct threat » existed to the dentist, see *Bragdon v. Abbott*, 163 F.2d 87, 90 (1st Cir. 1998)). See also *Chevron U.S.A Inc. v. Echazabal*, 536 U.S. 73, 85 (2002), to which we return below.

<sup>38</sup> See Art. 15 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, cited above. See also, e.g., Council Directive 90/364/EEC of 28 June 1990 on the protection of workers from the risks related to exposure to carcinogens at work, Article 3(4) of which states that “When the assessment referred to in paragraph 2 is carried out, employers shall give particular attention to any effects concerning the health or safety of workers at particular risk and shall, inter alia, take account of the desirability of not employing such workers in areas where they may come into contact with carcinogens”.

1. Without prejudice to Article 14 of Directive 89/391/EEC, Member States shall introduce arrangements for carrying out appropriate health surveillance of workers for whom the results of the assessment referred to in Article 4 of this Directive reveal a risk to health. These arrangements, including the requirements specified for health and exposure records and their availability, shall be introduced in accordance with national laws and/or practice.

Health surveillance, the results of which shall be taken into account in applying preventive measures in the specific workplace, shall be appropriate where:

- the exposure of the worker to a hazardous chemical agent is such that an identifiable disease or adverse health effect may be related to the exposure, and
- there is a likelihood that the disease or effect may occur under the particular conditions of the worker's work, and
- the technique of investigation is of low risk to workers.

Furthermore, there shall be valid techniques for detecting indications of the disease or effect.

Where a binding biological limit value has been set (...), health surveillance shall be a compulsory requirement for work with the hazardous chemical agent in question, in accordance with the procedures in that Annex. Workers shall be informed of this requirement before being assigned to the task involving risk of exposure to the hazardous chemical agent indicated.

2. Member States shall establish arrangements to ensure that for each worker who undergoes health surveillance in accordance with the requirements of paragraph 1, individual health and exposure records are made and kept up-to-date.

3. Health and exposure records shall contain a summary of the results of health surveillance carried out and of any monitoring data representative of the exposure of the individual. Biological monitoring and related requirements may form part of health surveillance.

Health and exposure records shall be kept in a suitable form so as to permit consultation at a later date, taking into account any confidentiality.

Copies of the appropriate records shall be supplied to the competent authority on request. The individual worker shall, at his request, have access to the health and exposure records relating to him personally.

Where an undertaking ceases to trade, the health and exposure records shall be made available to the competent authority.

4. Where, as a result of health surveillance:

- a worker is found to have an identifiable disease or adverse health effect which is considered by a doctor or occupational health-care professional to be the result of exposure at work to a hazardous chemical agent, or
- a binding biological limit value is found to have been exceeded, the worker shall be informed by the doctor or other suitably qualified person of the result which relates to him personally, including information and advice regarding any health surveillance which he should undergo following the end of the exposure, and the employer shall:
  - review the risk assessment made pursuant to Article 4(1),
  - review the measures provided to eliminate or reduce risks pursuant to Articles 5 and 6,
  - take into account the advice of the occupational health-care professional or other suitably qualified person or the competent authority in implementing any measures required to eliminate or reduce risk in accordance with Article 6, including the possibility of assigning the worker to alternative work where there is no risk of further exposure, and
  - arrange continued health surveillance and provide for a review of the health status of any other worker who has been similarly exposed. In such cases the competent doctor or occupational health-care professional or the competent authority may propose that exposed persons undergo a medical examination.

Thus, Council Directive 98/24/EC of 7 April 1998 on the protection of the health and safety of workers from the risks related to chemical agents at work envisages the situation where, due for instance to the consequences exposure to certain chemicals may have for them, workers are put at a particular risk. Re-assignment of the worker concerned to another position or the adoption of personal protective measures are explicitly envisaged as a possibility for the employer, who may in fact be obliged to resort to such measures where no other protection may be envisaged.

This could put the worker with a disability, translating into a heightened sensitivity to certain exposures, at a particular disadvantage. It is in such situations that the question arises of the relationship between occupational health and safety and the principle of equal treatment in relation to persons with disabilities.

Reasoning by analogy with the case-law from the American with Disabilities Act to the extent this concords with the framework of European Union law, it is suggested that the EU Member States should only accept refusals to hire a person with a disability (or, *mutatis mutandis*, to retain in employment a person who incurs a disability) based on health and safety at work-related considerations where the following four conditions are cumulatively met :

- *It would be not only more difficult or burdensome, but impossible for the employer hiring the person with a disability to comply with the requirements set out in the existing health and safety regulations, even by providing a form of reasonable accommodation to that person*<sup>39</sup>.

- *This impossibility has been determined following an individualized assessment of the person concerned, of the range of accommodations which could be provided as an alternative to a refusal to hire (or to a discontinuation of the employment), and of the incompatibility between the obligations imposed on the employer to guarantee health and safety at work and the recruitment (or the retainment) of the person concerned.* It follows from this requirement that any blanket, across-the-board restriction on the employment of persons with certain categories of disabilities, should be presumed in violation of the Framework Directive, even where such a restriction is purportedly justified by the need to comply with health and safety requirements. This derives from the fact that any denial of a job opportunity, purportedly justified by health and safety reasons, should be shown to be « necessary » to ensure compliance with those requirements<sup>40</sup>. But is also derives from the fact that any such denial may only be considered acceptable if the employer has considered which accommodations he or she could provide to the prospective employee with a disability to make it possible to recruit that person, and has concluded either that no accommodation could be envisaged, or that any such accommodation as could be envisaged would impose a disproportionate burden on the employer and therefore could not be considered « reasonable ». An inquiry into the reasonable accommodation which could be provided, indeed, requires an individualized assessment of the person with a disability in the general working environment ; no generalized restriction, excluding, for example, all persons with epilepsy or with an impaired mobility from certain undertakings, would be compatible with this requirement.

- *The incompatibility between the obligations imposed on the employer to guarantee health and safety at work and the recruitment (or the retainment) of the person concerned, which the employer alleges, must rely on current medical knowledge or on the*

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<sup>39</sup> This, it is submitted, leads to counsel against standards about the level of the duty of care which may be expected from the employer that are exceedingly vague, and do not offer the required legal certainty. Indeed, in the face of such an uncertainty, the employer may be tempted to impose broad restrictions on the employment of persons with disabilities, acting from a fear that the employment of such persons who, in his or her estimation, present higher risks for the protection of health and safety at work, may be interpreted in court as in breach of the standard of care imposed on employers for the benefit of their employees.

<sup>40</sup> The requirement of necessity is formulated under Art. 2(2)(b)(i) of the Framework Directive, with respect to the conditions under which apparently neutral provisions, criteria or practices may be justified although they put persons with disabilities at a particular disadvantage and therefore might be thought of as constituting an indirect discrimination ; and it is formulated under Article 2(5) of the Framework Directive, with respect to the measures laid down by national laws which, in a democratic society, pursue one or more legitimate objectives, which may include the protection of health and the protection of the rights and freedoms of others. It may well be argued however that, as Art. 7 of the Framework Directive states that the principle of equal treatment is « without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work (...) », the reference to this latter provision renders unnecessary the reliance on either of the two other provisions cited.

*best available objective evidence*. Such a judgment must not depend on the subjective appreciation of the employer, even where it is admitted that the employer has acted in good faith and with no discriminatory purpose. A case-law accepting a defence by the employer on the basis simply of the « reasonableness » of that employer's appreciation should be considered incompatible with the Framework Directive, as this constitutes an unacceptably low level of scrutiny of the response of the employer to the application of a prospective worker with a disability<sup>41</sup>.

• *The procedure which leads to the conclusion that the employer is justified in refusing to hire a person with a disability (or in not retaining that person) must comply with the fundamental rights recognized in EU law, including in particular the right to respect for private life and the protection of personal data*. This follows from the fact that any measure adopted by Member States in accordance with an authorization of European Union law – such as the Framework Directive authorizing the maintenance or the adoption of measures for the protection of health and safety at work – must be in conformity with the general principles of EU law, including the fundamental rights protected under the case-law of the European Court of Justice and now enumerated in the EU Charter of Fundamental Rights. It implies that the identification of a disability, either at the stage of pre-employment inquiries into the physical or mental abilities of the job applicant, or – more often – at the stage of the medical examination, must comply with the rules derived from Article 8 of the European Convention on Human Rights, and from Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>42</sup>.

In the view of the author of this report, the Member States would be acting in violation of their obligations under Directive 2000/78/EC if they tolerated from employers under their jurisdiction a refusal to hire a person with a disability (or a refusal to retain a person who has become disabled) justified by the need to protect health and safety at work, where any of the four conditions mentioned is not fulfilled. Indeed, unless these conditions are satisfied, such justification would easily lend itself to being relied upon as a « false excuse » for not hiring or retaining a person with a disability ; and it should be denounced as such. The following box summarizes, for the sake of clarity, the relationship between national health and safety regulations and the principle of equal treatment in employment and occupation for persons with disabilities, as analyzed in the preceding paragraphs.

#### **National health and safety regulations and the equal access to employment of persons with disabilities**

A Member State would not be in violation of its obligations under Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation if it provided that it can be a valid defence for employers accused

<sup>41</sup> See R. Whittle, « Health and Safety Law and the Right to Non-Discrimination on grounds of Disability – the EU Dimension », issues paper presented at the seminar of the EC Legal Expert Group on combating discrimination on grounds of disability, 29 March 2003, at p. 8. The standard of the « reasonable » employer is resorted to by courts in the United Kingdom, see *Jones v. the Post Office*, [2001] IRLR 384 (Court of Appeal), and *Surrey Police v. Marshall* [2002] IRLR 843 (Employment Appeal Tribunal), both cited by R. Whittle, referring in turn to a working paper by J. Davies, *A cuckoo in the nest ? A 'range of reasonable responses'*, *justification and the Disability Discrimination Act 1995*, 2003 (working paper). R. Whittle notes that the facts which gave rise to the two cases mentioned should be construed as instances of direct discrimination under the Framework Directive, but were treated as indirect discrimination – which may be justified under certain conditions – by the UK courts. However, the conditions identified here concern the relationship which is to be established between occupational health and safety on the one hand, non-discrimination on the other hand, on the basis of Articles 2(5) and 7(2) of the Framework Directive. In the view of the author of this report, it is therefore irrelevant under which form of discrimination these instances are classified.

<sup>42</sup> OJ L 281 of 23.11.1995, p. 31.

of discriminating against persons with disabilities by denying them employment opportunities that they are acting in order to comply with the existing national regulations protecting health and safety at work. This may be derived from Articles 2(5), 7(2) and 2(2)(b) of the Framework Directive. However, the Member States should strictly define the conditions under which this justification may be invoked : as this constitutes an exception to the principle of equal treatment, it should not be read too widely and authorize health and safety regulations to become false excuses for perpetuating discrimination against persons with disabilities in the employment relationship. Specifically, it is suggested that under the Framework Directive such a justification should only be considered as admissible where a) it would be not only more difficult or burdensome, but impossible for the employer hiring the person with a disability to comply with the requirements set out in the existing health and safety regulations, even by providing a form of reasonable accommodation to that person ; b) this impossibility has been determined following an individualized assessment of the person concerned, of the range of accommodations which could be provided as an alternative to a refusal to hire (or a discontinuation of the employment), and of the incompatibility between the obligations imposed on the employer to guarantee health and safety at work and the recruitment (or the retainment) of the person concerned ; c) the incompatibility between the obligations imposed on the employer to guarantee health and safety at work and the recruitment (or the retainment) of the person concerned, which the employer alleges, relies on current medical knowledge or on the best available objective evidence ; and d) the procedure which leads to the conclusion that the employer is justified in refusing to hire a person with a disability (or in not retaining that person) complies with the fundamental rights recognized in EU law, including in particular the right to respect for private life and the protection of personal data.

A Member State is not obliged under the Framework Directive to screen out from its health and safety regulations those regulations whose protective pretenses may adversely impact upon the access to employment of persons with disabilities. However the Member States could be encouraged and perhaps incentivized to do so, to the extent that they have provided for a level of protection of health and safety at work which goes beyond the minimal levels of requirement set out by EC Directives or required under Article 3(3) of the Revised European Social Charter.

## 5. The Question of Paternalism implied in the Protection of Health and Safety at Work

It will have not escaped notice that, in formulating these four conditions, this report has not proposed to make a distinction between the situation where the risk is *to the health and safety of co-workers or the general public*, and the situation where all the risk is exclusively *to the health and safety of the person with a disability* seeking employment or facing the threat of dismissal. Such a distinction is of course highly relevant from the point of view of political philosophy. The latter situation confronts us with a clear case of legal paternalism, in which measures restricting the liberty of the individual (in this case, his/her liberty to put his/her health or safety at risk by taking up an employment which could damage his/her health or even have fatal consequences) are justified by that individual's own welfare, rather than by the welfare of other persons or of the society as a whole<sup>43</sup> : where an individual confronts barriers to employment resulting from the desire to protect his own health and safety, therefore, there arises the question whether the autonomy of the individual should not be respected, and whether the legal system should not defer to the choice of that individual, provided that it is free and fully informed, to take the risk the employment would create. This is the question of paternalism which is implied

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<sup>43</sup> Gerald Dworkin defines paternalism as « interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced » (G. Dworkin, « Paternalism », *The Monist*, vol. 56, 1972, pp. 64-84, at p. 65). For a detailed look into situations where such paternalism may be justifiable in order to preserve the autonomy of the individual, i.e., to protect individuals from having the possibility to make certain choices where if such choices were available « they would be tempted to make them and they recognize, in advance, that making such choices would be harmful in terms of their long-range interests », see G. Dworkin, *The Theory and Practice of Autonomy*, Cambridge Univ. Press, 1988 (quote from p. 76).

in the imposition of protective health and safety regulations to persons who are denied employment on the basis of the need to comply with such regulations, although these persons would be willing to take up employment and accept the risks inherent to it.

The question thus formulated has received renewed attention in the legal circles since the United States Supreme Court decided the case of *Chevron U.S.A Inc. v. Echazabal* on 10 June 2002<sup>44</sup>. Chevron U.S.A. Inc. had refused to hire Mario Echazabal because of a liver condition that, according to the doctors of Chevron, could be exacerbated by being exposed to toxins present at the refinery where he was to be put to work. As a result, the independent contractor of Chevron whom Echazabal was working for laid him off. Echazabal filed suit, claiming that this was in violation of Title I of the American With Disabilities Act 1990. The suit however confronted the Court with a question of interpretation of the ADA. As already noted, the ADA permits certain employer defenses to a charge of discrimination based on « qualification standards » to the extent that these are job-related and consistent with business necessity. But the wording of the ADA introduces an ambiguity in stating in § 12113(b) that this term « may include a requirement that an individual shall not pose a direct threat to *the health or safety of other individuals in the workplace* »<sup>45</sup>. Literally, this could be construed as revealing a Congressional intent not to authorize an employer defense where the « direct threat » alleged is to the health or safety of *the individual concerned* him- or herself. The Equal Employment Opportunities Commission had adopted however a regulation which, in the words of the Supreme Court, carried this defense as provided for in the ADA « one step further, in allowing an employer to screen out a potential worker with a disability not only for the risks that he would pose to *others* in the workplace but for risks on the job to *his own* health and safety as well »<sup>46</sup>. A unanimous Supreme Court upheld the EEOC direct threat-to-self regulations which Chevron was relying on to justify its actions. Deferring to the judgment of the agency, it considered in particular that a narrow reading of § 12113(b) as proposed by Echazabal would lead to absurd results : for instance, by stipulating in that provision of the ADA that threats to others « *in the workplace* » could constitute a defense for the employer refusing to hire, the Congress could not have possibly excluded that such a refusal could be justified « when a worker's disability would threaten others *outside* the workplace », such as consumers of alimentary goods contaminated by a worker in the production process<sup>47</sup>. More importantly for our purposes however, the Supreme Court justified its decision by the need to reconcile the ADA with the Occupational Safety and Health Act (OSHA) 1970<sup>48</sup>. The OSHA imposes an obligation on each employer to « furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees »<sup>49</sup>. Chevron had argued in favor of the reasonableness of the EEOC regulations on which its defence was based by invoking the risk it would be facing, if it had recruited Echazabal despite his medical condition and if that condition has worsened as a result, to be found in violation of the OSHA. The Supreme Court recognized that this argument carried some weight :

Although there may be an open question whether an employer would actually be liable under OSHA for hiring an individual who knowingly consented to the particular dangers the job would pose to him, (...) there is no denying that the employer would be asking for trouble : his decision to hire would put Congress' policy in the ADA, a disabled

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<sup>44</sup> *Chevron U.S.A Inc. v. Echazabal*, 536 U.S. 73 (2002). For an inspiring discussion, see P. Blanck, E. Hill, Ch. D. Siegal & M. Waterstone, *Disability Civil Rights Law and Policy*, Thomson West, 2003, pp. 9-3 to 9-8.

