

Discrimination on the grounds of disability:

The relationship between EU Law and the UNCRPD
The concepts of Disability and Reasonable Accommodation

APPLYING EU ANTIDISCRIMINATION LAW
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«People with physical and mental impairments ... are people, but they have not as yet been included, in existing societies, as citizens on a basis of equality with other citizens ... people with physical and mental impairments, temporary or lifelong, ... demand full and equal justice»

M. Nussbaum, *Frontiers of Justice*, 2006

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Summary

- Regulatory evolution
- Relations between the UN Convention on the Rights of Persons with Disabilities of 13 December 2006 and the European Union Law
- The EU regime for protecting against discrimination based on disability - Directive 2000/78/EC – and the one foreseen by the UNCRPD
- The definition of disability
- Reasonable accommodation
- Final remarks

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The Treaty of Amsterdam – The EU Charter of Fundamental Rights

- **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**: **Charter of Fundamental Rights of the European Union**
 - **Article 21 - Non-discrimination**: «**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**»
 - **Article 26 - Integration of persons with disabilities**: 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 (Framework Equality 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** upholds (TFEU, **Article 19**) the provision establishing the competence of the EU to “combat discrimination based on sex, racial or ethnic origin, religion or belief, **disability**, age or sexual orientation”
- Also introduced the so-called **horizontal non-discrimination clause (TFEU, Article 10)**: “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, that makes reference to disability, is to integrate the fight against discrimination in all the EU’s policies and actions (the obligation of *mainstreaming*)
- **The TEU, Article 6 (1)** has also attributed **the same legal value of the Treaties** to the Nice Charter, 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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Ratification of the UNCRPD

- **2009:** the EU’s adhesion to the UN Convention of 13.12 2006 on the rights of persons with disabilities
- The ratification was implemented with Council Decision 2010/48/EC of 26.11.2009, filed with the UN on 23.12.2010
- Date of entering into force in the EU legal system: 22.01.2011
- **Article 5(2) UNCRPD - Equality and non-discrimination:** «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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The relationship between the UNCRPD and EU Law

- The UN Convention enters into the **Mixed Agreements**, that is, those international agreements that the EU negotiates with third parties and the aim of which in part falls within the exclusive scope of EU competence, and in part, 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 the ratification, the Convention has become an **integral part of EU law** (see CJEU, *HK Danmark* 11.4.2013, Joined Cases C-335/11 e C-337/11)
- Under art. 216 (2) TFEU, when the EU concludes international agreements, the latter bind its institutions and as a result, prevail over the acts of the EU itself
- In the **hierarchy of the sources**, the Convention, due to being a Mixed Agreement, holds the rank of **intermediate source**, inferior to that of the Treaties but superior to EU secondary legislation

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Effects of the UNCRPD in EU Law – Interpretive relevance

- The Court of Justice constantly affirms that the UNCRPD, despite being an integral part of EU law, has no direct effect; it is “**programmatic**” and its provisions are **not “unconditional and sufficiently precise** ... they therefore do **not** have **direct effect** in European Union Law” (CJEU 7.11.2013, C-363/12, *Z. v. A Government Department*, point 88 and subsequent; CJEU 22.5.2014, 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** (art. 216 (2), TFEU: “Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States”), which implies that:
 - 1) EU (and national) legislation must be interpreted in compliance with the UNCRPD (CJEU 11.4.2013, *HK Danmark* cit.; CJEU, 7.11.2013 *Z. v. Government Department*; CJEU, 4.7.2013 *Commission v. Italy*)
 - 2) If the text of a secondary-rank ruling is susceptible to multiple interpretations, where possible, the one that renders the provision compliant with the provisions of the Convention must prevail
 - 3) All the institutions in the Union must comply with the UNCRPD in the development, reinforcement and interpretation of Union Law

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The EU regime for protection against discrimination based on disability – 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 social protection**, raising the standard of living and the 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**, as regards both the **public and private sectors**, including public bodies in relation to (**Article 3**):
 - a) **Conditions for access to employment, to self-employment or to occupation**, including promotion;
 - b) Access to all types and to all levels of **vocational guidance and training**;
 - c) **Employment and working conditions**, including dismissals and pay;
 - d) Membership of and **involvement in an organisation of workers or employers**
- The Directive does not apply to payments of any kind made by State schemes or similar, 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, on grounds relating to **disability, less favourably than a non-disabled person in a comparable situation**
- **Indirect discrimination (Article 2(2)(b)):** when an **apparently neutral** provision, criterion or practice would put a **person with a disability at a particular disadvantage compared with other persons**
- **Harassment (Article 2(3)):** **unwanted conduct related to disability** which violates the **dignity and freedom of a person with a disability**, i.e. which creates an **intimidating, hostile, degrading, humiliating or offensive environment**
- **Instruction to discriminate (Article 2(4))** against a person on the grounds of disability

