

Discrimination on the grounds of disability: The UNCRPD and EU law

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The principle of non-discrimination [on the basis of disability] has an established history in Europe and multiple practical results [...] although the application on the ground is diverse

Tymowski, J. (2016), *The Employment Equality Directive: European Implementation Assessment*, European Parliamentary Research Service.

Structure

*The EU and the
CRPD*

*The CRPD: Provisions &
latest developments*

*A comparison between
EU law and the CRPD*

*Conclusions: Impact and
State of Play of the
CRPD in EU Law*

SECTION I:

The EU and the CRPD: The Legal Status of the CRPD and its Role as an Interpretive Tool for EU Law

The EU Legal Framework on Disability

- **Article 21 of the EU CFR** enshrines the right to non-discrimination, including on the grounds of disability, and **Article 26** contains the right of persons with disabilities to benefit from measures for their independence, social and occupational integration and participation in the community
- **Article 10 TFEU** contains the horizontal non-discrimination clause, while Article 13 EC (**Article 19 TFEU**), introduced by the Amsterdam Treaty, enacts a general legislative power to tackle (i.a.) disability discrimination
- The Amsterdam Treaty Declaration: Union institutions must take account of the needs of persons with disabilities in drawing up measures under former Article 95 EC (now **Article 114 TFEU**)

Status of the CRPD in EU Law

- In December 2010, the EU concluded (ratified) the CRPD: Council Decision 2010/48/EC.
- Disability equality/combating discrimination - an area of shared competence
- The UN Convention is a “mixed agreement” - an international agreement covering fields in which both the EU and the Member States have competence to act
- The CRPD forms an ‘integral part of EU Law’ (Cases C-335/11 C-337/11).
- The CRPD ‘enjoys a quasi-constitutional status in the EU legal system, beneath the Treaties but above secondary law’ (Favalli and Ferri, 2016)

Interpretive Role of the CRPD in EU Law and Effect of Ratification

- The CJEU must take the UN Convention into account when interpreting EU secondary legislation
- The CJEU recognises the existence of this duty of consistent interpretation, due to the ‘sub-constitutional’ rank of international agreements in the EU legal framework (Favalli and Ferri, 2016)
- All EU institutions must comply with the CRPD in developing, implementing and interpreting EU law

Secondary Legislation on Disability: Directive 2000/78

Indirect discrimination - Article 2(2)b(ii):

*“Indirect discrimination shall not be taken to occur when as regards **persons with a particular disability**, the employer or any person or organization to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice”*

Reasonable Accommodation - Article 5:

“employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer [...]”

