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Discrimination on the Grounds of Disability

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Applying EU Anti-Discrimination Law
Seminar for legal practitioners
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Introductory Remarks

The Relationship between EU Law and the UNCRPD

The Concepts of Disability and Reasonable Accommodation



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Introductory Remarks

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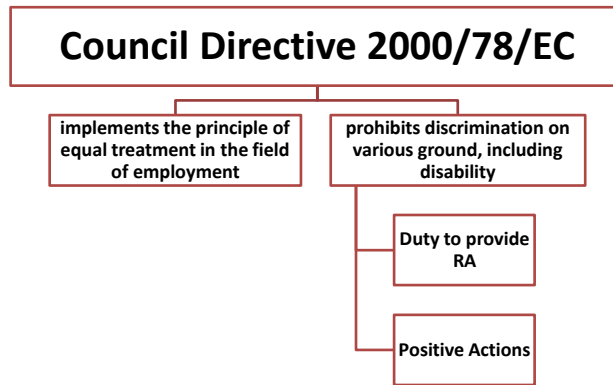
The original involvement of the former European Community in the area of disability was limited. The EC initiatives targeted to disabled people took the form of **action programmes intended to exchange information, or soft law.**

The Treaty of Amsterdam introduced Art. 13 EC (now **Art. 19 TFEU**) which enabled the Council to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation



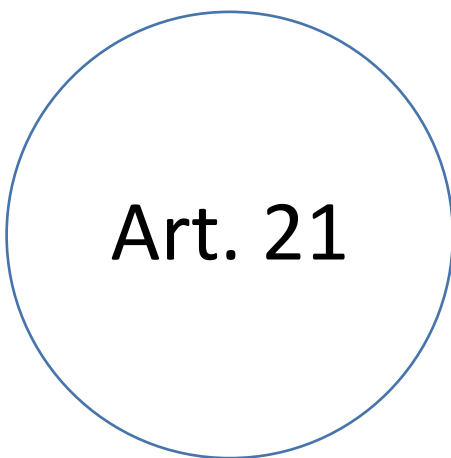
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Council Directive 2000/78/EC



