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Speakers' presentations

**EU DISABILITY LAW AND  
THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH  
DISABILITIES**

**SEMINAR FOR LEGAL PRACTITIONERS**

Trier, 18-19 April 2016



Funded by  
the European Union

**This seminar series has received financial support from the European Union Programme for Employment and Social Innovation "EaSI" (2014-2020). For further information please consult: [ec.europa.eu/social/easi](https://ec.europa.eu/social/easi)**

With the support of the EFC European Consortium of Foundations on Human Rights and Disability and the EDF European Disability Forum, and in cooperation with the European Commission (Contracting Authority). The information contained in this publication does not necessarily reflect the position or opinion of the European Commission.

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# Convención de las Naciones Unidas sobre los Derechos de las Personas con Discapacidad (UNCRPD):

## ELEMENTOS PRINCIPALES

Torcuato Recover. RED DE JURISTAS



**Plena**  
inclusión

# Antecedentes:

La CARTA DE NACIONES UNIDAS  
de 26 de Junio de 1945

➤ No recoge referencias explícitas a la  
discapacidad.

\* Sienta dos principios fundamentales  
para la normativa internacional:

1. La obligación de respetar los  
derechos humanos.

2. Obligación de NO DISCRIMINAR.

Artículo 1.3

# LA DECLARACION UNIVERSAL DE DERECHOS HUMANOS

- PERSIGUE SER: *“un ideal común por el que todos los pueblos y naciones deben esforzarse”* .
- recoge, por primera vez, los derechos civiles, políticos, económicos, sociales y culturales básicos de todos los seres humanos.

# LA DECLARACION UNIVERSAL DE DERECHOS HUMANOS

- ART. 1: *“todos los seres humanos nacen libres e iguales en dignidad y derechos”*.
- ART.2. NO DISCRIMINACION: *“toda persona tiene los derechos y libertades proclamados en esta Declaración, sin distinción alguna de raza, color, sexo, idioma, religión, opinión política o de cualquier otra índole, origen nacional o social, posición económica, nacimiento o cualquier otra condición”*
- ART. 7. Todos son iguales ante la ley y tienen, sin distinción, derecho a igual protección de la ley. Todos tienen derecho a igual protección **contra toda discriminación**.
- ART. 22. Toda persona, como miembro de la sociedad,...tiene derecho a la satisfacción de los derechos económicos, sociales y culturales, indispensables a su dignidad y al libre desarrollo de su personalidad.

# Pacto Internacional de Derechos Civiles y Políticos.

A.G. 16.12.1966

- Artículo 2. los Estados Partes se comprometen a respetar y a garantizar a todos los individuos los derechos reconocidos en el presente Pacto, sin distinción alguna de raza, color, sexo, idioma, religión, opinión política o de otra índole, origen nacional o social, posición económica, nacimiento o cualquier otra condición social.

# Pacto Internacional de Derechos Civiles y Políticos.

A.G. 16.12.1966

- **Artículo 26**

Todas las personas son iguales ante la ley y tienen derecho sin discriminación a igual protección de la ley. A este respecto, la ley prohibirá toda discriminación y garantizará a todas las personas protección igual y efectiva contra cualquier discriminación por motivos de raza, color, sexo, idioma, religión, opiniones políticas o de cualquier índole, origen nacional o social, posición económica, nacimiento o cualquier otra condición social.



# Pacto Internacional de Derechos Civiles y Políticos.

A.G. 16.12.1966

- Su artículo 28 establece el **COMITÉ DE DERECHOS HUMANOS** (modelo del COMITÉ DE LA Convención): órgano de expertos independientes que supervisa la aplicación del tratado por sus Estados Partes.
- Este ha amparado LA **DISCRIMINACION POSITIVA**: *“el principio de la igualdad exige algunas veces adoptar disposiciones positivas para reducir o eliminar las condiciones que **originan o facilitan** que se perpetúe la discriminación prohibida por el Pacto”*

# Pacto Internacional de Derechos Económicos, Sociales y Culturales

A.G. 16.12.1966

- Artículo 2.2. NO DISCRIMINACION:

Los Estados Partes se comprometen a garantizar el ejercicio de los derechos que en él se enuncian, sin discriminación alguna por motivos de raza, color, sexo, idioma, religión, opinión política o de otra índole, nacimiento o cualquier otra condición social.

# **Pacto Internacional de Derechos Económicos, Sociales y Culturales**

**A.G. 16.12.1966**

- Constituye un antecedente claro de la Convención, al tratar todos los derechos de forma diferenciada y prohibir la discriminación en el ejercicio de los derechos

# Lo tratados de Derechos Humanos de segunda generación

- Convención contra la tortura y otros actos crueles. 1988
- Convención sobre la eliminación de todas las formas de discriminación contra la mujer. 1981
- Convención sobre los derechos del niño. 1990.
- Convención sobre los derechos del adulto mayor (existe ya una Convención interamericana OEA)

# Las Normas Uniformes sobre la igualdad de oportunidades para las personas con discapacidad. 1993

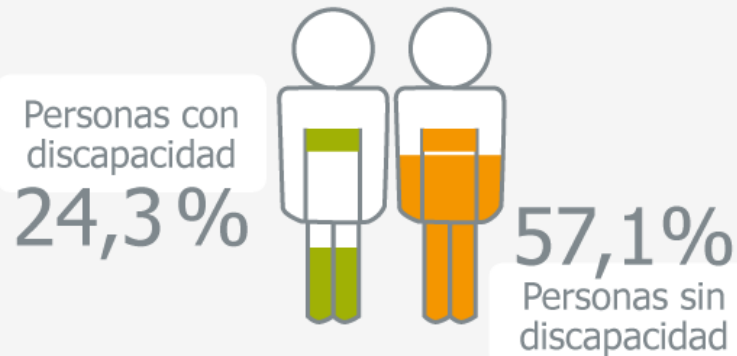
- Suponen el primer texto internacional, no vinculante, en materia de discapacidad.
- Comienza a superar los modelos médico y asistencial .
- Establece el concepto de discapacidad relacionada con el entorno.
- Introduce el criterio de “Servicios de apoyo”

# DATOS SOBRE DISCAPACIDAD

- En España hay 4,12 millones de personas con discapacidad =9,5 % de la población. 12 millones de personas contando a las familias
- En el mundo 1000 millones de personas viven con algún tipo de discapacidad.
- En uno de cada cinco hogares españoles vive una persona con discapacidad. (20% hogares)
- En general, se puede afirmar que la discapacidad **aparece a edades más tardías**. El 56% de las personas con discapacidad tienen más de 65 años.
- Se han producido profundos **cambios en las estructuras familiares** que debilitan las redes de solidaridad familiar.

# DATOS SOBRE DISCAPACIDAD

## Tasa de empleo

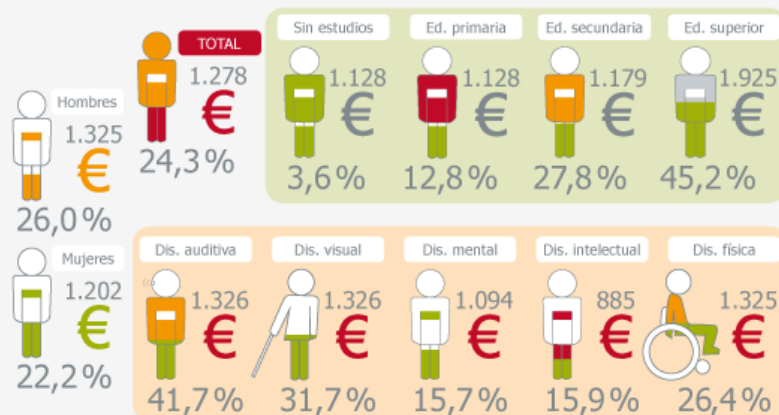


## Una de cada cuatro personas con discapacidad está actualmente ocupada

En 2013 apenas una de cada cuatro personas con discapacidad estaba ocupada, frente al 57% de la población sin discapacidad, lo que se explica particularmente por una baja tasa de actividad, del 37%, 40 puntos inferior que la del resto de la población, y por una mayor tasa de paro, del 35%.



## Tasa de empleo (%) y salario mensual neto medio (€)



## Un colectivo diverso

La integración del colectivo de personas con discapacidad en el mercado de trabajo es muy diversa, en función de sus características sociodemográficas. Tanto la tasa de empleo como el salario de aquellos que trabajan son mayores para los hombres, las personas con discapacidades sensoriales, las de menor grado de discapacidad y las que tienen un mayor nivel formativo.

# DATOS SOBRE DISCAPACIDAD

## Educación

- **En educación** también persiste el reto de reducir la brecha que existe entre la población con y sin discapacidad. La población con discapacidad entre los 18 y los 24 años presenta unas tasas de abandono escolar prematuro superiores al 50% (tasa del 31% de la población española).

## Datos sobre pobreza y necesidades sociales

- ***La discapacidad genera pobreza y el riesgo de discapacidad aumenta con la pobreza. Además, la pobreza está relacionada directamente con la educación y el empleo de las personas con discapacidad.***
- El 62% de las personas con discapacidad en la Unión Europea (UE) está entre los más pobres. En España, la tasa de pobreza de las personas con discapacidad también es superior a la de las personas sin discapacidad, debido a la confluencia de una cobertura de protección social de baja intensidad protectora y unas tasas de inactividad cercanas al 70%.

## Colectivo de mujeres con discapacidad.

- Destacar la situación especialmente vulnerable del colectivo de mujeres con discapacidad. (2,30 M de mujeres frente a 1,55 M de hombres)
- El nivel educativo de las mujeres con discapacidad es sensiblemente inferior al de los hombres (la tasa femenina de analfabetismo femenino con discapacidad es del 13,1% frente al 7,3% masculino, y los hombres con título universitarios son el 9% frente al 5,8% de las mujeres), y el desempleo afecta significativamente más a las mujeres con discapacidad (24%) que a los hombres (17,2%).



# Evolución de la discapacidad:

- Importante reducción de la incidencia de las anomalías congénitas. Más del 70% de las personas con discapacidad en edad laboral tienen una **discapacidad sobrevenida**.
- Ligero incremento de algunas de las discapacidades que se manifiestan en la infancia.  
Incremento de los TEA
- Previsible reducción de las discapacidades que se producen a consecuencia de enfermedades infecciosas y parasitarias
- Incremento de las discapacidades graves a consecuencia de accidentes de tráfico, laborales, domésticos y de ocio
- Incremento de la incidencia de enfermedades y trastornos mentales y de las enfermedades neurodegenerativas.
- Creciente demanda de asistencia especializada derivada de las enfermedades de baja incidencia que son altamente discapacitantes
- Frecuencia creciente de procesos patológicos complejos, caracterizados por la superposición de diferentes deficiencias
- Significativo aumento de la esperanza de vida de las personas con discapacidad
- Incremento en términos absolutos de las discapacidades que se producen a edades avanzadas
- Incremento de los riesgos de salud derivados de la contaminación ambiental.

## SITUACIÓN GENERALIZADA DE DISCRIMINACIÓN (informe OMS y BANCO MUNDIAL)

Es más probable que las personas con discapacidad sufran desempleo y en caso de tenerlo sus ingresos serán menores

Más altas tasas de pobreza y se agravará más la brecha de su inclusión y participación en sociedad.

## SITUACIÓN GENERALIZADA DE DISCRIMINACIÓN (ONU)

A las personas con discapacidad de forma sistemática les son violados los siguientes derechos:

- ❖ Derecho a una educación.
- ❖ Derecho a acceder a la información
- ❖ Derecho a la asistencia sanitaria
- ❖ Derecho a la libertad de movimiento
- ❖ Derecho a una vida independiente en comunidad.

## Mas situaciones de discriminación por discapacidad:

- Derecho al ejercicio de sus derechos políticos, como votar

# MODELOS DE LA DISCAPACIDAD

## Modelo de prescindencia o exclusión:

- Una vida con discapacidad no merece ser vivida = muerte física: ABORTO EUGENÉSICO; eutanasia
- Exclusión deriva de la absoluta subestimación de las personas con discapacidad = muerte social

## MODELOS DE LA DISCAPACIDAD:

### Modelo médico.

- El problema es del individuo. su deficiencia es la que le impide la inclusión. Determinación de la discapacidad en función de la patología
- Políticas de tratamiento: salud (influencia médica que invade toda la vida social) y Asistenciales. Institucionalización.

¿Qué es discapacidad?

## Modelo social.

Deficiencia + barreras

DISCAPACIDAD =

**DEFICIENCIA** (biológico) +  
**BARRERA** (social)



# Y, por fin, la Convención Internacional sobre los derechos de las personas con discapacidad

AG 56/168 de 2001 : “establecer un comité especial abierto a la participación de todos los Estados Miembros y observadores de las Naciones Unidas para que examine propuestas relativas a una convención internacional **amplia e integral para promover y proteger los derechos y la dignidad de las personas con discapacidad**, sobre la base de un **enfoque holístico** de la labor realizada en las esferas del **desarrollo social, los derechos humanos y la no discriminación** y teniendo en cuenta las recomendaciones de la Comisión de Derechos Humanos y de la Comisión de Desarrollo Social”



# Elementos clave de la Convención:

- La participación de las propias personas con discapacidad.
  - Constituyó un autentico empoderamiento de las personas con discapacidad.
  - Supuso atribuirles la condición de “expertos”, en relación a sus derechos y necesidades.
  - La convención refleja la palabra de las propias personas con discapacidad: **Nada para nosotros sin nosotros.**

## 2. Elementos clave de la Convención:

- La determinación de un nuevo concepto de discapacidad:
  - Supera los modelos de exclusión y el modelo médico.
  - Evita realizar una definición precisa, cerrada, de la discapacidad: Preámbulo, e): *“la discapacidad es un concepto que evoluciona y que resulta de la interacción entre las personas con deficiencias y las barreras debidas a la actitud y al entorno que evitan su participación plena y efectiva en la sociedad, en igualdad de condiciones con las demás”*

# El esfuerzo por no realizar una definición cerrada de la discapacidad:

- Preámbulo, e): “*la discapacidad es un concepto que evoluciona y que resulta de la interacción entre las personas con deficiencias y las barreras debidas a la actitud y al entorno que evitan su participación plena y efectiva en la sociedad, en igualdad de condiciones con las demás*”

- artículo 1(2) : “*las personas con discapacidad incluyen a aquellas que tengan deficiencias físicas, mentales, intelectuales o sensoriales a largo plazo que, al interactuar con diversas barreras, puedan impedir su participación plena y efectiva en la sociedad, en igualdad de condiciones con las demás*”

# La finalidad ultima de Convención:

- La IGUALDAD y NO DISCRIMINACION constituyen el EJE SUSTANCIAL de la Convención.

Artículo 1 El propósito de la Convención es:

“promover, proteger y asegurar el goce pleno y en condiciones de igualdad de todos los derechos humanos y libertades fundamentales por todas las personas con discapacidad, y promover el respeto de su dignidad inherente”.

# La UNCRPD como Carta de las personas con capacidades diferentes: propósito, principios fundamentales y derechos

En aplicación del **principio de no discriminación**, uno de los objetivos fundamentales de la CDPD ha sido **adaptar** las normas pertinentes de los Tratados de derechos humanos existentes, al contexto específico de la discapacidad. (Palacios-Bariffi)

***«Observando con preocupación que, pese a estos diversos instrumentos y actividades, las personas con discapacidad siguen encontrando barreras para participar en igualdad de condiciones con las demás en la vida social y que se siguen vulnerando sus derechos humanos en todas las partes del mundo»***

*«Convencidos de que una convención internacional ... contribuirá significativamente a paliar la **PROFUNDA DESVENTAJA** social de las personas con discapacidad y promoverá su participación, con igualdad de oportunidades, en los ámbitos civil, político, económico, social y cultural»*

# Preámbulo, m):

- *Reconociendo* el valor de las contribuciones que realizan y pueden realizar las personas con discapacidad al bienestar general y a la diversidad de sus comunidades y que la promoción de sus derechos humanos y libertades fundamentales contribuirá al desarrollo económico y social



# Principios generales.

## Artículo 3:

- a) El respeto de la dignidad inherente, la autonomía individual, incluida la libertad de tomar las propias decisiones, y la independencia de las personas.
- b) La NO DISCRIMINACIÓN;
- c) La participación e inclusión plenas y efectivas en la sociedad;
- d) El respeto por la diferencia y la aceptación de las personas con discapacidad como parte de la diversidad y la condición humanas;

# Principios generales.

## Artículo 3:

- e) La igualdad de oportunidades;
- f) La accesibilidad;
- g) La igualdad entre el hombre y la mujer;
- h) El respeto a la evolución de las facultades de los niños y las niñas con discapacidad y de su derecho a preservar su identidad.

# Los principios, por partes:

**a) El respeto de la dignidad inherente, la autonomía individual, incluida la libertad de tomar las propias decisiones, y la independencia de las personas.**

- Hagamos hincapié en la dignidad inherente a cada persona.

La individualización.

La AUTONOMIA PERSONAL.

Las personas con discapacidad no son “objetos” de cuidado, de “protección”, sino SUJETOS que gozan de derechos

La dignidad no está en la “capacidad”,  
sino en la condición humana

# Y Los derechos:

- Derecho a la vida. Artículo 10 y 11.
- Derecho de acceso a la justicia e igualdad ante la ley. Artículos 12 y 13.
- Derecho a vivir de forma independiente y a ser incluido en la comunidad.
- Derecho a la educación INCLUSIVA. Art. 24.
- Derecho al trabajo. Art. 25.
- Derecho a un nivel de vida adecuado. Art. 28
- Derecho a la participación en la vida política, el ocio y la cultura. Art. 29-30

# La Convención no reconoce nuevos derechos, ni diferencia entre derechos “CIVILES”, y “POLITICOS”

- Establece **derechos mixtos**, insistiendo siempre en la **ACCESIBILIDAD**.

No existirá derecho a la participación, si no se garantiza esta.

No existirá derecho a la acceso a la justicia, si no establecen ajustes que aseguren su acceso declaraciones, pruebas,

# Falta de adaptación en el acceso a la justicia..

- **6,5% presos tienen DI.** (66.681 = 4347 personas con D.I.)
- El programa de Reclusos atiende a **1.347** personas.
- **69,7%** llegan a prisión sin previa detección.

# Derecho al ocio

- Cada persona con discapacidad intelectual tiene sus propios intereses, sueños y capacidades que desarrollar. Puede y quiere decidir. Pero para todo ello, puede necesitar apoyos, más o menos intensos y no siempre los mismos. Los apoyos son recursos, estrategias o personas que nos ayudan a conseguir lo que queremos.
- Necesita oportunidades y un trato digno. *A TODA VELA*



# El Comité de NN.UU sobre los Derechos de las Personas con Discapacidad. Informes y denuncia individual

- Se establece un COMITÉ a semejanza los existentes en los otros tratados.
- Analiza los informes periódicos, sobre la aplicación de la Convención por cada estado parte.
- Realiza Observaciones Generales.
  - Efectuadas al art. 12. Igualdad ante la Ley, y al art. 9: Accesibilidad

- Denuncias individuales:
  - se deben presentar por escrito o en un formato alternativo.
  - Se admitirán aunque se trata de persona “incapacitada”.
  - El Comité dará traslado al Estado parte.
  - se exige, como regla general, el **agotamiento de los recursos judiciales internos**

# DENUNCIAS INDIVIDUALES ante el Comité

## Protocolo facultativo de la Convención sobre los derechos de las personas con discapacidad

- La presentación de denuncias de posibles violaciones de derechos humanos ante la ONU no exige de la intervención de abogados.
- Solo se admitirán denuncias respecto de estados firmantes.
- El Comité dará traslado al Estado y este presentará informe, explicaciones y acciones en 6 meses.



Preparando La graduación. Sergio López. INICO salamanca.

# IMPLEMENTING THE UNCRPD THROUGH EU LAW

Dr Karine Caunes

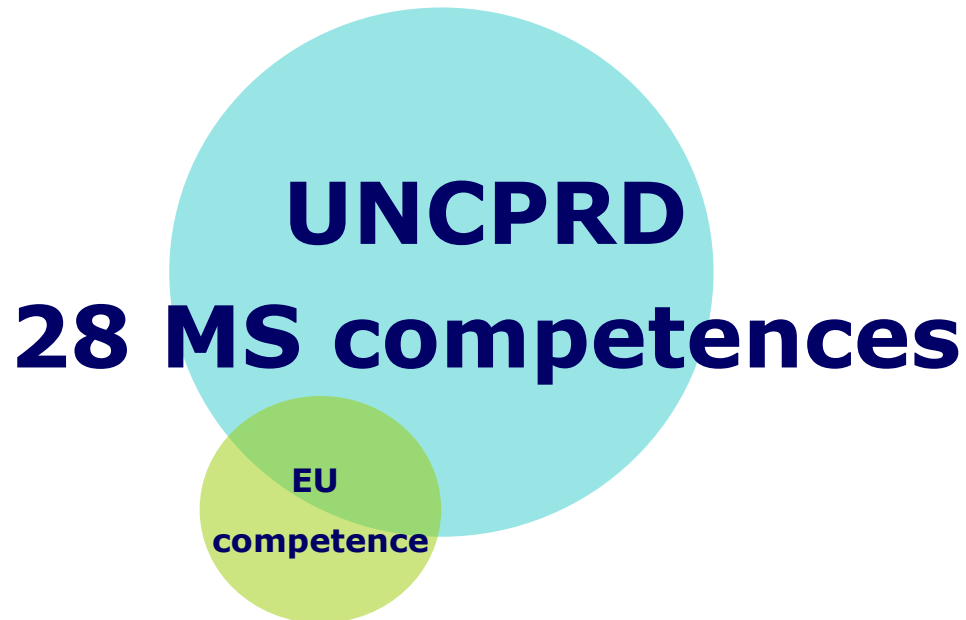


# The EU and the UN Convention

- 30 March 2007: the European Community **signed** the UN Convention
- 26 November 2009: Council Decision on the conclusion (**ratification**) of the Convention by the European Community
- **22 January 2011: entry into force** for the EU
- 5 June 2014: **first EU report to the UN** on the implementation of the CRPD
- All 28 EU Member States signed, 25 have ratified it

# EU and UNCPRD (mixed agreement)

## Competences



## Legal order & Conferral of powers

1-Treaties

2-UNCPRD

3-Secondary Legislation

# EU competence with regard to the UNCRPD

- **The rights recognised cover almost all policy fields:** accessibility, employment, education, health, independent living, participation in culture and sport, civil rights
  - **Mixed competences between EU and MS**
    - some articles concern only Member States
    - most UNCRPD fields concern matters of shared competence
- ⇒ the EU cannot act in relation to all UNCRPD areas
- ⇒ EU and MS together can fulfil the obligations laid down by the UN Convention in a coherent manner
- ⇒ Internal implementation EU institutions, Agencies, delegations...

