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EU Disability Anti-Discrimination Law: the UN CRPD, reasonable accommodation and CJEU Case Law

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Structure of Presentation:

1. The EU and the CRPD – general legal implications for the EU.
2. The CRPD, non-discrimination and reasonable accommodation.
3. EU law, non-discrimination and reasonable accommodation.
4. Tensions between EU law and CRPD with regard to the definition of disability and reasonable accommodation.

1. The EU and the CRPD

Nov. 2009 - the Council adopted a Decision to conclude – or ratify – the Convention.

Dec. 2010 - the EU concluded the Convention.

The Convention is a “mixed agreement” – an international agreement covering fields in which both the EU and the Member States have competence to act.

1. The EU and the CRPD (2)

Three possible scenarios describe the respective competence of the EU and the Member States:

- EU has exclusive competence to act in a certain area
- Member States have competence to act in a certain area
- EU and Member States share the competence to act in a certain area

Combating discrimination is an area of shared competence.

2. CRPD, Non-Discrimination and Reasonable Accommodation

A. Specific CRPD Articles

- Article 2 of the Convention defines “discrimination on the basis of disability” very broadly to mean:
“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 political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.”

A. Specific CRPD Articles (2)

- Article 3 lists the general principles of the Convention. These include non-discrimination and equality of opportunity.
- Article 4 establishes general obligations for State Parties.

This includes the obligation to “take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise”.

A. Specific CRPD Articles (3)

Article 5 – equality and non-discrimination

(1) State Parties recognise that all persons are equal before and under 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.

(3) States parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

(4) Measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination.

A. Specific CRPD Articles (4)

Article 27 – employment.

Non-discrimination is an obligation that applies across the Convention.

B. Reasonable Accommodation

CRPD defines a failure to make a reasonable accommodation as a form of discrimination.

Reasonable accommodation builds on the understanding that only applying a formal approach to non-discrimination will do little to help many people with disabilities.

Reasonable accommodation recognizes the relevance of “impairment” - if one ignores the impact of an impairment, and treats a person with a disability in exactly the same way as one treats a person without a disability, a *de facto* situation of inequality will arise.

B. Reasonable Accommodation (2)

The notion of reasonable accommodation was developed to address this situation.

Requires a covered party to take account of the characteristics related to disability, and to accommodate them by, e.g. changing the physical environment.

- “Instead of requiring disabled people to conform to existing norms, the aim is to develop a concept of equality which requires adaptation and change.”
(Sandra Fredman).

This obligation to accommodate is not unlimited – and is subject to the requirement that the accommodation does not result in a disproportionate burden.

C. Concept of disability under CRPD

The Convention is clearly founded upon the social model 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.” (Article 1)

3. EU law, non-discrimination and reasonable accommodation – the Employment Equality Directive (2000/78)

The Directive prohibits discrimination with regard to employment and vocational training on grounds of religion or belief, sexual orientation, age and disability.

A. The Employment Equality Directive defines four forms of action as discrimination

- direct discrimination
- indirect discrimination
- harassment
- instruction to discriminate against another person

Direct discrimination

- “where one person is treated less favourably than another is, has been or would be treated in a comparable situation” on the ground of disability

It is important that the less favourable treatment is on the ground of disability. It is not necessary that the person complaining of direct discrimination actually has a disability him or herself.

Indirect Discrimination

- where an apparently neutral provision, criterion or practice would put persons having a particular disability at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

Harassment

- where unwanted conduct related to the ground of 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.

Harassment needs to be on the ground of disability - individuals are protected from harassment on the grounds of disability, even if they are not disabled themselves.

Instruction to discriminate

- instruction to discriminate is defined as a form of discrimination.

B. Reasonable Accommodation (1)

“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, 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 provide training for such a person, unless such measures would impose a disproportionate burden on the employer. When this burden is, to a sufficient extent, remedied by existing measures as an element of disability policy in the Member State, it should not be considered disproportionate.” Art.5

B. Reasonable Accommodation (2)

CJEU in *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”.

The Directive requires an individualised accommodation to meet the needs of a particular individual.

The Directive does not explicitly define a denial of an accommodation as a form of discrimination.

What is an accommodation?

- *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 resources.”

Accommodation requirement applies to all aspects of the employment *and* employment related benefits.

CJEU: The list of measures in recital 20 is not exhaustive, and other measures can also amount to an accommodation.

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.”

Who is regarded as a person with a disability? (1)

CJEU has addressed this in three cases (2006, 2013 and 2014)

- Case C-13/05, *Chacón Navas* (2006)

Court defined disability for the purposes of the Directive as:

“a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life”. For any limitation to be regarded as a “disability”, “it must be probable that it will last for a long time” .

Who is regarded as a person with a disability? (2)

“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”.

Sickness could not be added to the list of grounds covered by the Directive.

Who is regarded as a person with a disability? (3)

- Joined Cases C-335 and C-337/11 *Ring and Skouboe Werge* (2013)

CJEU noted that the CRPD forms “an integral part of the EU legal order” and that secondary legislation must be interpreted in a manner consistent with the CRPD as far as possible.

CJEU noted that *Chacón Navas* was decided before the EU became a party to the UN CRPD and that the UN CRPD addresses the concept of disability.

Who is regarded as a person with a disability? (4)

CJEU: “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 others”.

The impairment must be “long-term”.

Who is regarded as a person with a disability? (5)

A curable or incurable disease could amount to a disability if it led to the required degree of limitation.

However, an illness which did not lead to such a limitation was not covered, and illness was not an additional ground of protection.

The disability did not have to prevent a person from working at all – it was sufficient if a person was only able to work part-time as result of the disability.

It was not necessary that individual required an accommodation.

Who is regarded as a person with a disability? (6)

Case C-363/12 Z (2014)

Court stated that the concept of disability within the meaning of the Directive “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’s condition did not impact on her ability to access, participate in or advance in employment in any way, and therefore her condition did not constitute a disability within the meaning of the Directive.

4. Tensions between EU law and CRPD: The Definition of Disability

Definition of disability applied by the CJEU is more limited than that found in CRPD.

CJEU requires an individual has an impairment which impacts on the ability to work in order to be disabled.

Reference point for CRPD is not ability to work, but participation society.

National law and judges can still follow CRPD approach

4. Tensions between EU law and CRPD: Reasonable Accommodation

CRPD specifically defines a failure to make a reasonable accommodation as a form of discrimination.

The EU directive is not specific on this point. However, Article 5 of the directive is clearly framed in terms of the equality paradigm.

B. CRPD defines a failure to make a reasonable accommodation as a form of discrimination (2)

Possible solutions:

- EU directive should be interpreted in such a way that a failure to provide a reasonable accommodation should be regarded as a form of discrimination.
- Member States which have ratified CRPD should ensure national law defines a failure in such a way.