EU Charter of Fundamental Rights

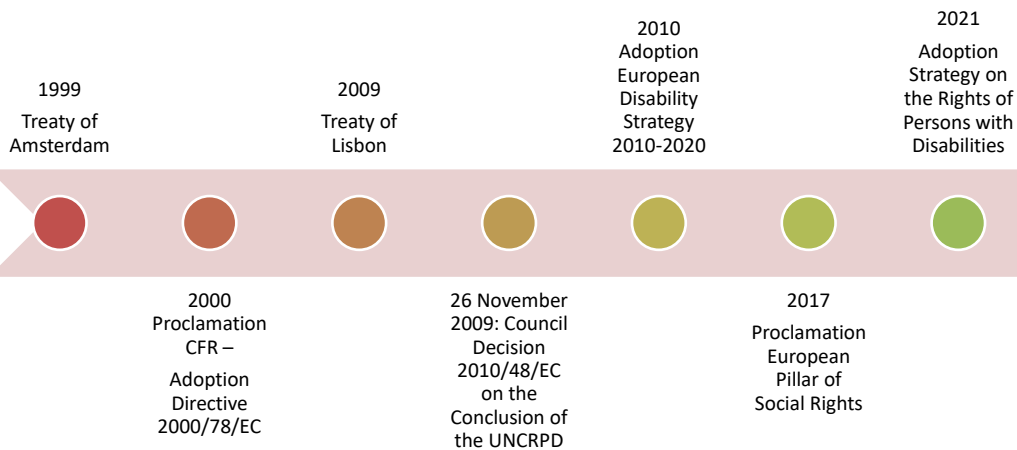
Art. 26



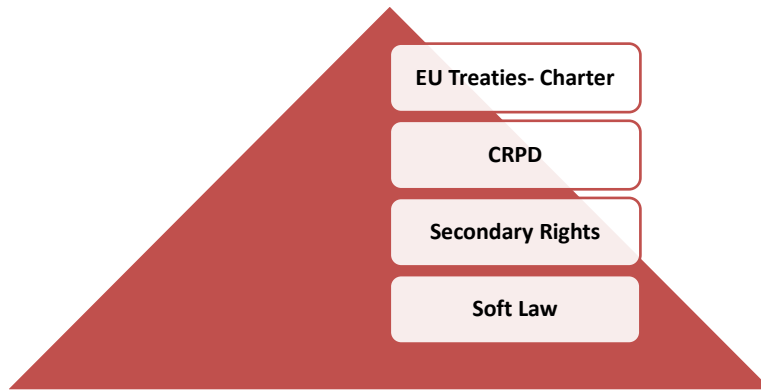
Article 26 of the Charter states that '[t]he Union recognises and respects the **right of persons with disabilities** to benefit from measures designed to ensure their **independence, social and occupational integration and participation in the life of the community**'

Case C-356/12 Glatzel

*“...although Article 26 of the Charter requires the European Union to respect and recognise the right of persons with disabilities to benefit from integration measures, the principle enshrined by that article 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)*



The Current EU Legal Framework



The Relationship between EU law and the UNCRPD

The UNCRPD

Human Rights Model of Disability

'Social-contextual' concept
of disability

Inherent Dignity of Persons
with Disabilities

Inclusive Equality

CRPD Committee –General Comment N. 6 (2018)

*“The human rights model of disability recognizes that disability is a **social construct** and impairments must not be taken as a legitimate ground for the denial or restriction of human rights. It acknowledges that disability is **one of several layers of identity**. Hence, disability laws and policies must take the **diversity of persons with disabilities** into account. It also recognizes that **human rights are interdependent, interrelated and indivisible**” (para 9)*

The UNCRPD in the EU legal Order

The UNCRPD is a mixed agreement

A **mixed agreement** is an international agreement which **falls partly within the competence of the EU and partly within the competence of the Member States**, and therefore includes among its parties the EU and (all or some of) the Member States

In compliance with Art. 44 UNCRPD, a **declaration of competence** has been annexed to the Decision on the Conclusion of the UNCRPD



The UNCRPD in the EU Legal Order

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

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



Secondary EU law must be interpreted in a manner **consistent** with the UNCRPD
(Joined cases C-335/11 and C-337/11
HK Danmark)

OPINION OF AG SAUGMANDSGAARD ØE, Case C-824/19

Komisija za zashtita ot diskriminatsia

“...the **primacy of international agreements concluded by the European Union over provisions of secondary legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.** Reference should be made to Article 13 of that UN Convention, which deals with ‘access to justice’ for persons with disabilities [...] That provision is explained in a recent document entitled ‘**International Principles and Guidelines on Access to Justice for Persons with Disabilities**’, published by the **United Nations**. That document aims to provide comprehensive, though non-binding, guidance and practical instruction on how to ensure access to justice for persons with disabilities...” (paras 81-82)

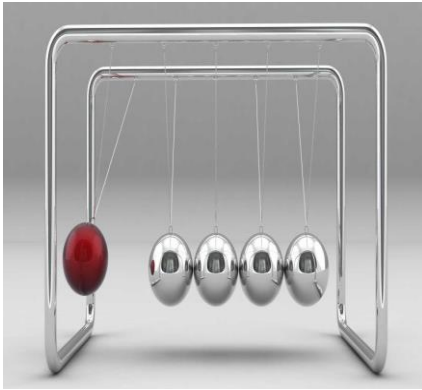
Limits of Consistent Interpretation

Provisions of internal EU law cannot be interpreted *contra legem*. If an internal provision cannot be interpreted in a way that is consistent with the international provision, the internal provision may be set aside, **but only in so far as the provision in the international agreement has direct effect.**