# European Disability Strategy 2010-2020

Adopted on 15 November 2010

## Objectives:

- To empower people with disabilities to enjoy their full rights
  - To Create a barrier-free Europe for all
- > It provides a strategic and multiannual framework to facilitate the implementation of the UNCRPD by the EU and support Member States in their implementation

Three main documents:

- Communication on a European Disability Strategy 2010-2020
- List of Actions 2010-2015
- Background Document with facts and figures



# European Disability Strategy 2010-2020

- Communication on a European Disability Strategy 2010-2020
  - Accessibility of goods and services
  - Participation as equal citizens in Europe and quality community-based services
  - Equality and combating discrimination
  - Employment in the open labour market
  - Inclusive education and training
  - Social protection to combat poverty and social exclusion
  - Equal access to health services and related facilities
  - External action including EU enlargement, neighbourhood and international development programmes
- Initial plan to implement the Strategy: List of Actions 2010-2015

# Reporting to the UN: art 35 CRPD

Each State Party shall submit to the Committee on the Rights of Persons with Disabilities a report:

- o on **measures taken** to give effect to its obligations under the Convention and on the **progress made**
- o **two years** after the entry into force of the Convention for that state party

## Article 44 CRPD

- o Convention open to 'regional integration organizations' for signature and ratification
- o Provisions of the Convention will apply to such organizations as States Parties within the limits of their competence

# Content of the Report

Focus UNCRPD entry into force for EU January 2011 to 2013 but previous information where relevant

Under each article : relevant measures, legislation, programmes, funding...

- Introduction to EU legal framework
- Charter of Fundamental Rights
- Internal implementation in EU institutions
- Addressed the declaration of competences but not limited
- Legislation adopted, repealed, amended after the Council Decision for Conclusion
- Case law of the Court of Justice (Dir 2000/78)
- EU level statistics describing rights enjoyments and gaps

# Dialogue on implementation

Article 36 consideration of the report

-List of issues –April 2015

-Response to list of issues June 2015

-Dialogue – Geneva 27-28 August 2015

-22 MS experts as observers

-Wide range of issues

- **EU competence MSs**

- **Internal implementation**

-CRPD: Concluding observations on the initial report of the European Union – 7<sup>th</sup> September 2015

# Implementing the UNCRPD through CJEU case-law

Two main issues

- The UNCRPD: binding but not compulsory?  
*Primacy, direct and indirect effect*
- The UNCRPD's substantial influence on the CJEU case-law

**CASE STUDY!**  
***CJEU, C-363/12, Z., 18 March 2014***

# THANK YOU!



# Access to justice: non-judicial mechanisms

Martha Stickings

EU disability law and the CRPD

Trier, 18-19 April 2016





# Overview

1. Role of complaints in ensuring standards are implemented
2. Available non-judicial redress mechanisms
3. Challenges in accessing non-judicial remedies
4. Tools to promote access to justice for workers with disabilities

# 1. Complaints can help to....

- Turn fundamental rights commitments into outcomes
- Enable and empower individuals
- Clarify meaning of existing standards and provide guidance on implementation

## 2. Available non-judicial remedies

- National human rights bodies:
  - National human rights institutions
  - Equality bodies
  - Ombuds organisations
- EU:
  - Petitions committee
  - European Ombudsman
- UN:
  - CRPD Committee



## Protection

## Promotion

### Complaints

### Monitoring

### Guidance

### Evidence Based Advice

**Nat'l**

Courts  
NHRIs (if mandated)  
NEBs (if mandated)  
DPAs  
Ombud institutions

NHRIs  
NEBs  
DPAs  
...

NHRIs  
NEBs  
DPAs  
...

NHRIs  
NEBs  
DPAs  
...

**EU**

CJEU  
European  
Ombudsman  
Petition Committee  
(EP)

European Parliament  
European  
Commission

FRA

FRA

**CoE**

ECTHR  
ECSR (collective )

Human Rights  
Commissioner  
ECPT, FCNM, CAHLR,  
GRETA  
Committee on CPCSE

Committee of  
Ministers  
CEPEJ  
Committee on CPCSE

CEPEJ  
Venice Commission

**UN**

Treaty bodies (under  
ICERD, ICCPR,  
CEDAW, CAT, CRPD)  
Special procedures

Treaty bodies (under  
the nine core  
conventions)  
Human Rights  
Council  
Special procedures

Treaty bodies (under  
the nine core  
conventions)  
OHCHR

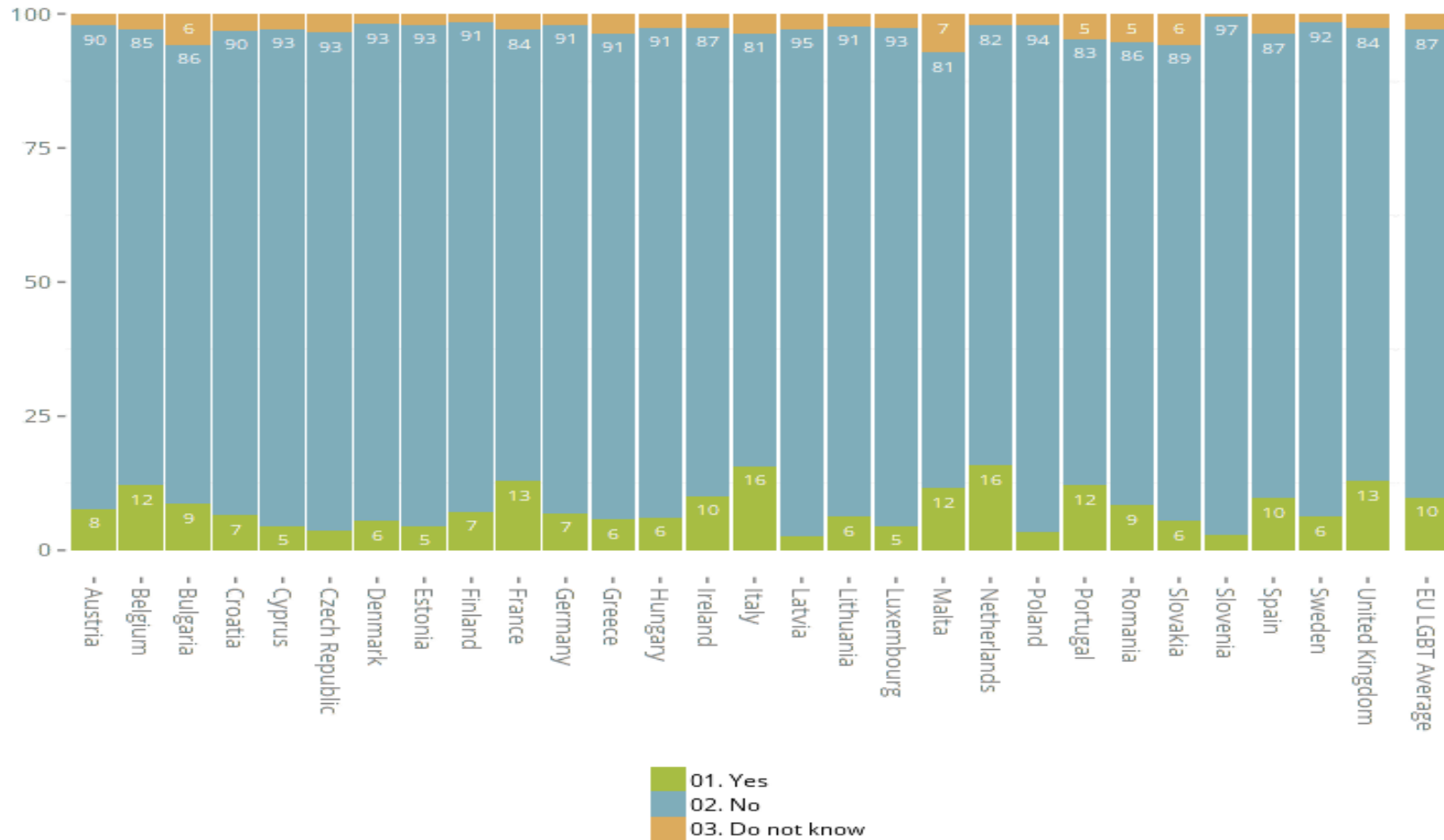
## 3. Challenges in accessing non-judicial remedies

- Lack of awareness of rights
  - Less than half of Eurobarometer respondents aware of their rights in cases of discrimination or harassment (October 2015)
- Lack of knowledge about where and how to complain
- Practical barriers
  - Lengthy procedures
  - Costs associated with bringing complaints

## **Additional barriers for persons with disabilities**

- Inaccessible complaints mechanisms
  - Only 6 EUMS provide information about how and where to complain about voting problems on accessible websites
- Lack of reasonable accommodations in complaints procedures
- Lack of support to lodge complaints
- Insufficient training for staff involved in complaints procedures

# Widespread underreporting



## 4. Tools to promote access to justice

- Awareness-raising: FRA's Clarity tool
- Research and analysis: FRA reports and EP Petitions Committee study
- Guidance for practitioners: Handbook on access to justice in Europe



## **FRA's Clarity tool**

- Aim: to enable easy identification of the most appropriate non-judicial body for a particular fundamental rights issue
- Targets individuals and intermediaries, including NGOs and DPOs
- Currently in its pilot phase, covering 15 EU Member States
- Accessible for persons with disabilities



# Where to turn for help?

A tool to provide guidance for fundamental rights problems in the EU

EN FR DE



Tool

How to use this tool

Non-judicial bodies in EU Member States

Other EU and International complaints bodies

Help



## Welcome to the Clarity interactive tool (beta)



The Clarity interactive tool allows you to find the right organisation to help you with your fundamental rights problem. Besides courts, each EU Member State has specialist public bodies that can give you information on or even make a decision about non-discrimination or fundamental rights issues.

**\*\* Please note that this tool is a beta version and currently covers 14 countries and is only available in English. \*\***

✓ Where?

● What?

By whom?

Who can help?



In which country did the alleged violation of your fundamental right(s) take place?

Cyprus





Where?



What?

In which country did the alleged violation of your fundamental right(s) take place?

Cyprus



Please, choose the area of the alleged violation

- Rights related to the protection of the physical and mental integrity of a person
- Non-discrimination rights**
- Rights related to the freedom of thought, expression and religion
- Social and political participation rights
- Rights related to the freedom to move within the EU
- Rights related to good public administration
- Rights related to the protection of private and family life
- Rights related to the protection of personal data
- Property rights
- Workers' rights and rights related to the protection of self-employment and business activities
- Rights in the area of social security and assistance, education, housing and health-care
- Consumer rights
- Environmental rights
- Right to access courts and other bodies in order to obtain redress, such as a binding decision or a financial compensation
- Asylum and immigration rights
- Rights of specific vulnerable groups: persons with disabilities, children and the elderly



## Please select the specific matter affected in your case

- Lack of respect for the cultural, religious and linguistic diversity
- Discrimination/unfair treatment in the area of employment
- Discrimination/unfair treatment in the area of education
- Discrimination/unfair treatment in the area of housing
- Discrimination/unfair treatment in the area of social protection
- Discrimination/unfair treatment in the area of goods and services
- Multiple discrimination - discrimination on more than one grounds
- None of the above



## Please select the relevant discrimination ground

- Gender
- Race and ethnic origin
- Age
- Disability
- Sexual Orientation
- Religion and belief
- Other grounds

✓ Where?

✓ What?

✓ By whom?

● Who can help?

Other grounds



Was the alleged violation committed by a private or public entity?

Public

Private

I don't know



Submit

 Restart

## National non-judiciary bodies who may be able to help you

Print page

Save to PDF

### 1 Office of the Commissioner of Administration and Human Rights

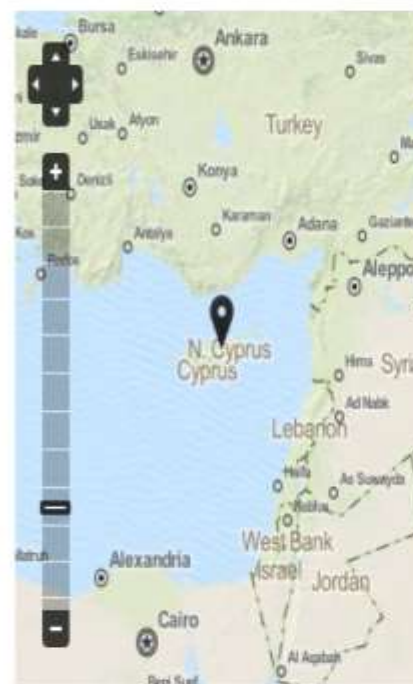
Cyprus

Era House, 2, Diagorou street, 1097 Nicosia Cyprus

Tel: (+357)22 405507

Website: <http://www.no-discrimination.ombudsman.gov.cy>

E-mail: [cc@eworx.gr](mailto:cc@eworx.gr)







[Home](#) > [Non-judicial bodies in EU Member States](#)

## Non-judicial bodies in EU Member States



▼ Refine by:

-  All
-  **Cyprus**

Each EU Member State has specialist public bodies to deal with non-discrimination and/or other fundamental rights issues.

For example, you can lodge your complaint before these bodies and obtain a satisfactory remedy without having to be assisted by a lawyer or pay court fees. Clarity will direct you to the appropriate institution which can receive your complaint. For a full list of national bodies in each Member State please see the [list on the FRA website](#).

You can also always submit fundamental rights' complaints to national courts which can issue binding judgments. Further information can be found on the [European e-Justice Portal](#).

Finally, local non-governmental organisations (NGOs) can also provide you with assistance. While most NGOs do not deal directly with individual complaints, they are a valuable source of information and contacts for those experiencing discrimination on different grounds, or other alleged violations of fundamental rights. If you are searching for an NGO working on an area relevant to you a, useful starting point is the Commission-funded [Platform of European Social NGOs \(Social Platform\)](#) or FRA's own [Fundamental Rights Platform \(FRP\)](#).

If you find an NGO that deals with the issue that relates to your complaint, you may be able to access information on their website that lists who their members are in your country.

### Ombudsman for Children and Youth



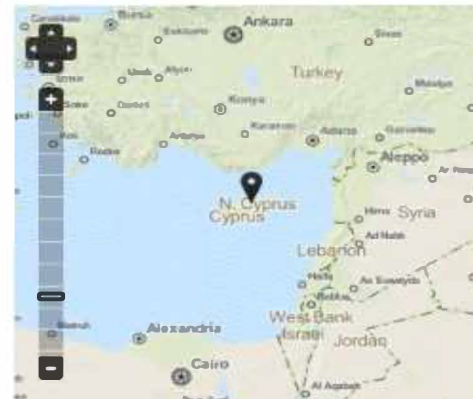
Apelli and Pavlou Nirvana str's corner, 1496, Nicosia

Tel: 22-873 200

Website:

[http://www.childcom.org.cy/ccr/ccr.nsf/DMLindex\\_en/DMLindex\\_en?opendocument](http://www.childcom.org.cy/ccr/ccr.nsf/DMLindex_en/DMLindex_en?opendocument)

E-mail: [cc@eworx.gr](mailto:cc@eworx.gr)



# FRA Focus: Bringing rights to life

- Maps fundamental rights landscape in the EU
  - How various institutions, norms and laws at national, Council of Europe, EU and international levels interrelate
  - Describes the rights, bodies and procedures at these different levels
- Highlights key challenges:
  - Horizontal: guarantee that all levels of the fundamental rights system are efficient, and use a variety of mechanisms to protect and promote rights and inform each other
  - Vertical: how to foster interaction among the different levels of the fundamental rights landscape



## Petitions Committee study

- Examines petitions received by the European Parliament on disability issues
- Reviews arrangements for similar protection functions in EU Member States
- Available at:  
[http://www.europarl.europa.eu/thinktank/en/document.htm?reference=IPOL\\_STU\(2015\)536465](http://www.europarl.europa.eu/thinktank/en/document.htm?reference=IPOL_STU(2015)536465)

# Handbook on access to justice in Europe

- Partnership with European Court of Human Rights
- Latest in series of FRA-CoE handbooks
  - European law in the field of non-discrimination (2011 – to be updated in 2016)
  - European law relating to the rights of the child
- Available in 2016
- Translated into all EU languages

# Handbook on access to justice in Europe

- Accessible summary and analysis of relevant case law of CJEU and ECtHR on key topics in the area of access to justice
- Highlight key European legal and jurisprudential principles
- Designed to be a practical guide for judges, prosecutors and legal practitioners involved in litigation

## **Access to justice for persons with disabilities**

- Highlights importance of the CRPD: access to justice on an equal basis with others
- Focuses on importance of accessibility and reasonable accommodation
- Right to take part in proceedings
- Training for courts, police and prison staff

# FRA publications: Access to justice

- [Clarity online tool](#)
- [Handbook on the establishment and accreditation of NHRIs in the EU](#)
- [Bringing rights to life: the fundamental rights landscape of the EU](#)
- [Access to justice in cases of non-discrimination in the EU: steps to further equality](#)
- [Handbook on non-discrimination law](#)

# FRA publications: rights of persons with disabilities

- [Violence against children with disabilities: legislation, policies and programmes in the EU](#)
- [The right to political participation for persons with disabilities: human rights indicators](#)
- [Legal capacity of persons with mental health problems and persons with intellectual disabilities](#)
- [Choice and control: the right to independent living](#)
- [Implementing the UN CRPD: An overview of legal reforms in EU Member States](#)

For more information:

[disability@fra.europa.eu](mailto:disability@fra.europa.eu)

[access2justice@fra.europa.eu](mailto:access2justice@fra.europa.eu)



[fra.europa.eu](http://fra.europa.eu)

# Moral becomes Legal: Disability Rights

John Horan  
Barrister



# A Moral Problem

Disabled people need reasonable steps taken by Court if they are to get a fair hearing –

- Morally the human thing to do
- Realistic steps

# Article 13

- “1) ...ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural ...accommodations, in order to facilitate their effective role as direct and indirect participants...”

# But

- - In UK international law has no direct application!

# Indirect Approach

- Article 6 of EHCR:
- “1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.  
...  
”

# And...

- Article 14 of ECHR:
- “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion .... Or other status.”

# Burnip v Birmingham City Council

Maurice Kay LJ:

- “... the European court has shown an increased willingness to deploy other international instruments as aids to the construction of EHCR.”
- Applied UNCRPD unlock to EHCR Art 14

- But:
  - “as aids to the construction of EHCR” only!
  - Fact based, real harm done
  - Restrictions:
    - “civil rights and obligations”
    - “fair ... hearing”

# Indirect Approach (2!)

- EU CHARTER Article 47
- “Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.”
  - Advice and representation
  - Legal Aid



# But...

- Same problems as ECHR!
  - UNCRPD “aid to construction”

# But...Direct Approach?

- Article 218 of TFEU:
  - Provides a procedure whereby the EU and States can make International Law EU Law!
  - EU Law has primacy over domestic law is the domestic jurisdiction

# Which means

- Direct affect where Treaty is “a clear and unconditional prohibition which is not a policy but a negative obligation”
  - UHCRPD?
- All domestic laws must be read compatibly with Community law regardless of whether or not they were enacted to give effect to Community obligations!

# The Law becomes.....

- Purposive
  - Vienna Convention
  - preamble and purpose
  - Article 1
  - Preambul A, B, C, E, F, H, K, M, L, O, T and V

# ...objective morality!

- Purposive: moral, human, realistic
- Domestic rules and codes
  - Rackham
  - UK Equal Treatment Benchbook?