<sup>45</sup> The emphasis is ours.

<sup>46</sup> *Echazabal*, 536 U.S. at 78. The EEOC regulation stipulated that « The term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace » (29 CFR § 1630.15(b)(2) (2001)).

<sup>47</sup> *Echazabal*, 536 U.S. at 83-84. The emphasis is ours.

<sup>48</sup> 84 Stat. 1590, as amended, 29 U.S.C. § 651 and ff.

<sup>49</sup> 29 U.S.C. § 654(a)(1).

individual's right to operate on equal terms within the workplace, at loggerheads with the competing policy of OSHA, to ensure the safety of 'each' and 'every' worker<sup>50</sup>.

Finally, as to the argument that imposing on a worker a protection from the risks to his health that his employment in certain conditions would create, was to adopt towards that worker precisely the kind of paternalism that the ADA in 1990 was intended to combat, the Supreme Court approved the view of the EEOC according to which in passing the ADA

Congress was not aiming at an employer's refusal to place disabled workers at a specifically demonstrated risk, but was trying to get at refusals to give an even break to classes of disabled people, while claiming to act for their own good in reliance on untested and pretextual stereotypes. [The EEOC regulation] disallows just this sort of sham protection, through demands for a particularized enquiry into the harms the employee would probably face.

The Supreme Court recalled in that respect that the EEOC regulations required that the direct threat defense, when invoked by an employer to justify a refusal to hire, must be (1) « based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence », and (2) upon an expressly « individualized assessment of the individual's present ability to safely perform the essential functions of the job » without causing a current, significant risk of substantial harm<sup>51</sup> ; it could have added that it must also be proven that (3) the risk cannot be eliminated or reduced to below the level of direct threat by the provision of some form of reasonable accommodation<sup>52</sup>. In sum, concluded the Court, the EEOC reasonably could see a difference between « rejecting workplace paternalism » – which the ADA indeed intended, to avoid exclusion of persons with disabilities from the workforce without good reason in the name of their own good – and « ignoring specific and documented risks to the employee himself, even if the employee would take his chances for the sake of getting a job »<sup>53</sup>.

The same solution would apply under European Union law, in an instance where the health and safety regulations adopted by an EU Member State would be denounced as being « overprotective » and as imposing unjustified, and therefore discriminatory, barriers to the employment of persons with disabilities. The Framework Directive 2000/78/EC, where it states that the principle of equal treatment in relation to persons with disabilities is without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work<sup>54</sup>, does not make any exception for the case where all the risk is to the worker's own health or safety because of her specific disability or medical condition, with no consequences to others, and where the worker concerned has fully consented to the risk she incurs by taking an employment for which she appears otherwise qualified. *A fortiori*, neither does Directive 89/391/EEC, adopted at a time where the civil rights model in the area of disability law had not emerged fully yet, provide for such an exception, where it states that the legislations of the EU Member States in the field of health and safety at work seek to protect the

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<sup>50</sup> Echazabal, 536 U.S. at 85.

<sup>51</sup> The importance of these conditions is underlined by the decision taken, on remand, by the Ninth Circuit in the Echazabal case. The Ninth Circuit considered that Chevron had failed to prove the existence of a « direct threat » because of the lacunae it found in the way the situation of Echazabal had been assessed : Chevron's doctors were not trained in liver disease, whilst those of Echazabal were specialists and had reached the opposite conclusion as to the risks entailed for Echazabal by working on the refinery ; even amongst the doctors of Chevron, there was no unanimity as to the risk to Echazabal ; finally, the doctors of Chevron had not envisaged specific information about the chemicals which Echazabal would be exposed to on the plant. See *Echazabal v. Chevron U.S.A., Inc.*, 336 F.3d 1023 (9th Cir. 2002).

<sup>52</sup> Echazabal had apparently not requested from Chevron or their sub-contractor Irvin Industries that they propose some form of reasonable accommodation to make it possible for him to work on the refinery.

<sup>53</sup> Echazabal, 536 U.S. at 86.

<sup>54</sup> Art. 7(2) of the Framework Directive.

health and safety of *every worker*<sup>55</sup>. Similarly, the Preamble of Council Directive 98/24/EC of 7 April 1998 on the protection of the health and safety of workers from the risks related to chemical agents at work<sup>56</sup> states that « the respect of minimum requirements on the protection of the health and safety of workers from the risks related to chemical agents aims to ensure not only the protection of the health and safety of each individual worker but also to provide a level of minimum protection of all workers in the Community which avoids any possible distortion in the area of competition ». In the view of the author of this report, it is significant that, under the Framework Directive 89/391/EEC or its daughter directives, for instance Directive 98/24/EC, the Member States are to provide that the employer « shall have a duty to ensure the safety and health of workers in every aspect related to the work »<sup>57</sup>, and that although the workers have certain obligations to contribute to limiting the risks<sup>58</sup>, « The workers' obligations in the field of safety and health at work shall not affect the principle of the responsibility of the employer »<sup>59</sup>. A Member State legislation which would create exceptions to this responsibility in favor of workers with a disability facing the refusal by an employer to hire them for health and safety reasons in the absence of any alternative possibility, would be considered as creating a situation of vulnerability for the workers who, being in need of employment, may be induced to accept certain risks which the employer has been unable to lower to an acceptable level. This would also be seen as creating the possibility of distortions of competition between the Member States, which the development of health and safety legislation at the European level precisely seeks to avoid<sup>60</sup>.

Although it may not be excluded that *Echazabal* will be invoked in future cases arising under the American With Disabilities Act to justify rules and policies which may appear overprotective<sup>61</sup>, the United States Supreme Court was careful in that case to insist that its reading of the ADA, implying the recognition into the ADA of an employer's defence of direct threat-to-self, should not legitimize forms of overbroad paternalism, not strictly tailored to meet

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<sup>55</sup> See Art. 3(a) of Directive 89/391/EEC.

<sup>56</sup> Cited above.

<sup>57</sup> Art. 5(1) of Directive 89/391/EEC.

<sup>58</sup> See Art. 13 of Directive 89/391/EEC : « 1. It shall be the responsibility of each worker to take care as far as possible of his own safety and health and that of other persons affected by his acts or omissions at work in accordance with his training and the instructions given by his employer.

2. To this end, workers must in particular, in accordance with their training and the instructions given by their employer:

(a) make correct use of machinery, apparatus, tools, dangerous substances, transport equipment and other means of production;

(b) make correct use of the personal protective equipment supplied to them and, after use, return it to its proper place;

(c) refrain from disconnecting, changing or removing arbitrarily safety devices fitted, e.g. to machinery, apparatus, tools, plant and buildings, and use such safety devices correctly;

(d) immediately inform the employer and/or the workers with specific responsibility for the safety and health of workers of any work situation they have reasonable grounds for considering represents a serious and immediate danger to safety and health and of any shortcomings in the protection arrangements;

(e) cooperate, in accordance with national practice, with the employer and/or workers with specific responsibility for the safety and health of workers, for as long as may be necessary to enable any tasks or requirements imposed by the competent authority to protect the safety and health of workers at work to be carried out;

(f) cooperate, in accordance with national practice, with the employer and/or workers with specific responsibility for the safety and health of workers, for as long as may be necessary to enable the employer to ensure that the working environment and working conditions are safe and pose no risk to safety and health within their field of activity.”

<sup>59</sup> Art. 5(3) of Directive 89/391/EEC. The Member States may however provide in their national legislation for “the exclusion or the limitation of employers' responsibility where occurrences are due to unusual and unforeseeable circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care” (Art. 5(4)).

<sup>60</sup> Directive 89/391/EEC mentions in its Preamble that it seeks to set a minimal level of protection throughout the European Community as it has been found that « national provisions on the subject, which often include technical specifications and/or self-regulatory standards, may result in different levels of safety and health protection and allow competition at the expense of safety and health”.

<sup>61</sup> See, e.g., *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002) (in which, in *dictum*, the Eighth Circuit notes that Wal-Mart could have raised the threat-to-self defense in a case where a pharmacist having diabetes sought to be employed in a single-pharmacist pharmacy, which did not provide for uninterrupted meal breaks), cited by P. Blanck et al., *Disability Civil Rights Law and Policy*, cited above, p. 9-6.

the requirements of health and safety rules. A similar note of caution should be made in the context of European Union law. The right which the Member States are recognized to maintain or adopt measures seeking to protect health and safety at work, despite the adverse impact this may have on persons with disabilities, should not serve to justify the exclusion of persons with disabilities from employment where the conditions imposed by Directive 2000/78/EC or which may be derived from this Directive are not satisfied. As mentioned above, the Member States face four limits when they consider that compliance with the protection of health and safety at work may justify denying a job opportunity to a person with a disability. These limits fulfil the same role, whether the health and safety requirements seek to protect the person with a disability from risks to him- or herself or whether they seek to protect co-workers or the general public from the risks presented by his or her employment. Without it being necessary here to recall those limits, it will be useful to emphasize in particular that, in order to avoid that employers use health and safety reasons as a « false excuse » for not recruiting persons with disabilities, an employer should only be able to invoke such reasons where, relying on current medical knowledge or on the best available evidence and after making an individualized assessment, the employer has proven that it is not possible to comply with the applicable health and safety regulations while employing the individual concerned, even by providing reasonable accommodation. *Mutatis mutandis*, the conditions enumerated hereabove which, in the view of the author of this report, should be verified before a person could be denied employment on ground of his or her disability for health and safety reasons, apply also where on the health and safety of the individual concerned is at stake.

## 6. Conclusion

This Report suggests that the relationship between health and safety regulations and the principle of equal treatment of persons with disabilities should be further clarified under European Community law. The Member States should be encouraged to seek inspiration from the four conditions described in I.4. in defining the conditions under which employers will be authorized to invoke health and safety justifications to defend themselves from the accusation of having committed a discrimination against persons with disabilities. These conditions should also be taken into account in the judicial interpretation of Directive 2000/78/EC by national jurisdictions and by the European Court of Justice.

The adoption of the set of conditions referred to above to regulate the potential conflicts between the obligations imposed on the employer by regulations on health and safety at work, on the one hand, the requirement of non-discrimination on the ground of disability, on the other hand, will ensure that the barriers confronting persons with disabilities which originate in health and safety regulations adopted at the level of the Member States will have to fall

- either where these barriers they have their source in the ill-founded fears, ignorance and/or prejudice of employers, who would not be in breach of health and safety regulations by recruiting or retaining an individual with a disability in the workforce ;
- or where these barriers result from the failure to provide reasonable accommodation in situations where there exists a risk that the employer will violate health and safety regulations, but where the provision of such an accommodation could avoid that risk ;
- or where these barriers result from the application of across-the-board prohibitions imposed on certain categories of applicants, whose employment is considered incompatible with health and safety requirements without an individual assessment being made into each situation.

Nevertheless, the conditions which have been stated will not challenge a last type of barrier to the employment of persons with disabilities which result from the existence of occupational health and safety regulations<sup>62</sup> : where all accommodations have been envisaged but either are

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<sup>62</sup> Another, less complete typology of such barriers is proposed by J. Davies and W. Davies, « Reconciling Risk and the Employment of Disabled Persons in a Reformed Welfare State », *Industrial Law Journal*, vol. 29 (2000), pp. 347-377. It should be emphasized that the typology proposed by Davies and Davies serves in their article to guide the

not practically effective (do not effectively eliminate the risk or do not reduce it at a level deemed acceptable in the judgment of the legislator) or lead to imposing a disproportionate burden on the employer, it seems to be compatible with the Framework Directive that the employer is left free to refuse to hire or to retain a person, without this being considered a discrimination in the meaning of that instrument. The choice made by the Framework Directive is that it is for the national legislator to decide what level of risks is acceptable : although the Member States may not opt for a level which is lower than the minimal standards set in European Community secondary legislation (see above, I.4.), they may set higher standards, even if the consequence of that choice will be to erect further barriers to the employment of persons with disabilities. Although the relationship between those national standards and the requirements of the Framework Directive 2000/78/CE are a matter for EU Law to regulate – and it is that function that the conditions set forth hereabove serve to fulfil –, the determination of the maximum level of acceptable risk, as such, is abandoned to the Member States. It is therefore the Member States which will have to decide, for instance, which weight they should afford to the autonomous choice of the individual to take up a risky employment, and how respect for autonomy in that sense should be balanced against the imposition of occupational health and safety requirements.

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choices to be made by the lawmaker, or by the judge in the interpretation of the Disability Discrimination Act 1995. The perspective adopted here is different.

### III. Pre-Employment Inquiries and Medical Examinations as Barriers to the Employment of Persons with Disabilities

An adequate regulation of pre-employment inquiries and medical examinations has a crucial role to play to prevent that occupational health and safety requirements, whether too broadly interpreted or not, will erect unjustified barriers to the employment of persons with disabilities. The reasons for this are easy to identify. In the cases most significant statistically, the disability will only be revealed by such inquiries or such medical examinations. It is therefore on the basis of such inquiries or examinations that the discrimination may occur; and it is by better protecting the privacy of the individual, through the strict regulation of the conditions under which information may be abstracted from that individual concerning his or her health, physical condition, or impairment, that we may hope to limit the number of circumstances where the disability will be known to the employer under conditions where this may lead to unjustified reactions from his/her part – reactions resulting from fear or prejudice, or from overprotective attitudes, which the employer will seek to justify by a misrepresentation of the obligations of the employer under health and safety regulations.

Of course, where the disability is visible (apparent), the risk of discrimination will exist independently of such searches. The situations where the disability of an individual is apparent are also the most delicate, because in the typical case, the discrimination will be obfuscated by the employer: the employer, although refusing to hire the individual because of his or her disability – whether this is the deliberate intention or results from a less conscious reaction to the disability the employer is confronted with –, will generally have no difficulty presenting that choice as based on other, non-suspect motives, and it will be particularly difficult for the complainant to prove that the rejection has been based in fact on the apparent disability<sup>63</sup>. Nevertheless, the second part of this report focuses on inquiries and medical examinations, because it is in these areas that the need for clarification of the applicable legal criteria was felt to be most pressing.

This part of the report is structured as follows. Section II.1. distinguishes the two stages in the recruitment process, before and after a conditional offer of employment is made. Section II.2. recalls the dual role of occupational medicine, which is both to avoid situations which pose a threat to the health of the employees and to seek to integrate all prospective employees in the workforce, if necessary by suggesting certain accommodations in order to eliminate or reduce to an acceptable level the risks entailed by the recruitment of certain employees whose condition puts them at a particular risk or might create risks for others. These sections thus set the stage for the analysis, in section II.3., of the regulation of the pre-employment medical examinations by privacy law. In this third section, nine principles are identified which should avoid that pre-employment medical examinations will create obstacles to the professional integration of persons with disabilities. These principles, derived from the right to respect for private life and the rules regulating the protection of personal data, will not in all cases suffice to protect persons with disabilities from being discriminated against in access to employment. Not only are they no answer to overprotective health and safety regulations, or to health and safety regulations interpreted in an excessively broad fashion by the employer or the occupational examining physician; they also offer no protection from the irrational prejudices of an employer confronted with a visible disability or to whom the fact of the disability is voluntarily communicated. They nevertheless do offer a protection against discrimination resulting either from unjustifiably intrusive inquiries or medical examinations, by imposing which occupational health practitioners fall into the practice of « selective » medicine at odds with their « protective » vocation; and they offer a protection against the irrational reactions of employers receiving information relating to the medical condition of a prospective employee, which

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<sup>63</sup> On the evidentiary difficulties raised by discrimination cases, see O. De Schutter, *Discriminations et marché du travail. Liberté et égalité dans les rapports d'emploi*, P.I.E. Peter Lang, 2001, pp. 82-92.

presents no relationship to the ability of that employee to effectively perform the job functions, but which may be a source of fear or prejudice.

### **1. The Two Stages in the Recruitment Process : Pre-Offer and Post-Offer**

Two stages in the recruitment process ought to be carefully distinguished. During a first stage, a selection is made by the employer (or possibly, the external agency or consultant the employer has entrusted with that mission) between the potential candidates which appear to present the minimal qualifications required for the job – qualifications relating to, for instance, literacy, languages or diplomas. During that stage, both psychological and physical tests may be imposed on the job applicant, and questions may be asked to her, relating for instance to the qualifications she asserts to possess or to her reasons for seeking the employment. This stage ends with one person being chosen from the pool of candidates. That person is offered an employment. The offer may still be conditional upon that person passing a medical examination, however. It is only during the second stage of the recruitment process, *post* the conditional offer of employment, that such an examination may take place.

