STUDENT ARTICLES

EMPLOYMENT LAW

The merits and shortcomings of the inclusion and application of the duty to make reasonable adjustments

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Introduction

Historically, the laissez-faire principle of state abstinence from interfering in the free market was deep-rooted, permitting discrimination in employment.[1] This approach shifted with the Disabled Persons (Employment) Act 1944, introducing a quota system.[2] However, the act did little to promote equality as "implementation was not vigorously pursued"[3] and the Act did not ensure parity of work for disabled persons. Additionally, disabled persons faced discrimination beyond just employment. Eventually, after much campaigning and "as many as sixteen unsuccessful attempts,"[4] the Disability Discrimination Act (DDA) 1995 was finally introduced, including a duty to make reasonable adjustments for "disabled persons"[5] in various areas. The DDA was subsequently amended,[6] to align with Directive 2000/78/EC and eventually incorporated into the Equality Act (EA) 2010.[7] This article shall focus on the duty's operation in the employment context as compared to the services and public functions context, exploring whether the definition of disability acts as an overly restrictive gatekeeper to the duty, the merits and shortcomings of the inclusion and application of the duty, the underlying theories of equality pursued, the broader social and economic context which limits the duty's promotion of equality and possible reforms to further the removal of barriers.

Scope of disability

The duty is only applicable to "disabled persons"[8] (persons with the protected characteristic of a disability).[9] Therefore, the definition of disability acts as a gatekeeper for the duty. For the purpose of the act, a person has a disability if they have a physical or mental impairment, and the impairment has a substantial (more than minor or trivial)[10] and long-term adverse effect on their ability to carry out normal day-to-day activities[11]. A broad purposive approach has been taken to interpret the already broad definition of disability.[12] However, the definition ultimately still follows a medical individualist model with a focus on the functional limitations of the individual rather than the barriers they face, hindering their participation in society.[13] The discomfort arising from the details of one's impairment being publicly scrutinised may discourage individuals from pursuing claims of a breach of the duty.[14] Even

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[1] See *Thomas Francis Allen v William Cridge Flood and Walter Taylor* [1898] AC 1 (HL); *Roberts v Hopwood* [1925] AC 578, (HL).
[2] Disabled Persons (Employment) Act 1944, s.9.
[3] Colin Barnes, Geoffrey Mercer, and Toby, Brandon 'Disability Policy and Practice: Applying the Social Model' (2006) 21 *Disability and Society* 744.
[4] Sandra Fredman, *Discrimination Law* (3rd edn, Oxford University Press 2022), 152.
[5] Disability Discrimination Act 1995, s.6.
[6] Disability Discrimination Act 1995 (Amendment) Regulations 2003.
[7] Equality Act 2010, s.20.
[8] Ibid, s.20.
[9] Ibid, s.6(2).
[10] Ibid, s.212(1).
[11] Ibid, s.6(1).
[12] The EAT confirmed a purposive approach should be adopted - *Goodwin v Patent Office* [1999] ICR 302 (EAT), 307.
[13] Sarah Butlin, 'The UN Convention on the Rights of Persons with Disabilities: Does the Equality Act 2010 Measure up to UK International Commitments' (2011) 40 *Industrial Law Journal* 428, 433.
[14] Anna Lawson, 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *Industrial Law Journal* 359, 362.

where cases are pursued, 11.5 per cent of Employment Tribunal (ET) preliminary hearings alleging disability discrimination fail due to not meeting the definition set out.[15]

In contrast, the United Nations Convention on the Rights of Persons with Disabilities (CRPD)[16] states that persons with disabilities "include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".[17] The CRPD adopts a primarily social model, focusing on the barriers to access rather than the nature of the impairment. However, it does retain a medical component while removing the "substantial" or "normal day-to-day" requirements. Adopting such an approach domestically would allow the continued preferential treatment of persons with medical impairments whilst also broadening the scope of disabilities and, consequently, the scope of the duty's protection. This approach would also shift judicial focus away from the individual's functional limitations to the alleged discrimination,[18] which could encourage more disabled individuals to pursue claims of a breach of the duty, furthering its effectiveness at removing barriers.

The duty to make reasonable adjustments

Despite the medical model adopted by the definition of disability, the duty encapsulates a social model, acknowledging that physical and social factors may provide barriers to full participation in society.[19] Section 20 outlines that the duty is engaged where "a disabled person" is placed at a substantial (more than minor or trivial) disadvantage "in comparison with persons who are not disabled" by virtue of a provision, criteria, practice (PCP), or physical feature; or by failure to provide an auxiliary aid.[20] All three of these potential requirements have a broad scope.

Section 20(10) outlines that "physical features" include references to building design, access, fixtures, fitting, chattel and more.[21] Whilst "PCP" lacks a statutory definition, the Equality and Human Rights Commission's (EHRC's) Codes of Practice (COPs) describe them as formal or informal policies, rules, practices, arrangements, and qualifications, including one-off decisions.[22] While auxiliary aids are described as things that can support a disabled person.[23] Although the codes are not law, they are admissible in proceedings and must be considered by the judiciary where relevant.[24] Thus, these broad descriptions increase the potential scope of when the duty is engaged, furthering the removal of barriers.

