

The Concepts of 'Disability' and 'Reasonable Accommodation' in EU Law and the UNCRPD

Seminar for Legal Practitioners

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EU disability law & the legal status of the CRPD in EU law

The CRPD: The concept of 'disability' and key non-discrimination provisions

EU law: The concepts of 'reasonable accommodation' and 'disability'

Concluding remarks on the CRPD and EU Non-discrimination law



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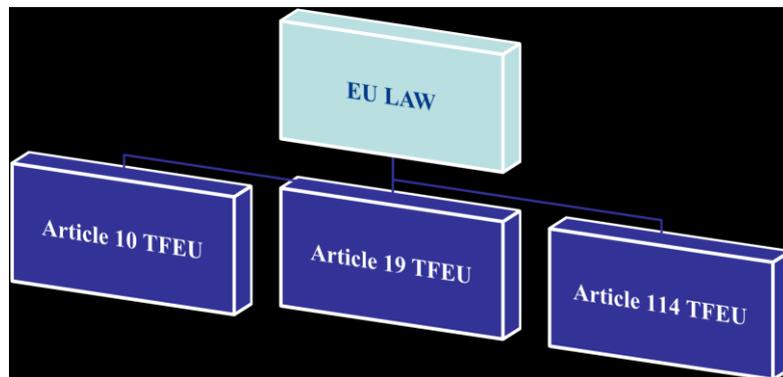
SECTION I:

*EU Disability Law and the Legal Status of
the CRPD in EU Law*



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***The Constitutional Provisions that Empower the EU to
Combat Discrimination***



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Secondary Legislation on Disability: Directive 2000/78

- The TFEU provisions prompted the adoption of, among other instruments, **two-non discrimination directives** in 2000
- The most relevant directive for the purposes of disability is **Council Directive 2000/78/EC** (establishing a general framework for equal treatment in employment and occupation)
- Directive 2000/78 implements the principle of equal treatment in the area of employment and **prohibits discrimination on various grounds, including disability**



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The Charter of Fundamental Rights of the EU

- The Charter of Fundamental Rights of the EU (EU CFR) **became binding in December 2009**, when the Lisbon Treaty came into force
- The EU CFR has the same legal value/status as the EU Treaties, but it does not expand the existing competences of the Union that are laid down in the Treaties (including the competence of the EU to protect and promote the rights of people with disabilities): See Article 51 EU CFR and Case C-354/13, *Kaltoft*, paras. 36-39)
- **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



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The Charter of Fundamental Rights of the EU

➤ Case C-356/12, *Wolfgang Glatzel v. Freistaat Bayern*: The principle enshrined in Article 26 EU CFR does not require the EU legislature to adopt any specific measure. In order for that article to be fully effective, it must be given more specific expression in European Union or national law. Accordingly, that article cannot by itself confer on individuals a subjective right which they may invoke as such [...] (para. 78)

➤ This means that it is intended to guide the EU institutions when they legislate, but it does not oblige them to act and it is not directly enforceable



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The Conclusion of the CRPD: A Mixed Agreement

In December 2010, the EU concluded (ratified) the CRPD: Council Decision 2010/48/EC

The UN Convention is a “mixed agreement”: an international agreement covering fields in which both the EU and its Member States have competence to act

Ensuring equality and combating (disability) discrimination is an area of shared competence



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Status of the CRPD in EU Law

According to **Article 216(2) TFEU**, international agreements concluded by the EU are binding for EU institutions as well as for EU Member States

The CRPD ‘enjoys a quasi-constitutional status in EU law, beneath the Treaties but above secondary law’ (*Favalli and Ferri, 2016*). The CJEU must take the CRPD into account when interpreting EU secondary legislation

Once included in the EU legal order, international agreements are subject to the judicial control of the CJEU, which has held that the CRPD forms an ‘integral part of EU Law’ (*HK Danmark, Cases C-335/11 & C-337/11, para. 30*)

The Employment Equality Directive must, as far as possible, be interpreted in a manner consistent with the CRPD (*HK Danmark, para. 32; Daouidi, Case C-395/15, para. 41*).



