

Disability and discrimination

Reasonable accommodation, ECJ cases and the UNCRPD

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- UN CRPD
- ECJ case law on disability issues
- Reasonable accommodation - the concept, the measures

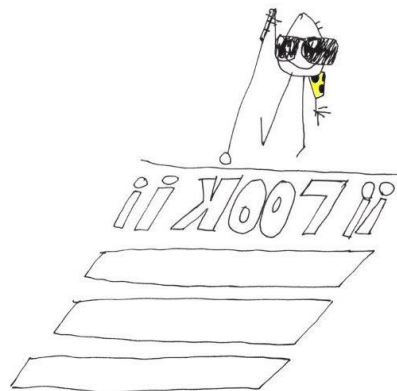
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- WHO / old medical model (outdated, but still present in people's minds).
 - Impairment: any limitation or complete loss of the ability to perform an activity in the manner considered **normal for a human being**.

WHO classification of impairments, handicaps, disadvantages

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- UNCRPD Preamble letter e:
 - The understanding of disability is continuously evolving
- UN CRPD Article 1:
 - Persons with disabilities include people who have long-term physical, mental, intellectual or sensory impairments which, **in interaction with various barriers**, may prevent them from **participating fully, effectively and equally in society**.



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- Lack of robust, detailed data
- Employment rate EU 2014 (20 to 64 years)
 - with severe disability: 29.9 %
 - without disability: 76.2 %
- People at risk of poverty or social exclusion (2018)
 - with severe disability: 36.1 %
 - without disability: 18.8 %
 - (Master Sheet European Disability Expertise 2020)
- Feeling of discrimination: 52% of people with disabilities
- Corona pandemic → Exacerbation of the situation / regression for people with disabilities - due to high risk impairment of participation

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- Barriers - hinder mobility, access opportunities, political participation
- Independent living with good quality: deinstitutionalisation, social protection, non-discrimination
- Full, effective, equal participation
- EU leadership / Promoting the rights of people with disabilities worldwide.

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- Disability by definition (UN CRPD): impairment plus barriers
- Barriers are the focus for policy intervention to create/enforce an inclusive labour force
- Removal of barriers: not always possible, then:
=> Reasonable accommodation

- **Principle 17 of the European Pillar of Social Rights:**
Inclusion of people with disabilities:
 - Right to income support that ensures a dignified life,
 - services that enable them to participate in the labour market and in social life,
 - A working environment adapted to the needs.
 - Employment Directive 2000/78/EC,
 - Directive (EU) 2019/882: Accessibility of products and services (entry into force 7.2025)
 - Article 2 UN CRPD (definition)
 - National legislation (Germany: The first law that explicitly contains the term "reasonable accommodation" has only been in force since 2017: § 7 BGG. But de facto § 81 para. 4 SGB 9 aF already contained the obligation to make reasonable accommodation in working life, for general civil law contracts the concept still does not apply today).

Adequate precautions

Reasonable accommodation and other

- Distinguish reasonable accommodation from:
 - general accessibility standards (universal design)
 - Accessibility
 - positive promotional measures

- UN CRPD Article 2:
 - "Necessary and appropriate modifications and adjustments which do not impose a disproportionate or undue burden and which, when required in a particular case, are made to ensure that persons with disabilities enjoy or are able to exercise all human rights and fundamental freedoms on an equal basis with others"
- 2000/78/EC Article 5:
 - Reasonable accommodation means "that the employer takes the **appropriate measures** necessary in the particular case to enable the disabled person to have access to employment, to pursue a vocational activity, to advance in his or her career and to participate in education and training, unless such measures would impose a disproportionate burden on the employer".

- Reasonable accommodation:
 - Individual
 - Concrete circumstances
 - Not an absolute obligation
 - Adequate (not optimal)
 - Not disproportionate / not unreasonable
- Accessibility:
 - For a specific group
 - (Absolute) duty - no test of "reasonableness" or "disproportionality".