Where the duty arises, it is required "to take such steps as… is reasonable... to avoid the disadvantage."[25] Examples of adjustments that might be considered reasonable include altering buildings, such as widening doorways;[26] altering policies, such as allowing disabled persons to work flexible hours; and

[15] Laura William, Birgit Pauksztat and Suzan Corby, 'Justice obtained? How disabled claimants fare at Employment Tribunals' (2019) 50 *Industrial Relations Journal* 314, 325.
[16] Convention on the Rights of Persons with Disabilities (adopted 12 December 2006, entered into force 3 May 2008) 2515 UNTS 3.
[17] Ibid, Art 1.
[18] Sarah Butlin, 'The UN Convention on the Rights of Persons with Disabilities: Does the Equality Act 2010 Measure up to UK International Commitments' (2011) 40 *Industrial Law Journal* 428, 434; and Anna Lawson, Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated (2011) 40 *Industrial Law Journal* 359, 362.
[19] Stephen Bunbury, 'The Employer's Duty to Make Reasonable Adjustments. When is a Reasonable Adjustment not Reasonable' (2009) 10 *International Journal of Discrimination and the Law* 111.
[20] Equality Act 2010, s.20.
[21] Ibid, s.20(10).
[22] Equality and Human Rights Commission, 'Employment Statutory Code of Practice' (2011) <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf> accessed 7 March 2024, ch 6.10; Equality and Human Rights Commission, 'Services, public functions and associations Statutory Code of Practice' (2011) <https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf> accessed 7 March 2024, ch 7.43.
[23] Ibid (Employment Statutory Code of Practice), ch 6.13, (Services, public functions and associations Statutory Code of Practice), ch. 7.45.
[24] Equality Act 2006 s.15(4).
[25] Equality Act 2010, s.20.
[26] Equality and Human Rights Commission, 'Employment Statutory Code of Practice' (2011) <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf> accessed 7 March 2024, ch 6.33.

providing equipment, such as an adapted keyboard[27], amongst other things.[28] Section 21 makes failure to comply with the duty discrimination,[29] and s.22 allows regulations to be prescribed, providing further details as to what is or is not: a reasonable step, a PCP, a physical feature, an alteration of physical features, or an auxiliary aid.[30]

The duty hinges on reasonableness, requiring duty-bearers to take "reasonable" steps, a concept highly context-dependent. Although there is no statutory definition, the COPs provide factors that might be considered when determining reasonableness, such as the costs, practicability and extent of disruptions required to make the steps, amongst other things[31]. Even with this guidance, what is considered reasonable is still very uncertain,[32] imposing concerns about expectations and litigation, with advocates of state abstinence from the free market, such as Epstein, viewing the duty as an undue burden, arguing in favour of "jettisoning" such systems.[33] However, as Lawson and Orchard highlight, this uncertainty is a corollary to flexibility, allowing the duty to respond to the circumstances of individual cases.[34]

Furthermore, the duty is essential for promoting substantive equality for disabled persons as it departs from the Aristotelian concept of treating like alike. Although equal treatment inherently resonates with our intuitive ideas of fairness,[35] it is highly problematic for disabilities, as exemplified by *Lewisham v Malcolm,*[36] Malcolm, a schizophrenic individual, sublet his council home, leading to possession order proceedings. He claimed this was disability-related discrimination, as it was his disability that made him decide to sublet. However, the House of Lords (HL) held that as a non-disabled tenant would have also been evicted for subletting, Malcolm had not been discriminated against. Hence, while treating like alike may at times be necessary, such as in cases of direct discrimination, solely relying on treating like-alike places those with disabilities at a substantial disadvantage as it completely overlooks the individual's specific needs, demonstrating why favourable treatment is at times necessary for disabled persons.

Importantly, the test of reasonableness is objective.[37] As such, rather than the defendant's perspective, it is the judiciary's view of what is reasonable on the facts of the case that determines what is reasonable. This makes the test more difficult for defendants and more protective for claimants, furthering equality.[38]

The duty in the employment context

The duty's operation differs depending on context. In employment, it is reactive, with schedule 8 outlining the reference to "a disabled person" in section 20 as a reference to an "interested disabled person"[39] (applicants or pre-existing employees).[40] This means the employer is under no obligation to anticipate and alter PCPs or physical features, which might put disabled persons generally at a

[27] Ibid, ch. 6.33.
[28] See - Ibid, ch 6.33; Equality and Human Rights Commission, 'Services, public functions and associations Statutory Code of Practice' (2011) <https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf> accessed 7 March 2024, ch 7.80.
[29] Equality Act 2010, s.21.
[30] Ibid, s 22.
[31] Equality and Human Rights Commission, 'Employment Statutory Code of Practice' (2011) <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf> accessed 7 March 2024, ch 6.28; Equality and Human Rights Commission, 'Services, public functions and associations Statutory Code of Practice' (2011) <https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf> accessed 7 March 2024, ch 7.30.
[32] Anna Lawson and Maria Orchard, 'The anticipatory reasonable adjustment duty: removing the blockages?' (2021) *Cambridge Law Journal* 308, 319.
[33] Discussing Equivalent US provision – Richard Epstein, 'Forbidden Grounds: the case against Employment Discrimination Laws' (1992) 44 *Stanford Law Review* 1583.
[34] Anna Lawson and Maria Orchard, 'The anticipatory reasonable adjustment duty: removing the blockages?' (2021) *Cambridge Law Journal* 308, 320.
[35] Sandra Fredman, *Discrimination Law* (3rd edn, Oxford University Press 2022), 42.
[36] *Malcolm v Lewisham LBC* [2008] UKHL 43, [2008] 1 AC 1399.
[37] *British Gas Services Ltd v McCaull* [2000] 9 WLUK 341 (EAT).
[38] Ian Smith and Owen Warnock, *Smith & Wood's Employment Law* (16th edn, Oxford University Press 2023), 347.
[39] Equality Act 2010, Sch 8, para 20(2).
[40] Ibid, Sch 8, para 20(2).

