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WEBINAR ON APPLYING EU ANTI-DISCRIMINATION LAW

"DISCRIMINATION ON THE GROUNDS OF DISABILITY: UNCRPD AND EU LAW"

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1- UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD) (13/12/2006) (I)

- **Recital e) UNCRPD:** recognises that "disability is an evolving concept and that disability 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 UNCRPD (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."



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1- UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD) (13/12/2006) (II)

- **UNCRPD Article 2 (Definition of 'discrimination on the basis of disability' and 'reasonable accommodation'):**

* **'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.

'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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1- UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD) (13/12/2006) (III)

- **Article 3 UNCRPD ('General principles'):** The general principles of the UNCRPD are non-discrimination (Art. 3[b]) and equality of opportunity (Art. 3[e]).

- **Article 5 UNCRPD ('Equality and non-discrimination'):**

* States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law (Art. 5[1])

* 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 (Art. 5[2]).



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1- UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD) (13/12/2006) (IV)

* In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided (Art 5[3]).

- Reference to 'reasonable accommodation' in Article 27(1) as a measure to safeguard and promote the realization of the right to work.

* Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.



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1- UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD) (13/12/2006) (V)

• **Article 27 ('Work and employment')**:

• States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities (Art. 27[1]).

• States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:



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1- UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD) (13/12/2006) (VI)

(a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions.

(b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances.



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1- UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD) (13/12/2006) (VII)

(c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others.

(d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training.

(e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment.



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1- UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD) (13/12/2006) (VIII)

(f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business.

(g) Employ persons with disabilities in the public sector.

(h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include positive action programmes, incentives and other measures.

(i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace.



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1- UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD) (13/12/2006) (IX)

(j) Promote the acquisition by persons with disabilities of work experience in the open labour market.

(k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.



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1- UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD) (13/12/2006) (X)

- **Article 27(2): prohibition of slavery and forced and compulsory labour:**
- States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.
- **EU ratification of the UNCRPD**, Council Decision 2010/48/EC of 26 November 2009: means that the concept of 'disability', for the purposes of Directive 2000/78/EC, must **be interpreted by the CJEU in the light of the UNCRPD** (Cases: *Ring-Skouboe Werge, Glatzel, FOA*).



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2- DISABILITY AND EMPLOYMENT: EU ANTI-DISCRIMINATION LEGAL FRAMEWORK (I)

- **Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.** This Directive represents the introduction of anti-discrimination law relating to disability into the EU.
- Directive 2000/78/EC prohibits discrimination in the fields of employment and vocational training on grounds of religion or belief, sexual orientation, age and disability.
- The concept of 'disability' interpreted in the light of the UNCRPD.



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2- DISABILITY AND EMPLOYMENT: EU ANTI-DISCRIMINATION LEGAL FRAMEWORK (II)

- The **concept of discrimination** provided for in the Directive includes **4 forms of discrimination**:
 - a) **Direct discrimination** (Article 2[2][a])
 - b) **Indirect discrimination** (Article 2[2][b])
 - c) **Harassment** (Article 2[3])
 - d) **Instruction to discriminate against another person** (Article 2[4])



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2.1- EU ANTI-DISCRIMINATION LEGAL FRAMEWORK: FORMS OF DISCRIMINATION (I)

- **A) DIRECT DISCRIMINATION** (Article 2[2][a]) Directive 2000/78/EC
- Direct discrimination shall be taken to occur "where one person is treated less favourably than another is, has been or would be treated in a comparable situation" on grounds of disability.
- The applicant does not necessarily have to be a person with a disability (see *Coleman v Attridge Law*, Case C-303/06)



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2.1- EU ANTI-DISCRIMINATION LEGAL FRAMEWORK: FORMS OF DISCRIMINATION (II)

- **B) INDIRECT DISCRIMINATION** (Article 2[2][b]) Directive 2000/78/EC
- Indirect discrimination shall be taken to occur "where an apparently neutral provision, criterion or practice would put persons having a particular (...) disability (...) at a particular disadvantage compared with other persons unless:

(*EXCEPTIONS)



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2.1- EU ANTI-DISCRIMINATION LEGAL FRAMEWORK: FORMS OF DISCRIMINATION (III)

- that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Article 2[2][b][i]); **or**
- as regards persons with a particular disability, the employer or any person or organisation 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" (Article 2[2][b][ii]).



