

Discrimination on the grounds of disability: the UNCRPD of 13.12.2006 and EU law

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Outline

- Legislative evolution
- Relationship between the UNCRPD and EU law
- Protection granted by EU law on disability discrimination - Directive 2000/78/EC - and by the UNCRPD
- The definition of disability
- Reasonable accommodation
- Conclusions

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The European Convention on Human Rights

- **European Convention on Human Rights - Prohibition of discrimination (Article 14):** "The enjoyment of the rights and freedoms set forth in this Convention shall be secured **without discrimination** on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or **other status**"
- Although disability is not explicitly included among the discrimination grounds, it has been included by ECHR case law in the notion of "other" grounds within the meaning of Article 14 (see judgment of 30 April 2009, *Glor v. Switzerland*, no. 13444/04).

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The Treaty of Amsterdam – Charter of Fundamental Rights - The Framework Directive

- **1999: The Treaty of Amsterdam** (Article 13, now **Article 19 TFEU**) provides for the first time for the **prohibition of discrimination** on grounds of sex, race, ethnic origin, religion, belief, age, sexual orientation and **disability**.
- **2000: CFR - Non-discrimination (Article 21):** "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, **disability**, age or sexual orientation **shall be prohibited**".
- **2000: CFR - Inclusion of persons with disabilities (Article 26):** the EU "recognises and respects the **right of persons with disabilities** to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community".
- **Directive 2000/78/EC (the so-called Framework Directive):** combating **discrimination based on religion or belief, disability, age or sexual orientation, in employment and occupation**

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The Lisbon Treaty

- **2009:** The **Lisbon Treaty** leaves unchanged, in **Article 19 TFEU**, the provision that enshrines the EU's competence to "combat discrimination based on sex, racial or ethnic origin, religion or belief, **disability**, age or sexual orientation".
- In addition, the so-called **horizontal non-discrimination clause** is introduced (**Article 10 TFEU**): "In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, **disability**, age or sexual orientation".
- The aim of the clause, which incorporates the reference to disability, is to integrate the fight against discrimination into all EU policies and actions (obligation of *mainstreaming*).
- **Article 6(1)** also gave the Charter **the same legal value as the Treaties**, thus making it a source of primary law: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000 ... which shall have the same legal value as the Treaties".

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The Ratification of the UNCRPD

- **2009: EU accession to the UN Convention on the Rights of Persons with Disabilities (13.12.2006)**
- Ratification took place by Council Decision 2010/48/EC of 26.11.2009, which was only deposited with the UN on 23.12.2010.
- Entry into force in EU law: 22.01.2011
- **Equality and non-discrimination (Article 5(2)):** 'States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds'.

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Relationship between the UNCRPD and EU law

- The Convention is a «**Mixed Agreement**» - international agreements that the EU negotiates with third parties, the scope of which falls partly within the exclusive competence of the EU and partly within that of the Member States.
- "... mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements in so far as the provisions fall within the scope of Community competence" (CJEU *Etang de Berre* 7.10.2004, Case C-293/2003).
- With ratification, the UNCRPD became an **integral part of EU law** (see CJEU *HK Denmark* 11.4.2013, Joined Cases C-335/11 and C-337/11).
- According to Article 216(2) TFEU, where the EU concludes international agreements, those agreements are binding on its institutions and, consequently, take precedence over acts of the EU itself.
- In the **hierarchy of sources**, the UNCRPD, as a Mixed Agreement, has the rank of **intermediate source**, lower than the Treaties, but higher than the EU secondary legislation.