disadvantage. Furthermore, the duty does not arise unless the employers know or ought to have known that an interested disabled person is likely to be exposed to a substantial disadvantage.[41]

Lawson argues in favour of implementing a group-based anticipatory duty for all potential disabilities in the employment context to further the removal of barriers[42]. However, whilst a powerful way of furthering equality, proactively implementing accommodations for all potential disabilities in the workplace would be resource-intensive and may not be feasible for many employers. Additionally, the reactive approach allows limited resources to be allocated to making tailored, flexible adjustments for the specific needs of the individual. Therefore, it is unlikely to be either in the employer's or the disabled employees' best interest for there to be an anticipatory duty in the employment context.

The leading authority for the application of reasonable adjustments is *Archibald v Fife.*[43] Archibald, a road sweeper, became unable to walk, thus making her unable to fulfil her role. The council subsequently retrained her for office work and put her on the shortlist for all office vacancies showing some level of preferable treatment. However, they maintained a policy of competitive interviews. After 2 years and over 100 unsuccessful interviews, Archibald was eventually dismissed on the grounds of incapability to carry out her role. Consequently, Archibald complained that the council had failed to make reasonable adjustments by requiring her to undergo the competitive interview process.

The HL interpreted arrangements (now covered by PCPs) broadly, ruling that the job description itself was an arrangement, and part of this was the implied terms of liability to be dismissed upon becoming incapable of fulfilling the role[44]. Thus, in comparison to others who were not at risk of being dismissed due to an inability to do the job because of a disability, Archibald was placed at a substantial disadvantage.[45] To remove this disadvantage, the HL held that a step could include transferring a disabled person from a post they can no longer do to an available post at a higher level, without a competitive interview in preference to a better-qualified candidate, if it was reasonable to do so in the circumstances.[46] Thus, an "employer is not only permitted but obliged to treat a disabled person more favourably than others."[47]

As discussed, abandoning a like-for-like approach is essential for achieving substantive equality. However, the question arises as to whether the favourable treatment demonstrated in *Archibald v Fife* went too far. Indeed, the council had already shown preferable treatment aimed at equality of opportunity,[48] which is an attractive concept as it removes barriers to access whilst still resonating with the intuitive ideas of fairness by allowing decisions to be made on merit,[49] which inherently benefits organisations. However, the HL ruled that the preferable treatment does not have to stop at equality of opportunity, and it may be reasonable to pursue equality of outcome.[50] Equality of outcome completely abandons any notion of treating like alike, being primarily concerned with the end result[51]. Such an approach is controversial not only for undermining the employer's interests,[52] but also for making the adversely affected group suffer for belonging to "a group whose membership is not immoral."[53]

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[41] Ibid, Sch 8, para 20(1).
[42] Anna Lawson, 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 Industrial Law Journal 359, 369.
[43] *Susan Archibald v Fife Council* [2004] UKHL 32, [2004] ICR 954.
[44] Ibid, [11] (Lord Hope), [33] (Lord Rodger), [62] (Lady Hale).
[45] Ibid, [12] (Lord Hope), [42] (Lord Rodger), [64] (Lady Hale).
[46] *Susan Archibald v Fife Council* [2004] UKHL 32, [2004] ICR 954, [20] (Lord Hope), [44] (Lord Rodger), [65] (Lady Hale).
[47] Ibid, [68] (Lady Hale).
[48] Ibid, [57] (Lady Hale).
[49] Sandra Fredman, *Discrimination Law* (3rd edn, Oxford University Press 2022), 55.
[50] *Susan Archibald v Fife Council* [2004] UKHL 32, [2004] ICR 954, [20] (Lord Hope), [44] (Lord Rodger), [65] (Lady Hale).
[51] Sandra Fredman, *Discrimination Law* (3rd edn, Oxford University Press 2022), 50.
[52] Tarunabh Khaitan, *A Theory of Discrimination Law* (1st edn, Oxford University Press 2015), 225-228.
[53] Ibid, 228-233.

Following *Archibald v Fife*, the scope of this preferential treatment was left relatively open-ended. However, the scope of the duty was made more apparent in *Griffith v Secretary of State.*[54] The Court of Appeal (CA) held whilst it could be reasonable to extend the absence allowance for disabled employees[55], these extensions did not have to be open-ended, and such proposed adjustments were not reasonable, based on the facts of Griffith, as they would not have removed the disadvantage.[56] The case of *G4S v Powell,*[57] also helps understand the limits. The claimant became disabled through a back injury, making them unable to continue their current role. Subsequently, they were transferred to a less well-paid position with pay protection, which was eventually removed. The EAT held maintaining the pay protection could be a reasonable step, noting the legislation plainly envisaged an element of cost to the employer[58]. Importantly, however, the EAT also noted this would not be reasonable in every case and that the financial considerations will always have to be weighed in the balance.[59]

Thus, from these cases, we can infer that preferable treatment amounting to equality of outcome at a cost to the employer can still be considered reasonable. However, it will not always be reasonable, and a delicate balancing act that does not completely ignore the employer's interests is needed. Indeed, the COP outlines factors, such as the employer's "financial or other resources" and "the type and size of the employer", amongst others,[60] that might be considered when determining reasonableness. Accordingly, only employers with the necessary resources are likely to have to show such high levels of preferable treatment.