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2.1- EU ANTI-DISCRIMINATION LEGAL FRAMEWORK: FORMS OF DISCRIMINATION (IV)

- **C) HARASSMENT** (Article 2[3])
- When unwanted conduct related to disability takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.
- The applicant does not necessarily have to be a person with a disability.



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2.1- EU ANTI-DISCRIMINATION LEGAL FRAMEWORK: FORMS OF DISCRIMINATION (V)

- **D) INSTRUCTION TO DISCRIMINATE** (Article 2[4])
- An instruction to discriminate against persons on the grounds of disability shall be deemed to be discrimination.



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2.2- EU ANTI-DISCRIMINATION LEGAL FRAMEWORK: RECITALS OF DIRECTIVE 2000/78/EC (I)

- **(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 for people with disabilities.”
- **(18)** “This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.”



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2.2- EU ANTI-DISCRIMINATION LEGAL FRAMEWORK: RECITALS OF DIRECTIVE 2000/78/EC (II)

- **(20)** “Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.”
- **(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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2.3- FUNDAMENTAL CONCEPTS UNDERLYING DISABILITY DISCRIMINATION IN THE WORKPLACE

- A) DEFINITION OF DISABILITY
- B) REASONABLE ACCOMMODATION
- C) POSITIVE ACTION
- D) BURDEN OF PROOF



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2.3- FUNDAMENTAL CONCEPTS UNDERLYING DISABILITY DISCRIMINATION IN THE WORKPLACE: DEFINITION OF DISABILITY (I)

- A) DEFINITION OF DISABILITY
- Directive 2000/78/EC includes disability as one of the grounds of discrimination, but offers no definition of the term 'disability'.
- A definition is offered in *Chacón Navas v Eurest Colectividades SA, Case C-13/05*; the Court defines 'disability' for the purposes of the Directive as:



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2.3- FUNDAMENTAL CONCEPTS UNDERLYING DISABILITY DISCRIMINATION IN THE WORKPLACE: DEFINITION OF DISABILITY (II)

"a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned over a long period of time in professional life."

* The definition of 'disability' given by the Court is "autonomous and uniform".

* In order for the limitation to fall within the concept of 'disability', "it must be probable that it will last for a long time".

* 'Disability' is not the same as 'sickness'.



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2.3- FUNDAMENTAL CONCEPTS UNDERLYING DISABILITY DISCRIMINATION IN THE WORKPLACE: DEFINITION OF DISABILITY (III)

* There is 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".

* 'Sickness' can not be included on the list of grounds covered by the Directive.

* The judgment has opened the door for people suffering from a prolonged illness, causing the required degree of limitation, to be considered as persons with 'disabilities' within the meaning of the Directive.



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2.3- FUNDAMENTAL CONCEPTS UNDERLYING DISABILITY DISCRIMINATION IN THE WORKPLACE: DEFINITION OF DISABILITY (IV)

- In *HK Danmark and Others v HK Danmark and others*, Joined Cases C-335/11 and C-337/11, the CJEU indicates that the Directive "must, as far as possible, be interpreted" in a manner consistent with the UNCRPD.
- Definition of disability in the light of the UNCRPD: in *Wolfgang Glatzel v Freistaat Bayern*, Case C-356/12, and in *Fag og Arbejde (FOA) v Kommunernes Landsforening (KL)*, Case 354/13, the Court defines 'disability' for purposes of the Directive as "a limitation which results in particular from long-term 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".