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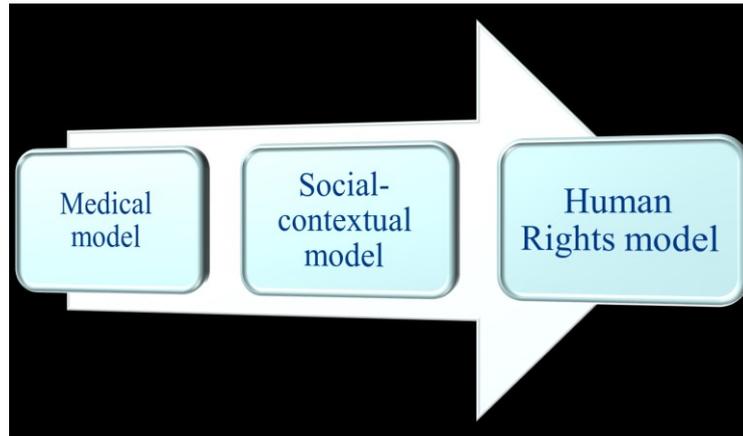
SECTION 2:

The CRPD: The Concept of ‘Disability’ and Key Non-discrimination Provisions



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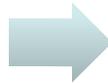
Models of Disability: The CRPD's Paradigm Shift



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Recital (e) of the CRPD's Preamble:

- 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:

- 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



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

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*



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The CRPD's 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



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The Prohibition of Discrimination: Article 5 CRPD



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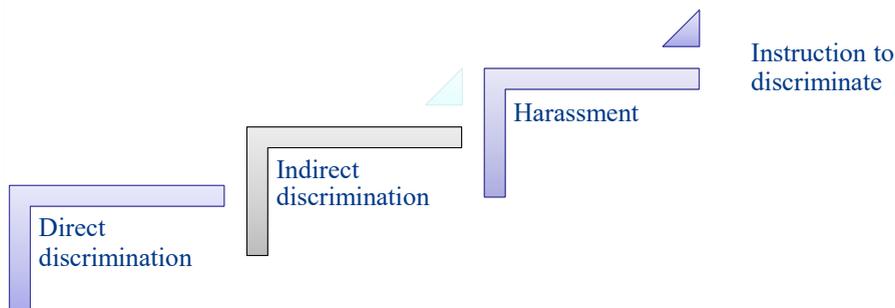
SECTION 3:

EU Law: The Concepts of 'Reasonable Accommodation' and 'Disability'



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Scope of the Prohibition of Discrimination in the Employment Equality Directive: Article 2



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Reasonable Accommodation: Article 5 of the Employment Equality Directive

*In order to guarantee compliance with the principle of **equal treatment** in relation to persons with disabilities, **reasonable accommodation shall be provided***

*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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What is a Reasonable Accommodation?: EU Law

Recital 20 Employment Equality Directive: “Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability” – see the non-exhaustive list in Recital 20

- *The Court has held that the concept of ‘reasonable accommodation’ must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers (e.g. a reduction in working hours)*

*HK Danmark,
C-335/11 &
C-337/11,
paras. 54 & 55*



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Reasonable Accommodation: EU Law

Recital 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”

- *The Court has held that it is for the national court to assess whether a reduction in working hours, as an accommodation measure, represents a disproportionate burden on employers (HK Danmark, para. 59)*

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 undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities”



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Reasonable Accommodation versus Indirect Discrimination

*Indirect Discrimination:
Article 2(2)(b)(ii) Directive
2000/78*

No indirect discrimination will be found to have occurred if the employer is obliged, under national legislation, to take appropriate measures (*i.e.* reasonable accommodation) to eliminate the disadvantages caused by the provision, criterion or practice that would otherwise be discriminatory



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The Concept/Definition of 'Disability' under EU Law