# The right to political participation of persons with disabilities

Martha Stickings

EU disability law and the CRPD

Trier, 18-19 April 2016



# International and European standards

## UN

- UDHR Art. 21
- ICCPR Art. 25
- CRPD Art. 29
- Concluding observations and general comments

## CoE

- ECHR (Art 3. of Protocol No. 1)
- Council of Ministers recommendations
- Code of good practice in electoral matters
- ECtHR case law

## EU

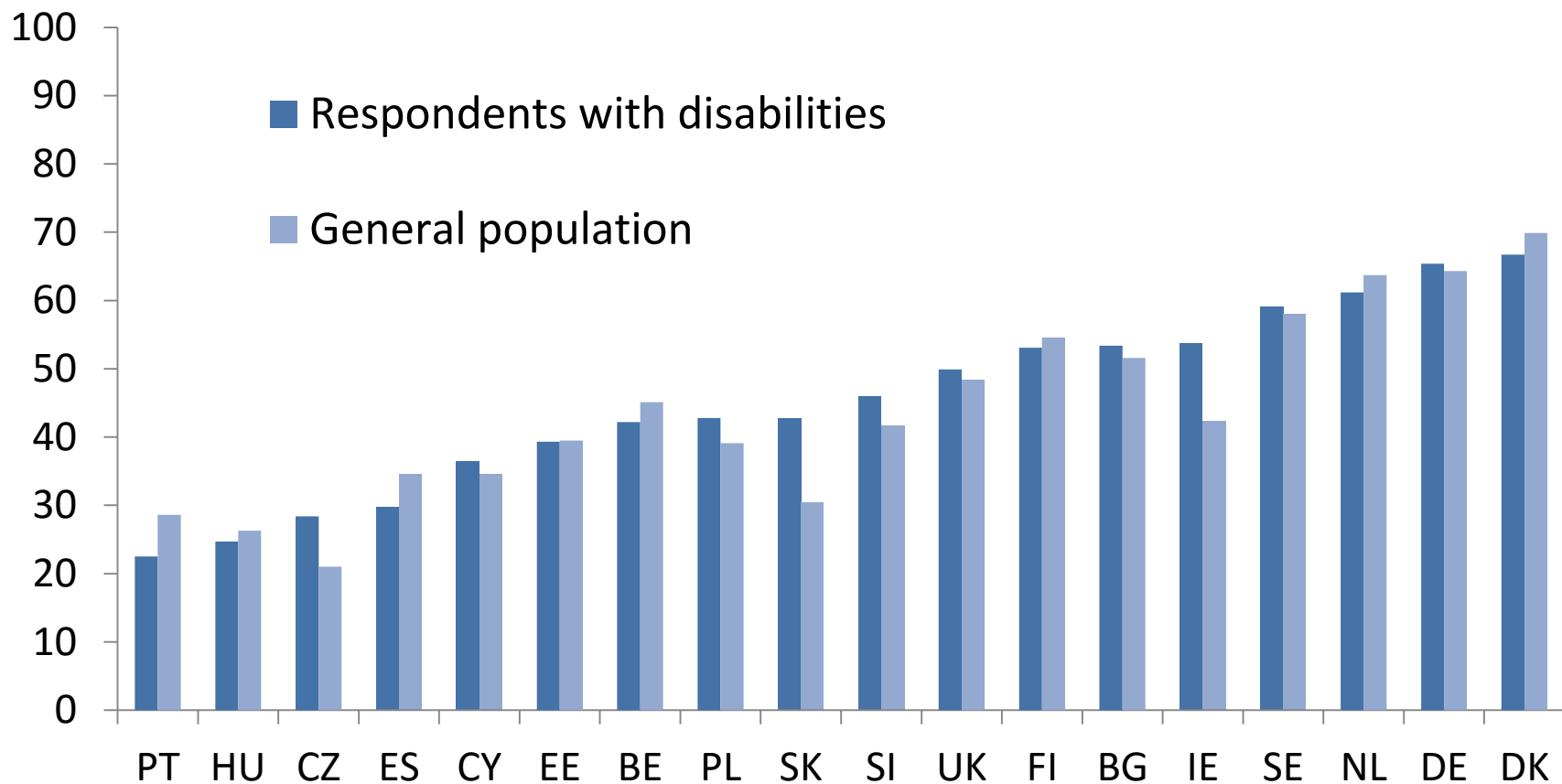
- CFR (Arts. 29 and 40)
- TEU Art 10
- TFEU Art 22
- Directives 93/109 and 94/80

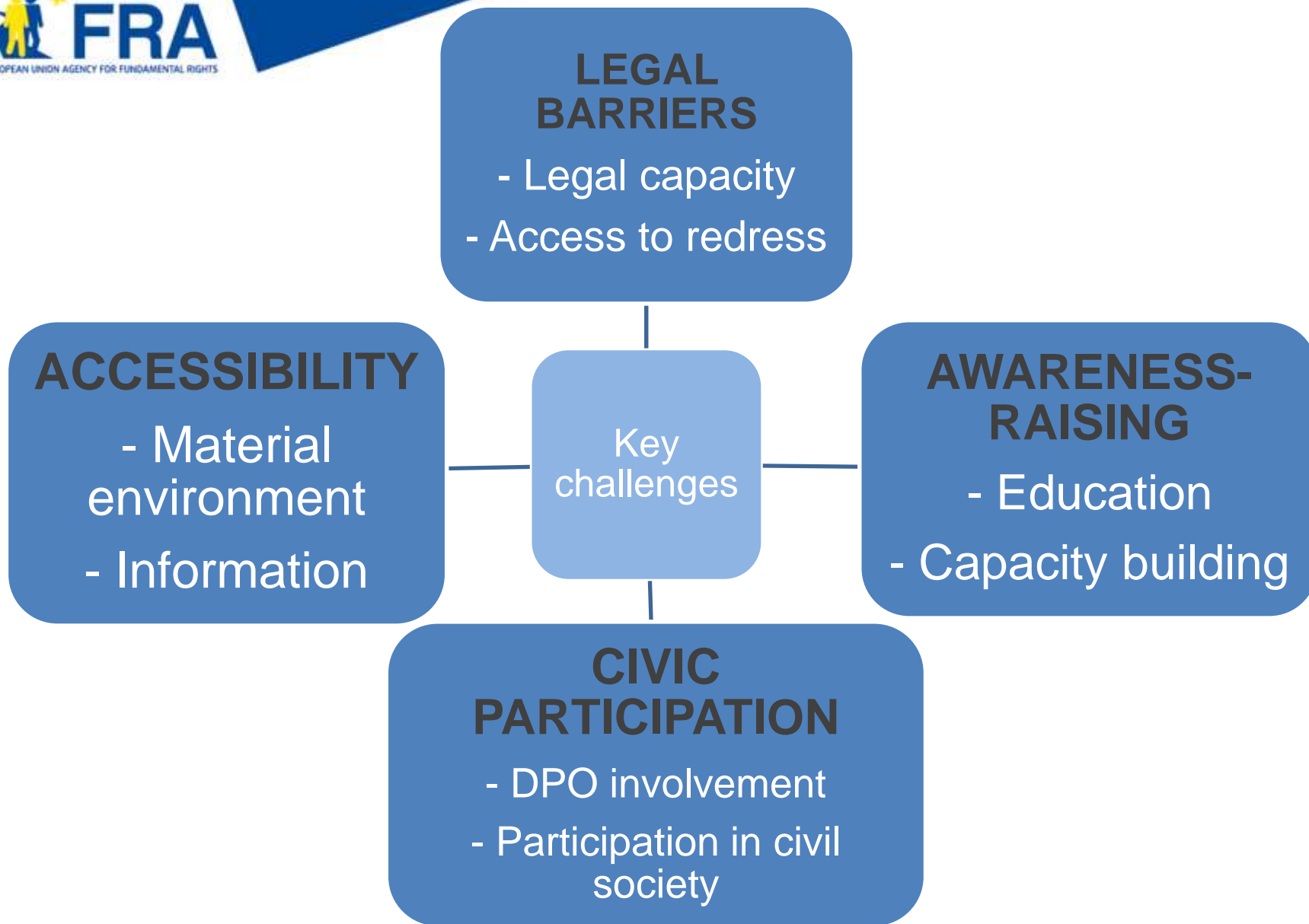
## Overview of FRA's project

- Close cooperation with the European Commission and ANED
- Developed and populated 29 human rights indicators in the area of political participation by persons with disabilities with a focus on elections
- Covered 28 EU Member States
- Using OHCHR's structure-process-outcome indicator model



## People with disabilities are interested in politics





## Legal barriers: key challenges

- Legal restrictions on right to vote and stand for election of people deprived of legal capacity
- Inaccessible and cumbersome administrative processes
- Difficulties accessing complaints mechanisms when facing problems in exercising the right to vote

# Legal capacity and the participation spectrum

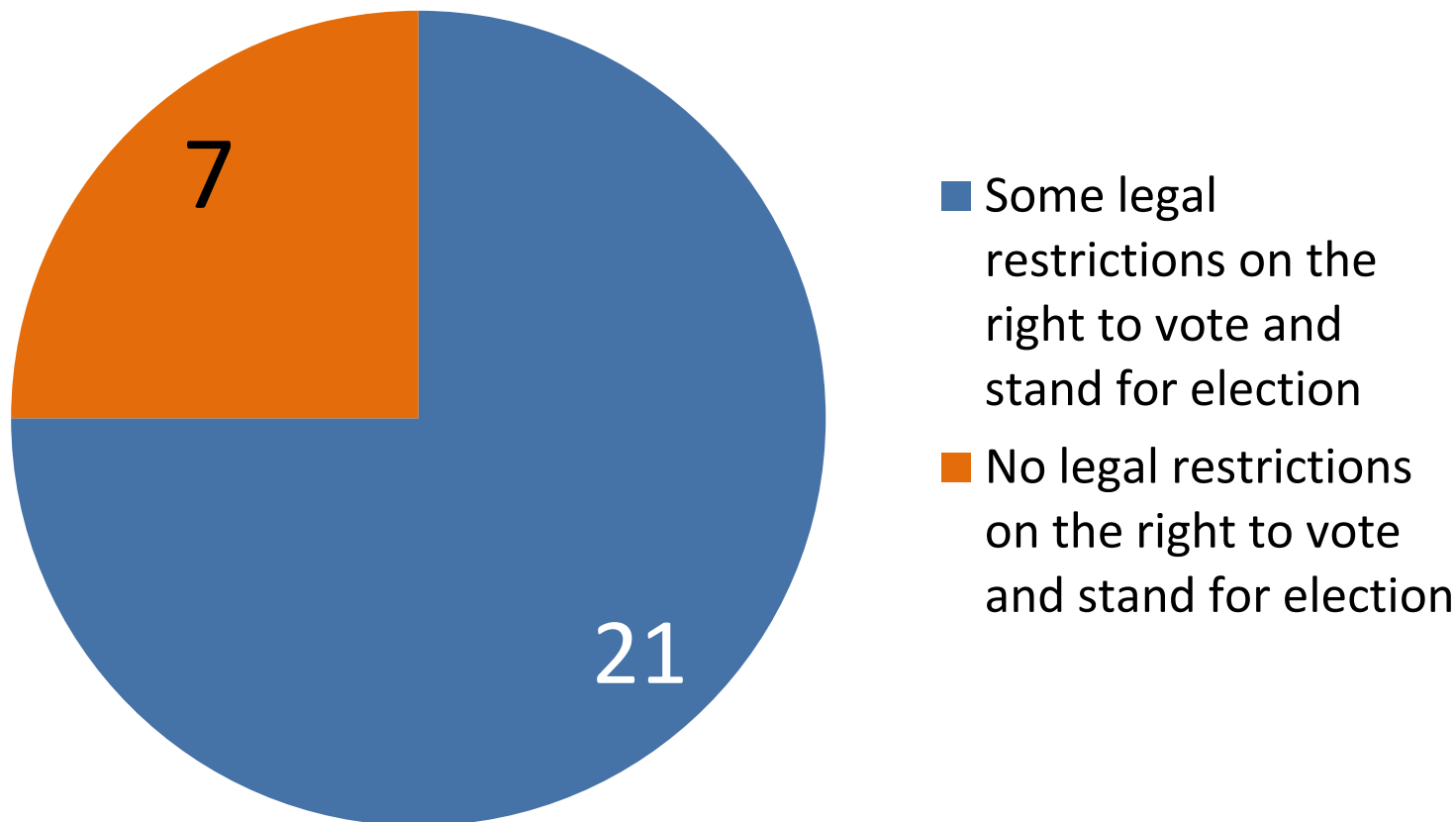


**Exclusion:** Denial to all people under partial and plenary guardianship, regardless of actual, individual level of functional ability

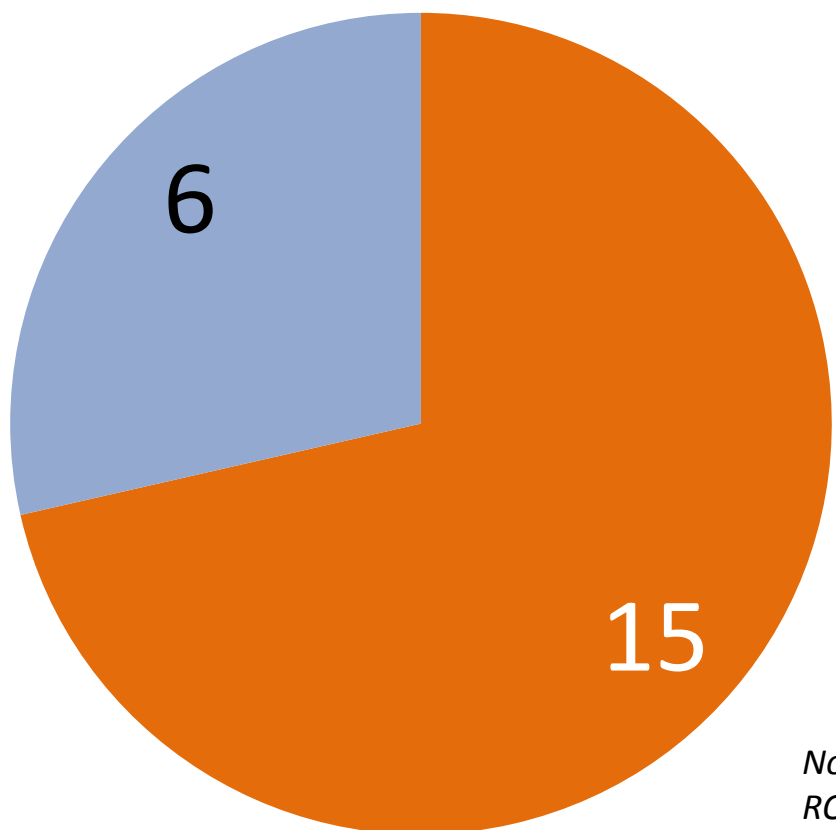
**Limited participation:** Exclusion hinges on the degree of limitation of legal capacity or evaluation on case by case basis

**Participation:** Persons with disabilities are allowed to vote and to be elected like all other citizens, legal capacity notwithstanding

## Can persons deprived of their legal capacity vote and stand for election?



## Is there a legal duty to provide assistance in voting to persons with disabilities?



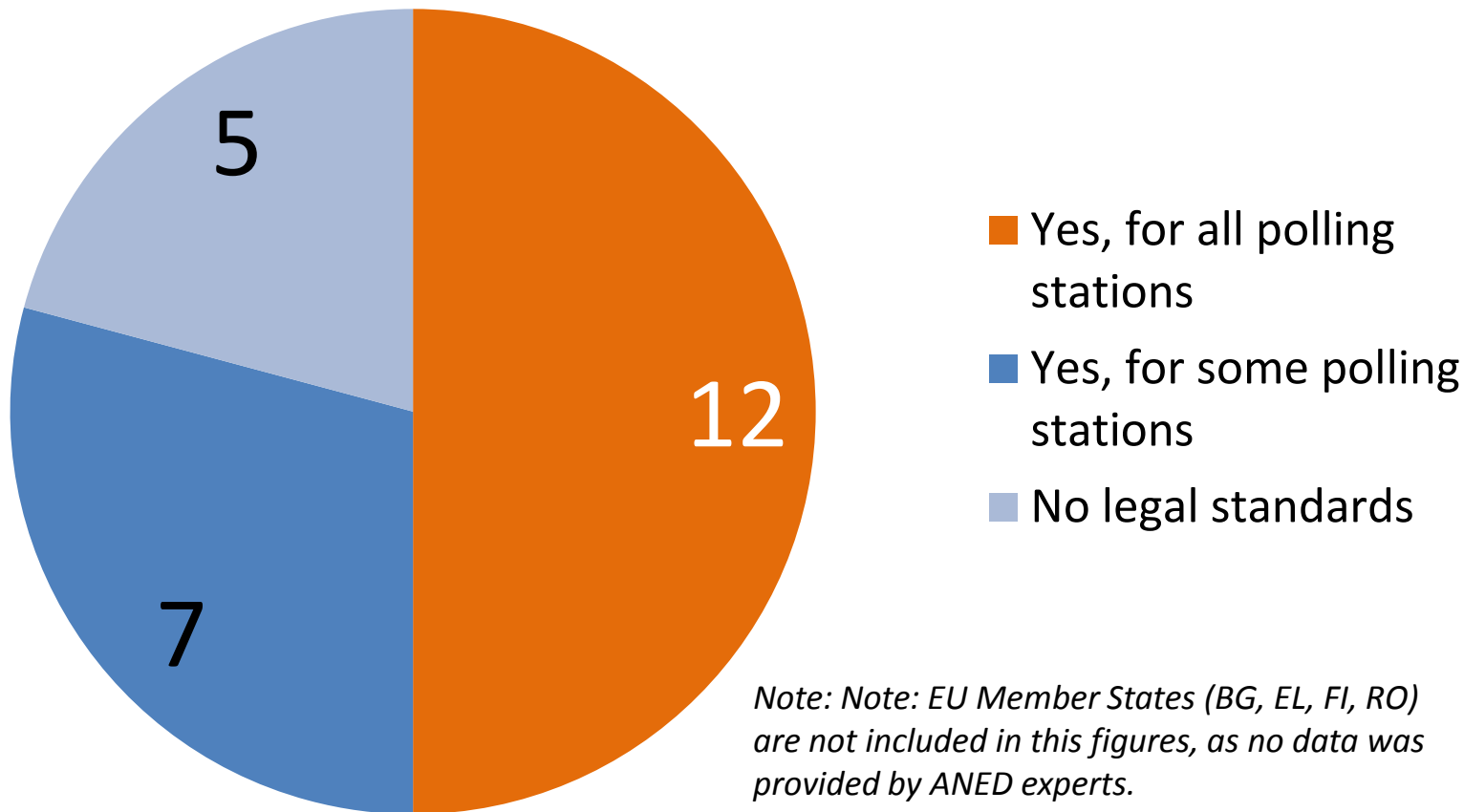
- Yes, for all persons with disabilities
- Yes, for people with physical and sensory disabilities

*Note: EU Member States (BE, BG, EE, ES, FR, IT, RO) are not included in this figures, as no data was provided by ANED experts.*

# Accessibility: key challenges

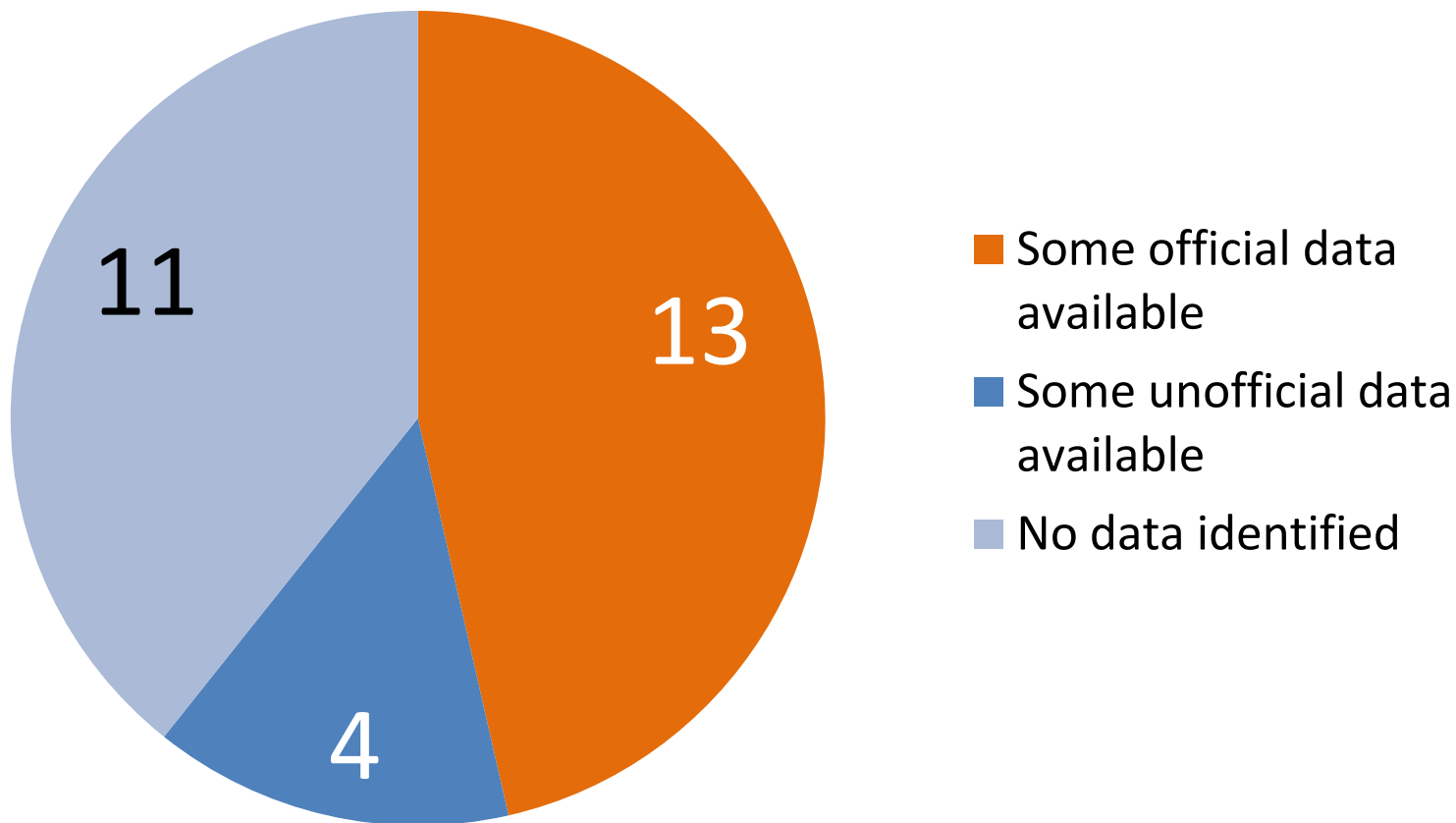
- Gaps in accessibility standards
  - Focus on persons with physical impairments
  - Lack of consistent criteria for accessibility
  - Unequal coverage across public and private sectors
- Lack of implementation of accessibility standards
  - Loopholes
  - Absence of reliable data

## Are there legal accessibility standards for polling stations in place in the EU Member States?





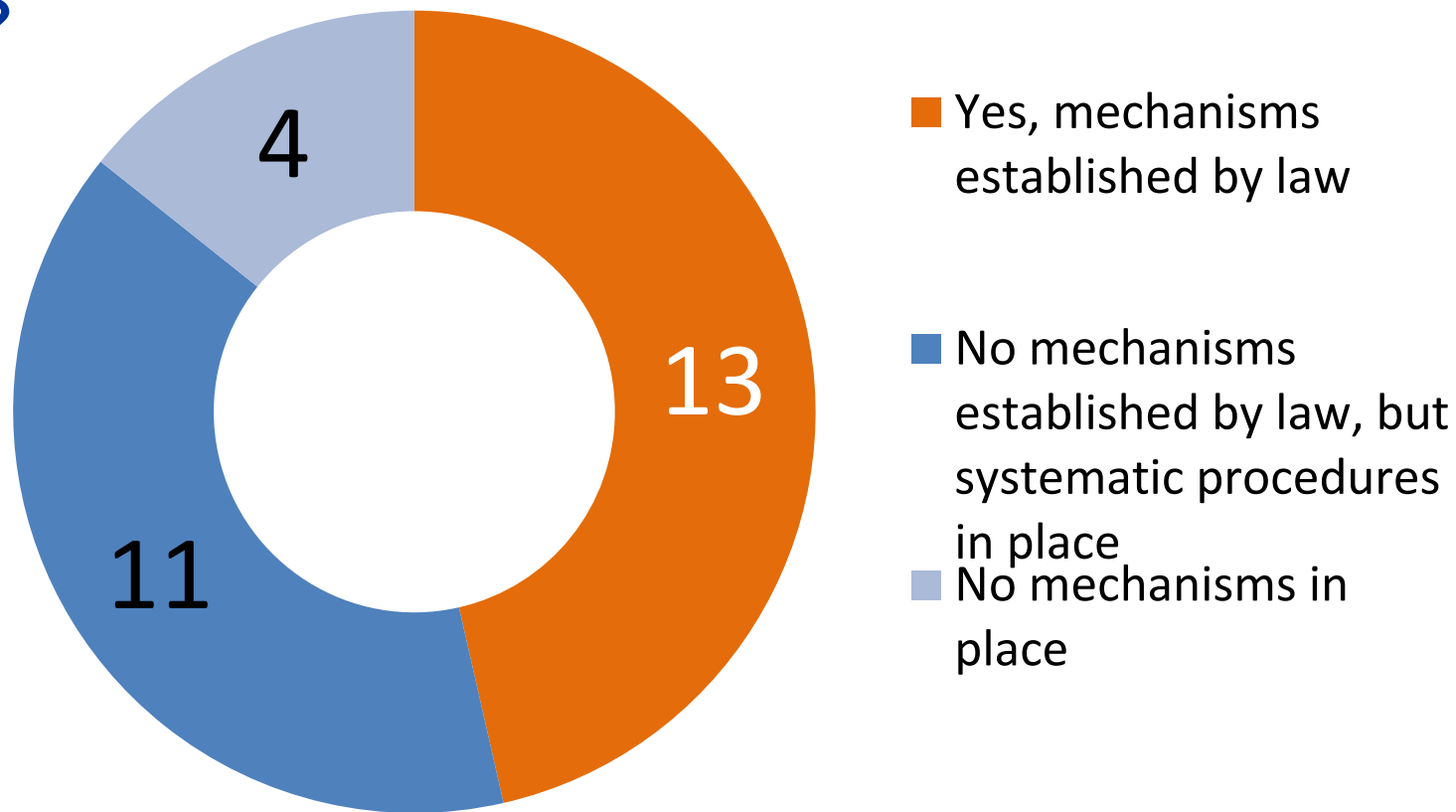
## How many polling stations are accessible for persons with disabilities?