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Effects of the UNCRPD on EU law – Interpretation tool

- The Court of Justice has consistently stated that the UNCRPD, although an integral part of EU law, has **no direct effect but is merely programmatic in nature**, since its provisions are not unconditional and sufficiently precise, and are subject to the intervention of further acts which are the responsibility of the contracting parties (CJEU 7.11.2013 case C-363/12 *Z. v. Commission of the European Communities*). *A Government Department*, paragraphs 88 et seq.; CJEU 22.5.2014, Case C-356/12 *W. Glatzel v. Freistaat Bayern*, point 69)
- However, the Convention has an important **interpretative effect**, based on the principle of **consistent interpretation** (Article 216(2) TFEU: 'Agreements concluded by the Union shall be binding on the institutions of the Union and on the Member States'), which implies that:
 - 1) EU (and national) legislation must be interpreted in accordance with the UNCRPD (CJEU 11.4.2013 *HK Denmark* cit.; CJEU 7.11.2013 *Z. c.*). *Government Department*; CJEU 4.7.2013 *Commission c. Italy*)
 2. if the text of a provision in secondary legislation is open to multiple interpretations, preference must be given, as far as possible, to that which makes that provision consistent with the rules of the UNCRPD
 3. all Union institutions must comply with the UNCRPD in developing, strengthening and interpreting EU law

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EU law on disability discrimination – Directive 2000/78/EC

- Directive 2000/78/EC aims to establish a **general framework for combating discrimination** based on religion or belief, **disability**, age or sexual orientation as regards **employment and occupation**.
- It considers that discrimination based, inter alia, on disability may undermine the achievement of the objectives of the Treaty, and in particular the **attainment of a high level of employment and of social protection**, raising of the standard of living and quality of life, economic and social cohesion, solidarity and the free movement of persons.

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Directive 2000/78/EC - Scope

- The Directive applies to **all persons**, both in the **public and private sectors**, including bodies governed by public law, as far as it concerns (**Art. 3**):
 - (a) **conditions for access to employment and occupation**, whether employed or self-employed, and to promotion;
 - (b) access to all types and levels of **vocational guidance and training**;
 - (c) **employment and working conditions**, including dismissal and pay;
 - (d) membership of and **involvement in an organisation of workers or employers**.
- It shall not apply to payments of any kind made by State schemes or similar schemes, including State social security or social protection schemes

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Directive 2000/78/EC - Definitions

- **Direct discrimination (Article 2(2)(a)):** where, a person is, has been or would be treated less favourably than a non-disabled person in a comparable situation, on grounds relating to **disability**.
- **Indirect discrimination:** when an **apparently neutral** provision, criterion, practice, act, pact or behaviour puts a **person with a disability at a disadvantage compared with other persons** - Article 2(2)(b)
- **Harassment:** unwanted conduct related to **disability** which violates the **dignity and freedom of a person with a disability**, i.e. which creates an **atmosphere of intimidation, humiliation and hostility** towards that person - Article 2(3)

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Directive 2000/78/EC - Justifications

- **Indirect discrimination** can be justified where (Art. 2(b)):
 - (i) the provision, criterion or practice is objectively justified **by a legitimate aim and the means of achieving it are appropriate and necessary**;
 - (ii) **in the case of persons with a particular disability, the employer is obliged by national law to take appropriate measures to remedy the disadvantages caused by the provision, criterion or practice.**
- **Irrelevance of the subjective element:** the discrimination operates objectively, i.e. on the basis of less favourable treatment of a worker belonging to the protected category, regardless of the intention of the author of that treatment

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Directive 2000/78/EC

Reasonable accommodation for the disabled

- **Art. 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** (cons. 20-21; see below). 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.
- In addition to the prohibition of discrimination against disabled people (negative obligation), the adoption of reasonable accommodation operates both as a **specific justification for indirect discrimination** (Article 2(2)(b), second part) and as a **positive obligation to adopt measures to support the employment integration of disabled people** (Article 5).
- Nothing is said **about the consequences of not taking reasonable measures** (see below)

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UNCRPD - The principle of non-discrimination

- **The principle of non-discrimination (Art. 3 General Principles)** is the key principle of the Convention
- Article 3 should be read in conjunction with **Article 4 General obligations**, which translates the principle into specific obligations on States Parties.
 1. States Parties undertake to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities **without discrimination of any kind on the grounds of disability**. To this end, they commit themselves:
 - ...b) to take all appropriate measures, including legislation, to **modify or abolish existing laws, regulation, customs and practices that constitutes discrimination against persons with disabilities**;
 - (e) to take **all appropriate measures to eliminate discrimination on the grounds of disability** by any person, organisation or private enterprise;
- **Article 5 Equality and non-discrimination** enshrines the **right** not to be discriminated against and the duty of States Parties to ensure that the principle in question is observed in national law.