- Directive 2000/78 prohibits discrimination on the ground of disability, but it does not define the concept of 'disability'
- This has led to a number of preliminary references to the CJEU seeking 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 (*see Waddington, 2015, 2016 and 2017; see also Lourenço/Pohjankoskiin, 2018; and Waddington and Broderick, 2018*)



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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: C-363/12

Kaltoft v. Kommunernes Landsforening: C-354/13



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

Milkova: C-406/15



Ruis Conejero: C-270-16

DW v. Nobel Plastiques Ibérica SA: C-397-18



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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)



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Remarks on Chacón Navas, C-13/05

- The definition of disability developed by the Court in *Chacón Navas* was based on the medical model
- According to the Court's definition, the cause of the disadvantage encountered by the disabled person was the 'impairment', and it was the impairment that hindered participation in professional life
- Therefore, the Court ruled that the 'problem' lay with the impaired individual, not with societal structures



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HK Danmark, 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'
- The impairment must be **long-term** (para. 39). A curable/incurable disease could be classified as a disability if it satisfies the definition, but illness (in itself) was not viewed by the CJEU as an additional ground of protection.
- The concept of 'disability' refers to a **hindrance to the exercise of a professional activity, not to the impossibility of exercising such an activity**. The state of health of a person with a disability who is fit to work, but only part-time, is capable of being covered by that concept (para. 44)



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Remarks on HK Danmark (Ring and Skouboe Werge)

- The CJEU held that, 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’
- The CJEU moved away from the medical model in this case, but it is debatable whether the Court endorsed the social-contextual model embraced by the CRPD (*Waddington, 2015; Waddington and Broderick, 2018*)
- Concerns remain regarding the application of the definition of ‘disability’ in practice



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Kaltoft, Case C-354/13

- *Kaltoft* sought to establish, *inter alia*, 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)



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Remarks on Kaltoft, Case C-354/13

- On the one hand, it is positive that the CJEU expanded 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, 2015; Waddington and Broderick, 2018*)
- This appears to represent a move away from the CRPD's human rights model (*Schiek, 2015; Waddington, 2015; Waddington and Broderick, 2018*)



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

- The CJEU affirmed the importance of interpreting the Directive in a manner that is compatible 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 her impairment (the 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



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

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



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Mohamed Daouidi v. Bootes Plus SL, Case 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, **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' (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)



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

- The Court adopted a narrow medical view regarding 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 at the time of the allegedly discriminatory act
- It may be difficult 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; Waddington and Broderick, 2018*)



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DW v. Nobel Plastiques Ibérica SA, Case C-397-18

- Directive 2000/78 must be interpreted as meaning that the **state of health of a worker categorised (under national law) as being particularly susceptible to occupational risks**, which prevents that worker from carrying out certain jobs on the ground that such jobs would entail a risk to his or her own health or to other persons, only falls within the concept of ‘disability’ where that state of health satisfies the CJEU definition of disability
- **Article 2(2)(b)(ii) of Directive 2000/78** must be interpreted as meaning that dismissal for ‘objective reasons’ of a disabled worker on the ground that he or she meets the selection criteria taken into account by the employer constitutes indirect discrimination on the ground of disability within the meaning of that provision, unless the employer has provided that worker with reasonable accommodation beforehand, within the meaning of Article 5 of that directive, which it is for the national court to determine



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SECTION 4:

Concluding Remarks on the CRPD and EU Non-discrimination Law



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Concluding Remarks

- The impact of the CRPD on EU non-discrimination law is most evident with regard to the concept/definition of ‘disability’. There is *some* evidence of a social model approach; however, there are still concerns regarding the application in practice of the CJEU’s definition of ‘disability’
- Unlike the CRPD, Article 5 of Directive 2000/78 does not define an unjustified failure to provide reasonable accommodation as a form of discrimination (although see the proposed non-discrimination directive)
- The CRPD is driving wide-ranging policy and legislative changes in EU Member States and at EU level: for instance, 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. However, it has not been adopted yet, despite recommendations from the CRPD Committee (2015)



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