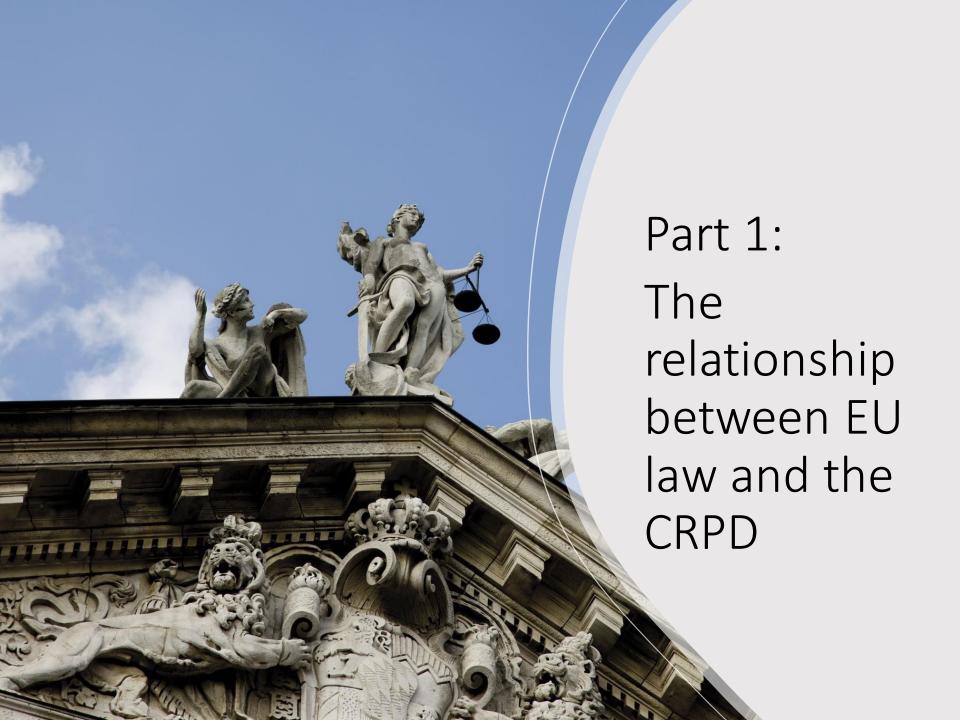


Disability in EU Law

Dr Lucy-Ann Buckley
School of Law
University of Galway

Overview

- 1. The relationship between EU law and the UN Convention on the Rights of Persons with Disabilities (CRPD) focusing specifically on the Framework Employment Directive (FED)
- 2. The concept of disability in the CRPD and EU law
- 3. Reasonable accommodation in the CRPD and EU law



UN Convention on the Rights of Persons with Disabilities (CRPD)

- The fastest negotiated human rights treaty in history.
- Ratified by 186 countries to date, including every member state of the European Union
- Signed by the EU in 2007 and ratified in 2010
 - Council Decision 2010/48/EC 2009 concerning the conclusion by the European Community, of the CRPD.
 - Annex II lists the EU acts on matters governed by the CRPD (exclusive or shared competence)

Framework Employment Directive (FED)

- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303
- FED addresses discrimination on grounds of disability, religion/ belief, sexual orientation and age
- Pre-dates the CRPD
- Scope of the FED is much narrower than the CRPD addresses only employment and vocational training

Joined Cases C-335/11 and C-337/11 Ring and Skouboe Werge

FED interpreted in light of the CRPD

 International agreements have primacy over instruments of secondary law. Those instruments must be interpreted in a manner consistent with those agreements.

CRPD is "an integral part of the EU legal order"

Case C-363/12 Z

Q: Is the [UN Convention] capable of being relied on for the purposes of interpreting, and/or of challenging the validity, of Directive 2000/78 ...?

A: (71) "international agreements are concluded by the European Union, they are binding on its institutions and, consequently, they prevail over acts of the European Union.