It is crucial that no medical examination is performed before the offer of an employment is made. Indeed, if the medical examination is performed before that moment and reveals a disability it will be very difficult or even impossible to prove that it is the knowledge of this disability which has led to the refusal to hire the individual concerned : the employer will be able to invoke a number of reasons to justify his/her choice, even if the real explanation for that choice is, for instance, that the medical examination has shown that the worker would require a form of accommodation because of her disability or that confidential medical information has been received by the employer suggesting that the individual concerned may become ill in the future, leading the employer to adopt the decision which most limits the financial risks implied in the recruitment – a decision not to hire. In other terms, « the scheme of permitting inquiries [into the disabilities of the individual concerned] only at the post-offer stage of the process mitigates the problems of proof that arise when a person is forced to reveal a disability before an offer is made. At that stage, absent an admission by the employer, the applicant will not know whether her exclusion was due to her disability or to her qualifications »<sup>64</sup>.

In accordance with this logic, the ADA authorizes the entities covered by this legislation to « make preemployment inquiries into the ability of an applicant to perform job-related functions », but prohibits at that stage medical examinations or inquiries « as to whether such applicant is an individual with a disability or as to the nature or severity of such disability »<sup>65</sup>. Employers are thus prohibited from making general pre-employment inquiries about a person's disabilities or about the nature or severity of such disabilities on application forms, in job interviews and in background or reference checks : qualified candidates should not be screened out because of their disability before their ability to do a job has been evaluated. As a result, questions such as whether an applicant has been hospitalized, treated for a medical condition, treated for workers' compensation illnesses or injuries, or had a major illness are prohibited.

The prohibitions regarding pre-employment inquiries do not prevent an employer from imposing certain tests – provided these are not construed as constituting « medical examinations » in the meaning of the ADA – or from obtaining information regarding an applicant's job-related qualifications, including information necessary to assess whether an individual can perform the essential functions of a job and to ensure health and safety on the job. Accordingly, an employer may ask questions to determine whether an applicant can perform such functions with or without accommodation. Such questions, however, should focus on the applicant's ability to perform a particular job and not on any disabling condition.

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<sup>64</sup> P. Blanck et al., *Disability Civil Rights Law and Policy*, cited above, p. 7-9.

<sup>65</sup> 42 U.S.C. § 12112(d)(2) (2000).

Considering the importance of the distinction made in the American with Disabilities Act between inquiries which may be made at the pre-offer stage and inquiries or medical examinations which may relate to a disability, it is surprising that such a distinction has not been emphasized, as it should have, in the relevant European instruments. Principle 4.3. of the Recommendation R(89)2 adopted on 18 January 1989 by the Committee of Ministers of the Council of Europe on the protection of personal data used for employment purposes mentions that « In the course of a recruitment procedure, the data collected should be limited to such as are necessary to evaluate the suitability of prospective candidates and their career potential ». The Explanatory Memorandum to the Recommendation says in para. 37 :

...the sort of data which can be legitimately collected should be limited to information thought necessary to determine whether a given candidate is the right person for the job. [T]he type of employment in question will influence the amount of information which can be sought, bearing in mind also that certain types of employment may require the prospective employer to obtain additional data relating to candidates' ability in the long term to move up in the hierarchy, to assume more responsibility with the passage of time, etc.

Although the principle thus stated in principle 4.3. of the Recommendation implies that any inquiries which, at the pre-offer stage, focus on the disability or the state of health – rather than on the ability to perform job-related functions – would be unjustified, the Recommendation fails to make explicit the distinction between the nature of inquiries preceding the offer of employment, on the one hand, post-conditional-offer medical examinations, on the other hand. Principle 10.2. of the Recommendation does not allude to that distinction. Instead it says that « An employee or job applicant may only be asked questions concerning his state of health and be medically examined in order : a. to determine the suitability of an employee or job applicant for his present or future employment ; b. to fulfil the requirements of preventive medicine ; or c. to allow social benefits to be granted ». Pre-offer inquiries and post-offer medical examinations are therefore treated on a par, which may be a source of confusion. In para. 74 of the Explanatory Memorandum to the Recommendation, the same assimilation occurs :

The nature of the employment will of course influence the sort of questions which may be asked of an employee or applicant, and thus the amount of data which can be collected. It will also influence the nature of the physical examination. For example, an applicant for a job in a nuclear power plant may, in addition to a rigorous medical examination, be required to supply information regarding the incidence of cancer or other diseases in his family history. Applicants for jobs in the liberal professions would not be expected to do so.

The author of this Report strongly recommends that a clear distinction be made in the relevant legislations adopted by the Member States between the inquiries which precede the offer of employment and the inquiries and medical examinations which follow the offer. Only after an employment offer is made may a medical examination be performed, or may questions focus on the disability or health condition of the prospective employee. Before the offer of employment is made, the questions addressed to the job applicant may only relate to his or her ability to perform the essential functions of the job proposed. Moreover, in evaluating at the pre-offer stage whether certain inquiries can be made about the physical and mental abilities of the job applicant, it should be kept in mind that, as expressed by the Committee of Ministers of the Council of Europe when adopting the « Charter on the Vocational Assessment of People with Disabilities »<sup>66</sup> :

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<sup>66</sup> Res. AP (95)3 on a Charter on the Vocational Assessment of People with Disabilities, adopted by the Committee of Ministers on 12 October 1995 at the 545th meeting of the Ministers' Deputies. This resolution was adopted in the framework of the Partial Agreement in the social and public health field proposing a set of principles to guide the public programmes for vocational rehabilitation and vocational assessment of people with disabilities, regrouped in the form of a « Charter on the vocational assessment of People with Disabilities ».

Performing the tasks of a particular job requires only a limited number of human abilities. If an employee's abilities correspond to the requirements of a given job, then the person in question can be profitably employed. There should be no justification for putting at a professional disadvantage people whose disabilities would have no effect on their performance of the duties involved in the job.

## **2. The Role of Occupational Medicine in Preventing Occupational Risks and in Facilitating the Provision of Reasonable Accommodation**

We should not see medical examinations only as entailing the risk of discrimination, either because of the nature of the medical information collected or because of the processing and further misuse of those data. Medical examinations also give the opportunity to the occupational health services to identify situations where certain individuals may be at risk, for instance because of a noisy working environment or because of exposure to certain chemicals, and to propose measures eliminating the risk or reducing it to acceptable levels. Pre-employment medical examinations therefore may contribute to the employer fulfilling her obligation to provide workers with disabilities the kind of accommodation they require, to the extent at least than some form of effective accommodation can be devised which does not entail a disproportionate burden. Indeed, the adaptation of the working environment to the needs of the workers is one of the functions classically ascribed to occupational medicine.

At the universal level, the most authoritative texts on occupational health services are the International Labour Organisation Occupational Health Services Convention of 1985 (No. 161)<sup>67</sup> and its accompanying Recommendation (No. 171)<sup>68</sup>. These standards stress that occupational health services are entrusted essentially with preventive functions. They are responsible for advising employers, workers and their representatives on maintaining a safe and healthy working environment, as well as on the adaptation of work to the capabilities of workers. The Occupational Health Services Convention defines these services as “services entrusted with essentially preventive functions and responsible for advising the employer, the workers and their representatives in the undertaking on (i) the requirements for establishing and maintaining a safe and healthy working environment which will facilitate optimal physical and mental health in relation to work; (ii) the adaptation of work to the capabilities of workers in the light of their state of physical and mental health”. Among the long list of functions Article 5 of the Convention assigns to these services<sup>69</sup> are “surveillance of workers’ health in relation to work” and “promoting the adaptation of work to the worker”. Recommendation (No. 171) is explicit on what is meant by the “surveillance of workers’ health in relation to work”, when

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<sup>67</sup> Adopted on 25 June 1985, entered into force on 17 February 1988.

<sup>68</sup> But see also the International Code of Ethics for Occupational Health Professionals, adopted by the International Commission on Occupational Health, Singapore, 1991.

<sup>69</sup> The full text of this provision reads : “Without prejudice to the responsibility of each employer for the health and safety of the workers in his employment, and with due regard to the necessity for the workers to participate in matters of occupational health and safety, occupational health services shall have such of the following functions as are adequate and appropriate to the occupational risks of the undertaking: (a) identification and assessment of the risks from health hazards in the workplace; (b) surveillance of the factors in the working environment and working practices which may affect workers' health, including sanitary installations, canteens and housing where these facilities are provided by the employer; (c) advice on planning and organisation of work, including the design of workplaces, on the choice, maintenance and condition of machinery and other equipment and on substances used in work; (d) participation in the development of programmes for the improvement of working practices as well as testing and evaluation of health aspects of new equipment; (e) advice on occupational health, safety and hygiene and on ergonomics and individual and collective protective equipment; (f) surveillance of workers' health in relation to work; (g) promoting the adaptation of work to the worker; (h) contribution to measures of vocational rehabilitation; (i) collaboration in providing information, training and education in the fields of occupational health and hygiene and ergonomics; (j) organising of first aid and emergency treatment; (k) participation in analysis of occupational accidents and occupational diseases.”

performed by a service whose essential function is preventive<sup>70</sup>. Paragraph 11 of the Recommendation reads :

Surveillance of the workers' health should include, in the cases and under the conditions specified by the competent authority, all assessments necessary to protect the health of the workers, which may include (a) health assessment of workers before their assignment to specific tasks which may involve a danger to their health or that of others; (b) health assessment at periodic intervals during employment which involves exposure to a particular hazard to health; (c) health assessment on resumption of work after a prolonged absence for health reasons for the purpose of determining its possible occupational causes, of recommending appropriate action to protect the workers and of determining the worker's suitability for the job and needs for reassignment and rehabilitation; (d) health assessment on and after the termination of assignments involving hazards which might cause or contribute to future health impairment.

More precisely, medical examinations are envisaged under the Recommendation in paragraph 16, which mentions the performance of a medical examination “for the purpose of determining fitness for work involving exposure to a particular hazard” (16(1)), and in paragraph 17, which states that :

17. Where the continued employment of a worker in a particular job is contra-indicated for health reasons, the occupational health service should collaborate in efforts to find alternative employment for him in the undertaking, or another appropriate solution.

The reminder of these functions assigned to occupational medicine<sup>71</sup> illustrates that despite their discriminating potential, pre-employment medical examinations seem to present a paradoxical relationship to the principle of equal treatment in relation to persons with disabilities. Indeed, while potentially a source of exclusion, such examinations also may guarantee that persons with disabilities will be protected from certain working environments which would or could worsen their condition. And they may form a crucial part of the identification of whichever reasonable accommodations may be requested by the person with a disability, the denial of such forms of accommodations constituting a specific form of discrimination, *sui generis* – not reducible, perhaps, to either direct discrimination or indirect discrimination<sup>72</sup>. What we require therefore is a strict regulation of pre-employment of medical examinations which shields the persons with disabilities from the risk of discrimination, but which preserves the possibility for occupational health services to effectively contribute to the improvement of working conditions and to the provision of any accommodations which may be required for the employment of persons with disabilities.

### **3. The Regulation of Pre-Employment Medical Examinations by Privacy**

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<sup>70</sup> See para. 3 of the Recommendation.

<sup>71</sup> European Community law is permeated by the same understanding of the role of occupational health services. In particular, Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ L 183 of 29.6.1989, p. 1) states that “the employer shall take the measures necessary for the safety and health protection of workers, including prevention of occupational risks and provision of information and training” (Art. 6(1)), these measures including “adapting the work to the individual, especially as regards the design of work places, the choice of work equipment and the choice of working and production methods” (Art. 6(2), d)), and implying in particular that where the employer entrusts tasks to a worker, he/she should “take into consideration the worker's capabilities as regards health and safety” (Art. 6(3), b)).

<sup>72</sup> See Art. 5 of the Framework Directive.

This section of the Report identifies the safeguards which privacy law contributes to pre-employment examinations<sup>73</sup>. Privacy law comprises both the traditional right to respect for private life and the more recently emerged rules on the processing of personal data. Initially separate, these two sets of rules have been recently converging, although the process of convergence has not been completed yet and each set of rules still retains part of its specificity<sup>74</sup>. The right to respect for private life, as embodied in particular in Article 8 of the European Convention on Human Rights, protects the individual from the invasion of his private sphere as such invasion may lead, in particular, to the revelation and dissemination of information the confidentiality of which he or she would have wanted to preserve. The rules on the processing of personal data, as contained in the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981<sup>75</sup> and, in EC Law, in the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>76</sup> and other, sister, Directives – with one directive being in preparation specifically on the protection of the personal data in employment –, protect individuals from the misuse which may result from the processing<sup>77</sup> not only of data pertaining to aspects of the private life of the individual, but of all « personal data », whether these data are private and confidential or whether these are public, insofar as they relate to an individual who is either identified or may be identified.

The following set of principles is drawn from both the right to respect for private life in its traditional meaning (understood as the right of the individual to be protected by a « private sphere » surrounding him or her) and the rules relating to the protection of private life in the processing of personal data. This approach was preferred above an alternative approach, which would have resulted in distinguishing the principles according to their origin in either of these two sources. Indeed, on the one hand, the traditional right to respect for private life has been enriched by the inclusion of a purely informational dimension : it now guarantees the individual not only against the unwanted subtraction of confidential information, but also against the systematic processing of information relating the individual<sup>78</sup> ; on the other hand, the « automatic » character of the processing of the personal data is not as decisive as previously in

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<sup>73</sup> Other studies include : G. Atherley, « Human Rights versus Occupational Medicine », *International Journ. of Health Services*, (1983) 265-275 ; S. Gevers, « Use of Genetic Data, Employment and Insurance : an International Perspective », *Bioethics*, 1993, pp. 126-134 ; L. Gostin, « Genetic Discrimination : the Use of Genetically Based Diagnostic and Prognostic Tests by Employers and Insurers », *American Journ. of Law and Medicine*, 1991, pp. 109-144 ; M. Kelman, « Concepts of Discrimination in 'General Ability' Jobs Testing », *Harv. L. Rev.*, vol. 104 (1991), p. 1158 ; A. Hendriks and S. Gevers, « (Pre-)employment Medical Examinations and the Law, with Particular Reference to the European Union », *Eur. Journ. of Health Law*, 1994, pp. 229-264. It should also be mentioned that, in view of its preparation of a sectoral directive concerning the protection of personal data of workers, the European Commission has commissioned two studies on this issue, which contain interesting – but rapidly outdated, per definition – comparative material : M. Freedland, *Data Protection and Employment in the European Union. An Analytical Study of the Law and Practice of Data Protection and the Employment Relationship in the EU and its Member States*, Oxford, 1999, 51 pages ; and two studies compiled by F. Hendrickx, 1. *Study on the protection of workers' personal data in the European Union : general issues and sensitive data*, 84 pages ; 2. *Study on the protection of workers' personal data in the European Union : surveillance and monitoring at work*, 39 pages.

<sup>74</sup> On the relationship between the two sets of rules, see O. De Schutter, « Vie privée et protection de l'individu vis-à-vis des traitements de données à caractère personnel », *Revue trimestrielle des droits de l'homme*, n°45 (2001), p. 137.

<sup>75</sup> E.T.S., n° 108.

<sup>76</sup> OJ L 281 of 23.11.1995, p. 31.

<sup>77</sup> The Convention of the Council of Europe for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981, as its title indicates, applies only to automatized processing of personal data. Directive 95/46/EC on the other hand, applies to all processing done « wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system » (article 3(1)), « processing » being defined in turn as « any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction » (article 2, b) of the Directive).

<sup>78</sup> See Eur. Ct. HR, *Rotaru v. Romania*, judgment of 4 May 2000, § 43.

defining the scope of protection afforded by the rules relating to the processing of personal data<sup>79</sup>. These two shifts lead to a multiplication of the situations where both sets of rules apply. Indeed, they both regulate the acquisition, at the employer's request, of information relating to the abilities or the disabilities of the candidate employee, and to the further use of that information, in the context of inquiries made during the recruitment process or in the context of pre-employment medical examinations.

The safeguards which privacy law – understood here as comprising the two dimensions the convergence of which has just been remarked upon – contributes to pre-employment medical examinations are examined in this Report because these safeguards make a crucial contribution to the protection of persons with disabilities from any discrimination which could have its source in such examinations. Discrimination could surface in two forms :

- Indirect discrimination will occur where the verifications made in the course of the medical examination subvert this examination, which should be protective in nature, into a selective process, resulting in the denial of employment to all candidates whose recruitment may entail financial risks for the employer, for instance because of the real possibility that they will become ill in the future. Principles 3 to 5 of the list of principles hereunder seek to prevent this from occurring. The substantial requirement relating to the nature and the scope of the examination which is practised (Principle 3) is supplemented by procedural guarantees relating to the independency of the occupational health physician and the possibility to appeal from his or her evaluation (Principles 4 and 5).
- Direct discrimination will occur 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<sup>80</sup>. Where medical data concerning a prospective employee are communicated to the employer, there is a risk that the employer will react with fear, prejudice or stereotype to those data if they reveal that the individual has a disability. Of course, where some form of reasonable accommodation is required – either because the individual concerned requests it, or because it is suggested by the occupational physician –, the disability will be known to the employer – although, strictly speaking, the employer will not have to know what the nature and scope of the disability is, but only which forms of effective accommodation could ensure that the person may be employed and which working environments are compatible with that person's medical condition. But where the disability is neither visible nor revealed by the individual concerned, it is essential that it is kept confidential : as long as this confidentiality is preserved, discrimination based on ignorance or prejudice will simply have nothing to hold upon. It is in this sense that the General Conference of the International Labour Organization stated, in the Recommendation accompanying the adoption of ILO Convention (n° 161) on Occupational Health Services, that « Provisions should be adopted to protect the privacy of the workers and to ensure that health surveillance is not used for discriminatory purposes or in any other manner prejudicial to their interests »<sup>81</sup>. Principles 6 to 8 provide for the protection of medical personal data, which are considered to be particularly sensitive since they could be used for discriminatory purposes.