Whilst even this more constrained form of equality of outcome might be objectionable to some, it is essential to look at the broader context of why such measures may be needed. As recognised in *G4S v Powell*, part of the purpose of the EA was to keep disabled persons employed.[61] However, currently, only 53.7% of disabled individuals are employed compared to 82.7 per cent of non-disabled individuals[62]. While the nature of some disabilities can explain part of the gap, it is also clear that disabled persons still face many barriers, which may make finding or keeping employment harder. Hence, to keep disabled individuals in employment, preferable treatment may be needed. Whilst adopting a narrower equality of opportunity approach may be more beneficial for employers and those adversely affected; it would only worsen this employment gap. Consequently, the court's approach of using both equality of opportunity and, in some cases, equality of outcome is morally justifiable to further enable disabled individuals to participate in employment, helping achieve the CPDR's article 27 right to "work and employment."[63] Indeed, a person's career may often be a key aspect of their identity; thus, by further enabling participation in employment, the court's approach upholds the dignity of disabled individuals.

Services and public functions

In services and public functions, the duty is anticipatory, with schedule 2 outlining the reference to "a disabled person" in section 20 as a reference to "disabled persons generally."[64] This means there is an obligation to anticipate the needs of potential disabled persons generally and proactively make adjustments. The services and public functions COP also outlines that the duty is evolving, demanding

[54] *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, [2017] ICR 160.
[55] Ibid, [78] (Lord Justice Elias).
[56] Ibid, [75-78] (Lord Justice Elias).
[57] *G4S Cash Solutions (UK) Ltd v Powell* [2016] 8 WLUK 343 (EAT).
[58] Ibid, [44] (Judge Richardson).
[59] Ibid, [60] (Judge Richardson).
[60] Equality and Human Rights Commission, 'Employment Statutory Code of Practice' (2011) <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf> accessed 7 March 2024, ch 6.28.
[61] *G4S Cash Solutions (UK) Ltd v Powell* [2016] 8 WLUK 343 (EAT), [44] (Judge Richardson).
[62] Aged 16-64 - House of Commons Library, 'Disabled people in employment' (19 June 2023) <https://researchbriefings.files.parliament.uk/documents/CBP-7540/CBP-7540.pdf> accessed 10 March 2024.
[63] Convention on the Rights of Persons with Disabilities (adopted 12 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 27.
[64] Equality Act 2010, Sch 2, para 2(2).

that duty-bearers keep the ways they are meeting the duty under regular review[65]. Consequently, this proactive group-based approach has much greater potential to drive systemic change than the reactive approach. Indeed, the anticipatory duty goes beyond even the CRPD's "reasonable accommodations" duty,[66] which is reactive.[67] Consequently, it is an even more powerful way of harnessing article 9, "accessibility rights,"[68] than the CRPD envisioned.

Despite being group-based, in s.21, the reference to "a disabled person" remains singular. This means although the anticipatory duty arises regardless of whether a particular individual is placed at a substantial disadvantage, the breach will only constitute unlawful discrimination if a particular person can show that they suffered a substantial disadvantage due to the breach.

Several high-profile cases illustrate the duty's broad implications,[69] such as *Paulley v FirstGroup.*[70] The claimant (a wheelchair user) was unable to board the bus as the wheelchair space was occupied by a woman with a child in a pushchair who refused to vacate the seat upon request. The defendant's policy outlined that other customers would be asked to move; however, if they refused, the wheelchair user would have to wait for the next bus. The recorder judge held that a reasonable adjustment to the policy would be requiring non-disabled passengers to vacate the seat if needed by a wheelchair user, plus an enforcement mechanism.[71] Conversely, the majority of the Supreme Court (SC) took a narrower approach, ruling such steps would not be reasonable[72]. Although, a reasonable adjustment to the company policy would be to require drivers to take further steps where the refusal is unreasonable, such as rephrasing the polite request to a more forceful request or pressurising the passenger by stopping the bus for a few minutes, amongst other suggestions.[73]

While it was an overall success for accessibility, Pearson criticises the SC for not considering the CPDR[74]. Whilst the judiciary does not have to consider international obligations when interpreting legislation[75], they are entitled to do so.[76]Article 9 of the CRPD lists accessibility as a right[77]. Additionally, accessibility to public transport can be central to achieving wider rights listed in the CRPD, such as education,[78] health,[79] work and employment,[80] and social,[81] political,[82] and cultural[83] activities. Thus, Pearson argues for a position closer to the recorder's decision. However, it is essential