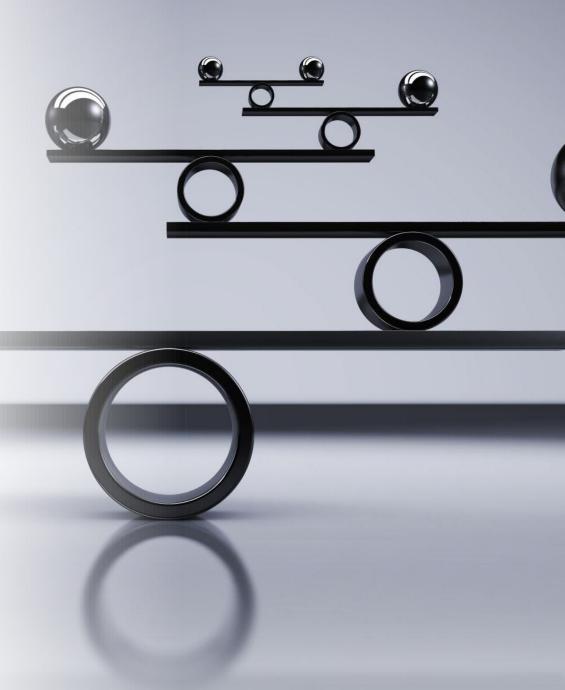
(72) "The primacy of international agreements ... over instruments of secondary law means that those instruments must as far as possible be interpreted in a manner that is consistent with those agreements."

Case C-363/12 *Z* (continued)

- (73) "The provisions of that Convention are thus, from the time of its entry into force, an integral part of the European Union legal order ..."
- (75) "...the UN Convention is capable of being relied on for the purposes of interpreting Directive 2000/78, which must, as far as possible, be interpreted in a manner that is consistent with that Convention"

Part 2:

The Impact of the CRPD on EU law: the meaning of Disability



Models of Disability

Medical model of disability

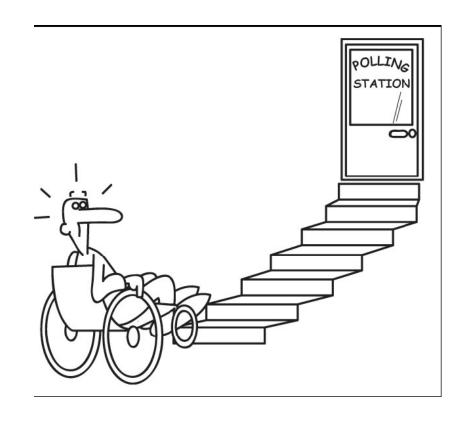
- Focus on what is "wrong" with the individual
- Focus on medical solutions and how to "fix" the person

Social model of disability

- Focus on barriers to participation (physical, attitudinal, societal)
- Focus on a rights-based approach to inclusion

What is wrong with this picture?

Apply the medical model



Apply the social model

CRPD and the concept of "disability"

- No fixed definition of disability
 - "a soft threshold definition in the form of guidance which is open-ended and inclusive" de Búrca

• Preamble:

 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

 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.

Article 1 CRPD

- Inclusive and open-ended concept of disability;
 not an exhaustive definition
- Clearly based on social model of disability
- Barriers may be attitudinal captures prejudicial impact
- Does not require the impairment itself to have a functional impact
- Article 1 refers to conditions being "long-term"
 - but again, this is not an exhaustive definition

Directive 2000/78/EC Framework Employment Directive (FED)

- The FED does not define disability
- Article 1: "The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of ... disability ...employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment".

Disability in the FED prior to ratification of the CRPD

C-13/05 Chácon Navas v. Eurest Colectividades SA

43 ... a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.

44 ... disability is different from sickness ... and 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

45 ... for any "limitation" to be regarded as a "disability", "it must be probable that it will last for a long time"

Disability after ratification of the CRPD

- Joined Cases C-335/11 and C-337/11 Ring and Skouboe Werge
- 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, and the limitation is a long-term one" [93]

 Concept of "disability" includes an illness if it comes within the above.

