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The concepts of disability and reasonable accommodation in EU law and the UNCRPD

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- Introductory Remarks
- Definition of Disability
- Reasonable Accommodation
- Concluding Remarks



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Introductory Remarks

The original involvement of the former European Community in the area of disability was limited to action programmes intended to exchange information, and soft law.

The Treaty of Amsterdam introduced Art. 13 EC (now **Art. 19 TFEU**) which enabled the Council to take appropriate action to **combat discrimination based *inter alia* on disability**

Article 21(1) EU CFR lists disability as one of the grounds on which discrimination must be prohibited. Article 26 EU CFR entails a specific recognition of the rights of persons with disabilities

Directive 2000/78 implements the principle of equal treatment in the field of employment, and prohibits discrimination on various ground, including disability. It includes a **duty to provide RA**, and a provision on **positive actions**

The UNCRPD in the EU Legal Order

The decision on the conclusion of the UNCRPD was adopted by the Council in November 2009 (**Council Decision 2010/48/EC**).

The UNCRPD is a **mixed agreement**



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The UNCRPD in the EU Legal Order

The UNCRPD forms integral part of EU law, and in hierarchical terms, it is

- inferior to the provisions of the Treaties
- but superior to secondary EU law



Secondary EU law must be interpreted in a manner consistent with the UNCRPD



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The CJEU Jurisdiction

The CJEU has the jurisdiction to interpret mixed agreements (and so the UNCRPD) under Art. 267 TFEU (*inter alia* Case C-53/96, *Hermes*).

- “... the Court has **jurisdiction** to define the obligations which the [EU] has assumed and those which remain the sole responsibility of the Member States” (Case C-240/09 *Lesoochránárske zoskupenie VLK*)

The CJEU Jurisdiction

The Court has jurisdiction to rule on the validity of EU measures under Art. 267 TFEU *vis a vis* an international agreement, but the legality of a EU measure can be called in question on grounds of breach of international agreements to which the EU is a party only if the provisions of those agreements have direct effect.

(Lack of) Direct Effect

“... it must be held that the **provisions of [the UNCRPD] are not, as regards their content, provisions that are unconditional and sufficiently precise [...]**, and that they therefore **do not have direct effect in European Union law**. It follows from this that the validity of Directive 2000/78 cannot be assessed in the light of the UN Convention” (Case C-363/12, *Z. v A Government Department*)



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UNCRPD as EU law...

“...The principle of equality, guaranteed by art. 3 of the Constitution, which finds, with regard to disabled persons, further recognition in the aforementioned United Nations Convention on Persons with Disabilities, to which the European Union has also joined ..., and which therefore binds the Italian legal system with the specific features of European Union law, limited to the areas of competence of the Union itself, while outside those powers it constitutes an international obligation, pursuant to art. 117, first paragraph...” (Italian Constitutional Court Judgement 236/2012

<http://www.giurcost.org/decisioni/2012/0236s-12.html>)



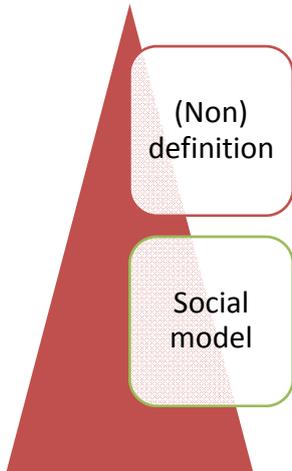
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The Definition of Disability

From the medical model to the social model

Article 1(2) UNCRPD

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.



(Non)
definition

Social
model

S.C. v Brazil - Communication No. 10/2013

- “...The Committee considers that the *difference between illness and disability is a difference of degree and not a difference of kind*. A health impairment which initially is conceived of as illness can develop into an impairment in the context of disability as a consequence of its duration or its chronicity. A *human rights-based model of disability* requires the *diversity* of persons with disabilities to be taken into account (preamble, para. (i)) together with the *interaction* between individuals with impairments and *attitudinal and environmental barriers* (preamble, para. (e)).”



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Definition of Disability in EU law

EU legislation, to date, does not include a definition of disability. In State aid law, namely in the 2014 GBER a definition of 'workers with disabilities' has been included.

In the non-discrimination field, the absence of a definition of disability as a ground of discrimination has proven problematic because a uniform definition across the EU is of paramount importance in determining the actual scope *ratione personae* of Directive 2000/78/EC



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Case C-13/05, *Sonia Chacón Navas v. Eurest Colectividades*

“The concept of ‘disability’ is not defined by Directive 2000/78 itself. Nor does the directive refer to the laws of the Member States for the definition of that concept.

*It follows from the need for **uniform application of Community law** and the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community, having regard to the context of the provision and the objective pursued by the legislation in question”*



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Case C-13/05, *Sonia Chacón Navas v. Eurest Colectividades*

*“...the concept of ‘disability’ must be understood as referring to a **limitation** which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.”*



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C-335/11 and C-337/11, HK Danmark: the Paradigm Shift

Ring and Werge
'arguably marks a paradigm shift in the Court's case-law. In that case, the EU concept of disability was explicitly aligned with that of the UN Convention' (Para 88, Case C-363/12 Z)



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C-335/11 and C-337/11, HK Danmark: the Paradigm Shift

*"...the concept of 'disability' must be understood as referring to 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....*

*...it does not appear that Directive 2000/78 is intended to cover only disabilities that are congenital or result from accidents, to the exclusion of those caused by illness. **It would run counter to the very aim of the directive, which is to implement equal treatment, to define its scope by reference to the origin of the disability"***



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Consistent interpretation



Case C-312/11, *Commission v. Italy*

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

Case C-354/13, *Kaltoft*

Case C-395/15, *Daouidi v Bootes*

Case C-406/15, *Milkova*

Case C-270/16, *Ruiz Conejero*

Case C-363/12 *Z. v A Government Department*

'[w]hereas the UN Convention refers broadly to participation in society, **the Court's definition covers only participation in professional life**'.