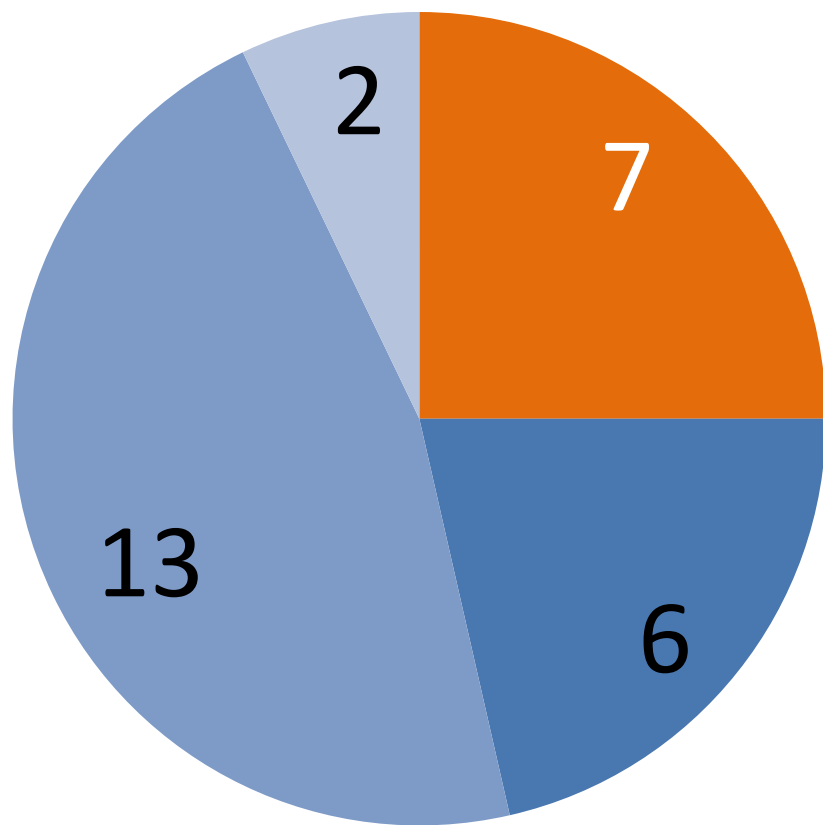
# Civic participation: key challenges

- Lack of systematic involvement and consultation of DPOs
- Low numbers of persons with disabilities elected to public office

## Are mechanisms in place to ensure consultation and involvement of DPOs in the development of laws and policies?



## Are persons with disabilities members of the current national parliament?

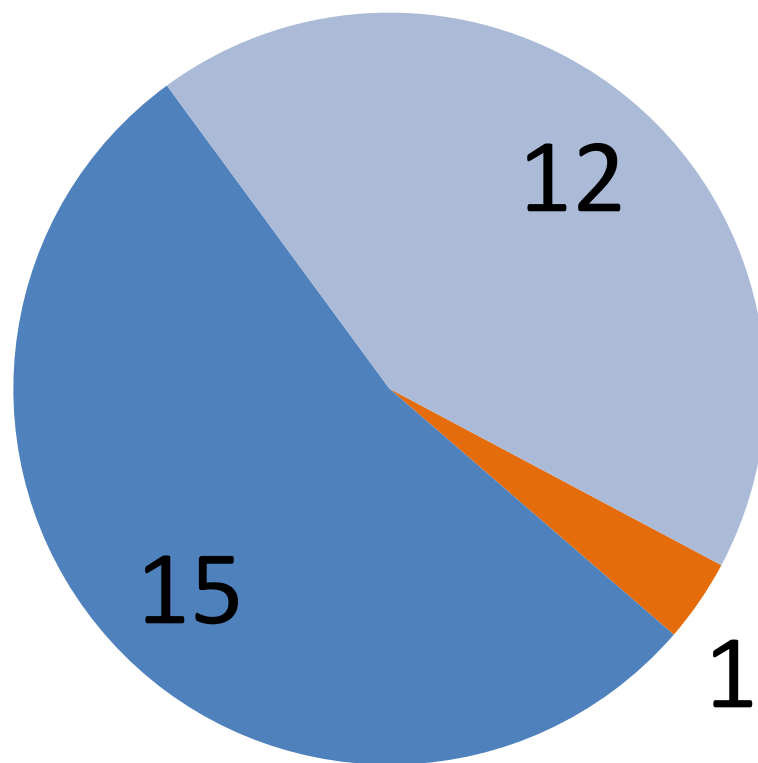


- Some MPs identify as having a disability (official data)
- Some MPs identify as having a disability (unofficial data)
- No data identified
  
- No MPs identify as having a disability (official data)

# Awareness raising: key challenges

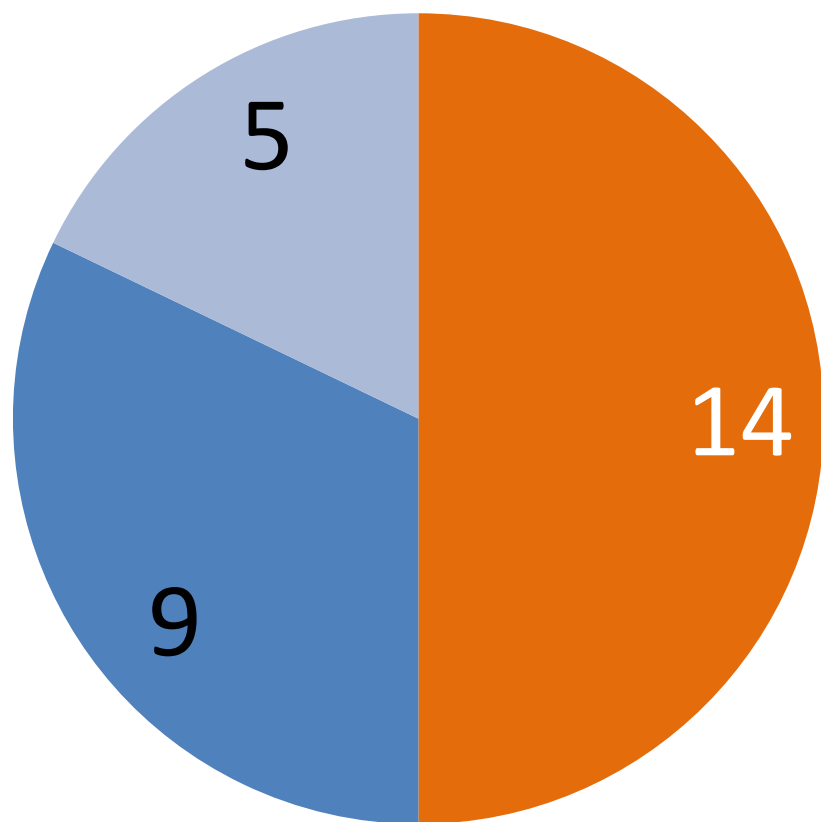
- Lack of training and awareness among key stakeholders
- Need for capacity building
- Absence of accessible information and campaign material

## Is training for election officials on non-discrimination on the grounds of disability, accessibility and reasonable accommodation required by law in EU Member States?



- Yes, training required by law
- Training not required by law, but some relevant training or guidance available
- No training required by law/No information

## Were some political party manifestos provided in accessible formats during the most recent elections?

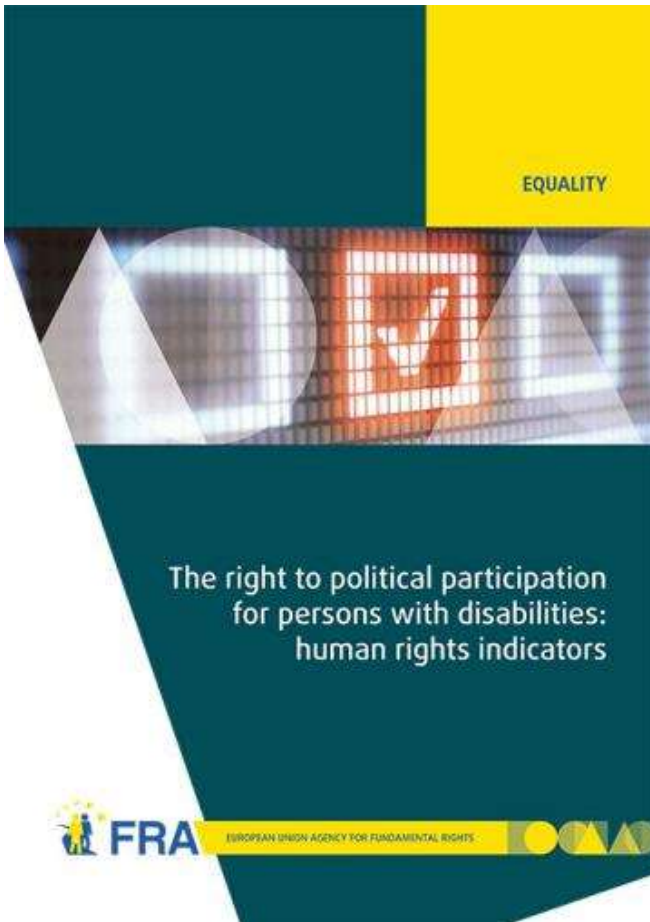


- Some political parties provided accessible manifestos
- No political parties provided accessible manifestos
- No information

## **What should be done? FRA opinions**


- Amend legislation depriving people of the right to vote based on a disability
- Develop, promulgate and monitor the implementation of minimum standards for the accessibility of facilities and services open or provided to the general public
- Closely engage persons with disabilities, including through their representative organisations, in decision-making processes
- Ensure election authorities and officials receive comprehensive training on non-discrimination, accessibility and reasonable accommodation





**EQUALITY**

The right to political participation for persons with disabilities: human rights indicators



**FRA**  
EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

Available in English

## The right to political participation of persons with disabilities

Summary

Article 29 of the Charter of Fundamental Rights of the European Union guarantees all EU citizens the right to vote and to stand as a candidate at elections to the European Parliament, and Article 20 guarantees the right to vote and stand as a candidate at municipal elections. Article 21 recognises the right to be free from discrimination, including on the grounds of disability, and Article 26 recognises and respects the right of persons with disabilities to be able to enjoy measures to ensure their independence, social and occupational integration and participation in the life of the community.

The opportunity to be involved in political life is at the heart of what it means to live in a democratic society. The right to political participation, including of persons with disabilities, is accordingly firmly grounded in international law, embodied in the United Nations UN Convention on the Rights of Persons with Disabilities (CRPD), Council of Europe

instruments and European Union (EU) primary and secondary legislation. The European Parliament elections taking place in May 2014 are an opportune moment to examine how relevant national legal, policy and administrative provisions encourage or hinder persons with disabilities from participating in elections.

The European Union Agency for Fundamental Rights (FRA) and the European Commission through the Academic Network of European Disability Experts (ANED) have collected data from across the 28 EU Member States, which show how the right to political participation of persons with disabilities set out in Article 29 of the CRPD is respected, protected, promoted and fulfilled in the EU. The opinions drawn from this data focus on elections and the rights to vote and to be elected, as guaranteed by the European Convention on Human Rights (ECHR), the Charter of Fundamental Rights of the EU and the EU treaties.

### Key findings and evidence-based advice

The first message stemming from FRA's and ANED's analysis is positive: given an accessible and enabling environment persons with disabilities are active citizens keen to be engaged in the political life of their communities. As well as voting in elections, persons with disabilities take part in other types of political activity in large numbers, including being members

of political parties, attending political meetings and contacting elected officials. Providing more accessible information and processes, as well as better support and reasonable accommodation—that is, adjustments to allow persons with disabilities to enjoy their human rights on an equal basis with others—when required can further improve their participation.

Available in 22 EU languages

- Publications
- Opinions
- › Data and maps
  - Survey data explorers
  - › Indicators and comparative data
    - › Indicators on the right to political participation of people with disabilities
  - Mapping victims' rights and support in the EU
  - Mapping child protection systems in the EU
  - International obligations
- Charterpedia
- Case-law Database
- Photo Galleries
- Videos
- Audios
- Infographics
- Country studies
- Tools

## Indicators on the right to political participation of people with disabilities



**FRA in close cooperation with the European Commission and the Academic Network of European Disability Experts (ANED), funded by the Commission, developed 28 human rights indicators to assess the political participation of persons with disabilities in the EU.**

The data is grouped into four key themes:

- lifting legal and administrative barriers;
- increasing rights awareness;
- making political participation more accessible;
- expanding opportunities for participation.

Each of the indicators may be considered independently, but should be read in the context of the wider set of indicators which together give an overview of the situation concerning the political participation of persons with disabilities. For more information see the full report 'The right to political participation for persons with disabilities: human rights indicators' and the report summary.

Theme	Structure	Process	Outcome
<b>Lifting legal and administrative barriers</b>	<ul style="list-style-type: none"> <li>• Article 29 of the CRPD</li> <li>• Article 12 of the CRPD</li> <li>• National disability strategies</li> <li>• Restrictions on right to vote of people without legal capacity</li> <li>• Requirement to register to vote</li> <li>• Alternative ways of voting</li> <li>• Voting from long-term institutions</li> <li>• Duty to provide assistance</li> <li>• Legally able to access complaints mechanisms</li> </ul>	<ul style="list-style-type: none"> <li>• Accessible information about complaints mechanisms</li> <li>• Cases considered by courts</li> <li>• Cases considered by non-judicial complaints bodies</li> <li>• Cases considered by international complaints bodies</li> </ul>	<ul style="list-style-type: none"> <li>• National MPs with a disability</li> <li>• Members of municipal authorities with a disability</li> </ul>
<b>Increasing rights awareness</b>	<ul style="list-style-type: none"> <li>• Article 29 of the CRPD</li> <li>• Article 9 of the CRPD</li> <li>• National disability strategies</li> <li>• Training for election officials</li> </ul>	<ul style="list-style-type: none"> <li>• DPO involvement</li> <li>• Commitment to accessible manifestos</li> <li>• Guidelines on accessible polling stations</li> </ul>	<ul style="list-style-type: none"> <li>• Accessible information websites</li> <li>• Accessible information television broadcasts</li> <li>• Accessible election manifestos</li> </ul>
<b>Making political participation more</b>	<ul style="list-style-type: none"> <li>• Article 9 of the CRPD</li> <li>• Voting from long-term</li> </ul>	<ul style="list-style-type: none"> <li>• DPO involvement</li> <li>• Commitment to accessible</li> </ul>	<ul style="list-style-type: none"> <li>• Accessible polling stations</li> <li>• Accessible public buildings</li> </ul>

All indicators are available online at:  
[fra.europa.eu/en/theme/people-disabilities](http://fra.europa.eu/en/theme/people-disabilities)

You can contact us at:  
[disability@fra.europa.eu](mailto:disability@fra.europa.eu)



[fra.europa.eu](http://fra.europa.eu)

## **Outline of presentation on the right to legal capacity**

Presentation to the Academy of European Law

Dr Oliver Lewis, [oliver@mdac.org](mailto:oliver@mdac.org), @olewis75

Trier, 18 April 2016

1. What is legal capacity, and how is this a contested concept?
  - In domestic law
  - In international law: UN and European bodies
2. Why is legal capacity important?
  - Range of rights deprived/affected
  - Examples from ECHR cases
3. What does Article 12 of the CRPD require?
  - Autonomous decision-making
  - Access to supports where needed
  - Reasonable accommodations
  - Safeguards against exploitation, violence and abuse
4. How can governments implement Article 12?
  - Engage people directly affected
  - Abolish laws unfit for purpose
  - Introduce new laws on core content
  - Appoint rights advisors
  - Monitor implementation of new laws
  - Provide access to justice systems
5. What could supports look like?
  - Supported decision-making is not a model, but a cluster of innovation
  - Examples for people with psychosocial disabilities
  - Examples for people with intellectual disabilities
6. What are civil society strategies for reform?
  - Build a coalition
  - Be clear about demands
  - Proposals to government
  - Strategic litigation
  - Pilot projects
  - Stories in the media
  - Activate public directly

“Eventually the folly of this will dawn on people and we shall all joyously realize that we are all abnormal, disabled, impaired, deformed and functionally limited, because, truth be told, that is what it means to be a human being.” – JE Bickenbach, in “Minority Rights or Universal Participation: The Politics of Disablement”

# The Right to Personal Mobility

**Ann Frye**

Ann Frye Ltd

PassePartout Training Ltd

"When I book a plane, even months in advance, I am still not sure I am going to reach my final destination. I don't even know if I am going to board. For persons with disabilities, travelling in Europe is still a challenge."

Stig Langvad, Executive Member, European Disability Forum

# What are the issues?

- The ability to travel is fundamental to the ability of disabled people to live independent lives;
- Public transport has presented accessibility challenges for many years:
  - High steps;
  - Narrow doorways;
  - Poor information;
  - Limited assistance.

● UNCRPD



# What do the terms mean?

- **Accessibility:**

- “Independent living and participation in society”;
  - Not defined – too vague

- **Reasonable accommodation:**

- “Necessary and appropriate accommodation and adjustments, not imposing a disproportionate or undue burden”;
  - But easy to say cost is too high!

- **Universal Design:**

- “The design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design”;
  - Best practice in terms of cost and outcome.

# Accessibility

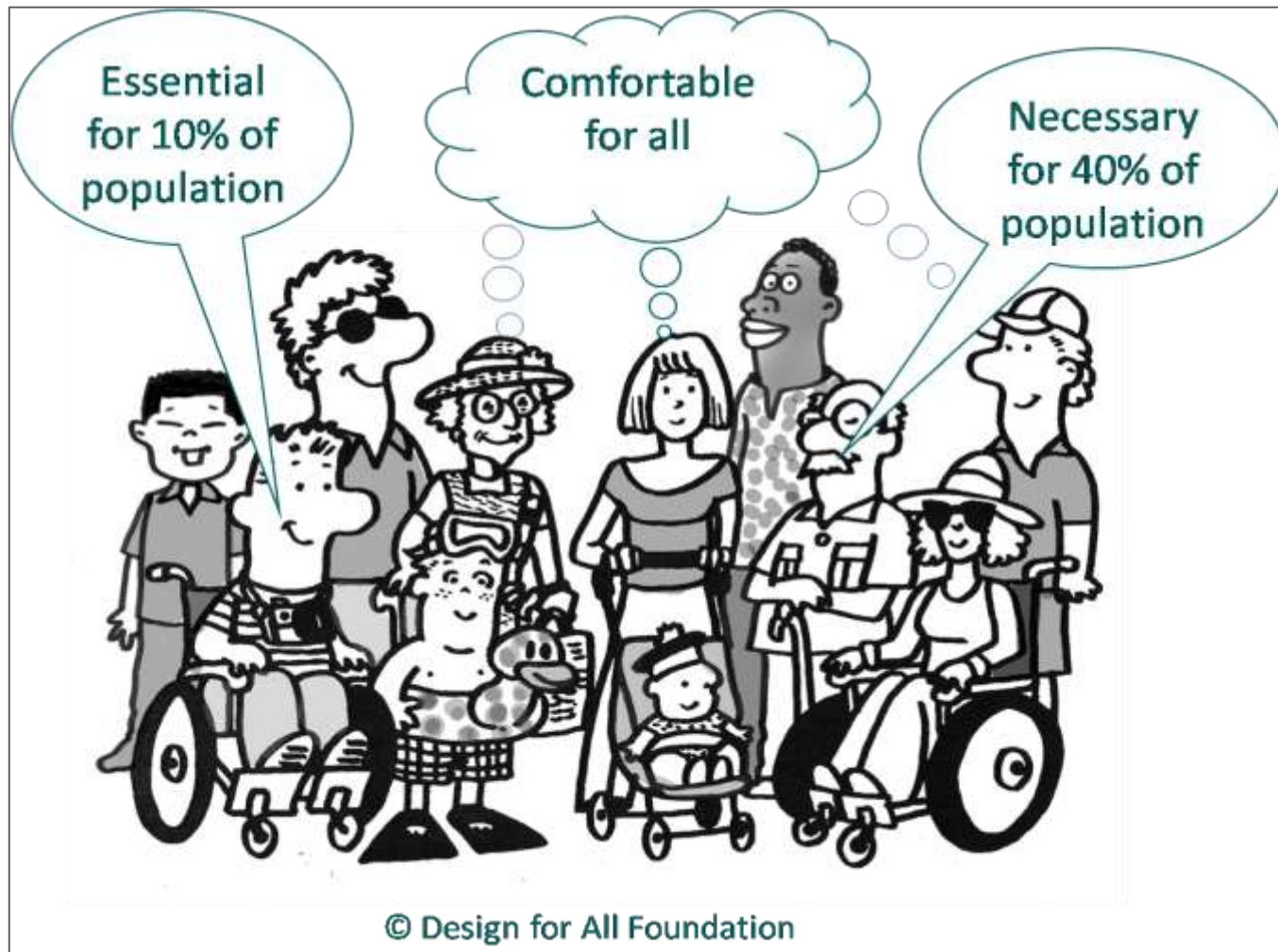
## Access must be ensured to:

- Living independently and being included in the community (article 19)
- Information and communication services (article 21)
- Education (article 24)
- Health (article 25)
- Work and employment (article 27) –
- Participation in political and social life (article 29)
- Participation in cultural life, recreation, leisure and sport (article 30).