Finally, Principle 9 relates to the mission of the examining physician to propose measures for the accommodation of candidate workers having certain disabilities. In accordance with what we have seen is one of the primary, universally recognized, roles of occupational medicine, pre-employment medical examinations should facilitate the adoption of measures which will effectively accommodate the needs of the worker with a disability and therefore promote his/her employment.

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<sup>79</sup> See note 77 hereabove.

<sup>80</sup> Art. 2(2)(a) of the Framework Directive.

<sup>81</sup> Recommendation 171 adopted on 26 June 1985 at the 71st session of the General Conference of the International Labour Organization, para. 11.2.

The list begins however with two principles which are directly related neither to the need to avoid pre-employment medical examinations leading to forms of direct discrimination or indirect discrimination, nor to the provision of reasonable accommodation. The requirement of a specific, free and informed consent of the individual concerned (Principle 1) and the requirement that the pre-employment medical examination takes place only once a conditional offer of employment has been made (Principle 2), should be seen as preliminary both in the sense that they come first in the sequence of questions raised by medical examinations and in the sense that they appear, in many respects, as the most important. Each principle from this list is stated, and explained with reference to the legal bases in international and European human rights law and European Union law. Where certain good practices could be identified in the Member States of the European Union, they are also described under each principle to which they relate.

**Principle 1. Any pre-employment medical examination may only be proposed with the specific, free and informed consent of the examinee.**

*The status of the requirement of consent*

Pre-employment medical examinations are to be clearly distinguished from the classical “therapeutic” function of medical examinations, which seek to formulate a diagnosis on the medical condition of a person to propose a therapy and remedy a condition found to be deficient. A Committee of Experts from the Council of Europe remarks that there are « obvious contrasts between diagnosis and treatment following a medical complaint and in the exclusive health interest of the individual concerned on the one hand, and a health evaluation upon the request of a third party which also serves other interests on the other »<sup>82</sup>. A first, obvious difference – to which principle 3 of this list relates – is that, in contrast to medical examinations performed in the therapeutical context, the purpose of pre-employment medical examinations is strictly defined : it is to verify the suitability of the prospective employee to the proposed employment position, in other terms, to verify whether there exist no counter-indications linked to the health of the individual to him or her being employed in the position for which the recruitment is envisaged. Although the latter proposition should not blind us to the complexities it entails – what exactly is “suitability” and how it should be verified is a matter of controversy –, the proposition as such is hardly contestable. And despite its generality, it does indicate that invasions upon the privacy of the candidate worker will have to remain strictly limited, as any such invasion will necessarily have to be justified by reference to the aim sought to be realized.

But another difference is that, in contrast to medical examinations performed in the classical (therapeutical) context of the patient-doctor relationship, pre-employment medical examinations performed for health and safety reasons are not voluntarily submitted to by the candidate employee. Of course, the specific, free and informed consent of the candidate employee is required before any medical investigation can be performed upon him ; but where the refusal to submit to such an investigation is the denial of a job opportunity, such a consent, although a *necessary* condition for the medical examination to be acceptable from a legal point of view, cannot be considered to be a *sufficient* condition. To pretend otherwise, equating the situation of the candidate employee to that of the consumer on a market of consumption goods<sup>83</sup>, would be wholly unrealistic, and oblivious of the unequal bargaining power between the employer and the candidate employee in the hiring process. In the view of the author of this report, the requirement that the prospective employee consent to the medical examination proposed is simply a pre-requisite to the acceptability of that examination, and not a substitute for

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<sup>82</sup> *Medical Examinations Preceding Employment and/or Private Insurance : A Proposal for European Guidelines*, Council of Europe, April 2000, p. 16.

<sup>83</sup> As by R. Epstein, *Forbidden Grounds. The Case Against Employment Discrimination Laws*, Cambridge, MA, Harvard University Press, 1992.

compliance with all the other principles regulating the pre-employment medical examination, including in particular principle 3 according to which

Any pre-employment medical examination may only be proposed if it is relevant to a) the health or safety of the worker concerned, b) the health or safety of others (co-workers or the general public), or c) the fitness of the candidate ensuring that he/she will be capable to perform the essential functions of the job, at the moment of the examination or in the immediate future. The invasion of the privacy of the examinee implicated by the examination must moreover be restricted to what is strictly necessary, and remain proportionate to the objectives pursued.

Admittedly, the temptation exists to recognize to consent a wider role than being a simple prerequisite. Some authors have argued that, as long as the medical examination (imposed, for instance, for the conclusion of an employment contract or an insurance contract) is voluntarily submitted to by the candidate – and thus validated by the free and informed consent of the person interested –, its requirement will not be in contradiction with Article 8 ECHR<sup>84</sup>. This report takes the view, however, that such a position underestimates the power relationships at work in an employment relationship, where the bargaining which takes place is really best described as mutual coercion : in such a context, it can be argued that the “consent” of the candidate employee to an examination which, if he refuses it, will lead to the denial of an employment opportunity, is never wholly “free”, but rather per definition coerced.

It is true that, in the system of Directive 95/46/EC, the consent of the data subject may validate the processing of even sensitive data, such as medical data. Directive 95/46/EC prohibits the processing of data concerning health unless :

“processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject under national law or rules established by national competent bodies to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy”<sup>85</sup>

or where any of the following exceptions apply :

“(a) *the data subject has given his explicit consent to the processing of those data*, except where the laws of the Member State provide that the prohibition [of the processing of data relating to health] may not be lifted by the data subject's giving his consent; or  
(b) processing is necessary for the purposes of carrying out the obligations and specific rights of the controller in the field of employment law in so far as it is authorized by national law providing for adequate safeguards; or  
(...)  
(e) the processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims”<sup>86</sup>.

However, neither the italicized provision (Article 8(2)(a) of Directive 95/46/EC), nor the general restriction clause contained in Article 8(4) of the Directive (according to which : “Subject to the provision of suitable safeguards, Member States may, for reasons of substantial public interest, lay down [additional] exemptions [to the prohibition imposed on the processing of medical data] (...) either by national law or by decision of the supervisory authority”),

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<sup>84</sup> See Ch. Byk, *Les progrès de la médecine et de la biologie au regard de la Convention européenne des droits de l'homme*, H(92)5, Direction des droits de l'homme du Conseil de l'Europe, Strasbourg, mars 1992, p. 62.

<sup>85</sup> Art. 8(3) of Directive 95/46/EC.

<sup>86</sup> Art. 8(2) of Directive 95/46/EC. The exceptions which are irrelevant to the question of pre-employment medical examinations have been omitted.

should be seen as rendering moot the principles applicable to all processing of all (including non-sensitive) personal data. These principles – including in particular the principles relating to the quality of the data (Art. 6)<sup>87</sup> and the legitimacy of the processing of data (Art. 7)<sup>88</sup> – remain applicable in all circumstances. Thus, although under Article 7, a), of the Directive the unambiguous consent of the individual concerned may legitimize the collection and processing of data, in accordance with Article 6(1)(b) and (c) of the Directive, even where the subject has explicitly consented to the processing of personal data, it still will be required that any medical data collected during the pre-employment medical examination are collected for « specified, explicit and legitimate purposes », that they are « not further processed in a way incompatible with those purposes », and that the data collected are « adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed »<sup>89</sup>.

Moreover, in the opinion of the author of this Report, consent may not play in the context of employment the same role as in other contexts where there is no reason to presume that the subject may be placed in circumstances of coercion constraining his free will. Both because it is specifically focussed on the protection of personal data in the employment relationship and because, as a Recommendation of a non immediately binding nature, it may be said to state aspirations rather than a legal norm obliging the Member States of the Council of Europe, Recommendation No. R(89)2 of the Committee of Ministers to Member States on the Protection of Personal Data Used for Employment Purposes goes further, in some respects, in the level of its requirements. In particular, while the Directive states that the consent of the individual concerned may suffice to legitimate the processing of data relating to his or her health, the Recommendation clearly identifies the express and informed consent of the employee or job candidate as required (see para. 10.3.) but not as sufficient, by itself, to make the processing of medical data acceptable : para. 10.2. of the Recommendation, on the contrary, identifies limitatively the objectives which a medical examination may pursue, *whether or not the subject consents to more searching inquiries into his health*. The Data Protection Working Party created under Article 29 of Directive 95/46/EC considers, in its Opinion 8/2001 on the processing of personal data in the employment context adopted on 13 September 2001, that « where as a necessary and unavoidable consequence of the employment relationship an employer has to process personal data it is misleading if it seeks to legitimise this processing through consent.

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<sup>87</sup> According to Article 6(1) of Directive 95/46/EC, “ Member States shall provide that personal data must be:

- (a) processed fairly and lawfully;
- (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes (...);
- (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
- (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;
- (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed (...).”

<sup>88</sup> According to Article 7 of Directive 95/46/EC, “ Member States shall provide that personal data may be processed only if:

- (a) the data subject has unambiguously given his consent; or
- (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or
- (c) processing is necessary for compliance with a legal obligation to which the controller is subject; or
- (d) processing is necessary in order to protect the vital interests of the data subject; or
- (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or
- (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection (...).”

<sup>89</sup> The Member State concerned may however adopt legislative measures to restrict the guarantees entailed by this principle which are necessary to safeguard, *inter alia*, “ the protection of the data subject or of the rights and freedoms of others” (Art. 13(1), g)).

Reliance on consent should be confined to cases where the worker has a genuine free choice and is subsequently able to withdraw the consent without detriment »<sup>90</sup>.

The weight afforded to the consent of the candidate employees varies across the jurisdictions<sup>91</sup>. However, considering the position of the Working party 'Article 29', it should come as no surprise that, in the consultation documents preceding the proposal the European Commission intends to make on the protection of personal data in employment relationships – with the objective of arriving at a « daughter » directive to Directive 95/46/EC, relating specifically to the protection of personal data in the specific context of employment –, the consent of the employee or prospective employee is considered not to constitute a sufficient justification for the processing of personal data relating to him or her<sup>92</sup>. The suspicion surrounding consent in the context of employment simply takes into account the power relationship which exists between the parties in such a context, and the coercion which the imbalance between the parties introduces. As noted by the European Group on Ethics in Science and New Technologies in its opinion on the ethical aspects of genetic testing in the workplace<sup>93</sup> :

...consent (...) may not be really free in the employment context, in which employees and prospective employees are either subordinate or dependent. [Employees] often find themselves in a position where it is virtually impossible for them to refuse, withdraw or modify consent, due to the employer's position and power, and to their own fear of loss of job offer, promotion and so on.

#### *The quality of the consent required*

Principle 1 formulates a requirement according to which any pre-employment medical examination may only be proposed with the specific, free and informed consent of the examinee. Implicit in Article 8 ECHR, this requirement is formulated in Article 5 of the Council of Europe Convention on Biomedicine and Human Rights, which states that “An intervention in

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<sup>90</sup> WP 48, 5062/01/EN/Final. The view of the Data Protection Working Party is that « The worker is in theory able to refuse consent but the consequence may be the loss of a job opportunity. In such circumstances consent is not freely given and is therefore not valid. The situation is even clearer cut where, as is often the case, all employers impose the same or a similar condition of employment » (p. 23).

<sup>91</sup> The United Kingdom Data Protection Commissioner has adopted the position that : « The extent to which consent can be relied upon in the context of employment is limited because of the need for any consent to be freely given. However in relation to the recruitment and selection of workers this is less of a constraint. Individuals in the open job market will usually have a free choice whether or not to apply for a particular job. If consent to some processing of sensitive data is a condition of an application being considered this does not prevent the consent being freely given. It must of course be clear to the applicant exactly what he or she is consenting to. As recruitment proceeds it becomes less likely that valid consent can be obtained. If, for example, the direct consequence of not consenting is the withdrawal of a job offer the consent is unlikely to be freely given » (Data protection Act 1998 Codes of Practice, *The Employment Practices Data Protection Code Part 1: Recruitment and Selection*, p. 32). This is hardly justifiable in theory and hardly workable in practice. In theory, it makes no difference to the amount of coercion limiting the free will of the individual whether his/her refusal to consent to the processing of sensitive data will result in an impossibility to apply for a position which is advertised, or whether it will result in a job offer being withdrawn. In practice, such a 'sliding scale' approach is a source of legal uncertainty. A notably different approach is adopted in Belgium. The Royal Decree of 13 February 2001 implementing the Data Protection Law of 8 December 1992 (*Arrêté royal portant exécution de la loi du 8 décembre 1992 relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel, M.B.*, 13.3.2001) provides in Article 27 that where the processing of sensitive data is legitimized exclusively by the consent of the individual concerned, such a processing will nevertheless be prohibited where a situation of dependency exists between the subject and the , which includes the employment relationship (« ce traitement est néanmoins interdit lorsque le responsable du traitement est l'employeur présent ou potentiel de la personne concernée ou lorsque la personne concernée se trouve dans une situation de dépendance vis-à-vis du responsable du traitement, qui l'empêche de refuser librement son consentement. Cette interdiction est levée lorsque le traitement vise l'octroi d'un avantage à la personne concernée »). The employment relationship is therefore presumed to contain an element of coercion, rendering suspicious the consent of the prospective employee or the employee.

<sup>92</sup> See on this proposal O. De Schutter, « La protection du travailleur vis-à-vis des nouvelles technologies dans l'emploi », *Revue trimestrielle des droits de l'homme*, 2003, pp. 627 ff.

<sup>93</sup> Opinion (n° 18) of 28 July 2003 to the Commission of the European Group on Ethics in Science and New Technologies (EGE), Ethical aspects of genetic testing in the workplace, para. 1.9.

the health field may only be carried out after the person concerned has given free and informed consent to it. This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks". The quality of the consent which is required should also be read taking into account the fact that a medical examination constitutes a collection of personal data, to which specific rules regarding the quality of consent apply (see further on the protection of personal data in this context Principles 6 to 8). Article 2 h) of Directive 95/46/EC defines the "consent" of the subject as « freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed ». With respect to the informed character of consent, Directive 95/46/EC notes that "...if the processing of data is to be fair, the data subject must be in a position to learn of the existence of a processing operation and, where data are collected from him, must be given accurate and full information, bearing in mind the circumstances of the collection" (Recital 38). Recommendation No. R(89)2 speaks of the "express and informed consent" of the employee to the collection of health data from sources other than the employee himself. To be valid, such consent given to the medical intervention should therefore, according to this Principle, present three qualities.

*Specificity.* Such a consent must be *specific* : it must be consent to the particular medical investigation performed upon the candidate employee. In the case of *X v. Commission*<sup>94</sup>, the applicant had sought to be recruited for a non-permanent, six-month position within the Commission. He had satisfied all the other requirements, however after he had refused to undergo the HIV test which the medical officer of the Commission had proposed, his blood sample had been subjected to an analysis which consisted in determining the T4/T8 ratio. In effect, such an analysis makes it possible to identify, rather than the seropositivity of the subject, the first manifestations of an aids-related illness. The European Court of Justice rejected the imposition of such a biased aids-test. The Court therefore annuls the judgment of the Court of First Instance which had rejected the action for annulment filed against the refusal by the Commission to appoint the applicant on the basis of physical unfitness, after the medical officer of the Commission had formulated the opinion that the candidate is physically unfit to perform the duties envisaged<sup>95</sup>. The Court considered that (Recital 23):

...the right to respect for private life requires that a person's refusal be respected in its entirety. Since the appellant expressly refused to undergo an Aids screening test, that right precluded the administration from carrying out any test liable to point to, or establish, the existence of that illness, in respect of which he had refused disclosure. However, it is apparent from the findings made by the Court of First Instance that the lymphocyte count in question had provided the medical officer with sufficient information to conclude that the candidate might be carrying the Aids virus.

The judgment of the European Court of Justice of 5 October 1994 clearly requires that any consent given to a medical intervention, including any medical examination, in principle must be specific : although specific consent may not be required for a number of routine verifications, it cannot be presumed, from the simple fact that one agrees to submit to a pre-employment medical examination, that this implies consenting to any examination which the examining physician deems necessary to perform in order to determine the physical fitness of the candidate to occupy the job.