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Directive 2000/78/EC – Notion and Justifications

- **Irrelevance of the subjective element:** discrimination operates objectively, in other words, as a result of the mere relevance of the inferior treatment reserved for the worker due to his/her belonging to a protected category, irrespective of the unlawful attitude of the perpetrator of the discrimination
- **Indirect discrimination** can be considered justified if (Article 2, letter b):
 - i) the provision, criterion or practice is objectively justified **by a legitimate aim and the means of achieving that aim are appropriate and necessary;**
 - ii) **in the case of persons with a particular disability, the employer is obliged by national legislation to take appropriate measures in order to eliminate the disadvantages caused by the provision, criterion or practice.**

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Directive 2000/78/EC - Reasonable accommodation for disabled persons

- **Article 5:** employers shall take **appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training**, unless such measures would impose a **disproportionate burden on the employer** (rec.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
- Nothing is explicitly stated with regard to the **consequences of failure to adopt reasonable measures**: however, it is plausible to argue, interpretively, that this falls within the notion of discrimination (see below)

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UNCRPD – The principle of non-discrimination

- **The principle of non-discrimination (Article 3 – General Principles)** constitutes the cardinal principle of the Convention
- Article 3 must be read in conjunction with:
 - **Article 5 (1)** 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
 - (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
 - Article 5 establishes the **right** of not being discriminated against and the obligation of the States Parties to ensure compliance with the principle under examination in their national laws

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UNCPRD – Non-discrimination and equality

- **Article 5**

- beyond the model of “formal” and “substantial” equality
- adoption of “**inclusive**” equality (General Comment no. 6, adopted on 9.3.2018):
 - dimension of recognition: recognising the dignity of all human beings and their possible belonging to different categories (“intersectionality”), fighting stereotypes, prejudices, and violence
 - participatory dimension: affirming the social relevance of disadvantaged groups and promoting their effective social inclusion
 - dimension of fair distribution: solving the problem of economic-social disadvantages
 - dimension of accommodation as a tool for guaranteeing human dignity

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UNCRPD – Prohibition of discrimination based on 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 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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UNCRPD – Reasonable accommodation

- The **obligation to adopt reasonable accommodation**
- Article 5 (3), UNCRPD: In order to promote equality and eliminate discrimination, **States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided**
- Article 2, UNCRPD, defines **reasonable accommodation** as **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 based on disability– General Comment no. 6 (2018)

- **Direct discrimination/Indirect discrimination/Harassment** (including bullying and related online forms, e.g. *cyberhate*)
- **Multiple** discrimination, when a person is discriminated against based on two or more factors: **Ordinary multiple**: when a subject is discriminated against on the basis of two or more factors, but each act of discrimination occurs at different times and is based each time on different factors; **additive**: the discrimination occurs on the same occasion, but on the basis of different factors that are added one to the other while maintaining their own individuality; each factor exacerbates discrimination (e.g. young blind worker of foreign nationality whose employer will not grant salary rises to subjects under the age of 35, to people with sensory impairments or of different nationalities); **intersectional**: this is based on multiple factors which interact with each other so that they can no longer be distinct and separate (e.g. refusal to grant a blind woman the right to access family planning services)
- discrimination against persons with a disability, or who have had one in the past or are susceptible to one (d. based on **assumed or future disability**)
- Discrimination **by association**: against persons linked to disabled persons
- Discrimination in the form of **refusal of reasonable accommodation**

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The UNCRPD versus EU law

The definition of disability

- **UNCRPD** - finalistic-relational notion of disability
- **Article 1 (2): people with disabilities** include those who have **long-term** physical, mental, intellectual or sensory **impairments**, which in **interaction with various barriers** can prevent their full and effective **participation in society** on an equal basis with others
- **Preamble, e): disability** is an evolving concept and that disability results from the **interaction** between people with impairments and attitudinal and environmental **barriers** that hinders their full and effective **participation in society** on an equal basis with others
- Overcoming the "**medical**" model of disability, focused on the impairments and functional limitations of the individual (= the disabled person is the problem, the cure or the assistance the remedy)
- Adoption of the "**social**" model of disability: discrimination derives from the barriers imposed by society on the disabled and the failure of society to adapt to their needs
- "**Human rights**" model (**General Comment No. 6**): disability is a "social construct" and impairments cannot justify denying or limiting the enjoyment of human rights; people with disabilities are holders of rights on an equal basis with others and are not subject to charity; disability is one of the various components of identity