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UNCPRD - Non-discrimination and equality

- (1) States Parties recognize that all persons are **equal before and under the law** and are **entitled, without any discrimination**, to equal protection and equal benefit of the law.
- 2. **States Parties shall prohibit all forms of discrimination on the grounds of disability** and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
- Beyond the "formal" and "substantial" model of equality
- Adoption of the "**inclusive**" model of **equality** (General Comment no. 6, adopted on 9.3.2018):
 - recognition dimension: recognising the dignity of all human beings and their possible belonging to different categories ("intersectionality"), combating stereotypes, prejudice and violence
 - participative dimension: to affirm the social importance of disadvantaged groups and to promote their effective social participation
 - fair redistribution dimension: solving the problem of economic and social disadvantages
 - the size of accommodations as a means of guaranteeing human dignity

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UNCRPD - The prohibition of discrimination on the grounds of disability

Art. 2 Definitions

- **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 and 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**.

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UNCRPD - Reasonable accommodation

- The **duty to make reasonable accommodations**
- Article 5(3) UNCRPD: In order to promote equality and eliminate discrimination, States Parties shall take all appropriate measures to **ensure that reasonable accommodation is provided.**
- Article 2 of the UNCRPD defines **reasonable accommodation** as **necessary and appropriate** modifications 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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The prohibition of discrimination on the grounds of disability - General Comment No 6 (2018)

- **Direct Discrimination/Indirect Discrimination/Harassment** (including online bullying and related forms, e.g. *cyberhate*)
- **Multiple** discrimination, where a person is discriminated against on two or several grounds
 - ordinary multiple: a person is discriminated against based on two or more characteristics, but each discrimination occurs at different times and is based each time on different characteristics;
 - additive: d. occurs on the same occasion, but based on different characteristics that add to each other while maintaining their own individuality; each characteristic exacerbates discrimination (e.g. young blind worker of foreign nationality whose employer does not grant salary increases either to persons under the age of 35, or to persons with sensory impairments or of different nationalities)
 - intersectional: it is based on several characteristics that interact with each other so that they can no longer be distinguished and separated (e.g. denial to a blind woman of access to family planning services)
- Discrimination against people who have a disability in the present, have had it in the past or have a predisposition to it
- Discrimination **by association**: against persons linked to the disabled
- Discrimination as **denial of reasonable accommodation**

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UNCRPD and EU law in comparison

The definition of disability

- **UNCRPD** - finalistic-relational notion of disability
- **Art. 1 (2): people 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.
- **Preamble, paragraph e):** disability is an **evolving concept** and is the result of the **interaction** between people with **disabilities** and behavioural and environmental **barriers**, which prevent their full and effective **participation in society on an equal basis** with others.
- Overcoming the **"medical" model** of disability, which focuses on the functional impairments and limitations of the individual (= the disabled person is the problem, treatment or care the remedy)
- Adoption of the **"social" model** of disability: disability stems from the barriers imposed by society on the disabled and the failure of society to adapt to their needs
- **Model "of human rights" (General Comment no. 6):** disability is a "social construct" and impairments must not be taken as a legitimate ground for the denial or restriction of human rights; persons with d. are rights holders on an equal basis with others and are not the object of charity; d. is one of several layers of identity

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The concept of disability in EU law

- **Directive 2000/78/EC does not** contain a **definition of disability**
- The **Court of Justice** has played (and still plays) a major role in the definition of disability and its interpretation
- **CJEU 11.7.2006, C-13/05, Chacón Navas**
- **CJEU 17.7.2008, C-303/06, Coleman**
- **CJEU 11.4.2013, Joined Cases C-335/11 and C-337/11, HK Denmark**
- **CJEU 18.12.2014, C-354/13, Kaltoft**
- **CJEU 7.11.2013, C-363/12 Z c. A Government department**
- **CJEU 1.12.2016, C-395/15 Daouidi**
- **CJEU 9.3.2017, C-406/15 Milkova**
- **CJEU 18.1.2018, C-270/16 Ruiz Conejero**