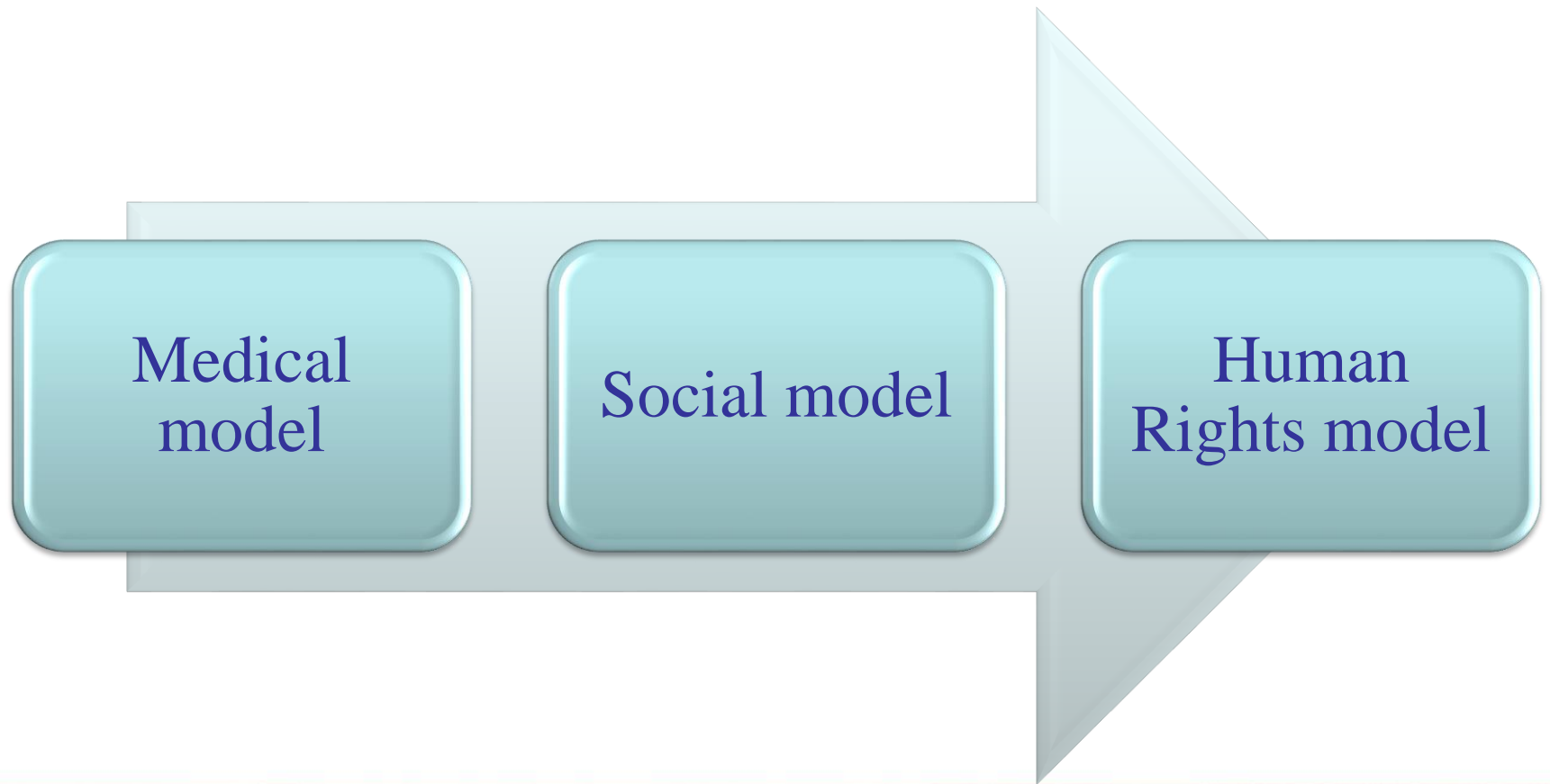
Secondary Legislation on Disability: Directive 2000/78

- **Recital 17:** This Directive 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
- **Recital 20:** Appropriate measures should be provided i.e. effective and practical measures to adapt the workplace to the disability
- **Recital 21:** Disproportionate burden: account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organization or undertaking and the possibility of obtaining public funding

SECTION 2:

The CRPD: Principles, Provisions and General Comment No. 6

Models of Disability: The 'Paradigm Shift'



Medical Model to the Social Model

- The medical model focused on the actual impairment or functional limitation and attempts to 'cure' the person with a disability so that he/she can fit in with the 'norm'
- The social model recognises that disability stems from barriers in society and from the failure of society to adapt to the needs of the person with a disability

Human Rights Model

- The human rights model recognises disability as a 'social construct'
- It acknowledges the fact that persons with disabilities are holders of rights on an equal basis with others and that they are not objects of charity
- It recognises that 'disability is one of several layers of identity (*General Comment No. 6; Degener, 2017*)'

Models of Equality



Formal
equality

Substantive
equality

Inclusive
equality

The CRPD's 'new model of equality': Inclusive Equality (General Comment 6)

**A fair
redistributive
dimension:**

to address socioeconomic disadvantages

**A recognition
dimension:**

to combat stigma, stereotyping & prejudice and to recognise the dignity of human beings and their intersectionality

**A participative
dimension:**

to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society

**An
accommodating
dimension:**

to make space for difference as a matter of human dignity

The Prohibition of Disability-Based Discrimination in the CRPD: Article 2 CRPD

➤ Article 2 CRPD: "Discrimination on the basis of disability" means:

Any distinction, exclusion or restriction *on the basis of disability* which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, *on an equal basis with others, of all human rights* and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes *all forms of discrimination, including denial of reasonable accommodation*

The Duty of Reasonable Accommodation

- Article 5(3): States Parties are required to ensure that reasonable accommodation is provided
- Article 2 CRPD defines ‘reasonable accommodation’ as entailing:

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms

Discrimination ‘on the basis of disability’ (GC No. 6)



SECTION 3:

Comparison of EU Law and the CRPD:

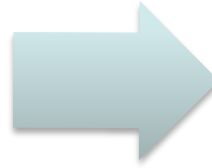
*The Concept of Disability and Reasonable
Accommodation*