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The concept of disability in EU law

- **Directive 2000/78/EC does not** contain a **definition of disability** ("handicap")
- The **Court of Justice** has played (and plays) a strategic role in relation to the notion 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 Danmark
 - 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
 - CJEU 11.9.2019, C-397/18 DW v. Nobel Plásticos Ibérica SA

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CJEU 11.7.2006, C-13/05, Chacón Navas

- The Court defines the notion of disability (the Directive uses the expression handicap) relevant under the Directive as «**a limitation which results from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life**» (par. 43) - the limitation must **last for a long time** (par.45)
- The term "handicap" differs from that of "illness"- A person who has been fired by his/her employer solely because of illness does not fall within the general framework outlined by Directive 2000/78/EC
- **medical model** of disability: the **cause of the disadvantage** is the «**impairment**» which an individual has, and it is the impairment which hinders participation in professional life
- The problem lies in the impaired individual, and not in the reaction of society to the impairment

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CJEU 11.4.2013, C-335/11 e C-337/11, HK Danmark

- By expressly referring to Article 1 (2) UNCRPD, the Court states that the **notion of "handicap"** pursuant to **Directive 2000/78** must be understood in the sense of "**a [long-term] 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**» (par. 38)
- Physical, mental, intellectual and sensorial impairments must be "**long-lasting**"

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HK Danmark – Remarks

- The Court of Justice abandons the medical model and accepts the **social model of disability**
- A positive reference to line e) of the Preamble and article 1 UNCRPD – it is recognised that a «**disability is an evolving concept**» and that it «**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**»

Positive role of International Law:

- 1) by virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding on its institutions, and consequently they prevail over acts of the European Union;
- 2) the primacy of international agreements concluded by the EU over instruments of secondary law means that those instruments must as far as possible be interpreted in a manner that is consistent with those agreements;
- 3) the EU has approved the UN Convention (Decision 2010/48), thus, the UNCRPD provisions are an integral part of the EU legal order, from the time of its entry into force;
- 4) according to the appendix to the Annex II to decision 2010/48, Directive 2000/78/EC is one of the European Union acts which refer to matters governed by the UN Convention; It follows that the Directive must, as far as possible, be interpreted in a manner consistent with that convention

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CJEU 7.11.2013, C-363/12 Z c. A Government department

- The Court reiterates the notion of disability expressed in HK Danmark and clarifies that the concept of «disability» within the meaning of Directive 2000/78/EC 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 (par. 77)
- The concept of «disability» within the meaning of Directive 2000/78/EC «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** ... 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 that Ms Z's condition does not constitute a 'disability' within the meaning of Directive 2000/78/EC

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Z – Remarks

- The Court appears to be referring to the medical model of disability and therefore, it seems to restrict the approach compared to the one adopted by the Convention
- This **narrower approach** ends up by negating the granting of benefits of a work-related nature, which would **normally be attributable to the scope of the Directive, simply because the condition of the person concerned cannot be ascribed to the more restricted notion of disability adopted by the Court**

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CJEU 18.12.2014, C-354/13, Kaltoft

- EU Law does not establish any general principle of non-discrimination on the basis of **obesity** as such, as far as employment and work conditions are concerned
- The Court reiterates the notion of “handicap” contained in HK Danmark
- 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/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 – Remarks

- On the one hand, it's a positive sign that the Court is expanding the approach to disability in order to potentially include obesity
- On the other hand, the fact that the person concerned is required to experience **“limitations” caused by his/her impairment 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 considered “long-lasting”
- The 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 (par. 56)**
- The **«long-term» nature of the limitation of capacity of the person concerned must be evaluated by the national courts which must base the decision on «all of the objective evidence», particularly on «documents and certificates» relating to that person's condition, «established on the basis of current medical and scientific knowledge and data» (par. 57)**