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

The UNCRPD's Lack of Direct Effect

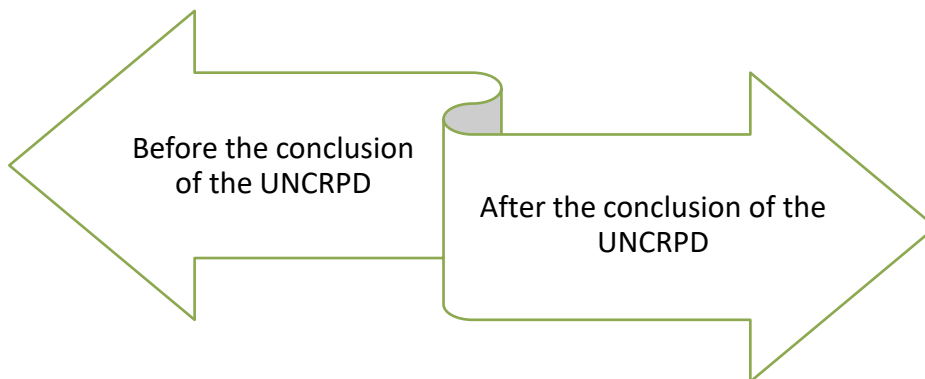


*“... it must be held that the **provisions of [the UNCRPD] are not, as regards their content, provisions that are unconditional and sufficiently precise [...], and that they therefore do not have direct effect in European Union law.** It follows from this that the validity of Directive 2000/78 cannot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



The Concepts of Disability and Reasonable Accommodation

Definition of Disability in EU law



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

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



Joined cases C-335/11 and C-337/11 *HK Danmark*

“...the concept of ‘disability’ must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which **in interaction with various barriers** may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers....” (para 38)

“...it does not appear that Directive 2000/78 is intended to cover only disabilities that are congenital or result from accidents, to the exclusion of those caused by illness. **It would run counter to the very aim of the directive**, which is to implement equal treatment, **to define its scope by reference to the origin of the disability**” (para 40)

HK Danmark: the Paradigm Shift

HK Danmark ‘**arguably marks a paradigm shift in the Court’s case-law**. In that case, the EU concept of disability was explicitly aligned with that of the UN Convention’ (para 88, Case C-363/12, *Z. v A Government Department*)

Case C-397/18, Nobel Plastiques Ibérica SA

*“The concept of ‘disability’ must be understood as referring to a **hindrance to the exercise of professional activity, not to the impossibility of exercising such activity.** The state of health of a person with a disability who is fit to work, albeit only part time, is thus capable of being covered by the concept of ‘disability’” (para 43)*

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

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

Case C-354/13, Kaltoft

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

Case C-354/13, Kaltoft

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

Case C-270/16, Ruiz Conejero

“...if the obesity of the worker concerned 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 carrying out his work or causing discomfort when carrying out his professional activity” can be considered a disability for the purpose of the directive (para 30).



C 395/15, Mohamed Daouidi



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



C 395/15, Mohamed Daouidi

*“...the evidence which makes it possible to find that such a limitation is ‘long-term’ includes the fact that, at the time of the allegedly discriminatory act, the incapacity of the person concerned **does not display a clearly defined prognosis as regards short-term progress** or the fact that that incapacity is likely to be significantly prolonged before that person has recovered; and in the context of the verification of that ‘long-term’ nature, the referring court must base its decision on all of the objective evidence in its possession, in particular on documents and certificates relating to that person’s condition, established on the basis of current **medical and scientific knowledge** and data” (para 56)*

Beyond Non-discrimination Law

Recent EU legislation includes a definition of persons with disabilities which reproduces Article 1(2) UNCRPD (e.g. Article 3(1) EAA – Article 2(3)(b) GBER)

Discrimination on the Grounds of Disability



Case C-406/15 *Petya Milkova*



Case C-16/19 *VL v Szpital Kliniczny*

Reasonable Accommodation in the UNCRPD

Reasonable accommodation is an **intrinsic part of the immediately applicable duty of non-discrimination** in the context of disability

Individualised reactive *ex nunc* duty, i.e. it must be provided from the moment that a person with a disability requires access to non-accessible situations or environments, or wants to exercise his or her rights.