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CJEU 11.7.2006, C-13/05, Chacón Navas

- The Court defines the concept of disability relevant to the Directive as "**a limit which results, in particular, from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life**" (par. 43).
- For a limitation to be covered by the concept of 'disability', it must therefore be likely to be **of long duration** (paragraph 45).
- By using the notion of "disability" the Directive has deliberately chosen a different term from "sickness". A pure and simple assimilation between the two notions is therefore excluded
- A person who has been dismissed by his employer solely on the ground of sickness does not fall within the scope of Directive 2000/78/EC

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Chacón Navas - Critical notes

- The concept of disability given by the Court is based on the medical model of disability
- The cause of the disadvantage is the "impairment" of which an individual is the bearer; and it is the impairment which hinders the individual's participation in professional life.
- According to the Court, therefore, the "problem" is the individual with disabilities and not the fact that the surrounding environment has failed to adapt to the needs of the disabled person.

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CJEU 17.7.2008, C-303/06, Coleman

- It does not follow from the provisions of Directive 2000/78 that the principle of equal treatment is limited to people who themselves have a disability (paragraph 38).
- The principle of equal treatment applies not to a particular category of persons, but by reference to the grounds mentioned in Article 1 (religion or belief, disability, age and sexual orientation).
- The prohibition of direct discrimination provided for by the Directive is not limited only to persons who are themselves disabled.
- Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is caused by the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the prohibition of direct discrimination.

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CJEU 11.4.2013, joined cases C-335/11 and C-337/11, HK Denmark

- The Court, expressly referring to Article 1(2) of the UNCRPD, states that the **concept of 'disability'** in **Directive 2000/78** 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'** (paragraph 38).
- Physical, mental, or psychological impairments must be "**long-term**".

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HK Denmark - Critical remarks

- The Court of Justice abandons the medical model and accepts the **social model of disability**
- Positive reference to paragraph e) of the Preamble and Article 1 of the Convention - it is recognised that "**disability is an evolving concept**" and that it is "**the result of the interaction between people with disabilities and attitudinal and environmental barriers, which prevent their full and effective participation in society on an equal basis with others**".
- Positive impact of international law:
 - 1) Under Article 216(2) TFEU, where the EU concludes international agreements, the latter are binding on its institutions and, consequently, take precedence over acts of the Union itself;
 - 2) The prevalence of international agreements concluded by the EU over secondary legislation requires that secondary legislation be interpreted in such a way as to bring it into line with such agreements as far as possible;
 - 3) Following EU approval, the provisions of the UNCRPD form an integral part of the Union's legal order from the date of its entry into force;
 - 4) the appendix to Annex II to Decision 2010/48 states that Directive 2000/78/EC is one of the acts of the Union concerning matters governed by the UNCRPD, so that it should be interpreted, as far as possible, in conformity with the UNCRPD

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CJUE 7.11.2013, C-363/12 Z v. A Government department

- The Court reiterates the concept of disability expressed in HK Denmark and clarifies that, for the purposes of the Directive, it must be understood as referring not only to the impossibility of exercising a professional activity, but also to a hindrance to the exercise of such an activity (paragraph 77).
- For the purposes of the Directive, the concept of disability presupposes that "the limitation from which the person suffers, in interaction with various barriers, may hinder that person's full and effective **participation in professional life** on an equal basis with other workers" (par. 80).
- "The inability to have a child by conventional means does not in itself, in principle, prevent the commissioning mother from having access to, participating in or advancing in employment" (par. 81); it follows that this condition does not **constitute a disability within the meaning of Directive 2000/78/EC**.

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Z - Critical notes

- The Court seems to recall the medical model of disability and, therefore, seems to narrow the approach compared to that adopted by the UNCRPD
- This narrower approach results in denying the granting of employment benefits, which would normally be within the scope of the Directive, on the sole ground that the condition of the person concerned cannot be covered by the more limited concept of disability adopted by the Court.
- In the present case, the worker in question was a woman without a uterus who had been denied paid leave equivalent to maternity or adoption leave after the birth of her biological child by means of a surrogacy contract.