*Absence of coercion.* The consent must be *free* from any coercion. Of course, it could be argued that in the context of the employment relationship, consent is never totally free, because of the

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<sup>94</sup> Case C-404/92 P, ECR (1994) 4737. For commentaries see O. De Schutter, "Les examens médicaux à l'embauche de la Commission européenne", *Revue trimestrielle des droits de l'homme*, 1995, p. 101; P. De Hert, *Art. 8 E.V.R.M. en het Belgisch Recht*, C.D.P.K. – Libri 4, Gent, Mys & Breesch, 1998, pp. 156-161; *Jaarboek Mensenrechten* 1994, 1995, p. 257, note J. Ter Heerdt; *NJCM* 1994, p. 231, note A. Hendricks; J. Reynaud, *Les atteintes aux droits fondamentaux dans les actes juridiques privés*, Presses univ. d'Aix-Marseille, 2003, p. 208.

<sup>95</sup> CFI, Joined Cases T-121/89 and T-13/90, *X v Commission*, ECR (1992) II-2195 (judgment of 18 September 1992).

unequal position of the parties and because of the differences, which have already been emphasized, between the classical therapeutic relationship between doctor and patient and occupational medicine. However it would be a paradoxical result if, because of this suspicion concerning the quality of the consent given in the context of pre-employment medical examinations, the requirement of a free consent were to be dropped altogether. Rather, this element leads to insist on the fragility of consent given in that context, and therefore limited weight should be attached to the existence of consent : the consent of the examinee should be considered as a necessary condition for any medical intervention, but not as a sufficient condition, which could justify, for instance, otherwise disproportionate investigations or investigations unrelated to the objective of assessing the suitability of the applicant to the job proposed. As already argued above, the existence of consent does not exonerate the employer from respecting all the other conditions imposed on the performance of pre-employment medical examinations.

*Informed character of the consent.* The consent must be *informed*. This requirement means that the candidate employee must be given advance information of the examinations which will be performed, and provided with the reasons which justify the investigations proposed in relation to the job. The Committee of Experts of the Council of Europe consider that<sup>96</sup>

The person who is requested to undergo a medical examination should receive previous information on its purpose, its content, the procedure and the possible consequences for employment (...). The information should be adequate, that is : understandable and sufficient to enable the examinee to make an informed decision as to whether or not to submit to the examination and give his consent.

In Belgium for instance, Article 3(2) of the Law of 28 January 2003 on medical examinations in the context of employment prescribes that such information shall be given by registered and confidential mail ten days before the examination takes place : such information will concern the information of a medical nature which will be sought, the kind of investigation which will be performed, and the reasons why it is performed<sup>97</sup>. The Dutch Medical Examinations Act (*Wet medische keuringen*) of 1997 provides that the employer must communicate in writing the purpose of the examination, the questions that are going to be asked and the planned medical examinations<sup>98</sup>. In Denmark, the Medical Data Act 1996 requires that the person who undertakes the examination shall ensure that the employee is informed both orally and in writing about the purpose, the type and method of examination, any potential risks it is associated with, the consequences the results of the examination may have for the employee, the storage of the results and the conditions under which the information may be communication to others<sup>99</sup>. Not only do such provisions ensure that the consent will be sufficiently specific. It also will make it possible for the examinee, perhaps with the help of a doctor of his or her choice, to decide whether the proposed examination is justified. Should the prospective employee arrive at the conclusion that there is no adequate justification for the proposed investigation, he or she should be able to refuse to submit to that investigation, and appeal against the decision to impose that test (see Principle 5).

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<sup>96</sup> *Medical Examinations Preceding Employment and/or Private Insurance : A Proposal for European Guidelines*, Council of Europe, April 2000, p. 30.

<sup>97</sup> Article 3(2) of the *Loi du 28 janvier 2003 relative aux examens médicaux dans le cadre des relations de travail*, M.B., 9.4.2003 : "Le travailleur ou le candidat travailleur doit être informé par lettre confidentielle et recommandée, dix jours avant l'examen, du type d'information que l'on recherche, de l'examen auquel il sera soumis et des raisons pour lesquelles celui-ci sera effectué".

<sup>98</sup> Dutch *Wet op de medische keuringen* of 5 July 1997, Stb. 1997, 365 and 336 most recently amended by the Act of 24 December 1997, Stb. 1997, 770.

<sup>99</sup> Law n° 86 of 24 April 1996.

**Principle 2. Any pre-employment medical examination may only be proposed at the last stage of the recruitment, after the offer of an employment contract has been made.**

This requirement is formulated both in the Proposal for European Guidelines on Medical Examinations published under the auspices of the Council of Europe in 2000<sup>100</sup>, and – in the specific context of genetic testing in employment – in the more recent Opinion of the European Group of Ethics on the Ethical Aspects of Genetic Testing in the framework of employment<sup>101</sup>. This rule<sup>102</sup> may be justified on two grounds.

First, the rule flows directly from the principle of proportionality which restricts the imposition of any medical examination : it will not be justified to impose a medical examination, constituting a serious interference with the right to respect for private life, on persons whom the employer does not intend to recruit, and the compatibility of the medical condition with the job of whom, therefore, the employer should not have to verify ; a medical examination imposed before the employment offer is therefore *ipso facto* disproportionate, quite independently from the nature of the investigation proposed.

Second, as explained above, the rule serves obvious evidentiary purposes, facilitating the proof of discrimination on grounds of disability. Because any refusal to recruit a person after the medical examination following the phase of selection will be attributable to the information collected during that examination, instances of direct discrimination on grounds of the state of health (and therefore, on grounds of disability) should normally be avoided, as they will be easily detected and identified as being the result of a violation of professional secrecy of the examining physician. By requesting that a medical examination be performed, the employer manifests his will to recruit the candidate, provided the medical examination does not lead to negative conclusions. This will ensure that the “protective” function of the pre-employment medical examination will not be overcome by considerations which relate to the “selective” function it is sometimes made to perform. At the stage of the recruitment process where the medical examination is performed, the “selection” has taken place already : all that still is required is that a medical examination ensures that the proposed recruitment will endanger the health and safety neither of the candidate employee concerned nor of others, and that the examinee will indeed be capable of performing the essential functions of the job – although this, in principle, has already been ascertained at the previous stage. Therefore, the rule will normally remove any incentive of the employer to circumvent a decision from the examining physician considering that the prospective employee is suitable for the employment proposed, by seeking to obtain information of a medical nature from the physician and, if this information suggests that there may be financial risks involved in the recruitment, to deny employment under any pretext despite the favorable decision taken by the examining physician.

**Principle 3. Any pre-employment medical examination may only be proposed if it is relevant to a) the health or safety of the worker concerned, b) the health or safety of others (co-workers or the general public), or c) the fitness of the candidate ensuring that he/she will be capable to perform the essential functions of the job, at the moment of the examination or in the immediate future. The invasion of the privacy of the examinee implicated by the examination must moreover be restricted to what is strictly necessary, and remain proportionate to the objectives pursued. Therefore, pre-employment medical examinations should only take place if specific health criteria exist related to the position**

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<sup>100</sup> *Medical Examinations Preceding Employment and/or Private Insurance : A Proposal for European Guidelines*, cited above, p. 33. See also *id.*, p. 35 : « Pre-employment medical examinations should take place in the very last stage of a job recruitment procedure. At the same time, the previous stages of the recruitment procedure should not include any forms of medical assessment. This does not prohibit the employer from questioning the applicant about his ability to perform the work, provided that this does not lead to a disguised form of medical assessment ».

<sup>101</sup> See point 2.6. of the Opinion.

<sup>102</sup> Which is formulated explicitly in Art. 4(2) of the Dutch *Wet op de medische keuringen* cited above.

**in question and if – taking into account the nature of the job – it is necessary to establish whether the applicant meets these medical requirements.**

*The general requirement of proportionality of any interference with the right to respect for private life*

Under the Council Directive 2000/78/EC of 27 November 2000, indirect discrimination occurs where “an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons *unless [...] that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*”. As we have seen however, this is 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 [the integration of persons with disabilities] into the working environment” (Article 7(2) of the Directive). Moreover, restrictions to the protection offered by the Directive may be authorized by national legislation which lays down measures which are considered to be necessary, in a democratic society, for i.a. the protection of health and the protection of the rights and freedoms of others (Art. 2(5) of the Directive). These clauses, the first part of this Report concluded, imply that the measures adopted by the Member States for the protection of health and safety at work may be construed as exceptions to the principle of equal treatment in employment and occupation in relation to persons with disabilities.

However, where they seek either to justify under Article 2(2)(b) of the Directive certain measures – such as pre-employment medical examinations – which arguably put persons with disabilities at a particular disadvantage in comparison to other persons, whether or not they also invoke in that respect Article 7 of the Directive, or where they intend to rely on the exception provided for by Article 2(5) of the Framework Directive, the Member States could only justify measures which are fully in conformity with Article 8 of the European Convention on Human Rights which protects the right to respect for private life<sup>103</sup>. This provision therefore limits the margin of appreciation of the Member States in the implementation of the Framework Directive, even where the Directive seems to be leave more freedom to the national authorities.

Article 8 ECHR<sup>104</sup> prohibits any medical examination which constitutes an unjustified interference with private life<sup>105</sup>, and which, in particular, when the examination is performed in the context of employment, is not strictly tailored to the needs of the task to be performed. In a recent decision of the European Court of Human Rights on this issue<sup>106</sup>, the applicant was employed as a passenger assistant by a Danish shipping company and, as a crewmember, he could be involved with the safety on board. After his employer had introduced random

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<sup>103</sup> ECJ, Case C-260/88, *ERT*, [1991] ECR I-2925, paras. 42-43 (member States invoking an exception under EC Law are bound by the fundamental rights contained in the general principles of EC Law).

<sup>104</sup> Or, arguably, of Article 1 para. 2 of the European Social Charter : see esp. Concl. VIII, p. 28 (interpreting this provision as implying a right of the candidate employee not to be subjected to requirements which bear no defensible relationship to the job to be performed, and which therefore are discriminatory).

<sup>105</sup> See, e.g., Eur. Comm. H.R., Appl. n°8239/78, *X v. the Netherlands*, dec. of 4 December 1978, *D.R.*, 16, p. 184; Eur. Comm. H.R., Appl. n° 8278/78, *X v. Austria*, dec. of 13 December 1979, *D.R.*, 18, p. 154 (“A compulsory medical intervention, even if it is of minor importance, must be considered as an interference with this [Article 8] right”); Eur. Comm. H.R., Appl. n°21132, *Peeters v. the Netherlands*, dec. of 6 April 1994, *D.R.*, 77-A, p. 75; Eur. Comm. H.R., Appl. n° 20872/92, *A.B. v. Switzerland*, *D.R.*, 80-A, p. 66. See generally M. van de Kerchove, “La protection de la santé publique par le droit pénal et les restrictions qui en découlent par rapport aux autres droits fondamentaux. Examen de la jurisprudence de la Cour et de la Commission européenne des droits de l’homme”, *Revue de science criminelle et de droit pénal comparé*, 1996, esp. pp. 103-105.

<sup>106</sup> See previously two inadmissibility decisions in which the European Commission of Human Rights considered manifestly ill-founded applications where complainants were alleging a violation of Article 8 ECHR in the imposition of a medical examination for candidates to a public function (Eur. Comm. H.R., dec. of 16 July 1981, Appl. No. 8909/80, *Digest*, vol. 3, p. 249), or the imposition of a psychiatric examination on a person applying to become a public notary (Eur. Comm. H.R., *A v. Federal Republic of Germany*, Appl. No. 8355/78).

mandatory alcohol and drug tests requiring the person concerned to provide a sample of urine without prior notice, the applicant complained that this constituted an unjustified interference with his right to respect for private life, guaranteed under Article 8 of the European Convention on Human Rights. The European Court of Human Rights disagreed. In the decision in which it concluded that the application was inadmissible because manifestly ill-founded, the Court insisted, however, on the circumstance that the regulation complained of could be justified as necessary in a democratic society. It said<sup>107</sup> :

The Court considers that it is common knowledge that the consumption of alcohol or the use of drugs usually has a direct influence to the detriment of one's ability to function mentally and/or physically (...) besides from reducing learning and memory, using hashish might reduce one's psychomotor functions up till 24 hours when doing complex tasks.

Furthermore, the Court notes that all crew members employed by DFDS [the employing company], when on board, are part of the safety crew and that although rarely needed it is absolutely essential that they are, in a fully adequate way at all times, able to perform functions related to the safety on board, which in case of a catastrophe might entail complex tasks.

Thus, taking all circumstances into account, the Court finds that DFDS was entitled to secure that its crew members were not under influence of alcohol or drugs while on board, that encompassing being on board subsequent to a leave off board.

The Court reiterates that it was undisputed during the proceedings before the Court of Arbitration that on two occasions DFDS employees had been in possession of and used drugs and that the testimonies heard before the said court substantiated that other employees on board had used drugs as a stimulant.

In these circumstances, the Court finds that considerations as to the public safety and the protection of the rights and freedoms of others, being passengers or crew members, justified that DFDS in order to secure this aim introduced adequate control measures like a random urine test by which both traces of alcohol and drugs could be detected.

The decision adopted in *Madsen* illustrates that the European Court of Human Rights is deferential to the States parties to the European Convention on Human Rights where the national authorities have determined that the interference with the right to private life of an individual subject to a medical testing is justified in the name of the protection of health and safety. *Wretlund v. Sweden*, decided on 9 March 2004, confirms this trend<sup>108</sup>. The applicant was an office cleaner at a nuclear plant. Assigned to clean the offices at the plant, she was not working in an area where she might be subjected to radioactivity and she was therefore not obliged to undergo any radiological examinations under the security rules for nuclear plants in Sweden. However, she was obliged to comply with a drug testing aimed at detecting the presence of cannabis, despite the fact that her union had consistently refused this in negotiations with the employer. The Swedish Labour Court considered that the imposition of such testing was nevertheless justified because of the specific risks entailed in working in a nuclear plant, requiring a drug-free environment at such plants : although, as a cleaner, the applicant was not to work in areas at risk, the court considered that « it would be impractical to make a distinction between employees working in areas where there were special security hazards and other employees [and that it] was moreover possible that employees would be moved from a workplace with little risk to another one where there was a specific risk ». The court added that the employer has an interest in « showing to the outside world that the nuclear power plant was absolutely drug-free », having regard to the particular nature of such a business. These considerations were deferred to by the European Court of Human Rights, which concluded that the application alleging the violation of Article 8 ECHR was manifestly ill-founded. It is fair to say that if the Court were to hold such a reasoning – effectively refusing to go beyond a

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<sup>107</sup> Eur. Ct. HR (1<sup>st</sup> sect.), dec. of 7 November 2002, *Madsen v. Denmark*, Appl. n° 58341/00 (inadmissibility).

<sup>108</sup> Eur. Ct. HR (4<sup>th</sup> sect.), dec. of 9 March 2004, *Wretlund v. Sweden*, Appl. n° 46210/99 (inadmissibility).

« manifestly irrational » level of scrutiny of the decisions of the national authorities – in a case where a job opportunity would have been denied to a person with a disability because of the possibility that that person might be moved to a « risk-sensitive » position in the future, or in order to reassure the public that the undertaking was operating at the minimal level of risk possible, this case-law would be offering a totally insufficient protection to persons with disabilities.

Despite the timidity of the European Court of Human Rights in these two cases, which we may well regret, Article 8 ECHR at least can be said to impose on the States parties to the Convention to protect any person under their jurisdiction from being subjected to medical examinations which are not strictly justified as necessary in a democratic society to the fulfillment of certain pressing needs<sup>109</sup>. In particular, States must protect employees or candidate employees from forms of pre-employment medical examination which are unrelated to the performance of the essential functions of the job or to the protection of health and safety in employment. This is also a clear implication from Recommendation No. R(89)2 of the Committee of Ministers to Member States on the Protection of Personal Data Used for Employment Purposes, adopted on 18 January 1989, para. 10.2. of which states :

“An employee or job applicant may only be asked questions concerning his state of health and be medically examined in order : a. to examine the suitability of an employee or job applicant for his present or future employment; b. to fulfil the requirements of preventive medicine; or c. to allow social benefits to be granted<sup>110</sup>”.

This may serve not only to clarify the reading of the Framework Directive 2000/78/EC, but also for the interpretation of the broader terms of Directive 95/46/EC. Indeed, the precise enumeration of para. 10.2. contrasts with the more open-ended formulation of Article 8(2), b), of the Directive, according to which the need to “carry(...) out the obligations and specific rights of the controller in the field of employment law” may justify the processing of medical data.