# Reasonable accommodation

- ***Reasonable accommodation*** must be made for people with disabilities ;
- ‘Necessary and appropriate modification and adjustments ..... to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’.

# Universal Design



# Equal Access/Eliminating Barriers

## **Article 9 –**

Equal access to information and communications technologies and an obligation to identify and eliminate barriers.

# Access to Transport

## **Article 9 –**

To enable persons with disabilities to live independently and participate fully in all aspects of life, ..., [with access] on an equal basis with others, to the physical environment, to **transportation ...**

- Article 20 - Personal mobility

“States Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities”.

- Is Europe getting it right?



# Progress?

- In the past 20 years, many countries have taken steps to tackle transport accessibility;
- Sometimes in response to direct action by disabled people;
- Measures include:
  - Civil rights legislation;
  - Technical regulations;
  - Design standards;
  - Best practice guidelines.

# Progress?

- There has also been legislation at European level to introduce common technical standards for accessibility.
- Notably:
  - Directive 2001/85/EC which defines access standards for buses and coaches (now replaced by UNECE Regulation 107);
  - Applicable standards in TSI relating to 'persons with reduced mobility' in the trans-European conventional and high-speed rail system (2008/164/EC).
- And now the European Accessibility Act will improve functioning of the internal market....

# European Accessibility Act

- Will complement existing EU legislation on passenger rights for disabled people as well as standards on accessibility of vehicles in different transport modes;
- Will allow disabled passengers to book tickets on transport companies' websites or directly via accessible ticket machines.
- For example, a blind person will be able to use voice or tactile interfaces to interact with the ticket machines and to get information about the schedule of his/her journey.

# Why is Rights legislation important?

- For many disabled people, the awareness, understanding and support of transport staff is as important as the design of the vehicle or infrastructure;
- Disabled people cannot travel with confidence if they do not know that their needs will be met in a consistent and appropriate way;
- For this reason the concept of “rights” legislation is a vital element of barrier free mobility.

- European Passenger Rights Regulations

# Passenger Rights Regulations

Regulation 1107/2006 “Concerning the Rights of Disabled Persons and Persons with Reduced Mobility when travelling by air;”

- Since July 2008

Regulation 1371/2007 on Rail Passengers Rights and Obligations;

- Since December 2009

# Passenger Rights Regulations

Regulation 1177/2010  
“Concerning the Rights of  
passengers when travelling  
by sea and inland waterway”;

- Since  
December  
2012

Regulation 181/2011  
“Concerning the rights of  
passengers in bus and coach  
transport;”

- Since  
March  
2013

# Scope

- Only the air travel Regulation (1107/2006) is exclusive to disabled passengers and PRMs;
- The other three Rights Regulations cover passenger rights generally but include specific requirements related to disabled passengers and PRMs;
- The articles on disability rights all use essentially the same text as Regulation 1107/2006.



# Definition

- “Disabled Person” or “Person with Reduced Mobility” (prm) includes anyone whose mobility when using transport is reduced due to:
  - Any physical disability (permanent or temporary);
  - Any intellectual impairment;
  - Any other problem caused by age or disability.

# Basic requirements

- Non discrimination/equal treatment
- Provision of assistance
- Quality standards
- Training (all staff dealing with travelling public)
- Enforcement (by Member States)
- Penalties (effective, proportionate, dissuasive)
- Complaints mechanism

# Is it working?

A (pre-notified) wheelchair user left waiting over an hour for assistance;

A disabled passenger left to wait in a small windowless room with no information;

No personalised assistance: staff helping several passengers at once and making everyone wait until all flights have arrived

A wheelchair user dropped by assistance providers whilst boarding a flight;

Blind passengers being asked to sit in wheelchairs to make it easier to move them through the airport..


**All of these examples happened in Europe since the Regulation came into effect**

# Is it working?

- Monitoring and enforcement (in the hands of Member States) is patchy and sometimes non-existent;
- Penalties vary widely (some criminal some civil) and are rarely imposed;
- Quality standards vary widely within and between countries;
- Training requirements are often ignored;
- Access standards for buildings and infrastructure are left to Member States.

# Conclusions

Passenger Rights Regulations have been widely welcomed by disabled people; but




They have not yet made the difference that was hoped for by the legislation;



We need greater clarity in the drafting of Regulations and:

# Conclusions


UNCRCPD is a valuable tool in the fight against discrimination in the transport field as elsewhere; But



It is not specific enough in isolation to empower disabled people easily;



Combined with both technical and rights based legislation in Europe, it should strengthen the case for accessible transport in a barrier free environment;



But, it needs to be tested in the courts on a more regular basis so that disabled people – and transport providers – understand the power of the law!

“Passengers’ rights have been in many ways one of the success stories in EU policy- facilitating freedom of movement of persons with disabilities.

However, lack of accessibility is often still a barrier. There are many issues still to be tackled to make independent, spontaneous and seamless travel a reality for everyone in the EU.”

Gunta Anca, Vice-President European Disability Forum

[ann@annfrye.co.uk](mailto:ann@annfrye.co.uk)

**Ann Frye**



# Workshop: Enforcement of Passenger Rights

**Ann Frye**

Ann Frye Ltd

PassePartout Training Ltd

## Key Topics for discussion

- Using the case of air travel:
  - Is the right legal framework in place?
  - Is it working?
  - If not, what needs to be done to make it more effective?

# Who are NEBs?

- Under Regulation (EC) 1107/2006 all Member States must appoint a body to:
  - Monitor performance;
  - Ensure quality standards are maintained; and
  - Investigate complaints;
- For air travel, almost all have appointed their Civil Aviation Authority.
- There are similar requirements for the other Passenger Rights Regulations.

# The Duties of NEBs

NEBs must take necessary measures to ensure :

- That the rights of disabled people and PRMs are respected;
- compliance with quality standards;
- Satisfactory implementation of the provision of assistance at airports;
- Satisfactory implementation of charging arrangements.

# The Duties of NEBs(2)

## NEBs must :

- Take measures to inform disabled people and PRMs about their rights;
- receive complaints made by disabled people and PRMs about an infringement of the Regulation;
- take all necessary measures to implement national rules and penalties on enforcement.

# Penalties

- Member States must set rules on penalties to apply to breaches of the Regulation and must make sure that these rules are implemented;
- The penalties must be “effective, proportionate and dissuasive”; But ....
- There is a wide variation in the legal powers used and in the penalties imposed in different Member States;
- Penalties range from 50 € to 4,500,000 €;
- Most NEBs seem to be reluctant to impose penalties and prefer to go down the route of persuasion to change practices.

# How to Complain

- A disabled person or PRM can report a breach of the Regulation to the airport managing body or airline concerned;
- If they are not satisfied with the response they can complain to the Enforcement Body who should investigate it;
- Member States must inform disabled people and PRMs about their rights and how to complain.

# Is it Working?

- Many NEBs do not undertake any monitoring or inspection or assess the passenger experience (many claim lack of resources);
- Some do not monitor the charges levied by airports for providing services under the Regulation or of the consultation which airports are required to carry out before setting the charge;
- Few NEBs have made significant efforts to promote awareness of the Regulation by passengers.



## Is it Working? (2)

- There is little evidence of any monitoring or inspection of airlines;
- Those NEBs that do take a number of approaches including:
  - Approval of ground handler training;
  - Review of operating manuals;
  - Review of websites for accessibility;
  - Annual surveys of the airlines' implementation.

## Is it Working? (3)

- Many NEBs are also the licensing authority for carriers registered in their state and so they have to approve their Operating Manuals;
- NEBs could therefore challenge policies on carriage of PRMs proposed by carriers but few have done so.

# What kind of complaints are there?

Most complaints are  
about problems at the  
airport;

But most people  
complain to the airline  
.....

# Complaints

Anecdotal feedback through the European Disability Forum suggests that many people do not complain because:

- They don't know their rights;
- They don't know how to complain;
- They don't speak the language of the country in which the problem occurred;
- They don't think it is worth the effort as there is no compensation available under the law.

# Why don't more people complain? (2)

In most countries, disabled people are unaware of the existence of the Regulation or their rights under it;

One airport said that they didn't tell people about how to complain because it would be too complicated!

A recent survey in one country indicated that 70% of disabled passengers didn't know that they had any rights.

# Where is the Case Law?

- Regulation (EC) 1107/2006 on air travel has been in force, in full, for over 7 years;
- Try searching for details of cases brought against airlines or airports for breaches of the Regulation.....

# easyJet

- easyJet was found guilty by a French court for not allowing unaccompanied wheelchair users onto a plane The court fined Easyjet 70,000 €;
- All three of the passengers who brought the case were told they could not check in for their flights because they did not have a helper to assist with their evacuation in the event of an emergency;
- easyJet has denied any "discriminatory intention".

And this could have been  
another....

**Ryanair sued after leaving wheelchair-  
bound woman on runway**



# Ryanair

- Ryanair was prosecuted for denying boarding to a disabled woman;
- But the case was brought under UK Discrimination Law – not Regulation 1107/2006;

And so could these.....

**Court's ruling leaves disabled  
air passengers 'defenceless'**

**Passenger wins right to take airline  
discrimination fight to supreme court**

# Thomas Cook

- Thomas Cook refused to allocate the wife of a disabled man a seat next to him so she was unable to provide the care he needed during the flight
- The Judge found that the airline was guilty of unlawful discrimination;
- But was unable to award damages under UK law because of inconsistency with the Montreal Convention.

# British Airways

- Mr Hook has severe mobility and learning disabilities;
- He brought his claim because he was not allocated seats that could better accommodate his disability (bulkhead) on either outward or return flights;
- The ruling was that damages could not be paid because of conflict with the Montreal Convention.
- The UK Equality & Human Rights Commission is continuing to fight to overturn this ruling.

# Compensation?

- The issue at stake in both these cases is whether the Montreal Convention has world-wide exclusive application so that under it, compensation can only be awarded in respect of physical injury or death or loss of baggage i.e. no compensation for injury to feelings;

## So where does this leave us?

- Lack of Case Law is hindering future prosecutions;
- There is a perception/reality that the law has no teeth;
- We know that disabled people face problems every day at airports and on board flight in and around Europe;
- But they either do not know their rights or do not think it is worth making a complaint.

# Discussion Topics

- What can realistically be done to make the enforcement of passenger rights more effective in terms of:
  - Legal changes?
  - Operational changes?
- How can passengers be encouraged to complain when things go wrong?
- Would higher penalties for breaches of the law make a difference?
- Should there be compensation paid to those whose complaints are upheld?
- Would a closer link between UNCRPD and European Passenger Rights Regulations be helpful? If so how?

# Exercise

## Groups 1 & 2

- You are an NEB
- What advice would you give to:
  - The European Commission
  - Disability organisations at European and national level
- About how to make the enforcement of the Regulation more effective?

## Groups 3 & 4

- You are a European level disability organisation
- What advice would you give to:
  - The European Commission
  - NEBs
- About how to make the enforcement of the Regulation more effective?



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SEMINAR ON EU DISABILITY LAW AND THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

**"THE RIGHT TO EQUALITY AND NON - DISCRIMINATION IN THE FIELD OF EMPLOYMENT AND OTHER AREAS"**

ERA (Trier, 18 19 April 2016)

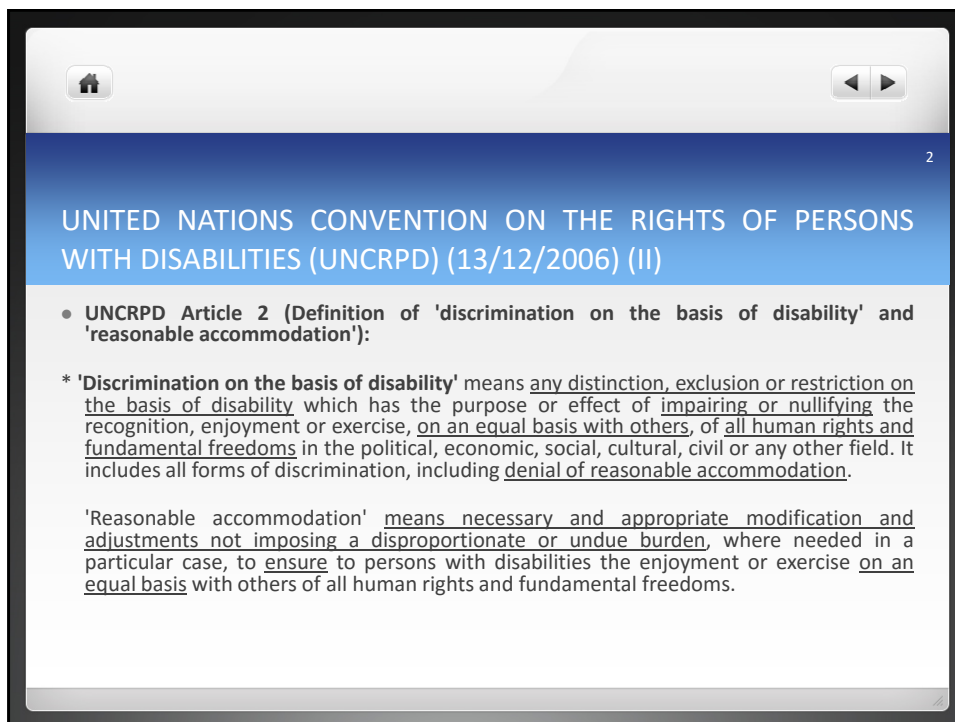
*Prof. Dr. Sara Alcázar Ortiz*

University of Zaragoza (ES). Faculty of Law

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UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD) (13/12/2006) (I)

- **Recital e) UNCRPD:** recognises that "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 (definition 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."



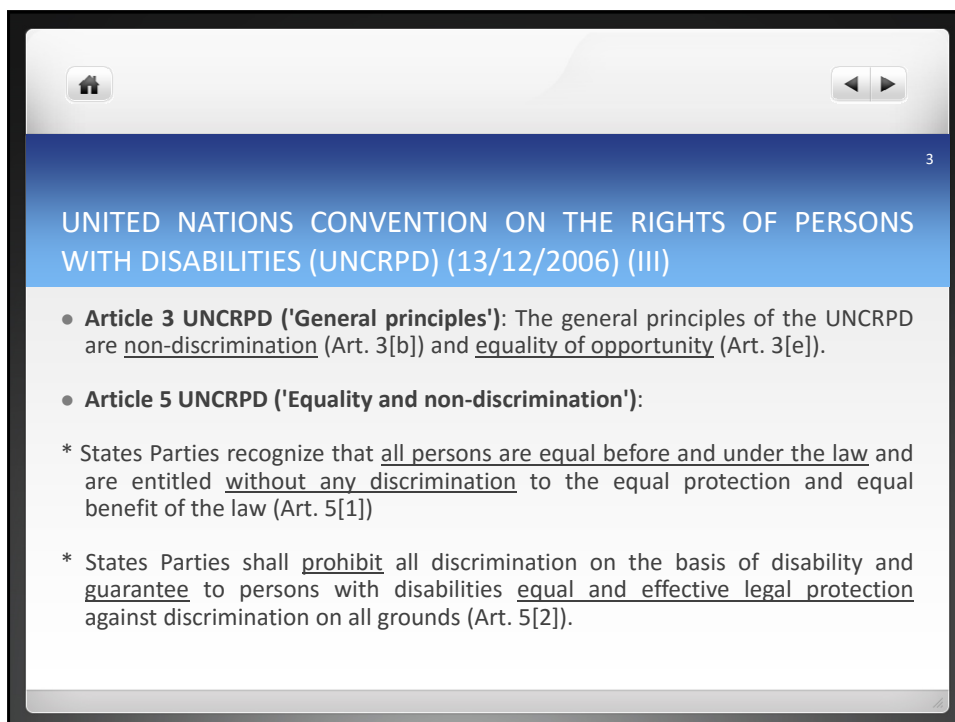
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## UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD) (13/12/2006) (II)

- **UNCRPD Article 2 (Definition of 'discrimination on the basis of disability' and 'reasonable accommodation'):**

\* **'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.

'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.



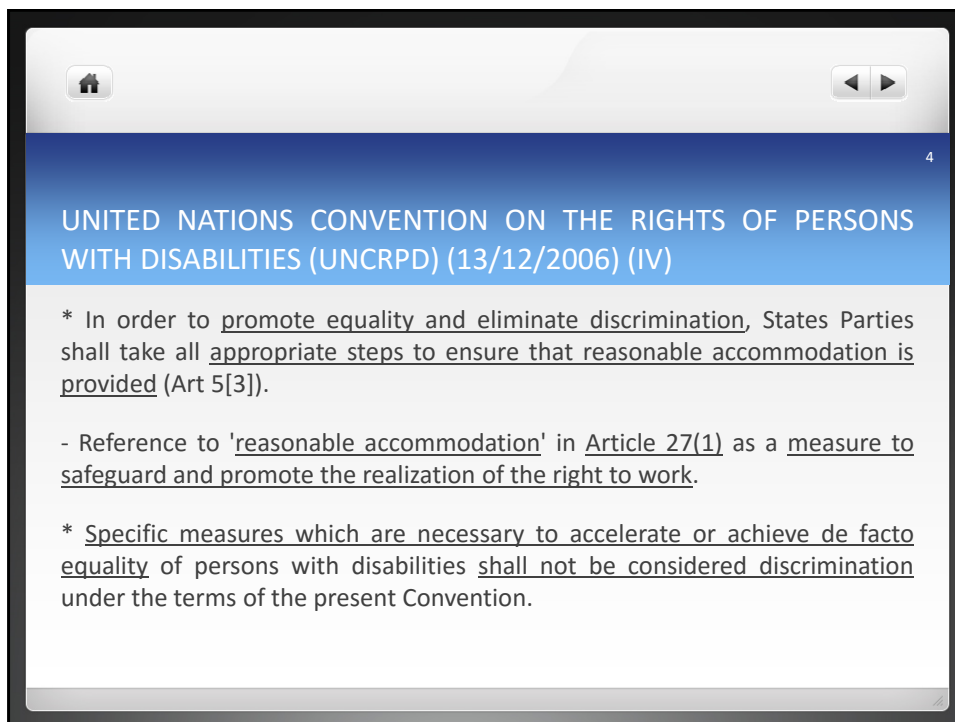
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## UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD) (13/12/2006) (III)

- **Article 3 UNCRPD ('General principles'):** The general principles of the UNCRPD are non-discrimination (Art. 3[b]) and equality of opportunity (Art. 3[e]).
- **Article 5 UNCRPD ('Equality and non-discrimination'):**

\* 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 (Art. 5[1])

\* 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 (Art. 5[2]).

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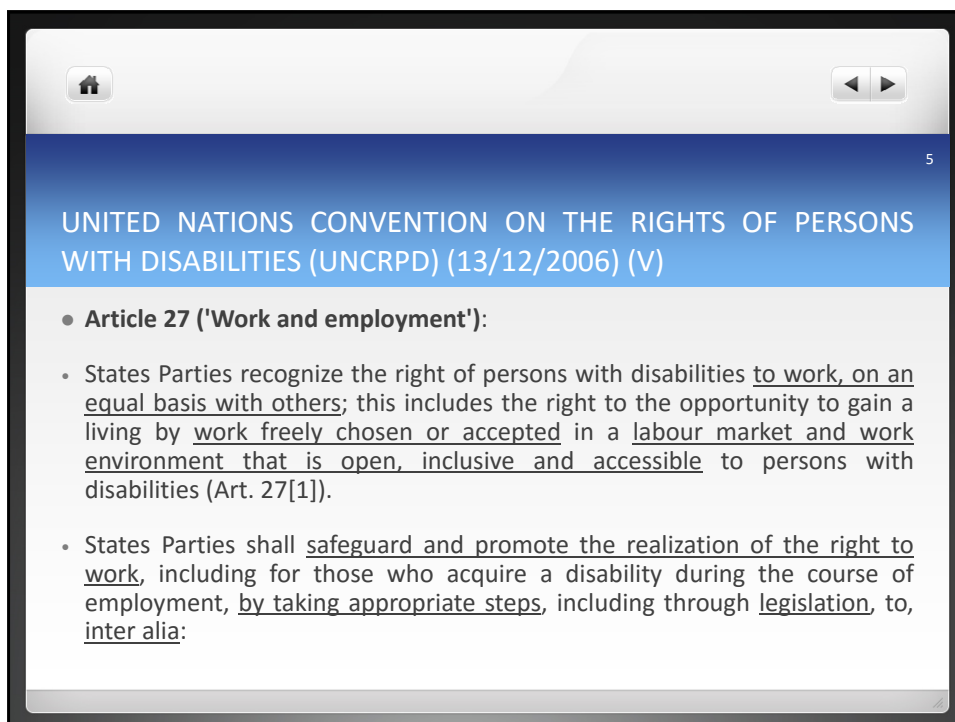
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## UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD) (13/12/2006) (IV)

\* In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided (Art 5[3]).