The CRPD's Conceptualisation of Disability

- The CRPD contains no fixed or explicit definition of disability
- A definition of disability is absent from Article 2 CRPD, which contains the Convention's definitions
- The Convention provides an 'open-ended' conceptualisation of disability in the Preamble and in Article 1 CRPD (Broderick, 2015; Favalli and Ferri, 2016)

Recital (e) of the CRPD Preamble recognises that:

- *Disability is an evolving concept that results from the **interaction between** persons with **impairments** and attitudinal and environmental **barriers** that hinders their full and effective **participation in society** on an equal basis with others.*



Article 1 of the CRPD - a 'non-definition of disability':

- *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.*

Concept/Definition of Disability under EU Law

- Directive 2000/78 prohibits discrimination on the grounds of disability, but it does not define the concept of disability (similarly to the other protected grounds)
- This has led to a number of preliminary references to the CJEU which seek guidance on how to interpret the concept of disability
- The question arises as to whether the CJEU's definition of disability is compatible with the CRPD (Waddington, 2015, 2016 and 2017 and also Lourenço/Pohjankoskiin, 2018)

Main CJEU Case Law on Disability

Chacón Navas v Eurest Colectividades SA: C-13/05

Coleman v Attridge Law (2008): 303/06



HK Danmark (Ring and Skouboe Werge): C-335/11 and C-337/11.

Glatzel v Freistaat Bayern: C-356/12



Z v A Government Department and the Board of Management of a Community School: C-363/12

Kaltoft v. Kommunernes Landsforening: C-354/13



Daoudi v Bootes Plus SL and Others: C-395/15

Ruis Conejero: C-270-16

Milkova: C-406/15

Chacón Navas, C-13/05

- The Court defined disability under the Employment Equality Directive as:

‘a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life’

- For any limitation to be regarded as a ‘disability’, ‘it must be probable that it will last for a long time’ (para. 45)
- The Court also held that for the purposes of the Directive, ‘disability’ is different from ‘sickness’, and there was nothing in the Directive ‘to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness’ (para. 46)

Remarks on Chacón Navas, C-13/05

- The definition developed by the Court in *Chacón Navas* was based on the medical model of disability
- According to the definition developed by the Court, the cause of the disadvantage encountered by the person with a disability was the functional limitation or ‘impairment’ that hindered participation of Ms. Navas in the working environment
- Therefore, the Court ruled that the ‘problem’ lay with the impaired individual, and not with the failure of the environment to adapt to her needs

HK Danmark (Ring and Skouboe Werge), Case C-335/11 and Case C-337/11

- The Court held that the concept of ‘disability’ must be understood as:

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

Remarks on HK Danmark (Ring and Skouboe Werge)

- A positive influence of international law: The CJEU held that, under Article 216(2) TFEU, where international agreements are concluded by the EU, they are binding on its institutions and prevail over Union acts (para. 28)
- In addition, given the primacy of international agreements over instruments of EU secondary law, such law must be interpreted, as far as possible, in a way that is consistent with international agreements (para. 28)
- The Court cited preamble. recital e) and Article 1 CRPD in developing its definition of disability
- Move away from the medical model, but is the definition really compatible with the CRPD when applied in practice?

Kaltoft v. Kommunernes Landsforening (2015), Case C-354/13

- *Kaltoft* sought to establish, *i.a.*, whether obesity can be deemed to fall within the definition of ‘disability’ under the Employment Equality Directive.
- The Court held that obesity constitutes a ‘disability’ within the context of the Directive, where it satisfies the definition laid out in *HK Danmark*: *a limitation resulting from an impairment which, in interaction with other barriers, hinders participation in professional life*
- In *Kaltoft*, the Court gave some examples of relevant limitations applicable in the context of obesity: if the obesity of the worker hindered that participation on account of reduced mobility or the onset of medical conditions preventing that person from carrying out work (para. 60)

Remarks on Kaltoft, Case C-354/13

- On the one hand, it is positive that the CJEU is expanding its approach to disability rights to potentially include obesity
- On the other hand, by requiring that a person must experience a limitation resulting from their impairment, this may serve to exclude certain types of discriminatory practices - such as, stereotypes, prejudicial attitudes (Waddington, L., 2015)

Z v. A Government department, Case C-363/12

- The CJEU affirmed the importance of an interpretation of the Directive which is incompatible with the CRPD and restated its definition of disability set out in *HK Danmark*
- The Court held that, although Ms. Z had a recognised limitation resulting from impairment (inability to conceive a child naturally), this did not amount to a disability for the purposes of the Directive, because it did not impact on her ability to work
- Thus, the Court denied Ms. Z employment-related benefits.