Case C-354/13, *Kaltoft*

- Mr Karsten Kaltoft worked for 15 years for the Municipality of Billund (Denmark) as a childminder
- During his employment, consequent to his recognised obesity, Kaltoft was provided financial assistance to fund fitness and physical training sessions
- Mr Kaltoft was dismissed in November 2010, and decided to bring an action for unlawful discrimination. He alleged that he was dismissed on account of his obesity

Case C-354/13, *Kaltoft*

Can obesity
discrimination fall
within the scope of
the EU concept of
disability
discrimination under
Directive
2000/78/EC?

Case C-354/13, Kaltoft

*“...It should be noted that obesity does not in itself constitute a ‘disability’ within the meaning of Directive 2000/78....However, **in the event that, under given circumstances, the obesity of the worker concerned entails a limitation which results in particular from physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one, obesity can be covered by the concept of ‘disability’ within the meaning of Directive 2000/78”***



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Case C-270/16, Ruiz Conejero

*“...in the event that, in given circumstances, the **obesity** of the worker concerned entails a limitation of capacity such as that referred to in the preceding paragraph of this judgment, such a state is covered by the concept of ‘**disability**’ within the meaning of Directive 2000/78”*



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C 395/15, Mohamed Daouidi

- The CJEU further considered the concept of disability, and discussed the assessment of such a “long-term limitation”



C 395/15, Mohamed Daouidi

- The referring court asks, in essence, whether Directive 2000/78 must be interpreted as meaning that the fact that a person finds himself or herself **temporarily unable to work**, as defined in national law, for an **indeterminate** period of time by reason of an accident at work implies, by itself, that the limitation of that person’s capacity can be defined as **‘long-term’**, within the meaning of ‘disability’ under that directive.

C 395/15, Mohamed Daouidi

*“...the evidence which makes it possible to find that such a limitation is ‘long-term’ includes the fact that, at the time of the allegedly discriminatory act, 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; and in the context of the verification of that ‘long-term’ nature, the referring court must base its decision on all of the objective evidence in its possession, in particular on documents and certificates relating to that person’s condition, established on the basis of current **medical and scientific knowledge** and data”*



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Reasonable Accommodation

Article 2 UNCRPD

*“Reasonable accommodation” means 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”*



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Reasonable Accommodation in the UNCRPD

Individual-oriented nature of the duty

Ex nunc duty

It is relevant with regards to all substantive rights

Effectiveness of the modifications or adjustments in removing the disadvantage



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Reasonable Accommodation in the UNCRPD

In *Jungelin v Sweden* (Communication No. 5/2011), that States Parties **enjoy a margin of discretion** in the formulation of reasonable accommodation duties



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Article 5 of the Directive 2000/78

*"In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that 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. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."*



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Reasonable Accommodation

“...the rationale behind the requirement of **reasonable accommodation** is to **strike a just balance** between the needs of persons with disabilities and those of the employer”
(Opinion AG Wahl, Z v A Government Department, para 105)

Reasonable Accommodation



Technical solutions



Organisational arrangements

Broad Notion of Reasonable Accommodation



- ❖ The Court has held that
 - ❖ the expression 'reasonable accommodation' must be given a **broad meaning** having regard, inter alia, to Article 2 UNCRPD
 - ❖ Reasonable accommodation includes organisational measures, and the term 'pattern' of working time must be understood as including a reduction in working hours

Scope *Ratione Temporis*

“It is plain that **that obligation will be triggered where the employee has told his employer of his disability and its extent, together with all relevant surrounding circumstances**. Provided no disproportionate burden is placed upon him, the employer will then be in a position to take active steps to assist the employee and to provide reasonable accommodation. By virtue of those measures, the employee will have been assimilated into the workforce” (Opinion AG Sharpston, Case C-270/16 *Ruiz Conejero*, para 37)

Dialogue with the Employer

“Even where the **disability is manifest**, however, that does not mean that the employer will in every case be aware of the appropriate measures ... that may be required in order to provide reasonable accommodation for the employee. **The employer may ask the employee to provide further details**, thereby enabling support and assistance to be provided where possible. If the employee refuses to provide that information or is unwilling to communicate it, he cannot be compelled to do so. ... In such circumstances, the employer will be limited in what he can do to taking steps that are obvious. The result of that action may, or indeed may not, achieve the result of assimilating the employee into the workforce. There can, though, be no duty on the employer to go any further.” (Opinion AG Sharpston, Case C-270/16 *Ruiz Conejero*, para 37)



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Disproportionate Burden

(21) To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.



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Concluding Remarks

Dialogue between Courts

Ring and Werge has opened a “Pandora’s box”. A series of preliminary references from national judges about the meaning of disability have in fact been raised since then, which the decision in *Daouidi* is not likely to end.

Reference to
the UNCRPD

Ambiguities

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Thank you for your attention!



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