[65] Equality and Human Rights Commission, 'Services, public functions and associations Statutory Code of Practice' (2011) <https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf> accessed 7 March 2024, ch 7.27.
[66] Convention on the Rights of Persons with Disabilities (adopted 12 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 2.
[67] Committee on the Rights of Persons with Disabilities, 'General Comment No.2 (2014) on Article 9: Accessibility' (22 May 2014) UN Doc CRPD/C/GC/2, [26].
[68] Convention on the Rights of Persons with Disabilities (adopted 12 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 9.
[69] See – *Road v Central Trains* [2004] EWCA Civ 1541, [2004] 104 CON LR 456; Royal Bank of Scotland v Allen [2009] EWCA 1213, [2009] 11 WLUK 505; *ZH v Commissioner of Police of the Metropolis* [2012] EWHC 604, [2012] 3 WLUK 434; *Pauley v FirstGroup Plc* [2017] UKSC 4, [2017] 1 WLR 423.
[70] *Paulley v FirstGroup Plc* [2017] UKSC 4, [2017] 1 WLR 423.
[71] See - *Ibid* [29].
[72] Ibid, [46-48] (Lord Neuberger), [83-86] (Lord Toulson), [92] (Lord Sumption); dissenting in part [135] (Lady Hale).
[73] Ibid, [66-69] (Lord Neuberger), [83-86] (Lord Toulson), [92] (Lord Sumption), [129] (Lady Hale), [146-147] (Lord Clarke).
[74] Abigail Pearson, 'The debate about wheelchair spaces on buses goes 'round and round': access to public transport for people with disabilities as a human right' (2018) 69 *Northern Ireland Legal Quarterly* 1, 4-7.
[75] *Regina (Hurst) v London Northern District Coroner* [2007] UKHL 13, [2007] 2 AC 189.
[76] Supreme Court, 'International Law in the UK Supreme Court' (13 February 2017) <https://www.supremecourt.uk/docs/speech-170213.pdf> accessed 12 March 2024.
[77] Convention on the Rights of Persons with Disabilities (adopted 12 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 9.
[78] Ibid, art 24.
[79] Ibid, art 25.
[80] Ibid, art 27.
[81] Ibid, art 28.
[82] Ibid, art 29.
[83] Ibid, art 30.

to note the CRPD itself contains a notion of "reasonable accommodations."[84] Thus, the rights are qualified, meaning the same decision may have been reached even with a rights-based approach.

It is, therefore, perhaps unsurprising that Pearson also criticises the CRPD for not taking the rights-based approach to its "logical conclusion" and calls for an "absolute right to access."[85] Whilst dignity is already implicit in the duty as it allows disabled persons to participate more fully in society, an "absolute right to access" would only further cement this promotion of dignity,[86] by potentially contributing to a near-complete reduction in barriers. Whilst an admirable concept, an absolute right to access would likely not be feasible due to the high costs and resource demands associated with such an approach.

Conversely, several feasible steps can improve the operation of the anticipatory duty. As discussed, the anticipatory duty has great potential to drive systematic change. However, as an EHRC report suggests, disabled persons still experience significant barriers to accessing services and public functions[87]. Lawson and Orchard argue the lack of visibility of the anticipatory duty has a role to play in this,[88] with both types of reasonable adjustments being "shoehorned" into ss.20-22,[89] whilst the individualistic language of the sections is only indicative of the reactive approach.[90] Only by changing the wording in schedule 2 does the duty emerge, which may lead to individuals overlooking or not understanding the duty. Lawson and Orchard argue a simple solution would be to create a separate section for the anticipatory duty in the main body of the Act.[91] The poor visibility is exacerbated by the COP covering all protected characteristics, which may lead to the anticipatory duty being overlooked. Consequently, the HL committee has recommended the EHRC issue a separate specific COP for reasonable adjustments[92]. However, as Lawson and Orchard highlight[93], issuing statutory codes requires the government's willingness to lay it before parliament,[94] which has not been provided.[95] Additionally, EHRC funding faced significant cuts from £70m in 2007[96] to £17.1m in 2023,[97] limiting its ability not only to publish codes but also to provide financial support for individual discrimination cases. Without proper funding and political will, the EHRC is constrained in promoting the application of the duty.

Underfunding also hampers access to legal aid, with the Legal Aid, Sentencing and Punishment of Offenders Act 2012 causing a substantial reduction in the availability of legal advice services.[98] Whilst

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[84] Ibid, art 2.
[85] Abigail Pearson, 'The debate about wheelchair spaces on buses goes 'round and round': access to public transport for people with disabilities as a human right' (2018) 69 *Northern Ireland Legal Quarterly* 1, 8-9.
[86] Sarah Butlin, 'The UN Convention on the Rights of Persons with Disabilities: Does the Equality Act 2010 Measure up to UK International Commitments' (2011) 40 *Industrial Law Journal* 428, 438.
[87] Equality and Human Rights Commission, 'Being Disabled in Britain: A Journey Less Equal' (01 April 2017) <https://www.equalityhumanrights.com/sites/default/files/being-disabled-in-britain.pdf> accessed 12 March 2024, ch 8.2.
[88] Anna Lawson and Maria Orchard, 'The anticipatory reasonable adjustment duty: removing the blockages?' (2021) *Cambridge Law Journal* 308, 316-318.
[89] Ibid, 316.
[90] Reference to "a disabled person" - Equality Act 2010, s.20.
[91] Anna Lawson and Maria Orchard, 'The anticipatory reasonable adjustment duty: removing the blockages?' (2021) Cambridge Law Journal 308, 316.
[92] The House of Lords Select Committee, 'The Equality Act 2010 the impact on disabled people' (11 June 2015) <https://publications.parliament.uk/pa/ld201516/ldselect/ldeqact/117/117.pdf > accessed 12 March 2024, ch. [231].
[93] Anna Lawson and Maria Orchard, 'The anticipatory reasonable adjustment duty: removing the blockages?' (2021) Cambridge Law Journal 308, 318.
[94] Equality Act 2006, s.15.
[95] The House of Lords Select Committee, 'The Equality Act 2010 the impact on disabled people' (11 June 2015) <https://publications.parliament.uk/pa/ld201516/ldselect/ldeqact/117/117.pdf > accessed 12 March 2024, ch. [163].
[96] Government Equalities Office, Department for Culture Media and Sport, 'Comprehensive Budget Review of the Equality and Human Rights Commission' (January 2013) <https://assets.publishing.service.gov.uk/media/5a78c097ed915d07d35b2272/Comprehensive_Budget_Review_of_the_EHRC_.pdf> accessed 12 march 2024.
[97] Government Equalities Office, ' Equality and Human Rights Commission: annual report and accounts' (26 July 2023) <https://www.gov.uk/government/publications/equality-and-human-rights-commission-annual-report-and-accounts-2022-to-2023/ehrc-annual-report-and-accounts-2022-to-2023-html#statement-of-accounts> accessed 12 March 2024.
[98] Women's and Equality Committee, 'Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission' (17 July 2019) <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1470/1470.pdf> accessed 12 March 2024, para 198.