Joined Cases C-335/11 and C-337/11 Ring and Skouboe Werge

- Reference to "barriers" more social model of disability
- BUT still requires a "limitation" arising from the impairment – suggests functional impact
- Must still be "long-term"

CRPD and EU law compared

- Article 1 CRPD:
- Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.
- FED:
- 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, and the limitation is a long-term one"

Case C-354/13 Karsten Kaltoft v Municipality of Billund

• Para 53: Following the ratification by the European Union of the United Nations Convention on the Rights of Persons with Disabilities, ... the Court held that the concept of "disability" must be understood as referring to 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

• Obesity may be a disability if it meets this test

Case C-363/12 Z

- CJEU held that the concept of disability:
 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.
- Z did not have a disability within the meaning of the FED as her lack of a uterus did not, "by itself" [81] affect her ability to participate in professional life.

Case 363/12 *Z* (continued)

 This overlooked the impact of structural barriers (the rules for paid leave) on the claimant's ability to participate on equal terms to persons without a similar impairment.

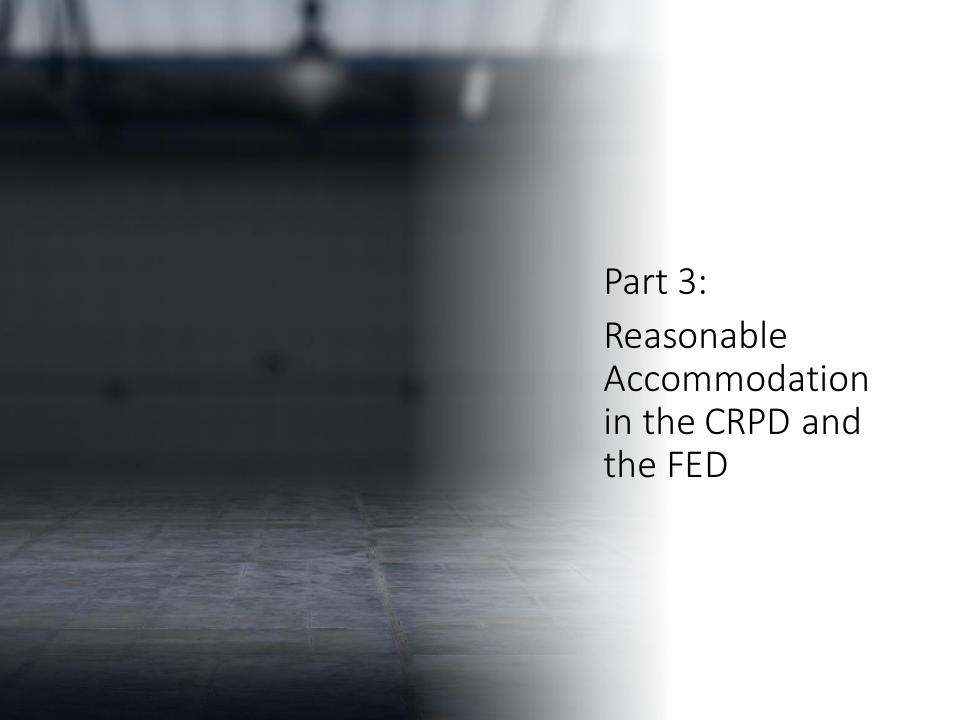
 CJEU cited a more social understanding of disability, but in practice applied a medical model.

Case C-395/15 Daouidi

- (49) "The UN Convention does not define 'long-term' as regards a physical, mental, intellectual or sensory impairment. Directive 2000/78 does not define 'disability', nor does it clarify the concept of a 'long-term' limitation of a person's capacity for the purposes of that concept."
- Evidence of 'long-term' includes lack of clearly defined prognosis as regards short-term progress, fact it is likely to be a prolonged period of time before recovery
- National Court must in determining 'long-term' base its decision on all of the objective evidence, such as, documents and certificates relating to that person's condition (based on current medical and scientific knowledge). Case by case analysis.