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CJEU 18.12.2014, C-354/13, Kaltoft

- EU law does not enshrine any general principle of non-discrimination on the grounds of **obesity**, as such, with regard to employment and working conditions.
- The Court reaffirms the concept of 'disability' in HK Denmark
- However, **where**, in certain circumstances, the worker's **state of obesity leads 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 and the limitation is a long-term one**, such a condition may fall within the concept of 'disability' within the meaning of Directive 2000/78/EC.
- Example: "if the obesity of the worker hindered his full and effective participation in professional life on an equal basis with other workers on account of **reduced mobility or the onset, in that person, of medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity**" (par. 60)

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Kaltoft - Critical notes

- On the one hand, it is good that the Court is expanding its approach to disability to include, potentially, obesity.
- On the other hand, the requirement that the person concerned should experience "limitations" caused by his disability could exclude certain types of discriminatory practices, such as stereotypes or other prejudicial attitudes.

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CJEU 1.12.2016, C-395/15 Daouidi

- The Court's definition of disability implies that the limitation must be regarded as 'long-term'.
- Evidence which makes it possible to find that 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 (paragraph 56).
- the 'long-term' nature of the limitation of capacity of the person concerned, the referring court must base its decision on all of the **objective evidence** before it, in particular on **documents and certificates** relating to that person's condition, established on the basis of current **medical and scientific knowledge and data**' (paragraph 57)

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Daouidi - Critical notes

- The Court seems to refer to the medical approach to disability regarding the evidence of the 'limitation of the capacity of the person concerned', thus giving primary probative prominence to medical certificates
- Difficulties in establishing the concept of "objective evidence" (e.g. discrepancy between certifications, uncertainty of diagnosis)
- Difficulties in providing the evidence required by the Court with regard to psychosocial disabilities

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CJEU 9.3.2017, C-406/15 MILKOVA

- Directive 2000/78 must be interpreted in a manner consistent with the UNCRPD
- **Article 7(2) must be construed as allowing legislation of a Member State which confers on employees with certain disabilities specific advance protection in the event of dismissal, without conferring such protection on civil servants with the same disabilities, unless it has been established that there has been an infringement of the principle of equal treatment, that being a matter for the referring court to determine.**
- When making that determination, the comparison of the situations must be based on an analysis focusing on all the relevant rules of national law governing the positions of employees with a particular disability, on the one hand, and the positions of civil servants with the same disability, on the other, having regard, in particular, to the purpose of the protection against dismissal at issue in the main proceedings.
- In the event that Article 7(2) of Directive 2000/78, read in the light of the United Nations Convention on the Rights of Persons with Disabilities and in conjunction with the general principle of equal treatment, precludes legislation of a Member State, the obligation to comply with EU law would require that the scope of the national rules protecting employees with a particular disability should be extended, so that those protective rules also benefit civil servants with the same disability.

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CJEU 18.1.2018, C-270/16 Ruiz Conejero

- Excluding a pure and simple assimilation of the notion of "disability" to that of "sickness".
- Compared to a non-disabled worker, a **disabled worker** is exposed to the **additional risk of absences due to a disability related illness**.
- He is therefore at greater risk of falling ill and reaching the sickness absence limits laid down in Article 52(d) of the Spanish Workers' Statute, with the result that that provision is, in principle, liable to disadvantage disabled workers and, therefore, to result in unequal treatment indirectly based on disability within the meaning of Article 2(2)(b) of Directive 2000/78/EC.
- Article 2(1) must be interpreted as precluding national legislation under which an employer may dismiss a worker on the grounds of his intermittent absences from work, even if justified, in a situation where those absences are the consequence of sickness attributable to a disability suffered by that worker, unless that legislation, while pursuing the legitimate aim of combating absenteeism, does not go beyond what is necessary in order to achieve that aim, which is a matter for the referring court to assess.