this causes issues for both forms of the duty, enforcement of the anticipatory duty also suffers from the fact that employment tribunals,[99] do not impose fees while county courts do, with the EHRC indicating that it paid, on average, £28000 to support each discrimination case.[100] Additionally, damages awarded if successful are relatively low,[101] and courts no longer require an unsuccessful defendant to pay the success fees[102] or after-the-event costs.[103] All these factors may discourage disabled individuals, who are already a disproportionately impoverished group,[104] from pursuing claims of a breach of the duty. A reversal of austerity measures and adequate funding could help more individuals pursue claims, furthering the duty's powerful potential for removing systemic barriers.

However, as the Women and Equalities Committee notes, primarily relying on a "piece-by-piece approach" is insufficient for tackling "systemic and routine discrimination."[105] Additionally, over-reliance on individual enforcement of the duty may undermine disabled individual's dignity, as they feel they need to fight for equality instead of it automatically being granted. An alternative approach to relying on individual enforcement already exists, as the EHRC can already challenge breaches of the duty independently of litigation brought by individual claimants.[106] However, once again, enforcement of this power is stifled by a lack of resources.[107]

Conclusion

In conclusion, the existence of the duty and the judiciary's broad multi-dimensional approach of employing equality of outcome, equality of opportunity, and implicit dignity in interpreting the duty to make reasonable adjustments have been quintessential in the promotion of equality for disabled individuals through the removal of barriers. However, the ability of the duty, especially the anticipatory duty, to tackle systemic issues has been stifled by austerity cuts, a lack of political will to support the EHRC, poor statutory wording, a restrictive medical model of disability, and an overly individualistic approach for enforcement. Until such issues are addressed, the potential of the duty to promote an equal society for disabled individuals shall not be truly realised.

[99] *R (UNISON) v Lord Chancellor* [2017] UKSC 51.
[100] Women's and Equality Committee, 'Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission' (17 July 2019) <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1470/1470.pdf> accessed 12 March 2024, para 193.
[101] As argued by claimant - *R (on the application of Leighton) v the Lord Chancellor* [2020] EWHC 336, [2020] ACD 50, [37].
[102] Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 44(4).
[103] Ibid, s.46(1).
[104] Disability Rights UK, 'Nearly half of everyone in poverty is either a disabled person or lives with a disabled person' (6 February 2020) <https://www.disabilityrightsuk.org/news/2020/february/nearly-half-everyone-poverty-either-disabled-person-or-lives-disabled-person> accessed 12 March 2024.
[105] Women's and Equality Committee, 'Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission' (17 July 2019) <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1470/1470.pdf> accessed 12 March 2024, para 12.
[106] Equality Act 2006, ss. 20-27.
[107] Anna Lawson and Maria Orchard, 'The anticipatory reasonable adjustment duty: removing the blockages?' (2021) *Cambridge Law Journal* 308, 335.

COMPETITION LAW

Competition soft law: Chinese experiences on monopoly challenges

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Introduction

In the recent case of *Federal Trade Commission v. Meta Platforms,*[1] it seems undeniable that the characteristics of digital platforms, such as cross-border operation, dynamic competition, network effect and user stickiness, have drastically increased the severity of the monopoly problem. The overpowering market strength of super-platforms has seriously jeopardized fair competition and technological innovation in the market, while anti-monopoly has been widely regarded as the most effective weapon to regulate super-platforms.[2] However, the EU and China choose hard law and soft law respectively to decline monopoly risk, both leading to effective results in their respective fields.[3] Aimed at exploring the adaptation of the competition soft law as the Chinese experiences in EU monopoly regulation, this short article will be divided into three sections. The first part will focus on the definition and overviews of soft law, whilst the subsequent sections will elaborate on the mechanisms and basic types of soft law and the benefits of soft law for EU antitrust regulation.

The definition and overviews of soft law

Soft law is a term that is commonly used to describe what was previously known as 'near-law.' It represents a set of norms that do not have formal legal consequences, but intends to guide individuals regarding their actions.[4] Despite not being binding in the traditional sense, it is capable of producing legal effects, qualifying as a type of imperfect norm. Soft law instruments that embody these norms generally share certain broad characteristics, whether at domestic or international levels. First, they seek to influence or regulate the conduct of those to whom they are directed, thereby encouraging compliance. Second, they do not, by themselves, impose obligations or confer rights upon the targeted audience. Third, the form and structure of these instruments bring them closer to resembling legal rules, indicating a certain degree of formalization.[5]