Three interests therefore may justify restrictions being imposed on the right to respect for private life of the candidate employee, by the performance of medical examinations before employment, which, if refused by the person concerned, could lead to denying to him or her the employment offered. These interests are 1°) the health and safety of the examinee, 2°) the health and safety of the co-workers or the general public, and 3°) the need to ensure that the examinee will be able to perform the essential functions of the job offered. It will be noted that the economic interest of the employer who requests the medical examination, where the intention is to ensure that he will only hire the fittest candidates – leading to exclude even candidates who would be able to perform the essential functions of the job, but perhaps in a less conventional way or at a greater cost to the employer – has not been identified here among the legitimate reasons which may be invoked to justify the interference with the right to privacy entailed by pre-employment medical examinations. The Committee of Experts of the Council of Europe notes, indeed, a « growing body of opinion that pre-employment medical examinations should not be carried out to screen job applicants for non-job related purposes, notably for third party's

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<sup>109</sup> The States parties to the ECHR are to protect the right to respect for private life also in relationships between private parties : see, among many others, Eur. Ct HR, *Halford v. the United Kingdom* judgment of 25 June 1997; or, more explicitly, Eur. Ct. HR, *Verlière v. Switzerland* (Appl. n° 41953/98), dec. of 28 June 2001 (inadmissibility decision, the application having been found to be manifestly ill-founded; however, the Court recognized that Article 8 ECHR obliges the State to offer an adequate protection to the individual against interferences with the right to respect for private life by other private parties – in this case, against an insurance company which had collected information about a client by recruiting a private detective). See generally on the extension of the obligations imposed on the States parties to the European Convention on Human Rights in this respect L. Verhey, *Horizontale werking van grondrechten, in het bijzonder van het recht op privacy*, Zwolle, Tjeenk Willink, 1992.

<sup>110</sup> According to the Explanatory Memorandum, this refers to medical examinations performed after industrial accidents or illness due to professional occupation.

financial interests »<sup>111</sup>. It is at this point that a clear distinction is made between “protective” and “selective” pre-employment medical examinations : the former are authorized under certain conditions; the latter are in principle prohibited, without prejudice however of the possibility to examine the suitability of the candidate, ensuring that he/she will be capable of performing the essential functions of the job. This is based on two considerations.

First, although it would be excessive to state, as some have<sup>112</sup>, that private economic interests cannot in the eyes of the European Court of Human Rights constitute a legitimate ground for interference with private life, such a justification for invading the privacy of the worker should nevertheless be considered with suspicion “since, otherwise, the entire issue could devolve into the realm of management theory, where the cost-benefit analysis dictates the policies to be applied”<sup>113</sup>; where the interference serves to protect third party interests, on the other hand, for instance those of the general public, the requirements of Article 8 ECHR have generally be read more loosely<sup>114</sup>.

Second, employment is a rare social good, access to which should be open to all without discrimination : the objective of social cohesion is better served by a robust conception of the requirements of privacy, clearly setting limits on the use of pre-employment medical examinations for “selective” – economic – purposes.

#### *The legitimate aims of medical examinations*

Each of the three interests competing with the privacy interest of the candidate employee is worth a separate analysis :

*I°) Health and safety of the examinee.* Certain medical examinations will be justifiable by the health or safety interests of the examinee him- or herself, in the name of which certain obligations are imposed on the employer under the existing health and safety regulations. Of course, the worker may wish to invoke a right to personal autonomy, or to self-determination, which he would present as a right to work despite the risks entailed, to challenge the paternalism inherent in health and safety regulations. In *Pretty v. the United Kingdom*, the applicant relied on Article 8 ECHR to seek the protection of her alleged right to « make decisions about one’s body and what happened to it » : as she was suffering from a neuro-degenerative disease leading to progressive muscle weakness affecting the voluntary muscles of the body and was thus unable to commit suicide by herself, she sought to be recognized a right to be assisted by her husband in committing suicide<sup>115</sup>. The European Court of Human Rights considered that « Though no previous case has established as such any right to self-determination as being

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<sup>111</sup> *Medical examinations preceding employment and/or private insurance : A Proposal for European Guidelines*, cited above, at p. 17.

<sup>112</sup> M. Vincineau, “Assurance et vie privée. Du vide légal à l’illicite”, *Revue belge de droit international*, 1994/2, p. 486; Fr. Rigaux, “La protection des droits de la personnalité”, in *Colloque du Centre de bioéthique de l’UCL*, 1988, t. II, p. 140; N. Hautenne, “Tests génétiques préalables à l’embauche et droit au respect de la vie privée”, *Annales d’études européennes de l’UCL*, vol. 4-2000, pp. 275 ff., at p. 295. This position is belied, for instance, by the *Verlière* decision cited above. The notion of “rights or freedoms of others”, the protection of which may justify, under Article 8(2) ECHR, an interference with the right to respect of private life, appears broad enough to encompass the economic interest of the employer in selecting a physically fit workforce. See also, among many others, Eur. Ct. HR (GC), *Hatton and others v. the United Kingdom* (Appl. n° 36022/97), judgment of 8 July 2003, para. 126.

<sup>113</sup> J. D. Craig, *Privacy and Employment Law*, Oxford – Portland Oregon, Hart Publ., 1999, p. 164.

<sup>114</sup> A relevant comparison is with alcohol tests performed by the police on car-users, which the European Commission of Human Rights had no difficulty in justifying : Eur. Comm. H.R., *X v. the Netherlands*, Appl. N° 8239/78, DR 18, pp. 154-155. It may also be noted that the European Court of Human Rights has clearly made a distinction between situations where two fundamental rights are in conflict with one another, such as the right to privacy and freedom of expression, and situations where a fundamental right is in conflict with an “interest” which, although perhaps considered a “right” in municipal law, does not have the status of a fundamental right according to the European Convention of Human Rights. The employer may have a legitimate interest in recruiting the most physically fit candidates to an employment ; he or she certainly has no fundamental right to do so.

<sup>115</sup> Eur. Ct. HR (4th sect.), *Pretty v. the United Kingdom* judgment of 29 April 2002 (Appl. N° 2346/02).

contained in Article 8 of the Convention, (...) the notion of personal autonomy is an important principle underlying the interpretation of its guarantees » (para. 61).

But the Court in *Pretty* then continued that a prohibition imposed by criminal law to aiding suicide may nevertheless be justified as a measure necessary in a democratic society to the protection of the rights of others – and, thus, as in compliance with Article 8 ECHR –. A blanket prohibition such as the one contained in the United Kingdom in the Suicide Act 1961 may be explained by the need to protect the most vulnerable persons and the difficulties which would be entailed in any attempt to distinguish situations of vulnerability and other situations where there is no risk of abuse. In para. 74 of its judgment, the Court explains :

Doubtless the condition of terminally ill individuals will vary. But many will be vulnerable and it is the vulnerability of the class which provides the rationale for the law in question. It is primarily for States to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created. Clear risks of abuse do exist, notwithstanding arguments as to the possibility of safeguards and protective procedures.

*Pretty* shows that a right to self-determination, implying a right for the worker to challenge measures restricting his access to employment for reasons related to his own health and safety, has hardly emerged yet in human rights law; it only recently appeared as one aspect of Article 8 ECHR, in a context so specific – that of the right to assisted suicide – that it seems premature to even identify this “right to take a risky employment” as a human right. In fact, *Pretty* may stand for the proposition that under the European Convention on Human Rights, States parties have the right to adopt protective measures, even where this leads to restricting the liberty of the individual concerned and where the individual would consent to running the risk to his safety or his health and is denouncing the measure imposed on him as motivated by paternalistic motives.

Alternatively, the worker may challenge the refusal to hire him on the basis of the negative medical opinion, and argue that the identified hazard to his health should have led, not to a refusal to hire him, but to the assignment of another task, alternative employment for him in the undertaking, or any other form of reasonable accommodation. Here, what is requested from the judge is to identify whether the examining physician should not have considered options he may have overlooked, rather than turning to the most comfortable solution, and that which suits best the interests of the employer. The judge will be justified in taking a hard look at the determination by the examining physician that a refusal to hire is justified, rather than the offer of a reasonable accommodation, where the independency of the examining physician vis-à-vis the employer and his impartiality are questionable, and where the understanding the examining physician has of the undertaking (and, therefore, of the possibilities of reassignment, or of the availability of resources to provide for an adjustment of the workplace or the workstation) is relatively weak. These requirements of independency/impartiality of the examining physician and of his familiarity with the undertaking figure among the principles listed hereunder (see Principles 4 and 9, respectively). All the principles of this list are, indeed, complementary and mutually supportive.

2°) *Health and safety of the co-workers or the general public.* Certain medical examinations will be justified by the health or safety interests of the co-workers of the examinee or those of the general public. The requirements of necessity and proportionality will be easiest to justify here, for two reasons. First, as in the previous case of medical examinations justified by the health and safety interests of the individual concerned, any counter-indications to the hiring of the candidate will generally be based on existing health and safety regulations, set down by the legislator, rather than by the employer upon the request of whom the medical examinations are performed. Therefore, there is no risk here of an instrumentalization of pre-employment medical examinations, for purposes of abusive “selection”: medical examinations justified by the need to ensure compliance with health and safety regulations, in other terms, are not to be considered

“suspect”, as would be examinations performed upon the request of the employer on the basis of his description of the qualities required for the effective performance of the job offered. Second, contrary to what we have seen in the previous case, there are no considerations of autonomy competing with the imposition of certain medical examinations as conditions for recruitment : here, it is not for paternalistic purposes that examinations are imposed, but for the protection of the right of others (e.g., the right of others not to be subjected to the risk entailed by the recruitment of a person subject to epilepsy crises as a pilot). As the cases of *Madsen* and *Wretlund* illustrate – although, as already noted, these decisions signify a disturbing trend in the case-law of the European Court of Human Rights –, it will be relatively easy to justify the proportionality of medical examinations imposed in such circumstances.

3°) *Suitability of the candidate for the performance of the essential functions of the job.* Finally, certain medical examinations will be justified by the need to ensure that the candidate will be capable of performing at least the essential functions of the job offered. It is where this justification is invoked that the risks of abuse are highest. Safeguards should exist in order to ensure that occupational medicine, which is essentially of a “protective” nature, will not develop into a “selective” medicine. As emphasized by Opinion (n° 18) of 28 July 2003 to the Commission of the European Group on Ethics in Science and New Technologies (EGE) on the ethical aspects of genetic testing in the workplace, « The medical examination should not be a criterion of selection. It should take place after the phase of selection »<sup>116</sup>. The extent of the medical examinations which may be performed in the context of the recruitment process should therefore be strictly delimited. In particular, these examinations should not seek to determine the existence of factors which create the risk, in a non-foreseeable future, that the candidate will be unable to perform the essential functions of the job. The employer may legitimately require that the candidate will be capable of performing the essential functions of the job; the employer may not in addition require not to incur any financial risk which “selective” pre-employment medical examination may avoid. This is precisely the limit which is set by Framework Directive 2000/78/EC, where it prohibits indirect discrimination on the ground of disability while at the same time not imposing that persons who are not capable to perform the essential functions of the post concerned have to be recognized access to employment<sup>117</sup>.

#### *The question of the future evolution of the state of health*

These different interests – the protection of the health and safety of the prospective employee, co-workers and the general public; and the verification of the suitability of the candidate for the job offered – define limitatively the scope of the investigations which may be performed by the examining physician in the course of pre-employment medical examinations. A judgment of the Court of First Instance of the European Communities seems to identify this as a direct consequence of Article 8 ECHR. In the case of *A. v. Commission*<sup>118</sup>, the interveners before the Court challenged the compatibility with this provision of the very existence of pre-recruitment medical examinations. In their view, such an examination “is solely in the interest of the institution [and] was thus really introduced (...) to safeguard the budgetary equilibrium of the institution concerned by preventing it from having to bear major expenses in the long or short term” : according to the interveners, such an objective “is not compatible with the right to respect for private life, as laid down in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms”. The Court of First Instance rejected this view, but in the course of rejecting it made it clear which objectives – in its opinion – the medical examinations may legitimately pursue<sup>119</sup> :

... the requirement under Article 33 of the Staff Regulations that every person should

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<sup>116</sup> Opinion (n° 18) of 28 July 2003 to the Commission of the European Group on Ethics in Science and New Technologies (EGE), Ethical aspects of genetic testing in the workplace, para. 2.6.

<sup>117</sup> See the Preamble of the Directive, Recital 17.

<sup>118</sup> Case T-10/93, *A. v. Commission*, ECR (1994) II-179 (judgment of 14 April 1994).

<sup>119</sup> Case T-10/93, *A. v. Commission*, cited above, Recital 50.

undergo a medical examination prior to being recruited as a Community official is in no way contrary to the fundamental principle of respect for private life set out in Article 8 of the Convention. *That examination is designed to enable the institution not to appoint a candidate unsuitable for the duties envisaged or to recruit him and assign him to duties compatible with his state of health.* That objective is perfectly lawful within any system of public administration and meets the interests of both the institutions and Community officials. In addition, the Court notes that the requirement of a medical examination prior to recruitment of officials is a requirement which is common to most legal systems in the Member States. In those circumstances, the very principle of a pre-recruitment medical examination cannot be regarded as being contrary to the principle of respect for a person's private life.

The passage highlighted constitutes a limitative enumeration of the purposes which pre-employment medical examinations may seek to pursue. The formulation chosen envisages the suitability of a candidate to employment at the moment at which the examination is performed. The implication seems to be that in the view of the Court of First Instance, a candidate who might constitute, later in life, a financial burden for the employer, whether or not the risk may be calculated or whether or not it may be located in a foreseeable future, should not be considered a candidate "unsuitable for the duties envisaged". Indeed, this position would seem to conform with the ratio underlying the prohibition of any practice by private or public employers to compel a prospective employee to submit to a test for evidence of HIV infection, as imposed by Recommendation n° R(89)14 on the Ethical Issues of HIV Infection in the Health Care and Social Settings ; as we shall see, it also is in line with the consensus about the prohibition of genetic screening in employment for non-protective purposes. The Committee of Experts of the Council of Europe concluded in 2000 that<sup>120</sup>

in principle, a pre-employment medical examination should be limited to assessing the ability of the applicant to perform the job *at the moment of the examination or in the immediate future.* The examination should not aim at predicting the future health status of the individual when this is not related to the physical and mental requirements of the position. For instance, a pre-employment medical examination should not be used to screen out job applicants with an increased risk for future disability.

However, the question whether only the actual fitness of the candidate may be evaluated, or whether the employer may also request an examination which will demonstrate possible evolutions in the future state of health, is one on which the case-law of the Community judicature has not always been constant, nor perfectly clear. In a judgment of 10 June 1980 delivered in the case of *Miss M. v. Commission*<sup>121</sup>, where the applicant had been considered unfit after she underwent a neuro-psychiatric examination following an initial examination by the medical officer of the Commission, the European Court of Justice gave this answer :

10. The purpose of the examination provided for by Article 33 of the Staff Regulations is to allow the institution concerned to determine whether, from the point of view of his health, the candidate is *capable of fulfilling all the obligations which are capable of falling upon him having regard to the nature of his duties.* To that end the medical officer of the institution may legitimately take into account, on the basis of all relevant medical criteria, not only possible physical deficiencies in the strict meaning of the word but also psychical or psychological disorders of such a nature as to affect the fulfilment by the candidate of his duties as an official.

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<sup>120</sup> *Medical examinations preceding employment and/or private insurance : A Proposal for European Guidelines*, cited above, at p. 35 (the emphasis is ours).

<sup>121</sup> Case 155/78, *Miss M. v. Commission*, ECR (1980) 1797 (judgment of 10 June 1980).

11. In that regard it is even possible to envisage that a finding of unfitness may be based not only on the existence of *actual* disorders but also on a medically justified *prognosis of future disorders* capable of jeopardizing in the foreseeable future the normal performance of the duties in question.

This appreciation has been confirmed in some later judgments. Thus for instance, in the case of *A v. Commission*<sup>122</sup>, the applicant – a candidate to positions in the EC delegations in ACP countries – had spontaneously revealed to the medical officer of the Commission that he was HIV-positive. Quoting *Miss M.*, the Court of First Instance repeated that “it is possible, according to the case-law of the Community judicature, for the medical officer of an institution to base a finding that a candidate is unfit not only on the existence of actual disorders but also on a medically justified prognosis of future disorders capable of jeopardizing in the foreseeable future the normal performance of the duties in question” (Recital 62). It found that :

“it has not been established that the medical opinion given by the medical officer and confirmed by the medical committee is vitiated by a manifest error of assessment. On the contrary, the Court takes the view that there is (...) in this case, (...) a comprehensible link between the medical findings contained in the opinion and the conclusion which it draws regarding the applicant's physical unfitness to perform the duties for which he had applied, particularly as those duties were to be performed in developing countries where, as the applicant and the interveners admitted at the hearing, the risks of infection are greater than in Europe” (Recital 65).