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Daouidi – Remarks

- The Court seems to refer to the medical approach to disability as proof of the “limitation of the capacity of the person concerned”, in this way giving primary evidentiary importance to medical certificates
- There are difficulties in establishing the concept of “objective elements” for evidentiary purposes (e.g. discrepancy between certificates, diagnostic uncertainty)
- There are difficulties in providing the evidence requested by the Court in relation to psychosocially disabled people

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CJEU 18.1.2018, C-270/16 Ruiz Conejero

- A pure and simple assimilation of the notion of “handicap” with that of “disease” is ruled out
- **A worker with a disability has the additional risk of being absent by reason of an illness connected with his disability**
- He thus runs a greater risk of accumulating days of absence because of illness, and consequently of reaching the limits laid down in Article 52(d) of the Spanish Workers’ Statute. It is thus apparent that the rule in that provision is liable to place disabled workers at a disadvantage and so to bring about a difference of treatment indirectly based on disability within the meaning of Article 2(2)(b), Directive 2000/78/EC
- **Article 2(2)(b)(i) Directive 2000/78/EC 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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CJEU 11.9.2019, C-397/18 DW v. Nobel Plastiques Ibérica SA

- *the state of health of a worker categorised as being particularly susceptible to occupational risks, within the meaning of national law, 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', within the meaning of that directive, where that state leads to a limitation of capacity arising from, inter alia, 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 their professional life on an equal basis with other workers. It is for the national court to determine whether those conditions are satisfied in the main proceedings*
- *...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 to determine the persons to be dismissed, namely having productivity below a given rate, a low level of multi-skilling in the undertaking's posts and a high rate of absenteeism, constitutes indirect discrimination on grounds of disability ..., unless the employer has beforehand provided that worker with reasonable accommodation*

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The latest episodes of the 'saga'

- Request for preliminary ruling raised by a Bulgarian Administrative Court in **Case C-824/19 Komisia za zashita ot diskriminatsia**:
 - whether, in light of the UNCRPD, it is permissible for a person without the ability to see to be able to work as a court assessor and participate in criminal proceedings (**Opinion of Advocate General delivered on 22.4.2021**)
- Request for preliminary ruling raised by a Lithuanian Tribunal in **Case C-795/19 Tartu Vangla**:
 - whether the FED must be interpreted as precluding provisions of national law which provide that «impaired hearing below the prescribed standard constitutes an absolute impediment to work as a prison officer and the use of corrective aids to assess compliance with the requirements is not permitted» (**Opinion of Advocate General delivered on 25.11.2020**)

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Directive (EU) 2019/882 and beyond

- **European Accessibility Act** = on the accessibility requirements for products and services

Rec. 13 The UN CRPD requires its Parties **to take appropriate measures to ensure that persons with disabilities have access, on an equal basis with others, to the physical environment, to transportation, to information and communications**, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas [...]

Article 3 Definitions: ‘persons with disabilities’ means persons **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**

- **The 2008 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation**

Rec. 19a) 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** (see Consolidated text 26.6.2019)

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Strategy for the Rights of Persons with Disabilities 2021 -2030

- Adopted by the European Commission 3 March 2021
- **AIM:** to ensure that people with disabilities can experience full social and economic inclusion on an equal basis with others and live free from discrimination
- implementing the UN Convention on the Rights of Persons with Disabilities and consolidating the EU's body of law on disability
- the Strategy sets out key initiatives around **three main themes:**
 - **EU rights:** Persons with disabilities have the same right as other EU citizens to move to another country or to participate in political life
 - **Independent living and autonomy:** Persons with disabilities have the right to live independently and choose where and with whom they want to live
 - **Non-discrimination and equal opportunities:** The strategy aims to protect persons with disabilities from any form of discrimination and violence and to ensure equal opportunities in and access to justice, education, culture, sport and tourism, all health services and employment

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UNCRPD Reasonable accommodation - definition

- **Article 2 - reasonable accommodation:** 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
- **Reasonable accommodation:** a tool via which the substantial equality of persons with disabilities is achieved
- **Material scope:** the obligation to adopt reasonable accommodation operates «to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms» (art. 2)
- **Personal scope:** the obligation applies to all people with disabilities (art. 1 (2))

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UNCRPD Reasonable accommodation - requirements

- **Individual/individualised:** eliminate the specific disadvantages to which, in the case in question, the individual disabled persons would be exposed, in order to ensure full enjoyment of human rights on an equal basis with others
- **Appropriate/effective:** suitable in the specific situation for removing the disadvantage (DPD Committee, General Comment no. 4, August 2016); material and organisational measures; this implies an obligation of dialogue between the disabled person and the holder of the obligation of reasonable accommodation
- **ex nunc Obligation** (DPD Committee, General Comment no. 2, April 2014): arises when the situation is determined in which the disabled person requires adjustment
- **Denial of reasonable accommodation** constitutes **discrimination** based on the disability (a *sui generis* form of discrimination)

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Reasonable accommodation - Employment

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

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EU law Reasonable accommodation – definition?