The earliest academic description of soft law stems from an article by Baxter in, 1980, who argues that soft law has the ability to adapt to the needs of all parties, facilitating movement and change.[6] However, Beil and Klabber criticized, respectively, the 'relative normativity,[7] and the definition of soft law,[8] due to the fact that the conventional role assigned to soft law can be adequately met by the conventional binary conception of law. Chinkin's work in 1989 exhibits a great deal of foresight, as she evaluates the positive and negative aspects of soft law. Her analysis takes into consideration the impact of soft law on both law-making procedures and the implementation and adjudication of international law.[9] Abbott and Snidal's 2000 work goes a step further, as they transcend disciplinary boundaries and criticism to argue that the threshold for soft law is reached when legal arrangements are weakened in terms of obligation, precision, or delegation.[10] D'Aspremont and Aalberts' 2012 scholarship on the state of the

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[1] *FTC v. Meta Platforms Inc*., No. 5:22-cv-04325-EJD, 2023 U.S. Dist. LEXIS 222277 (N.D. Cal. Jan. 31, 2023)

[2] Jin Sun, 'Anti-Monopoly Regulation of Digital Platforms' [2022] *Social Sciences in China* 70

[3] Kena Zheng, Francis Snyder, 'China and EU's wisdom in choosing competition soft law or hard law in the digital era: a perfect match?' [2023] China-EU Law Journal 26.

[4] Snyder, Francis, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' [1993] *Modern Law Review* 64.

[5] Stephen Daly, 'The Rule of (Soft) Law' [2021] *King's Law Journal* 4.

[6] Judge R R Baxter, 'International law in 'her infinite variety' [1980] *International and Comparative Law Quarterly* 566

[7] Weil Prosper, 'Towards Relative Normativity in International Law?' [1983] *American Journal of International Law* 440.

[8] Jan Klabbers, 'The Redundancy of Soft Law' [1996] *Nordisk Journal of International Law* 168.

[9] Christine M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' [1989] *International and Comparative Law Quarterly* 851

[10] Kenneth Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' [2000] *International Organization* 422.

art for soft law offers an invaluable analysis of different legal theories on international law and seeks to unearth answers to the questions that soft law poses.[11] The study of soft law was first concentrated in the field of international law studies, while at the beginning of the 21st century there were several researches focusing on the application of soft law on the economic area, which helped to form the basis of Chinese antitrust regulation.

Mechanisms and types of Chinese soft law in the economic sphere

The basis for the generation of soft law in the economic field is to respond to the double failure problem[12] Purpose-oriented organizations such as the government, social middle-tier organizations, and market players participate in decision-making on typical and recurrent economic issues. They formulate and apply laws through cooperative systems for economic governance, thereby building a purpose-oriented legal order.[13] From the perspective of sociology, there are structural modernization risks in the field of market operation and economic regulation. The legal system launched by the government (including hard law and soft law) and the legal system launched by non-official organizations (i.e. soft law), jointly constitute the legal pluralism in industrialized society or post-industrial society. In China, the political foundation for the generation of soft law in the economic field is consultative democracy. Consultative democracy indicates that in the governance of public affairs, state organs, civil organizations, or individual citizens consider public policies with collective binding force through dialogue, consultation, and other means, and confer legitimacy on hard law or soft law containing the intention of public policies.[14]

Moving to the types of Chinese soft law, the conventions of politics and law in the economic field exist in both countries with statute law, and countries with case law.[15] In addition, public policies in the economic field play their roles in their respective areas in the forms of market access policies, competition policies, consumer policies, industrial policies, regional economic policies, fiscal and tax policies, monetary policies, and distribution policies, and are formulated and implemented in the forms of outline, plan, guidance, suggestion, requirement, and demonstration. Another type that is more common in China are self-regulatory norms. In practice, this is manifested in company statutes, codes of conduct, codes and rules of practice, self-regulatory conventions, and which embody the phenomenon of rules 'expressed on the basis of common interest and mutual trust'. Lastly, professional standards belong to soft law; depending on the subject of formulation, they can be divided into standards formulated by State institutions, standards formulated by associations and guilds and recognised by State institutions, as well as standards formulated by social autonomous organisations. In the context of public governance, professional standards play an active role in regulating, restraining, guiding and evaluating market regulation and macroeconomic control.

Structural analysis and operational logic of soft law norms in the field of competition law

A structure of soft law in the field of competition law is generally based on rules of rights and obligations, or rules of powers and duties. The Guidelines on Overseas Antimonopoly Compliance for Enterprises issued by China, for example, contain clear provisions on the obligation to cooperate with overseas antimonopoly investigations and the right to respond to investigations. Another type of structure is based on responsiveness or purpose. Purpose-based law is characterised by the 'result-oriented' nature of its operation. In contemporary society, it is the purposive, or responsive law that has been adapted to the need to resolve socio-economic conflicts; and purposive legal thinking has become an indispensable structural element in both the soft and hard law of this type of law. Furthermore,

[11] Jean D' Aspremont and Tanja Aalberts, eds. 'Symposium on Soft Law' [2012] *Leiden Journal of International Law* 372.
[12] Philippe Nonet, Philip Selznick, and Robert A. Kagan, *Law and Society in Transition: Toward Responsive* Law (Transaction Publishers 2001).
[13] Teja Sukmana, Zahrah Salsabillah Ashari and Yadi Darmawan, 'Responsive Law and Progressive Law: Examining the Legal Ideas of Philip Nonet, Philip Selznick, and Sadjipto Raharjo' [2023] *Peradaban Journal of Law and Society* 93.
[14] Eliantonio, Mariolina and Stefan Oana, 'The Elusive Legitimacy of EU Soft Law: An Analysis of Consultation and Participation in the Process of Adopting COVID-19 Soft Law in the EU Special Issue on COVID-19 and Soft Law' [2021] *European Journal of Risk Regulation* 159.
[15] Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' [2008] *Modern Law Review* 853.

according to Gunther Teubner's systems theory, the auto-poietic core is a structural element of soft law in the economic sphere. The term auto-poietic is derived from biology and is used in jurisprudence to mean that the legal system is capable of self-observation, self-adjustment, self-description, self-constitution and self-reproduction. In the context of public governance of platform enterprises, the strengthening of civil self-governance and democratic participation has been realised at the level of the competition law system, which ensures the resilience of the legal system, composed of both soft and hard law, to adapt to the needs of society.