It should be underlined, however, that in the case of *A. v. Commission*, the Court of First Instance (third chamber) based itself *inter alia* on the consideration that the immune system of the applicant had *already* been affected, as shown by a fall in the T4 count linked to a symptomatology deriving from the normal clinical indicia of HIV infection : the applicant had thus, at the time of the pre-recruitment medical examination, already gone beyond the stage of asymptomatic seropositivity and had entered an advanced evolutionary stage of the disease. A few weeks after the judgment in *A. v. Commission*, another chamber of the Court of First Instance considered that the nominating authority could not follow the negative opinion of the medical officer of the Commission, even when this opinion has been confirmed by the Medical Committee constituted under Article 33, al. 2 of the Staff Regulations, when these negative opinions as to the physical fitness of the candidate are based on *prognoses* rather than on an evaluation of the *actual* state of health of the candidate : in that case, not only did the applicant appear to be perfectly in state of performing the functions of the job to which he was postulating, but moreover an outside expert has evaluated that there was a 20 to 25% risk that he would be developing a liver disease within 15 to 20 years, so that the development in the future of an illness, possibly making it impossible for the applicant to perform his functions, was by no means certain<sup>123</sup>. This case-law deprives of much of its significance the assertion of Recital 11 of the *Miss M. v. Commission* judgment of 10 June 1980.

In sum, there remains room for debate as to whether the imposition of a medical examination in order to determine the existence of a risk in the future evolution of the state of health of a job applicant may be in certain circumstances justified, and, if the results of that examination are negative, if they may result in the denial of the employment. Although it has evolved towards offering a higher level of protection to the applicant, the case-law of the European judicature is not fully conclusive on this issue. This report argues however that it would be in line with the requirements of the Framework Directive – specifically with its prohibition of indirect discrimination as defined in Article 2(2)(b) combined with Recital 17 of the Preamble – to exclude medical examinations which seek to identify the future risks to the employer of making a particular requirement, i.e., to determine not only whether the prospective employee is

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<sup>122</sup> Case T-10/93, *A. v. Commission*, ECR (1994) II-179 (judgment of 14 April 1994).

<sup>123</sup> Case T-94/92, *X v. Commission*, (judgment of 14 May 1994). See esp. Recitals 43 and 47.

in state to perform the essential functions of the job at the moment of the recruitment, but also will be capable of performing those functions in the future. This at least is the position which is emerging in regard to the specific issue of genetic testing, as explained in the box hereunder.

### Genetic screening

The question whether not only the actual physical or mental fitness of the job applicant, but also the future evolution of that fitness as it may be anticipated by the examining physician, may lead to a refusal to hire the individual applicant, is most explicitly posed in the current debates concerning the use of genetic screening in employment. In an opinion (n° 18) of 28 July 2003, the European Group on Ethics in Science and New Technologies (EGE) considered that

... in general, the use of genetic screening in the context of medical examination, as well as the disclosure of the results of previous genetic tests, is not ethically acceptable. The legitimate duties and right of employers concerning the protection of health and the assessment of ability can be fulfilled through medical examination but without performing genetic screening. Thus, employers should not in general perform genetic screening nor ask employees to undergo tests<sup>124</sup>.

The only purpose for which, in the view of the EGE, genetic screening may be imposed, is where the performance of such test is necessary for guaranteeing the *protection of the employee's health and safety or those of third parties*. Moreover it should only be performed, in the exceptional cases where this is explicitly provided by law, where its scientific validity is proven and where it is the only method to obtain the information required, where the performance of the test does not prejudice the aim of improving conditions in the workplace, where the principle of proportionality is respected regarding the motivations involved to perform the test, and where the principle of non-discrimination is not violated<sup>125</sup>.

This position is in conformity with the international and European law applicable to the question of genetic screening in the context of employment<sup>126</sup>. In particular, the exclusion of genetic screening for *selection* purposes (in order to determine the physical fitness of the prospective employee) and the correlative restriction of genetic screening to situations where this appears necessary for *health and safety* purposes follows not only from the general principle of proportionality embodied in Principle 3 of this list of Principles, which excludes all examinations which seek to identify the future physical fitness of the job applicant, or predict its evolution<sup>127</sup>, but also from Article 12 of the Council of Europe Convention on Human Rights and Biomedicine<sup>128</sup> and the Council of Europe Recommendation R(92)3 of 1992 on genetic

<sup>124</sup> Opinion (n° 18) of 28 July 2003 to the Commission of the European Group on Ethics in Science and New Technologies (EGE), Ethical aspects of genetic testing in the workplace, para. 2.10.

<sup>125</sup> Id., para. 2.11 to 2.13.

<sup>126</sup> It will be noted however that the Code of Practice on the Protection of Workers' Personal Data adopted in 1997 within the International Labour Organization considers that « current scientific knowledge is not sufficient to warrant [the use of genetic screening] for an occupational health purpose » (Article 3.20), thus offering a higher level of protection to the worker than the EGE is its opinion on this matter.

<sup>127</sup> The EGE considers that the exclusion of genetic screening in the context of employment except where it serves the protection of the health of the individual concerned is justified, *inter alia*, by the consideration that « A genetic test of limited predictive value would add nothing to knowledge of an applicant's ability to carry out the work at the outset and would give little information on how this might change in the future » (p. 13 of the opinion, para. 1.11.3.). In the view of the author of this report, even if genetic screening did give reliable indications as to the future abilities of the applicant to perform the job, this would not justify the imposition of such screening. Limiting the acceptability of medical investigations to circumstances where they serve to identify actual ability, or ability in the immediate future, does impose on the employer to accept a risk entailed in recruiting a person. But it contributes to legal certainty by defining a clear boundary as to which investigations are permissible. And it offers a better protection to workers with actual or perceived disabilities which may affect their ability to perform in the future.

<sup>128</sup> According to which « tests which are predictive of genetic diseases or which serve either to identify the subject as a carrier of a gene responsible for a disease or to detect a genetic predisposition or susceptibility to a disease may be

testing and screening for health care purposes. Principles 6 and 8 of this latter Recommendation allow genetic testing and screening only exceptionally and the collection and processing of personal data thereof only for the purposes of healthcare, diagnosis and disease prevention. In 1997, Recommendation (97)5 was adopted on the protection of medical data ; principle 4.9. provides that the collection and processing of genetic data should in principle only be permitted for health reasons. Article 12 of the 1997 Council of Europe Convention on Human Rights and Biomedicine (« Predictive genetic tests ») states that

Tests which are predictive of genetic diseases or which serve either to identify the subject as a carrier of a gene responsible for a disease or to detect a genetic predisposition or susceptibility to a disease may be performed only for health purposes or for scientific research linked to health purposes, and subject to appropriate genetic counselling.

The Explanatory Report to the Convention on Human Rights and Biomedicine confirms that this provision excludes predictive genetic testing as part of pre-employment medical examinations, « whenever it does not serve a health purpose of the individual. This means that in particular circumstances, when the working environment could have prejudicial consequences on the health of an individual because of a genetic predisposition, predictive genetic testing may be offered without prejudice to the aim of improving working conditions. The test should be clearly used in the interest of the individual's health. The right not to know should also be respected »<sup>129</sup>. Although Article 26(1) of the Convention on Human Rights and Biomedicine authorizes States parties to impose restrictions on the protection afforded by Article 12 of the Convention, such restrictions must be justified as necessary in a democratic society in the interest of public safety, for the prevention of crime, for the protection of public health or for the protection of the rights and freedoms of others. In the presence of a strong consensus within European States as to the illegitimacy of genetic screening in the context of employment where it does not serve the health of the individual concerned, it is very doubtful that a State could rely on that provision to justify authorizing employers under its jurisdiction to impose such screening.

Finally, the last sentence of Principle 3 is borrowed from the principles proposed by the Committee of Experts of the Council of Europe<sup>130</sup>. The principle expressed there is that pre-employment medical examinations should only take place if specific health criteria exist related to the position in question and if – taking into account the nature of the job – it is necessary to establish whether the applicant meets these medical requirements. This may be seen as a consequence of the requirements of proportionality, as it would be disproportionate to impose a pre-employment medical examination where there is no identified health justification for doing so for the position in question. Where no such justification exists, we may suspect that the pre-employment medical examination will serve the purpose of selection, rather than of protection. A consequence of the principle enunciated here may be that pre-employment medical examinations should only be considered acceptable if they are imposed on all job applicants, rather than only on some applicants for whom it would be considered that the risk is higher : indeed, the health justification for the imposition of medical examinations is related to the position and not to the person applying to the position.

**Principle 4. The independency from the employer of the examining physician must be guaranteed, in particular by guarantees from dismissal.**

The requirement of independency from the employer of the physician performing the medical examination prior to the employment forms an important procedural guarantee ensuring that the

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performed only for health purposes or for scientific research linked to health purposes, and subject to appropriate genetic counselling ».

<sup>129</sup> Explanatory report to the Convention on Human Rights and Biomedicine, para. 85.

<sup>130</sup> *Medical examinations preceding employment and/or private insurance : A Proposal for European Guidelines*, cited above, at p. 34.

previous principle, defining the scope of permissible medical examinations, will not be circumvented by the examining physician. This principle is inspired by Article 10 of ILO Convention (n° 161) of 25 June 1985 on Occupational Health Services :

The personnel providing occupational health services shall enjoy full professional independence from employers, workers, and their representatives, where they exist, in relation to the functions listed in Article 5.

The functions listed in Article 5 of the Convention, to which the requirement of independence applies, include the identification and assessment of the risks from health hazards in the workplace, the surveillance of the factors in the working environment and working practices which may affect workers' health, advice on planning and organisation of work, including the design of workplaces, participation in the development of programmes for the improvement of working practices as well as testing and evaluation of health aspects of new equipment, advice on occupational health, safety and hygiene and on ergonomics and individual and collective protective equipment, surveillance of workers' health in relation to work, promoting the adaptation of work to the worker, contribution to measures of vocational rehabilitation, collaboration in providing information, training and education in the fields of occupational health and hygiene and ergonomics.

The Recommendation accompanying the Convention defines the surveillance of workers' health as including, in particular, the medical examinations performed before the assignment of workers to tasks which may endanger their health. The surveillance of workers' health comprises according to the Recommendation<sup>131</sup> :

- (a) health assessment of workers before their assignment to specific tasks which may involve a danger to their health or that of others;
- (b) health assessment at periodic intervals during employment which involves exposure to a particular hazard to health;
- (c) health assessment on resumption of work after a prolonged absence for health reasons for the purpose of determining its possible occupational causes, of recommending appropriate action to protect the workers and of determining the worker's suitability for the job and needs for reassignment and rehabilitation;
- (d) health assessment on and after the termination of assignments involving hazards which might cause or contribute to future health impairment.

The requirement of independence of the occupational health services is described in para. 37 of the same Recommendation. This requirement translates, in particular, in the determination of the conditions for the engagement and termination of employment of the personnel of occupational health services :

- (1) The professional independence of the personnel providing occupational health services should be safeguarded. In accordance with national law and practice, this might be done through laws or regulations and appropriate consultations between the employer, the workers, and their representatives and the safety and health committees, where they exist.
- (2) The competent authority should, where appropriate and in accordance with national law and practice, specify the conditions for the engagement and termination of

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<sup>131</sup> Recommendation 171 concerning occupational health services, 26 June 1985, adopted at the 71st session of the General Conference of the International Labour Organization (para. 11).

employment of the personnel of occupational health services in consultation with the representative organisations of employers and workers concerned.

Although the Council of Europe Recommendation (89)2 on the protection of personal data used for employment purposes is silent on the question of the independence of medical examiners, the Explanatory Memorandum to that Recommendation states in para. 78 that « Where a company or organisation employs its own medical staff to conduct medical examinations on employees or job applicants, it is essential that the members of it enjoy ethical independence from their employer. »

**Principle 5. The candidate worker should be recognized a right to appeal against the decision of the examining physician before another physician or board of physicians, independent both from the first examining physician and from the employer; judicial review of the decision should in any event remain available.**

The International Code of Ethics for Occupational Health Professionals states that workers must be able to challenge the conclusions concerning work fitness in a procedure of appeal<sup>132</sup>. The justification for including this principle is self-evident. It is clear that the risks of abuses will be seriously limited, if not altogether eliminated, where such appeals are possible : an appeal, first, from the decision of the initial medical examiner to another medical instance capable of making a medical judgment annulling the previous one ; and an appeal, second, before a court or a tribunal in order to ensure that the procedural rules governing the imposition of the medical examination and the ensuing stages have been complied with, and that no manifest irrationality has been infecting the process<sup>133</sup>.

Two specific difficulties emerge in this context, however. One difficulty concerns the need to reconcile the protection of personal data – specifically, of the medical data collected in the course of the medical examination – and the requirement of professional secrecy imposed on the examining physician with the possibility for the examinee to seek a review of the assessment made of his/her aptitude to perform a particular function. The second difficulty concerns the difficulty for a court to review a judgment of a medical nature.

In order to overcome, at least partially, these difficulties, this principle proposes to organise an appeal before an independent medical authority, while ultimately reserving the possibility for a judicial review on manifest errors of appreciation. However, to ensure that this is a realistic possibility for the applicant, he or she must receive, directly or via his or her treating doctor, all the information which has led the examining physician to conclude that he or she may not take up the employment. Only by having access to that information will it be possible for the treating doctor to advise his or her patient as to the validity of the medical justification offered, and therefore of the usefulness of lodging an appeal against that medical decision. Such an appeal before another physician or board of physicians should be available to the applicant, as only an appeal before such an instance will effectively lead to to scrutinize the validity of the medical judgment made by the examining physician. Finally, an appeal from this second decision should be available before a court or a tribunal. However, per definition, as the judge will be ill-equipped to deal with medical judgments, he will essentially have to confine his control to verifying whether all the required procedural safeguards have been respected in the course of the adoption of the medical decision, and whether that decision is not manifestly irrational.

In the *Miss M. v. Commission* judgment of 10 June 1980, the European Court of Justice noted in Recital 14 that

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<sup>132</sup> International Code of Ethics for Occupational Health Professionals, cited above, Article 9.

<sup>133</sup> In order for these appeals to be effective, the employer should postpone its decision until it has been informed of the outcome of the reexamination. *Medical Examinations Preceding Employment and/or Private Insurance : A Proposal for European Guidelines*, cited above, p. 32.

...it is not for the Court to substitute its own judgment for that of the doctors on questions which are specifically medical. But it none the less remains for the Court, in the context of the task, which is peculiar to it, of reviewing whether the recruitment procedures have followed a lawful course and thus of assessing whether the candidate fulfils the conditions required by Article 28(E) for the performance of his duties, to consider whether it has available to it all information relevant to the reaching of its decision.

In that case, the medical officers of the Commission had objected to the production in court of the applicant's medical records; and, when ordered to appear before the Court, they refused to give any information on the nature of the medical examinations performed on the applicant, invoking the confidentiality of the medical findings, despite the fact that the applicant had formally released them from the obligation to observe this confidentiality. In view of this attitude, resulting in the impossibility for the Court to exercise its judicial review, the Court recalled that "the obligations to state the reasons for a refusal to engage a candidate as an official on grounds of physical unfitness must be reconciled with the requirements of confidentiality which, save in exceptional circumstances, leave the individual doctor to decide whether to communicate to those whom he is treating or examining the nature of the condition from which they may be suffering" (Recital 16). However, the solution to this difficulty was then considered to consist in ensuring that the person concerned could "request and ensure the communication to a doctor of his choice of information which should in particular enable the person concerned, either directly or through his doctor, to judge whether the decision refusing his appointment is in accordance with the provisions of the staff regulations" (Recital 17).

In the case *Miss M.*, the Court found the information communicated to the candidate's own doctor to be "so scant that it was not possible for him to advise her satisfactorily or for her to see to the defence of her interests" (Recital 18). The Court arrives at the conclusion that the decision to hold the applicant physically unfit should be annulled. Indeed, citing a "study of comparative law on the question of the confidentiality of medical findings under the laws of the various Member States of the Community" prepared by the Commission on the request of the Court, the Court considers that in three circumstances the confidentiality of medical information – which is normally protected because of the "confidential relationship (...) formed between the patient seeking treatment and the doctor" – may be limited : "where the person concerned has expressly given his consent"; "where the doctor's involvement takes place in the context of administrative checking procedures so that the spontaneous confidential relationship which is the basis of professional secrecy does not exist"; and "where reliance on such confidentiality would have the result of obstructing the normal course of justice" (Recital 19). All these three circumstances were present in the *Miss M.* case. The annulment of the decision to consider the applicant unsuitable for the job therefore constituted an obvious conclusion in the eyes of the Court.

The detour by the notion of shared professional secrecy – under which, while it may be opposed to the person concerned, the confidentiality of information relating to health may nevertheless be shared with another professional from the health sector equally bound by a requirement of confidentiality – may have become unnecessary today. Indeed, accompanying the rise of the notion of patients' rights, we have witnessed a progressive recognition that every person has a right to receive information concerning his or her state of health : Article 5 of the Council of Europe Convention on Human Rights and Biomedecine confirms this evolution.