- Reference to 'reasonable accommodation' in Article 27(1) as a measure to safeguard and promote the realization of the right to work.

\* Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

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## UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD) (13/12/2006) (V)

- **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:

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UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD) (13/12/2006) (VI)

(a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions.

(b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances.

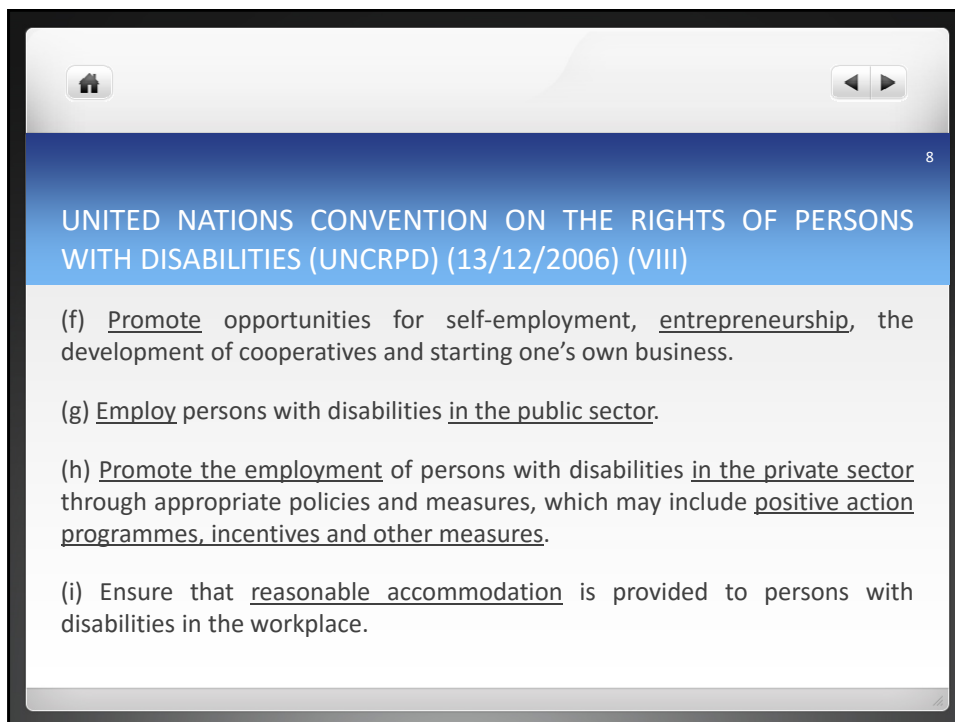
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UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD) (13/12/2006) (VII)

(c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others.

(d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training.

(e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment.

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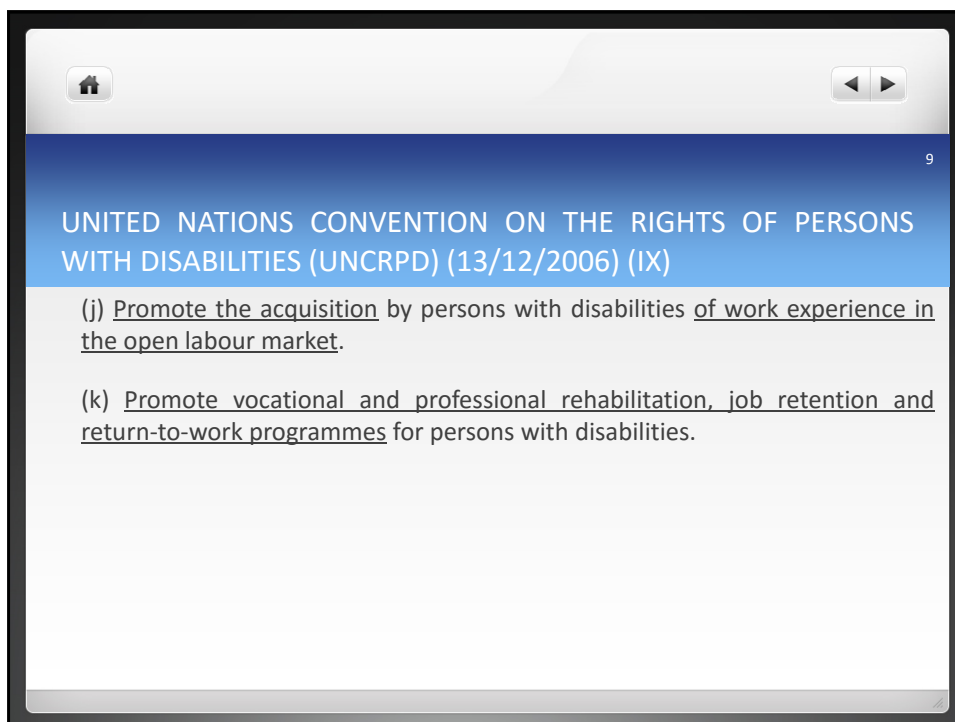
UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD) (13/12/2006) (VIII)

(f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business.

(g) Employ persons with disabilities in the public sector.

(h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include positive action programmes, incentives and other measures.

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

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UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD) (13/12/2006) (IX)

(j) Promote the acquisition by persons with disabilities of work experience in the open labour market.

(k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.



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## UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD) (13/12/2006) (X)

- **Article 27(2): prohibition of slavery and forced and compulsory labour:**
  - States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.
- **EU ratification of the UNCRPD**, Council Decision 2010/48/EC of 26 November 2009: means that the concept of 'disability', for the purposes of Directive 2000/78/EC, must **be interpreted by the CJEU in the light of the UNCRPD** (Cases: *Ring-Skouboe Werge*, *Glatzel*, *FOA*).



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## DISABILITY AND EMPLOYMENT: EU ANTI-DISCRIMINATION LEGAL FRAMEWORK (I)

- **Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.** This Directive represents the introduction of anti-discrimination law relating to disability into the EU.
- Directive 2000/78/EC prohibits discrimination in the fields of employment and vocational training on grounds of religion or belief, sexual orientation, age and disability.
- The concept of 'disability' interpreted in the light of the UNCRPD.

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## DISABILITY AND EMPLOYMENT: EU ANTI-DISCRIMINATION LEGAL FRAMEWORK (II)

- The **concept of discrimination** provided for in the Directive includes **4 forms of discrimination**:
  - a) **Direct discrimination** (Article 2[2][a])
  - b) **Indirect discrimination** (Article 2[2][b])
  - c) **Harassment** (Article 2[3])
  - d) **Instruction to discriminate against another person** (Article 2[4])

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## EU ANTI-DISCRIMINATION LEGAL FRAMEWORK: FORMS OF DISCRIMINATION (I)

- **a) DIRECT DISCRIMINATION** (Article 2[2][a]) Directive 2000/78/EC
- Direct discrimination shall be taken to occur "where one person is treated less favourably than another is, has been or would be treated in a comparable situation" on grounds of disability.
- The applicant does not necessarily have to be a person with a disability (see *Coleman v Attridge Law*, Case C-303/06)

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## EU ANTI-DISCRIMINATION LEGAL FRAMEWORK: FORMS OF DISCRIMINATION (II)

- **b) DIRECT DISCRIMINATION** (Article 2[2][b]) Directive 2000/78/EC)
- Indirect discrimination shall be taken to occur "where an apparently neutral provision, criterion or practice would put persons having a particular (...) disability (...) at a particular disadvantage compared with other persons unless:

(\*EXCEPTIONS)

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## EU ANTI-DISCRIMINATION LEGAL FRAMEWORK: FORMS OF DISCRIMINATION (III)

- that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Article 2[2][b][i]); **or**
- as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice" (Article 2[2][b][ii]).



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## EU ANTI-DISCRIMINATION LEGAL FRAMEWORK: FORMS OF DISCRIMINATION (IV)

- **c) HARASSMENT** (Article 2[3])
- When unwanted conduct related to 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.
- The applicant does not necessarily have to be a person with a disability.

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## EU ANTI-DISCRIMINATION LEGAL FRAMEWORK: FORMS OF DISCRIMINATION (V)

- **d) INSTRUCTION TO DISCRIMINATE** (Article 2[4])
- An instruction to discriminate against persons on the grounds of disability shall be deemed to be discrimination.



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## EU ANTI-DISCRIMINATION LEGAL FRAMEWORK: RECITALS OF DIRECTIVE 2000/78/EC (I)

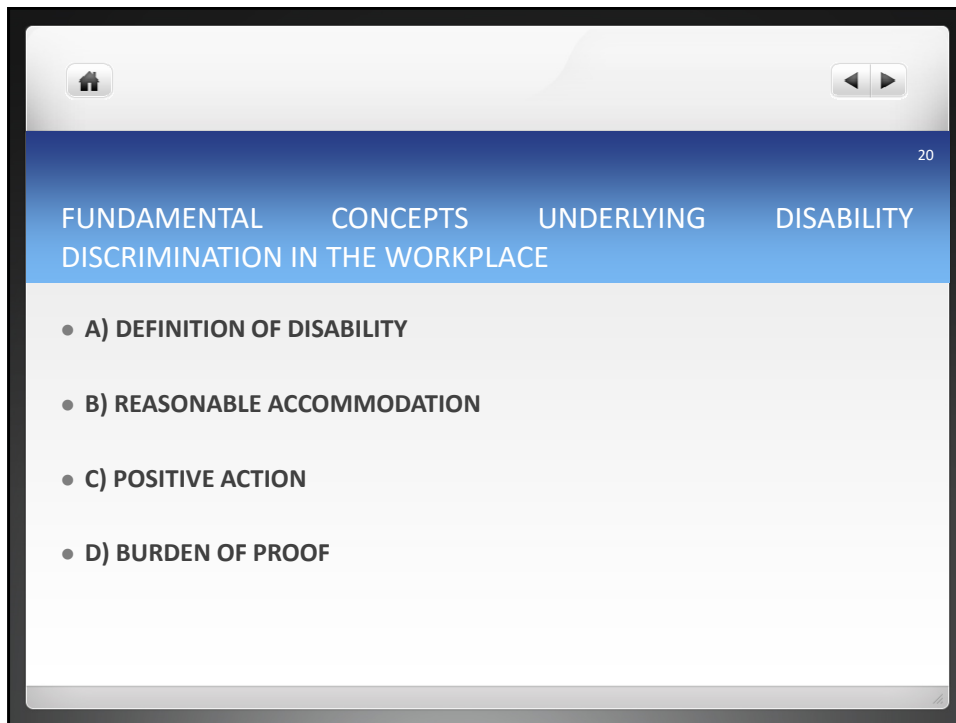
- **(17)** “This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.”
- **(18)** “This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.”



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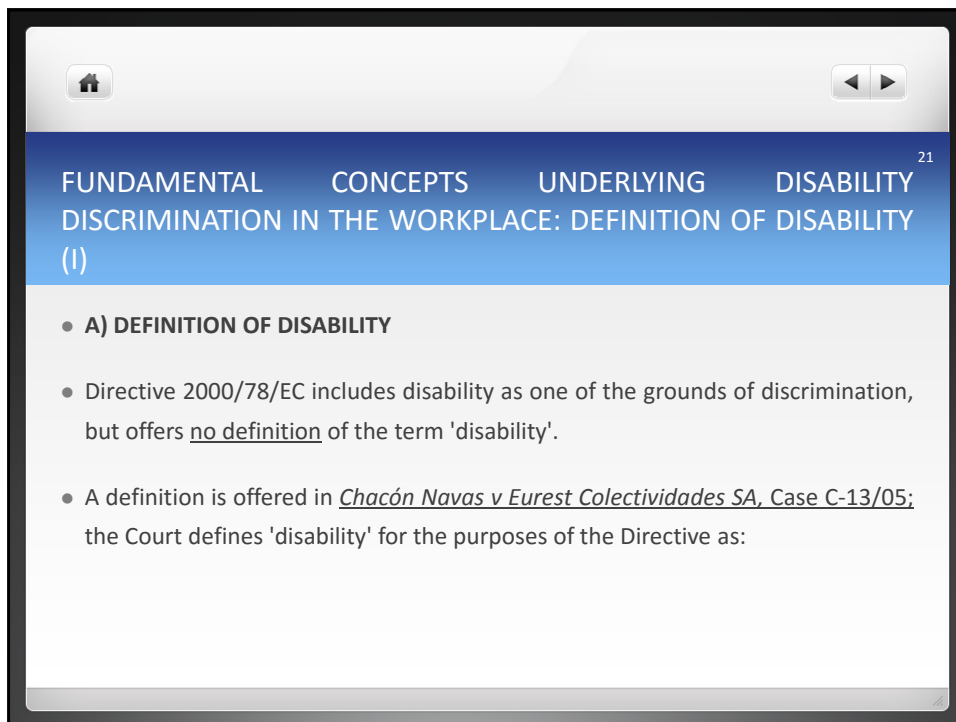
## EU ANTI-DISCRIMINATION LEGAL FRAMEWORK: RECITALS OF DIRECTIVE 2000/78/EC (II)

- **(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.”
- **(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.”



Slide 20: FUNDAMENTAL CONCEPTS UNDERLYING DISABILITY DISCRIMINATION IN THE WORKPLACE

- A) DEFINITION OF DISABILITY
- B) REASONABLE ACCOMMODATION
- C) POSITIVE ACTION
- D) BURDEN OF PROOF



Slide 21: FUNDAMENTAL CONCEPTS UNDERLYING DISABILITY DISCRIMINATION IN THE WORKPLACE: DEFINITION OF DISABILITY (I)

- A) DEFINITION OF DISABILITY
- Directive 2000/78/EC includes disability as one of the grounds of discrimination, but offers no definition of the term 'disability'.
- A definition is offered in Chacón Navas v Eurest Colectividades SA, Case C-13/05; the Court defines 'disability' for the purposes of the Directive as:

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FUNDAMENTAL CONCEPTS UNDERLYING DISABILITY DISCRIMINATION IN THE WORKPLACE: DEFINITION OF DISABILITY (II)

"a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned over a long period of time in professional life."

- \* The definition of 'disability' given by the Court is "autonomous and uniform".
- \* In order for the limitation to fall within the concept of 'disability', "it must be probable that it will last for a long time".
- \* 'Disability' is not the same as 'sickness'.

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FUNDAMENTAL CONCEPTS UNDERLYING DISABILITY DISCRIMINATION IN THE WORKPLACE: DEFINITION OF DISABILITY (III)

- \* 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' can not be included on the list of grounds covered by the Directive.
- \* The judgment has opened the door for people suffering from a prolonged illness, causing the required degree of limitation, to be considered as persons with 'disabilities' within the meaning of the Directive.

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FUNDAMENTAL CONCEPTS UNDERLYING DISABILITY  
DISCRIMINATION IN THE WORKPLACE: DEFINITION OF DISABILITY  
(IV)

- In *HK Danmark and Others v HK Danmark and others*, Joined Cases C-335/11 and C-337/11, the CJEU indicates that the Directive "must, as far as possible, be interpreted" in a manner consistent with the UNCRPD.
- Definition of disability in the light of the UNCRPD: in *Wolfgang Glatzel v Freistaat Bayern*, Case C-356/12, and in *Fag og Arbejde (FOA) v Kommunernes Landsforening (KL)*, Case 354/13, the Court defines 'disability' for purposes of the Directive as "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".

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FUNDAMENTAL CONCEPTS UNDERLYING DISABILITY  
DISCRIMINATION IN THE WORKPLACE: REASONABLE  
ACCOMMODATION (I)

- **B) REASONABLE ACCOMMODATION** (Article 5, Directive 2000/78/EC): "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, depending on the needs of each specific situation, to enable people with disabilities access to employment, participate in , or advance, or to undergo training, unless such measures would impose an excessive 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".

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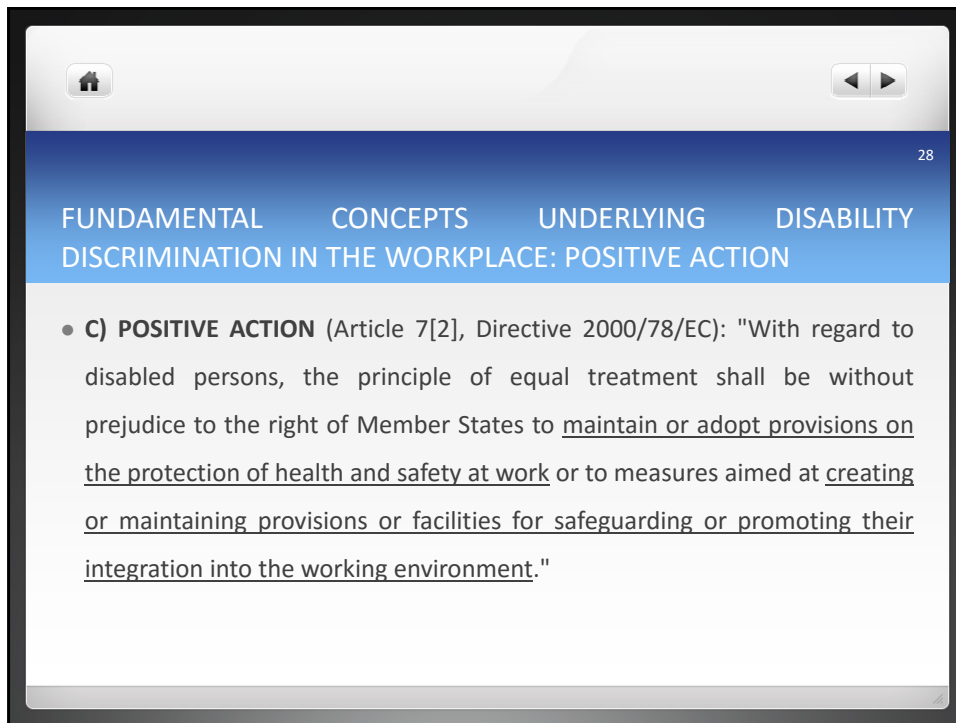
FUNDAMENTAL CONCEPTS UNDERLYING DISABILITY DISCRIMINATION IN THE WORKPLACE: REASONABLE ACCOMMODATION (II)

- The Directive requires that individualized accommodation be made (specifically tailored to the needs of a specific person).
- Can the concept of 'accommodation' be defined? In Recital 20 of Directive 2000/78/EC, 'appropriate measures' are defined as "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".

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FUNDAMENTAL CONCEPTS UNDERLYING DISABILITY DISCRIMINATION IN THE WORKPLACE: REASONABLE ACCOMMODATION (III)

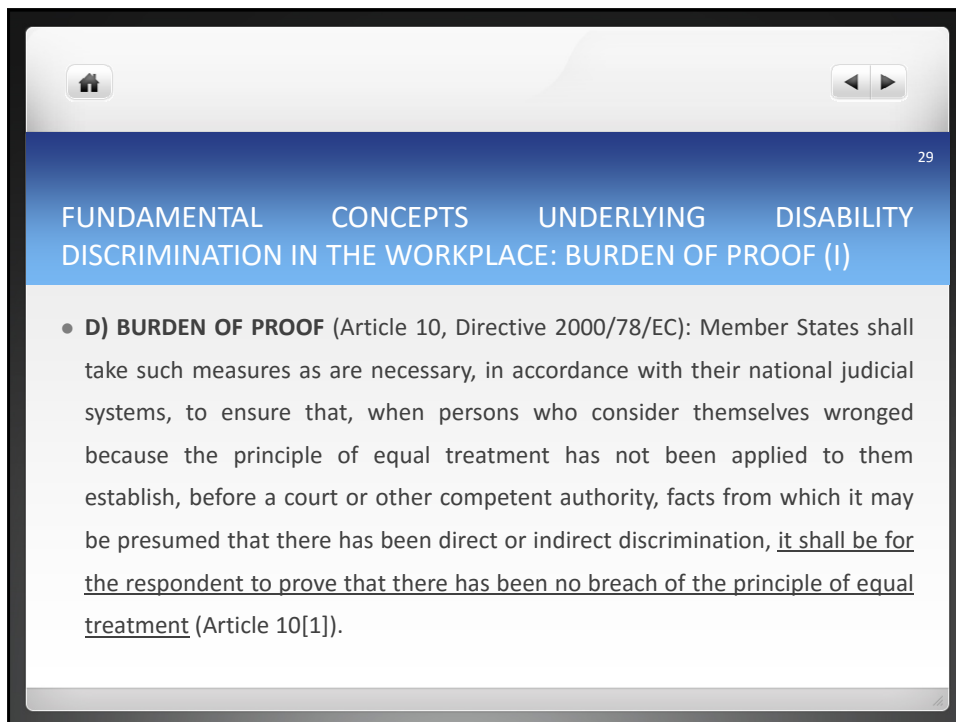
- Is it possible to determine whether the measures referred to in Article 5 give rise to a 'disproportionate burden'? Recital 21 of Directive 2000/78/EC provides that "account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance".



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FUNDAMENTAL CONCEPTS UNDERLYING DISABILITY DISCRIMINATION IN THE WORKPLACE: POSITIVE ACTION

- **C) POSITIVE ACTION** (Article 7[2], Directive 2000/78/EC): "With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment."



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FUNDAMENTAL CONCEPTS UNDERLYING DISABILITY DISCRIMINATION IN THE WORKPLACE: BURDEN OF PROOF (I)

- **D) BURDEN OF PROOF** (Article 10, Directive 2000/78/EC): Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment (Article 10[1]).

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## FUNDAMENTAL CONCEPTS UNDERLYING DISABILITY DISCRIMINATION IN THE WORKPLACE: BURDEN OF PROOF (II)

- It is up to the claimant to submit *prima facie* evidence.
- The respondent must provide a sufficient explanation to be considered to have assumed the burden of proof.
- Where the respondent fails to assume the burden of proof, the Court must conclude that there has been discrimination contrary to the law.