Case C-406/15, Milkova

- Mental illness does constitute a disability ...
- (48) That interpretation is supported by the UN Convention which, in accordance with settled case-law, may be relied on for the purposes of interpreting Directive 2000/78
- CJEU then referred to CRPD Article 27(1) on the right to work and Article 5(1) on equality and went on to state:
- (50) "It follows from the foregoing that the legislation at issue in the main proceedings comes within the scope of Article 7(2) of Directive 2000/78 and, as such, pursues an objective covered by EU law ..."



Reasonable Accommodation in the CRPD

- Article 2 Discrimination includes a denial of reasonable accommodation
- Article 2 "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

Reasonable Accommodation in the CRPD

 CRPD Committee - there is a duty to legislate to ensure that reasonable accommodation provisions are enshrined in law – such laws should ensure that reasonable accommodation is recognized and punishable form of discrimination (Concluding observations on the Initial Report on Germany 13 May 2015.)

Justiciable and immediately enforceable.

Reasonable Accommodation

Fredman:

 "Instead of requiring disabled people to conform to existing norms, the aim is to develop a concept of equality which requires adaptation and change."

Reasonable accommodation and other concepts



Article 5(3) provides for reasonable accommodation



Article 5(4) provides for positive or affirmative action



Article 9 provides for accessibility



Separate and distinct concepts

Reasonable Accommodation – CRPD duty

Two elements:

Duty to accommodate

Disproportionate burden



Duty to accommodate (1)

- Individualised, reactive duty
- Individualised must respond to the particular needs of the particular person – no "one size fits all" – need a case-by-case assessment
- Reactive triggered or enforceable from the moment a person with a disability requires an accommodation

Duty to accommodate (2)

- Proposed accommodation must address the barrier to inclusion in an effective way
- Process requires dialogue between the duty bearer and the person with a disability
- Nature of the required dialogue depends on the kind of relationship



Disproportionate Burden

Duty of reasonable accommodation is limited by "disproportionate or undue burden" – single concept, not two separate concepts.

Factors: cost, structural burden, disruption, benefits (including benefits to third parties).

Third party perceptions of unfairness are irrelevant

Significance of the word 'Reasonable'

- CRPD Committee General Comment No. 6 on Art. 5 (2018), para 26(e):
- "Reasonable accommodation" is a single term, and
 "reasonable" should not be misunderstood as an exception
 clause; the concept of "reasonableness" should not act as a
 distinct qualifier or modifier to the duty. ... this occurs at
 a later stage, when the "disproportionate or undue burden"
 assessment is undertaken. Rather, the reasonableness of an
 accommodation is a reference to its relevance,
 appropriateness and effectiveness for the person with a
 disability

Reasonable Accommodation in the FED

• Article 5:

... reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

Guidance on Accommodations

Recital 20:

 effective and practical measures to adapt the workplace to the disability, i.e. adapting premises and equipment, patterns of working time, the distribution of tasks etc

Ring and Skouboe Werge:

 the 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 others.

What is a disproportionate burden?

Recital 21

• To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.

Limitation - essential functions of the post

Recital 17

 The directive does not require the recruitment, promotion or maintenance in employment of a person who is not competent, capable and available to perform the essential functions of the post concerned, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

The role of judges

"The impact an anti-discrimination law may have on society depends, to a large extent, on the attitude of the judiciary rather than on the text of the legislation itself."

Theresia Degener,
Legal Expert to the UN High
Commissioner for Human Rights as
co-author of the background study to
the UNCRPD



Questions/ concerns for the CJEU and National Courts

- Reasonable Accommodation is not explicitly described as discrimination in the FED
- The reasonable accommodation duty in the CRPD applies to all contexts (e.g., education, health, transport), but at EU level it applies only to employment and vocational training
- However, member states also have compliance duties as signatories of the CRPD (shared competence)
- 27 countries in Europe have ratified the CRPD therefore it should form part of national legal interpretations