- For people with disabilities: reasonable accommodation = a key concept of 2000/78/EC (still no reasonable accommodation required: social protection, health services, education... movement in access to and supply of goods and services - EAA -)
- Concept of substantive equality (as opposed to formal equality)
- No affirmative action in favour of disabled people as a group, but breaking down stereotypical prejudices that limit opportunities for disabled people

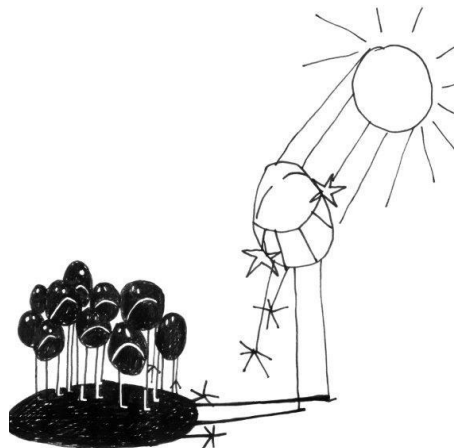
- Recital 17: Limits to reasonable accommodation
 - Person must be competent, capable and available to perform the essential functions of the job in question
- Recital 20: Appropriate measures
 - Effective and practicable measures
 - Setting up the workplace according to the disability
 - For example: appropriate design of the premises and adaptation of the work equipment,
 - Adjustment of the working rhythm,
 - The Distribution of tasks or the offer of training and familiarisation measures

- Recital 21:
 - Excessive Burden Test: Consideration of financial and other burdens,
 - Size and financial possibilities of the organisation or company,
 - Possibility of public funding or other public support.

- Art. 5 para. 3: no disproportionate burden if:
 - it is sufficiently compensated by measures within the framework of the Member State's disability policy;
 - important role of national legislation
 - different levels of reasonable accommodation for people with disabilities in different Member States?
 - Role of the UN CRPD?
- Does the company have to apply for compensation/ government funding, if possible?
 - No, but if not: no disproportionate burden

- Employee/applicant is qualified
- Employer is aware of the needs of the workforce
- Reasonable accommodation=> suitable condition for employee to perform the essential functions of the job.
- Reasonable accommodation does not impose a disproportionate burden

- UN CRPD
 - No reasonable accommodation = discrimination
 - → trad. Concepts:
 - direct discrimination,
 - indirect discrimination
 - new type of discrimination sui generis: no reasonable accommodation
 - → results from the UNCRPD disability concept:
 - Impairment + barriers = disability



Summary comments on the First Report of the European Commission to the CRPD Committee (2015)

- 94 recommendations, criticisms and comments (2nd reporting procedure started at the end of April 2022):
- Examples first report:
 - Obligation to provide reasonable accommodation is missing in areas such as health, education, goods and services...
 - No 'disability mainstreaming' / no disability reference in 'gender mainstreaming'
 - Lack of procedural accommodation for persons with disabilities seeking access to justice in EU Member States
 - Training needed for Member States on Reasonable Accommodation and Accessibility in Employment

Directive 2019/882

- Directive 2019/882 = European Accessibility Act (EAA)
- Adopted 7 June 2019
- Implementation period Member States:
28 June 2022
- Application of the Directive by national law: 28 July 2025 at the latest.

- Goal: Accessibility of products and services (barrier-free)
- Priority of application: "Universal Design" (Art 2, 9 UNCRPD)
- But: reasonable accommodation should not be excluded (para 50) → but is not specifically defined or required.

- Strong focus on digital offerings
 - Electronic commerce and its platforms
 - Devices, operating systems, computers for electronic communication
 - E-books and software for it
 - Access to audiovisual media (TV, e-book readers, CD players, etc.)
- Services and products Transport sector (passenger transport)
- Emergency numbers
- Banking services (also ATMs, service terminals)

- Derogation in the EAA: Art 14
 - Follows the ratio of reasonable accommodation limits
 - No substantial change to the product/service is required that calls into question its essential characteristics.
 - No disproportionate burden for actors
 - Reasons for this must be documented/ can be requested
 - Reduced requirements for micro-enterprises (less than 10 employees).