Remarks on Z v. A Government department, Case C-363/12

- The CJEU's definition of disability is narrower than the CRPD, which refers to impairments which in interaction with various barriers may hinder full and effective participation **in society**
- The CJEU's narrow approach leads to individuals being denied employment-related benefits that would normally be covered by the Directive on the grounds that they do not meet the definition of disability adopted by the Court (Waddington, 2015)

Mohamed Daouidi v Bootes Plus SL, C-395/15

- The CJEU's definition of disability requires that the relevant impairment be 'long-term', indicating that both permanent and long-lasting conditions are covered
- In *Daouidi*, the CJEU provided guidance, stating that a limitation may be deemed "long term" if the incapacity of the person concerned does not display a 'clearly defined prognosis as regards short-term progress or the fact that that incapacity is likely to be significantly prolonged before that person has recovered' (paras. 56/57)
- The CJEU placed emphasis on 'objective evidence': 'documents and certificates relating to that person's condition, established on the basis of current medical and scientific knowledge and data' (para. 57).

Remarks on Mohamed Daouidi v Bootes, C-395/15

- The Court adopted a narrow medical view on the types of evidence that should be provided in order to demonstrate that an individual is entitled to protection under the Directive
- Individuals have to show their capacity level
- Difficulty for claimants to provide such evidence, particularly those with psychosocial disabilities (Waddington, 2017)
- Difficulty for courts to assess the so-called ‘objective evidence’ (Waddington, 2017)

Reasonable Accommodation: EU law and the CRPD

- The CRPD and the CRPD Committee clearly define reasonable accommodation as a form of discrimination (*sui-generis*)
- EU law does not: Article 5 of the Directive 2000/78 simply establishes an obligation to provide reasonable accommodation
- The CJEU has not commented on the classification of the reasonable accommodation duty, although it did have the opportunity to do so in *HK Danmark (Ring and Skouboe Werge)*
- The 2008 proposal for a new non-discrimination directive, *inter alia*, on the ground of disability, in the relevant fields beyond employment does define an unjustified failure to provide reasonable accommodation as a form of discrimination

Reasonable Accommodation: EU law and the CRPD

- The CRPD Committee has clearly stated that the reasonableness of an accommodation is not to be assessed with regard to costs and that the cost issue falls under the disproportionate/undue burden defence (para. 25a).
- Instead, the reasonableness of an accommodation is ‘a reference to its relevance, appropriateness and effectiveness for the person with a disability’ (General Comment No. 6, para. 25(a))
- By way of contrast, the Court of Justice does consider the concept of ‘reasonableness’ under the cost heading (*HK Danmark*, para. 58)
- Several EU Member States also follow this approach – the CJEU should ensure consistency with the CRPD Committee’s interpretation of the duty of reasonable accommodation

SECTION 4:

*Concluding Remarks: Impact of the
Convention on EU Law and State of Play*

Impact of the CRPD on EU Law and State of Play

- The CRPD has had quite considerable impact on the interpretation of EU law by the CJEU, particularly with regard to the concept/definition of disability – an expanding social model approach
- However, there are still concerns in the application of the Court's definition
- The CPRD is driving wide-ranging policy and legislative changes in the EU Member States
- The EU monitoring framework collects data and continues to check that EU law and its application are coherent with the CRPD
- The proposed non-discrimination directive has been subject to a number of revisions in light of the EU's ratification of the CRPD in 2010

Impact of the CRPD on EU Law and State of Play

- In its Concluding Observations on the EU's initial report, the CJEU has recommended that:
 - The EU should adopt the proposed directive on equal treatment, extending protection against discrimination to persons with disabilities, including by the provision of reasonable accommodation in all areas of its competence.
 - The Committee has expressed concern that the Racial Equality Directive, the Gender Equality Goods and Services Directive and the Gender Equality Employment (Recast) Directive fail explicitly to prohibit discrimination on the grounds of disability and to provide reasonable accommodation
 - The EU should ensure that all forms of disability discrimination is prohibited, including multiple and intersectional discrimination

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THANK YOU FOR YOUR ATTENTION

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