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2.3- FUNDAMENTAL CONCEPTS UNDERLYING DISABILITY DISCRIMINATION IN THE WORKPLACE: REASONABLE ACCOMMODATION (I)

- **B) REASONABLE ACCOMMODATION** (Article 5, Directive 2000/78/EC): "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, depending on the needs of each specific situation, to enable people with disabilities access to employment, participate in , or advance, or to undergo training, unless such measures would impose an excessive 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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2.3- FUNDAMENTAL CONCEPTS UNDERLYING DISABILITY DISCRIMINATION IN THE WORKPLACE: REASONABLE ACCOMMODATION (II)

- The Directive requires that individualized accommodation be made (specifically tailored to the needs of a specific person).
- Can the concept of 'accommodation' be defined? In Recital 20 of Directive 2000/78/EC, 'appropriate measures' are defined as "effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources".



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2.3- FUNDAMENTAL CONCEPTS UNDERLYING DISABILITY DISCRIMINATION IN THE WORKPLACE: REASONABLE ACCOMMODATION (III)

- Is it possible to determine whether the measures referred to in Article 5 give rise to a 'disproportionate burden'? Recital 21 of Directive 2000/78/EC provides that "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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2.3- FUNDAMENTAL CONCEPTS UNDERLYING DISABILITY DISCRIMINATION IN THE WORKPLACE: POSITIVE ACTION

- **C) POSITIVE ACTION** (Article 7[2], Directive 2000/78/EC): "With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment."



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2.3- FUNDAMENTAL CONCEPTS UNDERLYING DISABILITY DISCRIMINATION IN THE WORKPLACE: BURDEN OF PROOF (I)

- **D) BURDEN OF PROOF** (Article 10, Directive 2000/78/EC): Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment (Article 10[1]).



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2.3- FUNDAMENTAL CONCEPTS UNDERLYING DISABILITY DISCRIMINATION IN THE WORKPLACE: BURDEN OF PROOF (II)

- It is up to the claimant to submit *prima facie* evidence.
- The respondent must provide a sufficient explanation to be considered to have assumed the burden of proof.
- Where the respondent fails to assume the burden of proof, the Court must conclude that there has been discrimination contrary to the law.



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2.4- CJEU CASE LAW ON DISABILITY (I)

- ***Chacón Navas v Eures Colectividades, SA.*** Case C-13/05. CJEU 11/7/2006.
- ***Coleman v Attridge Law.*** Case C-303/06. CJEU 17/7/2008.
- ***Reinhard Prigge and Others v Deutsche Lufthansa AG.*** Case C-447/09. CJEU 11/9/2011.
- ***Johann Odar v Baxter Deutschland GmbH.*** Case C-152/11. CJEU 6/12/2012.



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2.4- CJEU CASE LAW ON DISABILITY (II)

- ***Already considered in the light of the UNCRPD:**
- ***HK Danmark and Others v HK Danmark and Others***. Joined Cases C- 335/11 and C 337/11 (cases *Jette Ring* and *Lone Skouboe Werge*). CJEU 11/4/2013.
- ***Wolfgang Glatzel v Freistaat Bayern***. Case C-356/12. CJEU 22/5/2014.
- ***Fag og arbejde (FOA) v Kommunernes Landsforening (KL)***. Case C-354/13. CJEU 18/12/2014.



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2.4- CJEU CASE LAW ON DISABILITY (II)

- ***Mohamed Daouidi v Bootes Plus, S.L.*** Case C-395/15. CJEU 1/12/2016.
- ***Petya Milkova v Izpalniteken director na Agentsiata za privatizatsia i sledprivatizatsionen kontrol***. Case C-406/15. CJEU 9/3/2017.
- ***Carlos Enrique Ruíz Conejero v Ferroser Servicios Auxiliares, S.A.*** Case C-270/16. CJEU 18/1/2018.
- ***DW v Nobel Plastiques Ibérica, S.A.*** Case C-397/18. CJEU 11/9/2019.



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AND EU LAW"***

THANK YOU VERY MUCH FOR YOUR ATTENTION

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