- Germany:
 - Reasonable accommodation not provided for in the General Equal Treatment Act (AGG) (but is partly included via UN-CRPD, BGG, Art 3 para. 3 sentence 2 GG → Passenger transport Railways)
 - SGB 9: Disability law (rehabilitation, participation, workplace)
 - Regulations only for severely disabled persons: § 164 para 4 SGB 9 (formerly: § 81 para 4 SGB 9):
 - Disabled workers → Access to the workplace, appropriate work organisation, necessary work aids

Reasonable accommodation

- ECJ C-335/11 Ring and Skouboe Werge
 - Both secretaries with severe back pain (osteoarthritis, consequence of an accidental whiplash).
 - Long periods of absence from the workplace
 - Dismissal (without taking into account the legislation on the protection of persons with disabilities)
 - Both sued against the dismissal and demanded reasonable accommodation (part-time work, height-adjustable desk)
 - ECJ: Long-lasting impairments which, in interaction with various barriers, may prevent the person concerned from participating fully and effectively in working life on an equal footing with other workers = disability (not only congenital or accidental but also caused by illness).
 - For the question of whether a person's state of health is covered by this term, it does not matter what kind of measures the employer has to take (part-time work and height-adjustable desks are not special adaptations for people with disabilities)

- "Flat grinder" case
 - Worker must lift workpieces weighing 30 kg and more
 - and cannot lift more than 10 kg after an operation.
 - Employer dismisses him.
 - Federal Labour Court: Reasonable accommodation Change in work organisation; special machine for workpieces from 10 kg. Dismissal was inadmissible
- Other cases of German courts
 - Reasonable accommodation \neq Best imaginable accommodation
 - Various arrangements possible: decision up to the employer
 - But: Right to self-determination according to § 9 SGB IX
 - Example: Work aid for blind computer specialists

- Ireland: Reasonable accommodation required since 1998; scheme supplemented to meet requirements of 2000/78/EC
 - Harrington v. East Coast Area Health Board
 - Wheelchair users
 - Interview should take place in inaccessible building
 - Equal Opportunities Officer: Adequate provision has not been made.

- Feist v. State of Louisiana
 - Feist: deputy attorney general, suffered from osteoarthritis, no free parking space
 - Louisiana Department of Justice: reasonable accommodation only if it is conducive to job performance
- Fifth Circuit Court of Appeals:
 - Employers may be required to make arrangements that are not attributable to the "essential functions" of the job if they are necessary to provide an employee with equal access to employment or its benefits and privileges.

Reasonable accommodation for interviews

- New situation (compared to the 1990s):
Disability does not have to be hidden in most cases
- Knowledge of the disability is the prerequisite for reasonable accommodation
- The most important thing for disabled people and employers is to know the possibilities for accommodations

- Sign language interpreter
- Barrier-free accessible premises (for wheelchair users, but also for the blind, learning disabled)
- Possibility to bring guide dog
- Writing facility for the armless / blind (PC)
- Stutterers must be able to answer questions in writing.
- Reasonable time extension for disabled persons in selection test
- Explanations in easy to understand language

- Disability: Distinction disability - disease
- Emphasis not on disability but on disability discrimination
- Reasonable accommodation: powerful tool to overcome barriers / opportunity to participate
- Problem: Adequate precautions can take effect too late (e.g. application of deaf people).
- Part of the change in the image of disability
- Adequate provisions must be made individually / correspond to individual needs.
- Dynamic concept: in need of further development

- Notes, explanations, guidance for people with intellectual disabilities
- Explanations of procedural acts in plain language by the court
- Sign language interpreters in the main hearings and for public legal advice
- Specially trained lawyers
- Accessible and technically well-equipped courtrooms

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