- **Directive 2000/78/EU** does not contain an explicit notion of reasonable accommodation, unlike the Convention (Article 2)
- **Article 5:** employers shall take **appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training**, unless such measures would impose a **disproportionate burden on the employer**
- **Recital 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 of resources**”

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EU law Reasonable accommodation – requirements

- In HK Danmark decision, cit., the ECJ, making express reference to Article 2 UNCRPD has ruled that “with respect to Directive 2000/78, that concept 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” (par. 54)
- The list of appropriate measures referred to in Recital 20 is not exhaustive and, therefore, the reduction in working hours can be considered an adaptation measure pursuant to Article 5 of the Directive, where the reduction of working hours allows the worker to be able to continue to carry out his/her work (HK Danmark)
- **Material scope:** all public and private employers, in the job, employment, and career orientation sectors, including affiliation and activity in an organisation of workers or employers
- **Personal scope:** in favour of all people with disabilities according to the notion enucleated by the Court of Justice (see above)

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Eu Law - Disproportionate (financial) burden

- **Limit**
- **FED:** the accommodation must not give rise to a **disproportionate *financial* burden**
- It is necessary to bear in mind in particular the **financial costs** and other costs that the measures entail, plus the **scale and financial resources of the organisation or undertaking** and the possibility of obtaining **public funding or any other assistance** (Recital 21)

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UNCRPD - Disproportionate burden

- **UNCRPD:** From the point of view of the **Convention**, instead, what counts is the **proportional relationship** between the **means** used to adopt reasonable accommodation and the **purpose**, that is, full enjoyment by the disabled person of the rights considered from time to time (General Comment no. 6)
- **Cost is one of the indicators** to consider, also the fact that the financial commitment is eventually reimbursed by the public authority, as well as **the extent of the reduction or compensation of the disability** made possible by the measure; **balancing the interests** of the disabled person and the employer by assessing the overall gains and losses in the situation in question (e.g. not only the individual advantage of the disabled person, but also the advantage that other workers - disabled and non-disabled - can derive from measures that make the work environment generally more adaptable to individual needs)

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Denial of reasonable accommodation

- The **Convention** rules that **denial of reasonable accommodation constitutes discrimination Article 2 (3) "Discrimination on the basis of disability ... It includes all forms of discrimination, including denial of reasonable accommodation"**
- Employment Equality Directive: Nothing is explicitly stated with regard to the **consequences of failure to adopt reasonable measures**
- This falls within the notion of discrimination. This conclusion can be reached in an **interpretative manner for the EU Directive**, even more so because of the obligation to interpret it in accordance with the Convention
- The 2008 proposal for a non-discrimination Directive: denial of reasonable accommodation = discrimination [See Article 2, 2, (e), consolidated text 26.6.2019]

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The 2008 proposal for a non-discrimination Directive - Reasonable Accommodation

Article 4a Reasonable accommodation for persons with disabilities

1. In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided within the areas set out in Article 3.

2. For the purpose of paragraph 1, reasonable accommodation means necessary and appropriate modification and adjustments not imposing a disproportionate burden, where needed in a particular case, to accommodate the specific needs of a person with a disability so as to allow that person access on an equal basis with others to the specific social protection measure, educational activity, good or service concerned.

Article 2 Concept of discrimination

par. 2, lett. e) denial of reasonable accommodation for persons with disabilities, that shall be taken to occur where there is a failure to comply with Article 4a of this Directive

(See consolidated text 26.6.2019)

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Conclusions

- The UN Convention of 13.12.2006 has undoubtedly had a considerable impact on the EU's anti-discrimination law on disability
- However, it cannot yet be argued that full harmonisation has been achieved between the Convention and EU law
- In conclusion, **the long history of marginalization of people with disabilities has been *formally* cancelled, however the achievement of *effective* protection against discrimination based on disability, through the translation of the aims and ambitions of the UN Convention into EU legislative acts, still represents an open challenge**

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**Thank you
for your kind attention!**

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