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## CJEU CASE LAW ON DISABILITY (I)

- **Chacón Navas v Eures Colectividades, SA.** Case C-13/05.
- **Coleman v Attridge Law.** Case C-303/06.
- **Reinhard Prigge and Others v Deutsche Lufthansa AG.** Case C-447/09.
- **Johann Odar v Baxter Deutschland GmbH.** Case C-152/11.



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## CJEU CASE LAW ON DISABILITY (II)

- *\*Already considered in the light of the UNCRPD:*
- *HK Danmark and Others v HK Danmark and Others*. Joined Cases C- 335/11 and C 337/11 (cases *Jette Ring* and *Lone Skouboe Werge*).
- *Wolfgang Glatzel v Freistaat Bayern*. Case C-356/12.
- *Fag og arbejde (FOA) v Kommunernes Landsforening (KL)*. Case C-354/13.

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## EU STATE AID EXEMPTIONS (GBER) REGARDING WORKERS WITH DISABILITIES (I)

- **Commission Regulation (EU) No 651/2014 of 17 June 2014** declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty. The aim of the Exemption Regulation, in force since 1 July 2014, is to exempt certain forms of aid from the notification and authorisation obligation imposed under the TFEU.
- **Article 1(f):** The Regulation applies to recruitment and employment aid for workers with disabilities.



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## EU STATE AID EXEMPTIONS (GBER) REGARDING WORKERS WITH DISABILITIES (II)

- **Article 2(3):** For the purposes of the Regulation, 'worker with disabilities' means any person who:
  - a) is recognised as a person with disabilities under national law; or
  - b) has long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in a work environment on an equal basis with other workers.



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## EU STATE AID EXEMPTIONS (GBER) REGARDING WORKERS WITH DISABILITIES (III)

- **Article 4 ('Notification Thresholds')**: the Regulation shall not apply to aid exceeding the following thresholds:
  - \* 4(1)(p): for aid for the employment of workers with disabilities in the form of wage subsidies: EUR 10 million per undertaking, per year.
  - \* 4(1)(q): for aid for compensating the additional costs of employing workers with disabilities: EUR 10 million per undertaking, per year.



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## EU STATE AID EXEMPTIONS (GBER) REGARDING WORKERS WITH DISABILITIES (IV)

- **Article 6** ('Incentive effect'): the Regulation shall apply only to aid which has an incentive effect (6[1]); however the following categories of aid are not required to have or shall be deemed to have an incentive effect:
  - (c) aid for the employment of workers with disabilities in the form of wage subsidies, if the relevant conditions laid down in Article 33 are fulfilled.
  - (d) aid compensating for the additional costs of employing workers with disabilities, if the conditions laid down in Article 34 are fulfilled.



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## EU STATE AID EXEMPTIONS (GBER) REGARDING WORKERS WITH DISABILITIES (V)

- **Article 33** ('Aid for the employment of workers with disabilities in the form of wage subsidies'):
  1. Aid for the employment of workers with disabilities shall be compatible with the internal market within the meaning of TFEU Article 107(3) and shall be exempted from the notification requirement of TFEU Article 108(3).
  2. Eligible costs shall be the wage costs over any given period during which the worker with disabilities is employed.

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## EU STATE AID EXEMPTIONS (GBER) REGARDING WORKERS WITH DISABILITIES (VI)

3. Where the recruitment does not represent a net increase, compared with the average over the previous 12 months, in the number of employees in the undertaking concerned, the post or posts shall have fallen vacant following voluntary departure, disabilities, retirement on grounds of age, voluntary reduction of working time or lawful dismissal for misconduct and not as a result of redundancy.
4. Except in the case of lawful dismissal for misconduct, the workers with disabilities shall be entitled to continuous employment for a minimum period consistent with the national legislation concerned or any collective agreements which are legally binding for the undertaking and governing employment contracts.
5. The aid intensity shall not exceed 75 % of the eligible costs.

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## EU STATE AID EXEMPTIONS (GBER) REGARDING WORKERS WITH DISABILITIES (VII)

- **Article 34** ('Aid for compensating the additional costs of employing workers with disabilities'):
  1. Aid for compensating the additional costs of employing workers with disabilities shall be compatible with the internal market within the meaning of TFEU Article 107(3) and shall be exempted from the notification requirement of TFEU Article 108(3).
  2. The eligible costs shall be the following:
    - (a) costs of adapting the premises.



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## EU STATE AID EXEMPTIONS (GBER) REGARDING WORKERS WITH DISABILITIES (VIII)

(b) costs of employing staff solely for time spent on the assistance of the workers with disabilities and of training such staff to assist workers with disabilities.

(c) costs of adapting or acquiring equipment, or acquiring and validating software for use by workers with disabilities, including adapted or assistive technology facilities, which are additional to those which the beneficiary would have incurred had it employed workers who are not workers with disabilities.

(d) costs directly linked to transport of workers with disabilities to the working place and for work related activities.



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## EU STATE AID EXEMPTIONS (GBER) REGARDING WORKERS WITH DISABILITIES (IX)

e) wage costs for the hours spent by a worker with disabilities on rehabilitation.

(f) where the beneficiary provides sheltered employment, the costs of constructing, installing or modernising the production units of the undertaking concerned, and any costs of administration and transport, provided that such costs result directly from the employment of workers with disabilities.

3. 3. The aid intensity shall not exceed 100 % of the eligible costs.



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“THE RIGHT TO EQUALITY AND NON-DISCRIMINATION IN THE  
FIELD OF EMPLOYMENT AND IN OTHER AREAS”

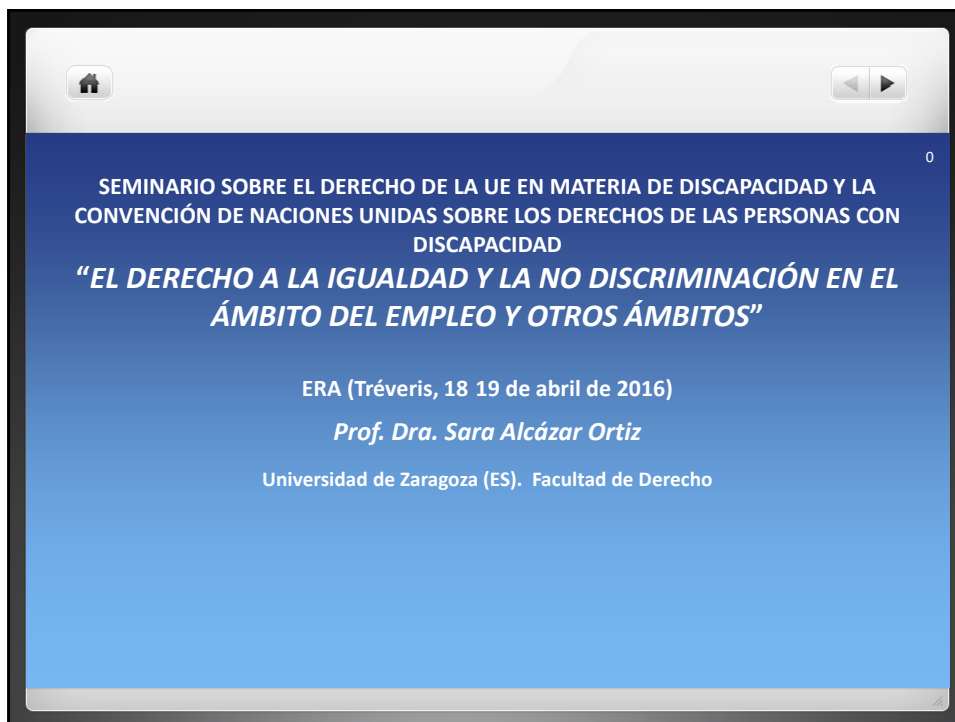
**THANK YOU FOR YOUR ATTENTION**

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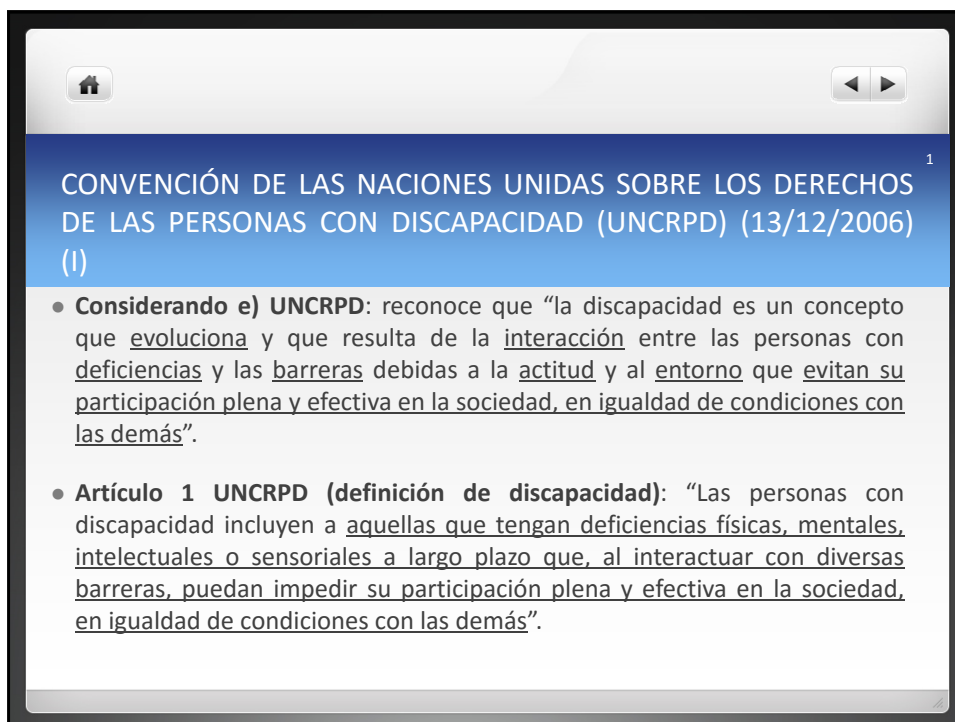
SEMINARIO SOBRE EL DERECHO DE LA UE EN MATERIA DE DISCAPACIDAD Y LA CONVENCIÓN DE NACIONES UNIDAS SOBRE LOS DERECHOS DE LAS PERSONAS CON DISCAPACIDAD

**“EL DERECHO A LA IGUALDAD Y LA NO DISCRIMINACIÓN EN EL ÁMBITO DEL EMPLEO Y OTROS ÁMBITOS”**

ERA (Tréveris, 18-19 de abril de 2016)

*Prof. Dra. Sara Alcázar Ortiz*

Universidad de Zaragoza (ES). Facultad de Derecho



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CONVENCIÓN DE LAS NACIONES UNIDAS SOBRE LOS DERECHOS DE LAS PERSONAS CON DISCAPACIDAD (UNCRPD) (13/12/2006) (I)

- **Considerando e) UNCRPD:** reconoce que “la discapacidad es un concepto que evoluciona y que resulta de la interacción entre las personas con deficiencias y las barreras debidas a la actitud y al entorno que evitan su participación plena y efectiva en la sociedad, en igualdad de condiciones con las demás”.
- **Artículo 1 UNCRPD (definición de discapacidad):** “Las personas con discapacidad incluyen a aquellas que tengan deficiencias físicas, mentales, intelectuales o sensoriales a largo plazo que, al interactuar con diversas barreras, puedan impedir su participación plena y efectiva en la sociedad, en igualdad de condiciones con las demás”.



## CONVENCIÓN DE LAS NACIONES UNIDAS SOBRE LOS DERECHOS DE LAS PERSONAS CON DISCAPACIDAD (UNCRPD) (13/12/2006) (II)

- **Artículo 2 UNCRPD (Definición de “discriminación por discapacidad” y “ajustes razonables”):**

\* Por “**discriminación por motivos de discapacidad**” se entenderá cualquier distinción, exclusión o restricción por motivos de discapacidad que tenga el propósito o el efecto de obstaculizar o dejar sin efecto el reconocimiento, goce o ejercicio, en igualdad de condiciones, de todos los derechos humanos y libertades fundamentales en los ámbitos político, económico, social, cultural, civil o de otro tipo. Incluye todas las formas de discriminación, entre ellas, la denegación de ajustes razonables.

\* Por “**ajustes razonables**” se entenderán las modificaciones y adaptaciones necesarias y adecuadas que no impongan una carga desproporcionada o indebida, cuando se requieran en un caso particular, para garantizar a las personas con discapacidad el goce o ejercicio, en igualdad de condiciones con las demás, de todos los derechos humanos y libertades fundamentales.



## CONVENCIÓN DE LAS NACIONES UNIDAS SOBRE LOS DERECHOS DE LAS PERSONAS CON DISCAPACIDAD (UNCRPD) (13/12/2006) (III)

- **Artículo 3 UNCRPD (“Principios generales”):** Son principios generales de la UNCRPD el de no discriminación (art. 3.b) y el de igualdad de oportunidades (art. 3.e).

- **Artículo 5 UNCRPD (“Igualdad y no discriminación”):**

\* Los Estados Partes reconocen que todas las personas son iguales ante la ley y en virtud de ella y que tienen derecho a igual protección legal y a beneficiarse de la ley en igual medida sin discriminación alguna (art. 5.1).

\* Los Estados Partes prohibirán toda discriminación por motivos de discapacidad y garantizarán a todas las personas con discapacidad protección legal igual y efectiva contra la discriminación por cualquier motivo (art. 5.2).





## CONVENCIÓN DE LAS NACIONES UNIDAS SOBRE LOS DERECHOS DE LAS PERSONAS CON DISCAPACIDAD (UNCRPD) (13/12/2006) (IV)

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\* A fin de promover la igualdad y eliminar la discriminación, los Estados Partes adoptarán todas las medidas pertinentes para asegurar la realización de ajustes razonables (art. 5.3).

- Referencia a los “ajustes razonables” en el artículo 27.1) UNCRPD, como medida para salvaguardar y promover el derecho al trabajo.

\* No se considerarán discriminatorias, en virtud de la presente Convención, las medidas específicas que sean necesarias para acelerar o lograr la igualdad de hecho de las personas con discapacidad.



## CONVENCIÓN DE LAS NACIONES UNIDAS SOBRE LOS DERECHOS DE LAS PERSONAS CON DISCAPACIDAD (UNCRPD) (13/12/2006) (V)

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### • **Artículo 27 (“Trabajo y empleo”):**

• Los Estados Partes reconocen el derecho de las personas con discapacidad a trabajar, en igualdad de condiciones con las demás, incluyendo el derecho a tener la oportunidad de ganarse la vida mediante un trabajo libremente elegido o aceptado en un mercado y un entorno laborales que sean abiertos, inclusivos y accesibles a las personas con discapacidad (art. 27.1).

• Los Estados Partes salvaguardarán y promoverán el ejercicio del derecho al trabajo, incluso para las personas que adquieran una discapacidad durante el empleo, adoptando medidas pertinentes, incluida la promulgación de legislación, entre ellas:



## CONVENCIÓN DE LAS NACIONES UNIDAS SOBRE LOS DERECHOS DE LAS PERSONAS CON DISCAPACIDAD (UNCRPD) (13/12/2006) (VI)<sup>6</sup>

a- Prohibir la discriminación por motivos de discapacidad con respecto a todas las cuestiones relativas a cualquier forma de empleo, incluidas las condiciones de selección, contratación y empleo, la continuidad en el empleo, la promoción profesional y unas condiciones de trabajo seguras y saludables.

b- Proteger los derechos de las personas con discapacidad, en igualdad de condiciones con las demás, a condiciones de trabajo justas y favorables, y en particular a igualdad de oportunidades y de remuneración por trabajo de igual valor, a condiciones de trabajo seguras y saludables, incluida la protección contra el acoso, y a la reparación por agravios sufridos.



## CONVENCIÓN DE LAS NACIONES UNIDAS SOBRE LOS DERECHOS DE LAS PERSONAS CON DISCAPACIDAD (UNCRPD) (13/12/2006) (VII)<sup>7</sup>

c- Asegurar que las personas con discapacidad puedan ejercer sus derechos laborales y sindicales, en igualdad de condiciones con las demás.

d- Permitir que las personas con discapacidad tengan acceso efectivo a programas generales de orientación técnica y vocacional, servicios de colocación y formación profesional y continua.

e- Alentar las oportunidades de empleo y la promoción profesional de las personas con discapacidad en el mercado laboral y apoyarlas para la búsqueda, obtención, mantenimiento del empleo y retorno al mismo.

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## CONVENCIÓN DE LAS NACIONES UNIDAS SOBRE LOS DERECHOS DE LAS PERSONAS CON DISCAPACIDAD (UNCRPD) (13/12/2006) (VIII)

f- Promover oportunidades empresariales, de empleo por cuenta propia, de constitución de cooperativas y de inicio de empresas propias.

g- Emplear a personas con discapacidad en el sector público.

h- Promover el empleo de personas con discapacidad en el sector privado mediante políticas y medidas pertinentes, que pueden incluir programas de acción afirmativa, incentivos y otras medidas.

i- Velar por que se realicen ajustes razonables para las personas con discapacidad en el lugar de trabajo.

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## CONVENCIÓN DE LAS NACIONES UNIDAS SOBRE LOS DERECHOS DE LAS PERSONAS CON DISCAPACIDAD (UNCRPD) (13/12/2006) (IX)

j- Promover la adquisición por las personas con discapacidad de experiencia laboral en el mercado de trabajo abierto.

k- Promover programas de rehabilitación vocacional y profesional, mantenimiento del empleo y reincorporación al trabajo dirigidos a personas con discapacidad.

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## CONVENCIÓN DE LAS NACIONES UNIDAS SOBRE LOS DERECHOS DE LAS PERSONAS CON DISCAPACIDAD (UNCRPD) (13/12/2006) (X)

- **Artículo 27.2: prohibición de esclavitud y trabajo forzoso y obligatorio:**
  - Los Estados Partes asegurarán que las personas con discapacidad no sean sometidas a esclavitud ni servidumbre y que estén protegidas, en igualdad de condiciones con las demás, contra el trabajo forzoso u obligatorio.
- **Ratificación por la UE de la UNCRPD**, aprobada por la Decisión 2010/487CE del Consejo, de 26 de noviembre de 2009: implica que el concepto de “discapacidad”, a efectos de la Directiva 2000/78/CE, debe **ser interpretado por el TJUE a la luz de la UNCRPD** (Casos Ring-Skouboe Werge, Glatzel, FOA).

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## DISCAPACIDAD Y EMPLEO: EL MARCO JURÍDICO ANTIDISCRIMINACIÓN DE LA UE (I)

- **Directiva del Consejo 2000/78/CE del 27 de noviembre de 2000 relativa al establecimiento de un marco general para la igualdad de trato en el empleo y la ocupación.** Esta Directiva supone la introducción en la Unión Europea del Derecho antidiscriminación en relación con con la discapacidad.
- La Directiva 2000/78/CE prohíbe la discriminación en los ámbitos de empleo y formación profesional por motivos de religión o convicciones, orientación sexual, edad y discapacidad.
- Interpretado el concepto de “discapacidad” a la luz de la UNCRPD.

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## DISCAPACIDAD Y EMPLEO: EL MARCO JURÍDICO ANTIDISCRIMINACIÓN DE LA UE (II)

- El **concepto de discriminación** contemplado en la Directiva incluye **4 formas de discriminación**:
  - a) **la discriminación directa** (artículo 2.2.a)
  - b) **la discriminación indirecta** (artículo 2.2.b)
  - c) **el acoso** (artículo 2.3)
  - d) **la orden de discriminar a otra persona** (artículo 2.4)

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## EL MARCO JURÍDICO ANTIDISCRIMINACIÓN DE LA UE: FORMAS DE DISCRIMINACIÓN (I)

- **a) DISCRIMINACIÓN DIRECTA** (artículo 2.2.a) Directiva 2000/78/CE)
- Exis. rá discriminación directa “cuando una persona sea, haya sido o pudiera ser tratada de manera menos favorable que otra en situación análoga” por motivos de discapacidad.
- El o la demandante no necesariamente ha de ser una persona con discapacidad (véase *Coleman contra Attridge Law*. Asunto C-303/06).



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## EL MARCO JURÍDICO ANTIDISCRIMINACIÓN DE LA UE: FORMAS DE DISCRIMINACIÓN (II)

- **b) DISCRIMINACIÓN INDIRECTA** (artículo 2.2.b) Directiva 2000/78/CE)
- Existirá discriminación indirecta “cuando una disposición, criterio o práctica aparentemente neutros pueda ocasionar una desventaja particular a personas con una (...) discapacidad (...) determinada, respecto de otras personas, salvo que:

(\*EXCEPCIONES)



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## EL MARCO JURÍDICO ANTI-DISCRIMINACIÓN DE LA UE: FORMAS DE DISCRIMINACIÓN (III)

- dicha disposición, criterio o práctica pueda justificarse objetivamente con una finalidad legítima y salvo que los medios para la consecución de esta finalidad sean adecuados y necesarios (artículo 2.2.b) (i); **o que**
- respecto de las personas con una discapacidad determinada, el empresario o cualquier persona u organización a la que se aplique lo dispuesto en la presente Directiva, esté obligado, en virtud de la legislación nacional, a adoptar medidas adecuadas de conformidad con los principios contemplados en el artículo 5 para eliminar las desventajas que supone esa disposición, ese criterio o esa práctica” (artículo 2.2.b).(ii)



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## EL MARCO JURÍDICO ANTI-DISCRIMINACIÓN DE LA UE: FORMAS DE DISCRIMINACIÓN (IV)

- **c) ACOSO** (artículo 2.3)
- Cuando se produzca un comportamiento no deseado relacionado con el motivo de discapacidad que tenga como objetivo o consecuencia atentar contra la dignidad de la persona y crear un entorno intimidatorio, hostil, degradante, humillante u ofensivo.
- El o la demandante no necesariamente ha de ser una persona con discapacidad.