When it comes to the legislative side, soft law can fill the gaps in specific areas of hard law and serve as experimental legislation to accumulate experience for the formulation of hard law. On the law enforcement side, soft law can enhance the operability of hard law through quantification and refinement, so as to improve the effectiveness of hard law. On the judicial side, judicial practice, jurisprudence and legal principles all have an impact on the application of hard law. For example, China's State Council issued the Guidelines of the Anti-Monopoly Committee of the State Council on the Definition of Relevant Markets in 2009.

How EU can increase the application of competition soft law on the present basis

Most monopoly behaviour in the digital economy era are innovative and hidden, and it is difficult to regulate all new monopoly behaviours through a certain number of classifications. At the same time, conflicts may arise between the application of the EU Digital Market Act 2023 and EU competition law, as some Member States have strengthened their own antitrust laws. For example, the regime of significant cross-market competitive effects under s.19a of the German Anti-Restrictive Competition Act conflicts with the gatekeeper regime in the EU Digital Markets Act. The low threshold for application of the Digital Market Act, whereby a gatekeeper's conduct can be found to be unlawful without proof of anti-competitiveness, and Germany's granting of a party's right to a defence based on the objectivity of the conduct, cause the risk of fragmentation of the EU's antitrust regulation of the digital economy. Soft law, as a more flexible legal norm, is an effective solution to the lack of harmonisation of regulations across regions. Thus, the introduction of soft law incentives in the EU has a certain degree of feasibility.[16]

Where appropriate, the EU could introduce specialised government-led incentive compliance guidelines. Objectively speaking, the necessity for platform operators in the digital economy in order to open up their own important facilities to other competing operators, needs to be viewed in a prudent manner, and a lack of attention may lead to the suspicion that antitrust law is overly interfering with the market.[17] Therefore, the author believes that adopting the soft law of compliance guidelines to regulate the monopolistic behaviour of platform enterprises can not only maintain the appropriate intervention of the law in market behaviour, but also expand the innovation space of enterprises. In the process of formulating soft law, the joint participation of multiple subjects should be emphasised, so that its legal rules on digital platforms better reflect the will of the majority of subjects. In addition, the effectiveness of soft law norms should be further clarified, and it is recommended that the nature of soft law be determined in the form of legislation or judicial interpretation, and that the links between it and laws, regulations, rules and relevant policies be reconciled, with a view to better serving judicial practice.

Regulatory bodies can also encourage companies to participate in signing self-regulatory conventions. Taking China as an example, "antitrust guidelines on the country's platform economy",[18] as a representative of the basic rules of platform operation, the self-regulation agreement jointly signed between platforms and the related compliance management rules present a good role in management. Besides, the self-regulatory mechanism of digital platforms can be constructed to solve the problem of

[16] Commission (2015) 'Better regulation for better results–An EU Agenda' (Communication) COM (2015) 215 final.
[17] Joskow P. L., Rose N. L., The effects of economic regulation (Elsevier Science Publisher 1989)
[18] Xinhua, 'China unveils antitrust guidelines on platform economy', (english.www.gov.cn, February 7, 2021) <https://english.www.gov.cn/policies/latestreleases/202102/07/content_WS601ffe31c6d0f72576945498.html>accessed 12 March, 2024.

platform monopoly and guide platform enterprises to use their private power correctly.[19] Platform rules should be formulated in a fair, just and open manner, neither violating the law nor disregarding public order and morality due to excessive consideration of traffic and attention. At the same time, platform rules should be clearly expressed through language and text, avoiding ambiguity. Engineers and algorithms will be relied upon to implement the platform rules, ensuring that the algorithms operate transparently; called transparency of implementation.[20] At the same time, the platform should establish an internal and external self-reflection mechanism for the whole process, and should face all platform users and assess and account for its rules on time, so as to keep abreast of the times, and with a view to improving the platform's rules and transparency mechanism.

One of the feasible options from soft law is that starting from tax incentives, enterprises can be graded into four levels - A, B, C, and D - based on the construction of anti-monopoly compliance systems and the supervision of competition policy compliance on digital platforms. Different tax policies can then be implemented for different companies, ultimately achieving counteracting competition distortions.

Conclusion

In summary, soft law governance in China's economic sphere has gradually emerged in the course of the reform of the economic system and the construction of a nation based on the rule of law. Although research on soft law governance in the field of competition law is not in-depth, studies related to this area are undoubtedly of great value to the accumulation of theoretical resources and the enrichment of the results of regulatory practice in dealing with monopoly risks in the EU.

[19] Michael A Cusumano, Annabelle Gawer, David B Yoffie, 'Can Self-Regulation Save Digital Platforms?' [2021] *Industrial and Corporate* Change 1259.
[20] Joseph Antel and Barbu-O'Connor et al, 'Effective Competition in Digital Platform Markets: Legislative and Enforcement Trends in the EU and US' [2022] *European Competition and Regulatory Law Review* 35.