**Principle 6.** The conclusions of the examining physician should be transmitted both to the candidate worker and, unless the candidate worker objects, to the employer. However, it should contain no information of a medical nature. It should exclusively state whether the candidate is fit for a particular position, or which adjustments should be made to make recruitment possible. The information of a medical nature should be contained in personal confidential health files accessible only to the personnel providing occupational health services bound by professional secrecy and to the extent that the information contained in

**the file is relevant to the performance of their duties. It may be transmitted to the treating doctor of the person concerned with his/her consent.**

Medical examinations constitute an invasion of privacy, not only because, in many cases, they infringe upon the right to bodily integrity, but also because they result in the processing of personal data relating to the health of the person concerned. The specific rules relating to the protection of personal data therefore should also be taken into account in considering the legal framework of pre-employment medical examinations. These rules serve to protect the candidate employee from the risk of direct discrimination based on the state of health, which arguably constitutes discrimination on the grounds of disability in the meaning of Directive 2000/78/EC. These rules are formulated at a general level in the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981<sup>134</sup> and, in the European Union, in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>135</sup>. The European Commission is now envisaging the adoption of a sectoral Directive, relating more specifically to the protection of personal data of workers in the employment relationship<sup>136</sup>. A number of texts, drawn from more or less authoritative sources, may serve as a source of inspiration. Prominent among them are the Practical Guidelines adopted by the International Labour Office in November 1996 upon the recommendation of a Group of Experts, and Recommendation No. R(89)2 of the Committee of Ministers to the Council of Europe Member States on the Protection of Personal Data Used for Employment Purposes, adopted on 18 January 1989. On 13 September 2001, the Working Party “Article 29” on data protection – the consultative organ created by Articles 29 and 30 of the Directive 95/46/EC – adopted an Opinion on the processing of personal data in the context of employment<sup>137</sup>. A number of national independent authorities in the field of data protection have also issued opinions on the protection of personal data in the context of employment. These texts all identify data relating to the health of the employee or the prospective employee as specific, “sensitive” data, requiring a reinforced protection under national law.

Principle 6, the first in this list of principles which concerns specifically the protection of personal data, paraphrases para. 16 of Recommendation (No. 171) adopted within the International Labour Organisation<sup>138</sup>. It is a consequence of the requirements of necessity and proportionality of the interference with the privacy rights of the candidate employee that only the information which the employer requires should be transmitted to him. Para. 16 of Recommendation (No. 171) states :

16. (1) On completing a prescribed medical examination for the purpose of determining fitness for work involving exposure to a particular hazard, the physician who has carried out the examination should communicate his conclusions in writing to both the worker and the employer.

(2) These conclusions should contain no information of a medical nature; they might, as appropriate, indicate fitness for the proposed assignment or specify the kinds of jobs and the conditions of work which are medically contra-indicated, either temporarily or permanently.

The preceding paragraphs of the same Recommendation specify the protection which should preserve the confidentiality of the medical file :

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<sup>134</sup> ETS, n° 108.

<sup>135</sup> OJ L 281 of 23.11.1995, p. 31.

<sup>136</sup> For an analysis of the stakes of this discussion, see O. De Schutter, “La protection du travailleur vis-à-vis des nouvelles technologies dans l’emploi”, *Revue trimestrielle des droits de l’homme*, n°54, 1<sup>er</sup> avril 2003, pp. 627-664.

<sup>137</sup> Opinion n° 8/2001 of 13 September 2001, WP 48, 5062/01.

<sup>138</sup> See also Art. 10 of the International Code of Ethics for Occupational Health Professionals, cited above.

14. (1) Occupational health services should record data on workers' health in personal confidential health files. These files should also contain information on jobs held by the workers, on exposure to occupational hazards involved in their work, and on the results of any assessments of workers' exposure to these hazards.

(2) The personnel providing occupational health services should have access to personal health files only to the extent that the information contained in the files is relevant to the performance of their duties. Where the files contain personal information covered by medical confidentiality this access should be restricted to medical personnel.

(3) Personal data relating to health assessments may be communicated to others only with the informed consent of the worker concerned.

15. The conditions under which, and time during which, personal health files should be kept, the conditions under which they may be communicated or transferred and the measures necessary to keep them confidential, in particular when the information they contain is placed on computer, should be prescribed by national laws or regulations or by the competent authority or, in accordance with national practice, governed by recognised ethical guide-lines.

The formulation of Principle 6 moreover takes into account that the examinee « has a legitimate interest in being able to (...) withdraw from the procedure if he wishes so and to prevent the conclusions from being communicated to the requesting party. Therefore, he should be entitled to be the first to receive the results. This means that the examinee should in all cases be informed by the examining physician of the results and conclusions of the medical examination before the opinion is communicated to the requesting party [the employer], and be entitled to stop the opinion from being communicated »<sup>139</sup>.

**Principle 7. The employer should be prohibited from requesting from the candidate employee information relating to his state of health other than that collected by the examining physician in the context of protective occupational health services.**

Principles 5 and 6 seek to achieve an adequate balance between the need to protect the confidentiality of medical data, on the one hand, and the need to guarantee the exercise of the right of the prospective employee to appeal against a refusal to employ her based on the results of the medical examination performed, on the other hand. The solution proposed is that information of a medical nature (as distinguished from information concerning the decision whether or not to employ the concerned person, on the basis of the medical examination performed) may be transmitted to a physician designated by the individual concerned, usually her treating doctor, in order to ensure that she will be adequately counseled as to the opportunity to challenge the refusal. The physician thus designated is him- or herself bound by a requirement of professional secrecy, which guarantees that the medical data will not be divulged to third persons.

Where the medical information relating to her state of health is requested by the individual concerned from her treating doctor, the question arises whether the access to such information could be denied in certain circumstances. This may seem in contradiction with the right of the individual to receive information relating to his state of health, which has been recently reaffirmed in a number of EU Member States as an aspect of a recent emphasis on the rights of patients and as illustrating the emerging principle of autonomy which constitutes its philosophical justification. But denying access to that information may also protect the person to whom it relates. In particular, where the individual concerned requests to receive that

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<sup>139</sup> *Medical Examinations Preceding Employment and/or Private Insurance : A Proposal for European Guidelines*, cited above, pp. 31-32.

information in written form, there is a risk that this will increase his or her vulnerability, as he or she may be pressured by the employer to provide the employer with that information in circumvention of the prohibition imposed on the employer to seek to have access to the medical file<sup>140</sup>. Therefore the right of the individual to have access to all the medical information transmitted to his or her treating doctor, based on the principle of autonomy, may have to be checked in certain circumstances by a principle of protection, in order to avoid the risk that the subject will be coerced into sharing that information with others<sup>141</sup>. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data does not impose a clearcut solution to this dilemma. Article 12 of Directive 95/46/EC of 24 October 1995 guarantees a right of access to the individual whose personal data have been processed, stating that this information is to be communicated to him « in an intelligible form ». However Article 13(1)(g) provides that Member States may introduce exceptions to that right of access, *inter alia*, in the name of « the protection of the data subject or of the rights and freedoms of others ». Similarly, The Council of Europe Convention on Human Rights and Medicine, while stating that « Everyone is entitled to know any information collected about his or her health » (Art. 10(2)), also provides that « In exceptional cases, restrictions may be placed by law on the exercise [of this right] in the interests of the patient » (Art. 10(3)).

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<sup>140</sup> Such a prohibition is explicit, for instance, in Belgium, in Article 14 of the Royal Decree of 28 May 2003 implementing certain aspects of the Law of 4 August 1996 on the well-being of workers in the execution of their work (*Arrêté royal du 28 mai 2003 relatif à la surveillance de la santé des travailleurs, M.B.*, 16.6.2003). This provision says : « Il est interdit aux employeurs de faire effectuer au cours de la procédure de recrutement et de sélection et au cours de la période d'occupation, d'autres tests ou d'autres examens médicaux que ceux qui peuvent être effectués par le conseiller en prévention-médecin du travail, en vertu du présent arrêté, notamment dans un autre but que celui de fonder la décision d'aptitude du candidat ou du travailleur, soumis à la surveillance de santé obligatoire, en rapport avec les caractéristiques du poste de travail ou de l'activité à risque défini concernés ».

<sup>141</sup> On the dual role of the treating doctor, who should at once provide the information to the patient and present that information in an understandable language in order for it to be effectively « accessible », and exercise a « filtering » function in certain exceptional circumstances where the patient needs to be protected from the impact the information could have on her physical or psychological well-being, see the following opinions of the Belgian Commission for the protection of private life (Commission pour la protection de la vie privée) : Opinion n°36/95 of 22 December 1995, *Interprétation de l'article 10 § 3 de la loi du 8 décembre 1992 relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel* (in which, interpreting Article 10(3) of the Belgian Law of 8 December 1992 in the light of Articles 12 and 13 of Directive 95/46/EC, the Commission concludes with a position clearly skeptical about the protectionist principle that « le maître du fichier ou le médecin qui assume la surveillance et la responsabilité du traitement est tenu de communiquer au médecin choisi par l'intéressé toutes les données médicales concernant ce dernier. En règle générale, le médecin choisi par la personne concernée doit lui communiquer toute l'information qui la concerne. A titre exceptionnel, ce médecin est en droit d'effectuer une sélection parmi les données si une telle mesure s'avère strictement nécessaire pour la protection de l'intéressé lui-même ou des droits et libertés d'autrui. La Commission est d'avis [que] la personne concernée peut imposer au médecin de lui communiquer les informations par écrit »); Opinion n°30/2001 of 22 August 2001, *Avant-projet de loi relatif aux droits du patient* (in which the Commission criticizes the possibility to refuse to transmit the medical information to the subject concerned in the relatively broad terms envisaged by the Bill preparing the Law on the rights of patients, noting that for such a refusal to be justified, there would need to be a clear indication that a form of pressure was exercised on the patient : « [L']avant-projet de loi prévoit expressément que le prestataire de soins peut refuser cette copie s'il est d'avis qu'en accédant à la demande, il pourrait manquer à l'égard des tiers à son devoir en matière de secret professionnel. Suivant l'exposé des motifs, cette règle vise à empêcher un mauvais usage éventuel que des tiers (p. ex. des assureurs, des employeurs) pourraient faire d'une copie qu'ils pourraient obtenir par l'intermédiaire du patient en faisant pression sur celui-ci. Il est aussi renvoyé à la situation des personnes contraintes de cohabiter dans un contexte fermé, comme p. ex. dans une prison ou dans un établissement de défense sociale, etc. La Commission estime que la disposition proposée est trop large et laisse une trop grande liberté d'appréciation au prestataire de soins pour refuser une copie. Le prestataire de soins devrait disposer d'indications précises dont il ressort que des pressions sont exercées afin que celui-ci communique une copie de son dossier ») . The French Commission Nationale de l'Informatique et des Libertés, interpreting Article 40 of the French Law of 6 January 1978 according to which the right to access to medical information should be exercised by seeking this information from the treating doctor to whom it is transmitted, considered that by adopting this solution, the legislator had sought to unbind the doctor from his obligation of professional secrecy, while preserving the possibility for the doctor to refuse information where in doing so he acts in the interest of the patient (« [le législateur a voulu] délier le praticien de son obligation de secret, tout en préservant son pouvoir d'appréciation quant à l'étendue de la communication (...). Le praticien doit donc garder la possibilité de refuser, dans l'intérêt du malade, de lui communiquer certaines informations sur son état de santé ») (CNIL, 4<sup>ième</sup> rapport d'activité, La Documentation française, Paris, 1984, p. 121).

A procedural solution is called for. It is suggested that the right of access will be sufficiently respected if the individual receives an oral explanation and may consult her medical file during her encounter with her treating doctor. In fact, the treating doctor, whom we may presume has a relationship of confidence with the patient, may thus render the medical information « accessible » to the patient, as required by Article 12 of Directive 95/46/EC : in order to ensure such accessibility, dialogue may present virtues which the transmission of a written piece of information will lack. In certain cases in fact, the written information – for instance, the results of a laboratory test – will be illegible to the patient, and dialogue is the only way in which such information can be made understandable to the person concerned. Where the patient requests that the information be given in the written form, however, the treating doctor may have a « filtering » function to perform. Here, indeed, the risk of misuse is clearly present. A written certificate would generally not be required unless in order for the patient to satisfy the request of a third party – an insurer or, for example, the employer. The treating physician could be encouraged not to comply with the demand of his or her patient to receive a written document containing an information of a medical nature, unless if provided with a written document in which the third party requesting such a certificate specifies the reasons why such a certificate is required, to which use it will be put, and how its confidentiality will be preserved. The requirement to deliver such a document will act as an effective deterrent to the unscrupulous employer seeking to pressure the prospective employee in order to obtain certain assurances that she will not become ill in the future or does not otherwise present hidden disabilities which could entail supplementary risks or costs for the employer hiring her.

This solution seeks to reconcile, by a procedural safeguard, the principle of autonomy – entailing a right to the medical information – and the principle of protection – requiring that the patient be shielded from pressure being exercised by a third party, for instance the employer –. Although this solution is not prescribed under international or European human rights law, the author of this report believes that it could constitute a valuable solution to the dilemma faced in the reconciliation of these competing principles.

**Principle 8. The data concerning health shall only be processed where it is necessary for the purposes of carrying out the obligations and specific rights of the controller in the field of employment law in so far as it is authorized by national law providing for adequate safeguards, where the processing takes place fairly and lawfully, and where the data processed are adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed. Moreover, such data shall only be processed by a health professional subject under national law or rules established by national competent bodies to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy.**

This principle paraphrases, by summarizing them, the obligations imposed on the processor of personal data by the applicable instruments, in particular by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. In the explanation to Principle 1, it has already been mentioned that the consent of the examinee, event if specific, free and informed, although a prerequisite to the legality of the medical examination, could not be considered sufficient to legitimize the processing of the medical data, despite the terms used in Article 8(2)(a) of Directive 95/46/EC. It was argued there that the legitimation by the consent of the subject of the processing of health data, although understandable in general, should not be considered acceptable in the context of employment relationships. In accordance with Principle 3 and with the first conditions which, in the view of the author of this report, should be met for the employer to be authorized to validly raise a defence in justification of not hiring a person with a disability because of health and safety requirements, it is considered that the processing of health data should only be justified where it is necessary for the purposes of

carrying out the obligations and specific rights of the controller in the field of employment law in so far as it is authorized by national law providing for adequate safeguards.

**Principle 9. The examining physician must have sufficient knowledge of the working environment in which the job is to be performed in order to a) be capable of exercising an independent judgment as to which medical examinations are relevant to deciding on the suitability of the candidate to perform the job offered and b) to consider which accommodations could be proposed to make the recruitment possible.**

Although this principle is final in the list and could be considered of secondary importance as it is vague in its formulation and does not replicate an existing legal standard, the function it fulfils in the whole set of principles should not be underestimated.

First, whether or not certain examinations are to be performed should not be left to the appreciation of the employer, whether this appreciation is made in good faith or not. Instead, it should be based on an independent appreciation of a physician relying on current medical knowledge or the best available objective evidence. This requires that the examining physician is sufficiently informed about the tasks implied in the job offered and about the general working environment. Where the examining physician lacks this knowledge, he may be tempted to simply adopt the views of the employer as to the health requirements which may justifiably be imposed, and not exercise the independent judgment which is required from him.

Second, as this report has emphasized earlier, no decision to deny employment (or to discontinue an employment relationship) should be made if the apparent conflict between health and safety regulations and the envisaged employment could be overcome by the provision of a form of a form of effective accommodation not imposing a disproportionate burden on the employer. In order to ensure that these rules will be complied with, it is essential that the occupational health services are well acquainted with the undertaking, its organisational structure, its premises, its working processes. Only with this knowledge will it be possible for the occupational health services to effectively contribute to identifying alternative employment for the worker who cannot be put to work in the position initially planned for health or safety reasons, or to find « another appropriate solution », as expressed in paragraph 17 of the Recommendation (n° 171) to the ILO Occupational Health Services Convention of 1985<sup>142</sup> ; only then will they be in a position to identify the forms of accommodation which could ensure the employment of the worker with a disability, where such a disability so requires.

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<sup>142</sup> This is classically a function attributed to the occupational health services, and it is a function which, if effectively exercised, greatly contributes to the professional integration of persons with disabilities : in Belgium, see Article 6, 2°, b), of the Royal Decree of 27 March 1998 (Arrêté royal du 27 mars 1998 relatif au Service interne pour la **Prévention** et la Protection au Travail (M.B., 31.3.1998)), which states that the occupational doctors (now called « conseillers en prévention ») in particular should « promouvoir les possibilités d'emploi pour tout un chacun, notamment en proposant des méthodes de travail adaptées, des aménagements du poste de travail et la recherche d'un travail adapté, et ce également pour les travailleurs dont l'aptitude au travail est limitée ».