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Reasonable accommodation -UNCRPD

- **Reasonable accommodation**: a tool through which the substantial equality of persons with disabilities is achieved;
- **Objective scope**: the duty to adopt r.a. operates in relation to all human rights and fundamental freedoms (art. 2)
- **Subjective scope**: the duty applies to all persons with disabilities (art. 1, (2))
- **Individuals/individualised**: eliminate the specific disadvantages to which, **in the concrete case**, individuals with disabilities would be exposed, in order to ensure the full enjoyment of human rights on an equal basis with others
- **Appropriate/effective**: suitable in the specific situation to remove the disadvantage (RPD Committee, General Comment No. 4, August 2016); material and organisational measures; this implies an obligation of dialogue between the disabled and the holder of the duty
- **Duty ex nunc** (RPD Committee, General Comment No. 2, April 2014): arises when the situation in which the disabled person needs adjustment is determined.
- **Refusal of reasonable accommodation** constitutes **discrimination** on grounds of disability (*sui generis* form of discrimination)

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Reasonable accommodations - EU law

- **Directive 2000/78** does not contain an explicit notion, unlike the Convention defining the r.a. (Article 2),
- Recital 20: "appropriate measures, i.e. effective and practical measures to adapt the workplace to the disability, e.g. **by adapting premises or equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources**".
- In CJEU Hk Denmark, cited above), the Court, referring expressly to Article 2 of the UNCRPD, held that "as regards Directive 2000/78, that concept must be understood as meaning that it refers to the **elimination of various barriers which hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers** " (paragraph 54).
- The list of appropriate measures in recital 20 is not exhaustive and, therefore, the reduction of working time can be regarded as an adaptation measure within the meaning of Article 5 of the Directive, if the reduction of working time allows the worker to continue working (HK Denmark).
- **Objective scope:** to all public and private employers, in the field of employment, occupation, vocational guidance, including membership and activity in an organization of workers or employers
- **Subjective scope:** in favour of all persons with disabilities as defined by the Court of Justice (see above)

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... more

- **Limit:** accommodation must not involve a **disproportionate financial burden**: account must be taken in particular of the **financial** or other **costs** entailed, the **scale and financial resources of the organisation or undertaking** and the possibility of obtaining **public funding or any other assistance** (see point 21)
- From the point of view of the **Convention**, on the other hand, what counts is the **proportional relationship between the means** employed to adopt the r.a. **and its aim**, i.e. the full enjoyment by the disabled person of the rights concerned (General Comment no. 6).
- Financial cost is one of the potential factors to consider, also the fact that the financial commitment is possibly reimbursed by the public authority, the extent of the reduction or compensation of disability made possible by the measure; balancing of interests of the disabled and the employer by assessing the overall gains and losses in the concrete situation (e.g. not only the individual advantage of the disabled can be taken into account, but also the advantage that other workers - disabled and not - can derive from measures that make the working environment generally more adaptable to individual needs)
- **Directive 2000/78/EC** does not expressly provide for the **consequences of not taking reasonable accommodation**
- The **Convention** states that **the refusal r.a. constitutes discrimination**
- The Court of Justice has not taken a clear position on the matter, not even in the HK Denmark judgment
- The **2008 proposal for a Council Directive** on implementing the principle of equal treatment between persons irrespective of, inter alia, disability, in all sectors (beyond employment and occupation) expressly provides that "refusal of a reasonable accommodation ... in respect of persons with disabilities shall be deemed to be discrimination" (Art. 2, latest version 2017).

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Conclusions

- The UNCRPD of 13.12.2006 has undoubtedly had a considerable impact on the EU disability discrimination law.
- However, full harmonisation between the UNCRPD and EU law has not yet been achieved.
- The UN Committee on the Rights of Persons with Disabilities, in its concluding observations (October 2015) on the EU report on the implementation of the Convention, expresses concerns that the EU has not yet managed to conduct a cross-cutting comprehensive review of its legislation in order to ensure full harmonization with the provisions of the Convention, and recommends:
 - adopting new legislation on equal treatment extending protection against discrimination of people with disabilities, including the duty to adopt reasonable accommodation in all areas of competence;
 - the adoption of measures to ensure that discrimination in all aspects on the grounds of disability is prohibited, including multiple and intersectional discrimination

In conclusion, the long history of marginalisation of people with disabilities has been *formally* abolished, but achieving *effective* protection against discrimination on the grounds of disability by translating the aims and ambitions of the UNCRPD into EU legislation is still an open challenge.

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**Thank you.
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