The reasonableness of an accommodation is a reference to its **relevance, appropriateness and effectiveness**.

“**Disproportionate or undue burden**” should be understood as a single concept that sets the **limit of the duty** to provide reasonable accommodation. The determination of whether a reasonable accommodation is disproportionate requires an assessment of the “**proportional relationship between the means employed and its aim**”

CRPD Committee - Draft General Comment on Article 27 on the Right of Persons with Disabilities to Work and Employment (2021)



“[...] A public sector employee with a vision impairment who is **not provided with the appropriate equipment** to perform their allocated tasks, such as a computer program that magnifies text on a computer screen, is an example of denial of reasonable accommodation. Examples of reasonable accommodation include making existing facilities and information accessible to the individual with disabilities, modifying equipment, reorganizing activities, rescheduling work or enabling access to support personnel. Reasonable accommodation needs to be **negotiated with the individual...**” (para 22)

Reasonable Accommodation in the UNCRPD



CRPD Committee, *Richard Sahin v Sweden*,
CRPD/C/23/D/45/2018 (2020)



CRPD Committee, *Michael Lockrey v Australia*,
CRPD/C/15/D/13/2013 (2016)



CRPD Committee, *ML Jungelin v Sweden*,
CRPD/C/12/D/5/2011(2014)



CRPD Committee, *HM v Sweden*, CRPD/C/7/D/3/2011 (2012)

CRPD Committee *VFC v Spain* CRPD/C/21/D/34/2015

“In order to assess the relevance, suitability and effectiveness of reasonable accommodation, factors such as financial costs, available resources, size of the accommodating party (in its entirety), the effect of the modification on the institution and the overall assets, rather than just the resources of a unit or department within an organizational structure, must be taken into consideration” (para 8.6)

Reasonable Accommodation in the Directive

Article 5

Recital 20 of the Preamble - **Non-exhaustive list** of accommodation measures, which may be physical, organisational and/or educational.

Recital 21 of the Preamble – Guidance on **disproportionate burden**

Recital 17 of the Preamble – Capacity to perform essential functions of the job

Reasonable Accommodation

- Joined cases C-335/11 and C-337/11 *HK Danmark*
- C-312/11 *European Commission v Italy*
- Case C-397/18 *Nobel Plastiques Ibérica SA*
- Case C-795/19, *Tartu Vangla*
- Case C-824/19 *Komisia za zashtita ot diskriminatsia*

Reasonable Accommodation

CJEU Case Law

A finding that the person concerned has a 'disability' **comes before the determination and assessment of the appropriate accommodation measures** referred to in Article 5.

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

Denial of reasonable accommodation is a form of discrimination.

Joined cases C-335/11 and C-337/11 HK Danmark



As recital 20 in the preamble to Directive 2000/78 and Article 2 UNCRPD envisage not only material but also organisational measures, and the term ‘pattern’ of working time must be understood as the rhythm or speed at which the work is done, **a reduction in working hours may constitute one of the accommodation measures referred to in Article 5 of the Directive.**

Case C-795/19, Tartu Vangla

*“Article 2(2)(a), Article 4(1) and Article 5 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as **precluding national legislation which imposes an absolute bar** to the continued employment of a prison officer whose auditory acuity does not meet the minimum standards of sound perception prescribed by that legislation, **without allowing it to be ascertained whether that officer is capable of fulfilling those duties, where appropriate after the adoption of reasonable accommodation measures for the purposes of Article 5 of that directive**”*

Case C-824/19 *Komisia za zashtita ot diskriminatsia*

- The CJEU refers to Article 5(3) UNCRPD as having “*an inclusive purpose promoting equality for disabled persons and eliminating discrimination*” and to Article 27 UNCRPD
- The CJEU Concludes that Article 2(2)(a) and Article 4(1) of the Directive 2000/78, read in the light of Articles 21 and 26 of the Charter and of the UNCRPD must be interpreted as meaning that they **preclude that a blind person be totally deprived of any possibility of performing the duties** of a juror in criminal proceedings.

OPINION OF AG RANTOS Case C-485/20 *HR Rail* (11 November 2021)

The purpose of a reasonable accommodation is to achieve a fair balance between the needs of people with disabilities and those of the employer.

Article 5 of Directive 2000/78 does not limit the measures adopted to the position occupied by the disabled worker alone. On the contrary, access to a job and the provision of training leave open the possibility of assignment to another job.

Practical Challenges at the National Level

Recognition that RA is a flexible notion (e.g. Cass. civ. Sez. lavoro, Sent. 09-03-2021 n. 6497)

Variety of RA (e.g. adjusting a provision criterion or practice, changing a work post at the same rate pay, working from home, adapted work schedule, redeployment to another branch)

Guidelines & Reports (e.g. NDA Report <https://nda.ie/publications/employment/employment-publications/reasonable-accommodations-obstacles-and-opportunities-to-the-employment-of-persons-with-a-disability1.html>)

Failure to provide RA is a form of discrimination (e.g. Spanish Constitutional Court 15 March 2021)

Practical Challenges at the National Level

Financial Cost

Impact on other workers

Impact on the whole service/work organization

Benefit for the persons with disabilities

Benefit for other workers

- Challenging balance between the right of the employee with disabilities and the rights of other employees (e.g. Denmark Board of Equal Treatment, Decision No. 9226 of 22 March 2021 - <https://www.equalitylaw.eu/downloads/5404-denmark-workplace-situation-guide-dog-and-allergy-77-kb>)



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Thank you for your attention!
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Selected Bibliography

EC, How to put reasonable accommodation into practice – guide of promising practices, 8 September 2020
<https://ec.europa.eu/social/main.jsp?catId=738&langId=it&pubId=8341&furtherPubs=yes>

Anglmayer, I (2020), Implementation of the Employment Equality Directive in light of the UN CRPD European Implementation Assessment,

[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654206/EPRS_STU\(2020\)654206_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654206/EPRS_STU(2020)654206_EN.pdf)

Bell M. (2018), 'Adapting work to the worker: The evolving EU legal framework on accommodating worker diversity', *International Journal of Discrimination and the Law*, 132

EQUINET (2021), *Discussion Paper. Reasonable accommodation for persons with disabilities Exploring challenges concerning its practical implementation.*

Degener T. (2017), 'A New Human Rights Model of Disability', in V. Della Fina, R. Cera, and G. Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer)

Ferri D. (2020) 'The Unorthodox Relationship between the EU Charter of Fundamental Rights, the UN Convention on the Rights of Persons with Disabilities and Secondary Rights in the Court of Justice Case Law on Disability Discrimination'. *European Constitutional Law Review*

Selected Bibliography

Ferri D. & Broderick A. (Eds) (2020) *Research Handbook on EU Disability Law* (pp. 1-11). Edward Elgar Publishing.

Lawson A. and Beckett AE (2020) 'The social and human rights models of disability: towards a complementarity thesis' *The International Journal of Human Rights*

Liu K and O'Conneide C. *The ongoing evolution of the case-law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC*

https://ec.europa.eu/info/sites/default/files/the_case_law_of_the_cjeu_on_dir_200043ec_and_200078ec_web.pdf

Lock T. (2019) , 'Rights and Principles in the EU Charter of Fundamental Rights', (2019) 56 (5) *Common Market Law Review*, p. 1201

Waddington L (2018), 'The Influence of the UN Convention on the Rights of Persons with Disabilities on EU Anti-Discrimination Law', in U. Belavusau and K. Henrard, *About EU Anti-Discrimination Law beyond Gender* (Hart Publishing).

Waddington L., Lawson A. (2016), 'The Unfinished Story of EU Disability Non-Discrimination Law', in A. Bogg, C. Costello and A.C.L. Davies (eds.), *Research Handbook on EU Labour Law* (Edward Elgar)

Waddington L., Broderick A. (2018), *Combating Disability Discrimination and Realising Equality: A Comparison of the UNCRPD and EU Equality and Non-discrimination Law* (European Commission - Brussels)