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## EL MARCO JURÍDICO ANTI-DISCRIMINACIÓN DE LA UE: FORMAS DE DISCRIMINACIÓN (V)

- **d) ORDEN DE DISCRIMINAR** (artículo 2.4)
- Toda orden de discriminar a personas por motivos de discapacidad se considerará discriminación.



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## EL MARCO JURÍDICO ANTI-DISCRIMINACIÓN DE LA UE: CONSIDERANDOS DE LA DIRECTIVA 2000/78/CE (I)

- **(17)** “La presente Directiva no obliga a contratar, ascender, mantener en un puesto de trabajo o facilitar formación a una persona que no sea competente o no esté capacitada o disponible para desempeñar las tareas fundamentales del puesto de que se trate o para seguir una formación dada, sin perjuicio de la obligación de realizar los ajustes razonables para las personas con discapacidad”.
- **(18)** “Concretamente, la presente Directiva no puede tener el efecto de obligar a las fuerzas armadas, como tampoco a los servicios de policía, penitenciarios, o de socorro, a contratar o mantener en su puesto de trabajo a personas que no tengan las capacidades necesarias para desempeñar cuantas funciones puedan tener que ejercer en relación con el objetivo legítimo de mantener el carácter operativo de dichos servicios”.

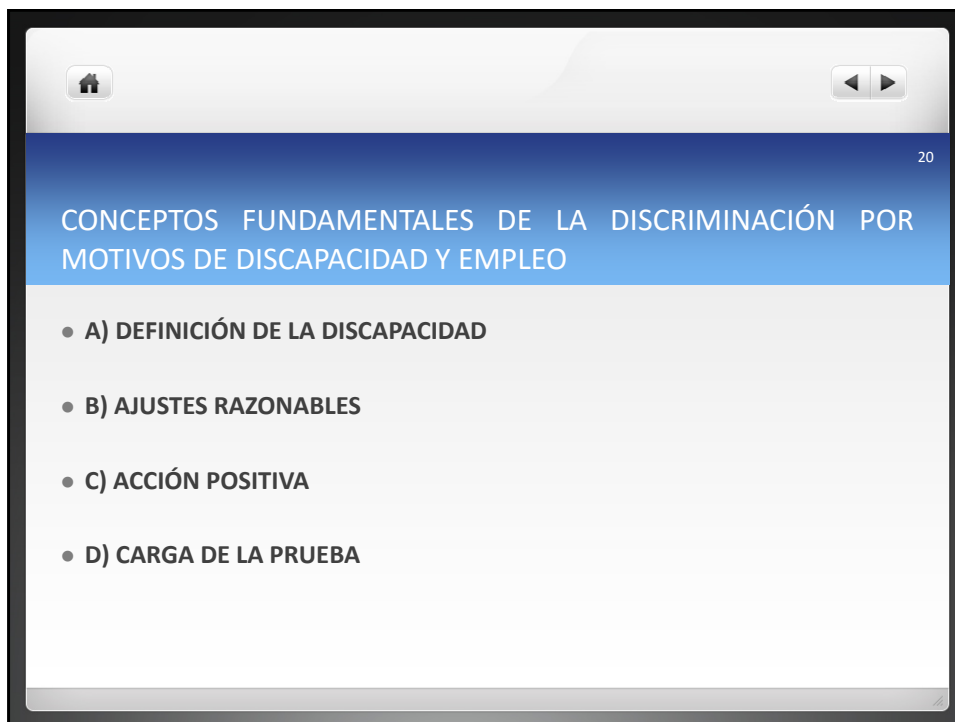


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## EL MARCO JURÍDICO ANTI-DISCRIMINACIÓN DE LA UE: CONSIDERANDOS DE LA DIRECTIVA 2000/78/CE (II)

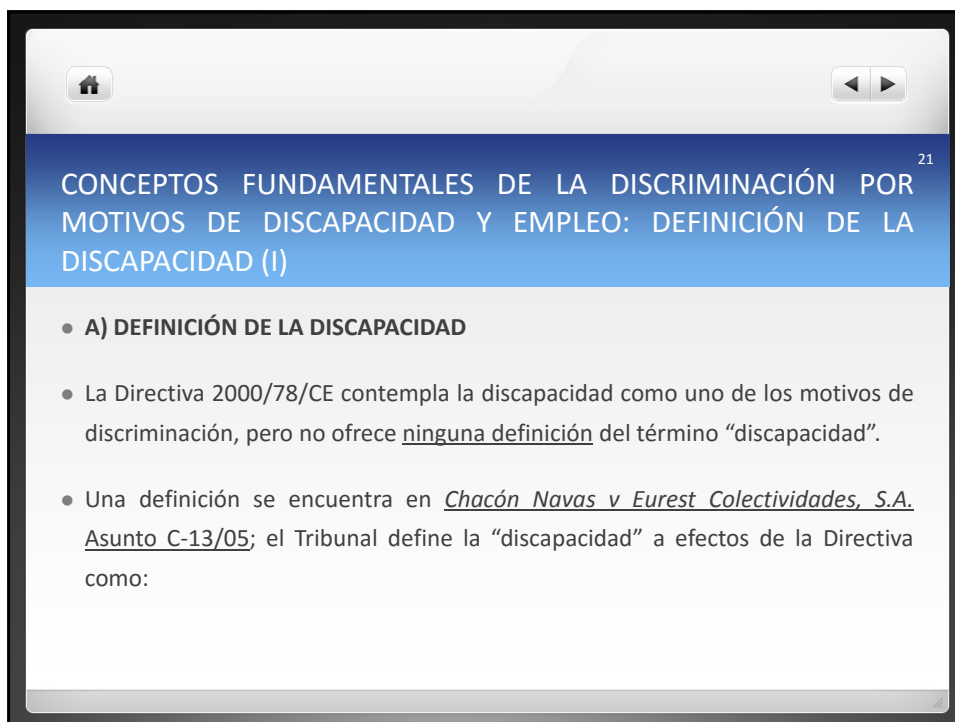
- **(20)** “Es preciso establecer medidas adecuadas, es decir, medidas eficaces y prácticas para acondicionar el lugar de trabajo en función de la discapacidad, por ejemplo adaptando las instalaciones, equipamientos, pautas de trabajo, asignación de funciones o provisión de medios de formación o encuadre”.
- **(21)** “Para determinar si las medidas en cuestión dan lugar a una carga desproporcionada, deberían tenerse en cuenta, particularmente, los costes financieros y de otro tipo que éstas impliquen, el tamaño, los recursos financieros y el volumen de negocios total de la organización o empresa y la disponibilidad de fondos públicos o de otro tipo de ayuda”.





Slide 20: CONCEPTOS FUNDAMENTALES DE LA DISCRIMINACIÓN POR MOTIVOS DE DISCAPACIDAD Y EMPLEO

- A) DEFINICIÓN DE LA DISCAPACIDAD
- B) AJUSTES RAZONABLES
- C) ACCIÓN POSITIVA
- D) CARGA DE LA PRUEBA



Slide 21: CONCEPTOS FUNDAMENTALES DE LA DISCRIMINACIÓN POR MOTIVOS DE DISCAPACIDAD Y EMPLEO: DEFINICIÓN DE LA DISCAPACIDAD (I)

- A) DEFINICIÓN DE LA DISCAPACIDAD
- La Directiva 2000/78/CE contempla la discapacidad como uno de los motivos de discriminación, pero no ofrece ninguna definición del término “discapacidad”.
- Una definición se encuentra en Chacón Navas v Eurest Colectividades, S.A. Asunto C-13/05; el Tribunal define la “discapacidad” a efectos de la Directiva como:



## CONCEPTOS FUNDAMENTALES DE LA DISCRIMINACIÓN POR MOTIVOS DE DISCAPACIDAD Y EMPLEO: DEFINICIÓN DE LA DISCAPACIDAD (II)

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“una limitación derivada de dolencias físicas, mentales o psíquicas y que durante un largo período suponga un obstáculo para que la persona de que se trate participe en la vida profesional”.

- \* La definición del concepto de “discapacidad” dada por el Tribunal es “autónoma y uniforme”.
- \* Para que una limitación pueda ser considerada “discapacidad”, “se requiere la probabilidad de que sea de larga duración”.
- \* “Discapacidad” no es lo mismo que “enfermedad”.



## CONCEPTOS FUNDAMENTALES DE LA DISCRIMINACIÓN POR MOTIVOS DE DISCAPACIDAD Y EMPLEO: DEFINICIÓN DE LA DISCAPACIDAD (III)

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- \* La Directiva no contiene indicación alguna “que sugiera que los trabajadores se encuentran protegidos en virtud de la prohibición de discriminación por motivos de discapacidad tan pronto como aparezca cualquier enfermedad”.
- \* La “enfermedad” no puede incluirse en la lista de motivos contemplados por la Directiva.
- \* La sentencia ha podido suponer una puerta abierta para que las personas que sufran una enfermedad de larga duración, que cause el grado de limitación requerido, fueran consideradas “discapacitadas” a efectos de la Directiva.



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## CONCEPTOS FUNDAMENTALES DE LA DISCRIMINACIÓN POR MOTIVOS DE DISCAPACIDAD Y EMPLEO: DEFINICIÓN DE LA DISCAPACIDAD (IV)

- En *HK Danmark y otros contra HK Danmark y otros*, Asuntos acumulados C-335/11 y C-337/11, el TJUE indica que la Directiva “debe interpretarse, en la medida de lo posible”, de conformidad con la UNCRPD.
- Definición de discapacidad a la luz de la UNCRPD: en *Wolfgang Glatzel contra Freistaat Bayern*. Asunto C-356/12, y en *Faq oq Arbejde (FOA) contra Kommunernes Landsforening (KL)*, Asunto 354/13, el Tribunal define la “discapacidad” a efectos de la Directiva como “una limitación, derivada en particular de dolencias físicas, mentales o psíquicas, a largo plazo, que, al interactuar con diversas barreras, puede impedir la participación plena y efectiva de la persona de que se trate en la vida profesional en igualdad de condiciones con los demás trabajadores”.



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## CONCEPTOS FUNDAMENTALES DE LA DISCRIMINACIÓN POR MOTIVOS DE DISCAPACIDAD Y EMPLEO: LOS AJUSTES RAZONABLES (I)

- **B) AJUSTES RAZONABLES** (artículo 5, Directiva 2000/78/CE): “A fin de garantizar la observancia del principio de igualdad de trato en relación con las personas con discapacidades, se realizarán ajustes razonables. Esto significa que los empresarios tomarán las medidas adecuadas, en función de las necesidades de cada situación concreta, para permitir a las personas con discapacidades acceder al empleo, tomar parte en el mismo o progresar profesionalmente, o para que se les ofrezca formación, salvo que esas medidas supongan una carga excesiva para el empresario. La carga no se considerará excesiva cuando sea paliada en grado suficiente mediante medidas existentes en la política del Estado miembro sobre discapacidades”.



## CONCEPTOS FUNDAMENTALES DE LA DISCRIMINACIÓN POR MOTIVOS DE DISCAPACIDAD Y EMPLEO: LOS AJUSTES RAZONABLES (II)

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- La Directiva exige que se realicen ajustes individualizados (específicamente adaptados a las necesidades de una persona concreta).
- ¿Se puede definir el concepto de “ajustes”? En el Considerando 20 de la Directiva 2000/78/CE las “medidas adecuadas” se definen como “medidas eficaces y prácticas para acondicionar el lugar de trabajo en función de la discapacidad, por ejemplo adaptando las instalaciones, equipamientos, pautas de trabajo, asignación de funciones o provisión de medios de formación o encuadre”.



## CONCEPTOS FUNDAMENTALES DE LA DISCRIMINACIÓN POR MOTIVOS DE DISCAPACIDAD Y EMPLEO: LOS AJUSTES RAZONABLES (III)

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- ¿Se puede determinar si las medidas contempladas en el artículo 5 dan lugar a una “carga desproporcionada”? El Considerando 21 de la Directiva 2000/78/CE establece que “deberían tenerse en cuenta, particularmente, los costes financieros y de otro tipo que éstas impliquen, el tamaño, los recursos financieros y el volumen de negocios total de la organización o empresa y la disponibilidad de fondos públicos o de otro tipo de ayuda”.



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## CONCEPTOS FUNDAMENTALES DE LA DISCRIMINACIÓN POR MOTIVOS DE DISCAPACIDAD Y EMPLEO: LA ACCIÓN POSITIVA

- **C) ACCIÓN POSITIVA** (artículo 7.2, Directiva 2000/78/CE): “Por lo que respecta a las personas con discapacidad, el principio de igualdad de trato no consistirá en un obstáculo al derecho de los Estados miembros de mantener o adoptar disposiciones relativas a la protección de la salud y la seguridad en el lugar de trabajo, ni para las medidas cuya finalidad sea crear o mantener disposiciones o facilidades con objeto de proteger o fomentar la inserción de dichas personas en el mundo laboral”.



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## CONCEPTOS FUNDAMENTALES DE LA DISCRIMINACIÓN POR MOTIVOS DE DISCAPACIDAD Y EMPLEO: LA CARGA DE LA PRUEBA (I)

- **D) CARGA DE LA PRUEBA** (artículo 10, Directiva 2000/78/CE): “Los Estados miembros adoptarán con arreglo a su ordenamiento jurídico nacional, las medidas necesarias para garantizar que corresponda a la parte demandada demostrar que no ha habido vulneración del principio de igualdad de trato, cuando una persona que se considere perjudicada por la no aplicación en lo que a ella se refiere de dicho principio, alegue, ante un tribunal u otro órgano competente, hechos que permitan presumir la existencia de discriminación directa o indirecta” (artículo 10.1).



## CONCEPTOS FUNDAMENTALES DE LA DISCRIMINACIÓN POR MOTIVOS DE DISCAPACIDAD Y EMPLEO: LA CARGA DE LA PRUEBA (II)

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- La prueba *prima facie* corresponde a la parte demandante.
- La parte demandada debe aportar una explicación suficiente, con el fin de asumir la carga de la prueba.
- Si la parte demandada no asume la carga de la prueba, el Tribunal deberá concluir que ha habido discriminación contraria al Derecho.



## JURISPRUDENCIA DEL TJCE EN MATERIA DE DISCAPACIDAD (I)

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- ***Chacón Navas contra Eures Colectividades, S.A.*** Asunto C-13/05.
- ***Coleman contra Attridge Law.*** Asunto C-303/06.
- ***Reinhard Prigger y otros contra Deutsche Lufthansa AG.*** Asunto C-447/09.
- ***Johann Odar contra Baxter Deutschland GmbH.*** Asunto C-152/11.

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## JURISPRUDENCIA DEL TJCE EN MATERIA DE DISCAPACIDAD (II)

- **\*Ya consideradas a la luz de la UNCRPD:**
- ***HK Danmark y otros contra HK Danmark y otros.*** Asuntos acumulados C-335/11 y C 337/11 (Casos Jette Ring y Lone Skouboe Werge).
- ***Wolfgang Glatzel contra Freistaat Bayern.*** Asunto C-356/12.
- ***Fag og arbejde (FOA) contra Kommunernes Landsforening (KL).*** Asunto C-354/13.

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## EXENCIONES DE AYUDAS ESTATALES DE LA UE (GBER) EN MATERIA DE TRABAJADORES CON DISCAPACIDAD (I)

- **Reglamento (UE) nº 651/2014, Comisión, de 17 de junio de 2014**, por el que se declaran determinadas categorías de ayudas compatibles con el mercado interior en aplicación de los artículos 107 y 108 del Tratado. Reglamento de Exención, en vigor desde el 1 de julio de 2014, y cuyo objetivo es eximir ciertas formas de ayudas de la obligación de notificación y autorización impuesta por el TFUE.
- **Artículo 1.f):** El Reglamento se aplica a las ayudas a la contratación y empleo de trabajadores con discapacidad.



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## EXENCIONES DE AYUDAS ESTATALES DE LA UE (GBER) EN MATERIA DE TRABAJADORES CON DISCAPACIDAD (II)

- **Artículo 2.3:** Define como “trabajador con discapacidad” a los efectos del Reglamento a toda persona que:
  - a) esté reconocida como persona con discapacidad con arreglo a la legislación nacional, o
  - b) tenga deficiencias físicas, mentales, intelectuales o sensoriales a largo plazo que, al interactuar con diversas barreras, puedan dificultar su participación plena y efectiva en un entorno de trabajo, en igualdad de condiciones con los demás trabajadores.



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## EXENCIONES DE AYUDAS ESTATALES DE LA UE (GBER) EN MATERIA DE TRABAJADORES CON DISCAPACIDAD (III)

- **Artículo 4 (“Umbrales de notificación”):** el Reglamento no se aplicará a las ayudas que superen los siguientes umbrales:
  - \* 4.1.p): en las ayudas para el empleo de trabajadores con discapacidad en forma de subvenciones salariales, 10 millones EUR por empresa y por año.
  - \* 4.1.q): en las ayudas para compensar los costes adicionales del empleo de trabajadores con discapacidad, 10 millones EUR por empresa y por año.





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## EXENCIONES DE AYUDAS ESTATALES DE LA UE (GBER) EN MATERIA DE TRABAJADORES CON DISCAPACIDAD (IV)

- **Artículo 6** (“Efecto Incentivador”): el Reglamento se aplicará exclusivamente a las ayudas que tengan un efecto incentivador (6.1), sin embargo no será necesario que las siguientes categorías de ayudas tengan un efecto incentivador, o se considerará que lo tienen:
  - c) las ayudas para el empleo de trabajadores con discapacidad en forma de subvenciones salariales, si se cumplen las condiciones pertinentes, establecidas en el artículo 33.
  - d) las ayudas para compensar los costes adicionales del empleo de trabajadores con discapacidad, si se cumplen las condiciones establecidas en el artículo 34.



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## EXENCIONES DE AYUDAS ESTATALES DE LA UE (GBER) EN MATERIA DE TRABAJADORES CON DISCAPACIDAD (V)

- **Artículo 33** (“Ayudas para el empleo de trabajadores con discapacidad en forma de subvenciones salariales”):
  1. Las ayudas para el empleo de trabajadores con discapacidad serán compatibles con el mercado interior a tenor del artículo 107.3 TFUE y quedarán exentas de la obligación de notificación establecida en el artículo 108.3 TFUE.
  2. Serán subvencionables los costes salariales a lo largo de cualquier período determinado durante el cual esté contratado el trabajador con discapacidad.



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## EXENCIONES DE AYUDAS ESTATALES DE LA UE (GBER) EN MATERIA DE TRABAJADORES CON DISCAPACIDAD (VI)

3. Cuando la contratación no represente un incremento neto del número de empleados en la empresa en cuestión en comparación con la media de los 12 meses previos, el puesto o puestos deberán haber quedado vacantes a raíz de la dimisión del trabajador, de su discapacidad, de su jubilación por motivos de edad, de la reducción voluntaria del tiempo de trabajo o de su despido disciplinario procedente y no de resultados de su despido.

4. Salvo en caso de despido disciplinario procedente, los trabajadores con discapacidad tendrán derecho a un empleo permanente durante un período mínimo en consonancia con la normativa nacional aplicable o con cualquier convenio colectivo legalmente vinculante para la empresa en materia de contratos de empleo.

5. La intensidad de ayuda no deberá exceder del 75 % de los costes subvencionables.



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## EXENCIONES DE AYUDAS ESTATALES DE LA UE (GBER) EN MATERIA DE TRABAJADORES CON DISCAPACIDAD (VII)

• **Artículo 34** ("Ayudas para compensar los costes adicionales del empleo de trabajadores con discapacidad"):

1. Las ayudas para compensar los costes adicionales del empleo de trabajadores con discapacidad serán compatibles con el mercado común a tenor del artículo 107.3 TFUE y quedarán exentas de la obligación de notificación establecida en el artículo 108.3 TFUE.

2. Serán subvencionables los costes siguientes:

a) los costes de adaptación de las instalaciones.



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## EXENCIONES DE AYUDAS ESTATALES DE LA UE (GBER) EN MATERIA DE TRABAJADORES CON DISCAPACIDAD (VIII)

b) los costes de empleo de personal exclusivamente durante el tiempo que dedique a asistir a trabajadores con discapacidad y de formación de dicho personal para ayudar a los trabajadores con discapacidad.

c) los costes de adaptación o adquisición de equipos, o de adquisición y validación de programas informáticos, destinados a trabajadores con discapacidad, incluidas las instalaciones tecnológicas adaptadas o de ayuda, suplementarios a los costes que habría soportado el beneficiario si hubiera contratado a trabajadores sin discapacidad.

d) costes directamente relacionados con el transporte de los trabajadores con discapacidad al lugar de trabajo y para actividades relacionadas con el trabajo.



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## EXENCIONES DE AYUDAS ESTATALES DE LA UE (GBER) EN MATERIA DE TRABAJADORES CON DISCAPACIDAD (IX)

e) los costes salariales de las horas empleadas por un trabajador con discapacidad en rehabilitación.

f) cuando el beneficiario proporcione empleo protegido, los costes de construcción, instalación o modernización de las unidades de producción de la empresa en cuestión, así como cualesquiera costes de administración y transporte, siempre que se deriven directamente del empleo de trabajadores con discapacidad.

3. La intensidad de ayuda no deberá exceder del 100 % de los costes subvencionables.



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**“EL DERECHO A LA IGUALDAD Y LA NO DISCRIMINACIÓN EN EL  
ÁMBITO DEL EMPLEO Y EN OTROS ÁMBITOS”**

**MUCHAS GRACIAS POR SU ATENCIÓN**

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**SEMINAR ON EU DISABILITY LAW AND THE UNITED NATIONS CONVENTION ON THE  
RIGHTS OF PERSONS WITH DISABILITIES  
(ERA, Trier, 18-19 April 2016)**

**“THE RIGHT TO EQUALITY AND NON-DISCRIMINATION IN THE FIELD OF  
EMPLOYMENT” (19 April 2016)**

**PROF. DR. SARA ALCÁZAR ORTIZ**

**CASE FACTS FOR THE MOOT COURT EXERCISE**

Ms. Carmen Ponti worked in Madrid as a primary school teacher at a private school called “El Rosal”. She was hired on 30 April 1999 and at that time signed a permanent employment contract which was in force until 30 January 2016, the date on which she was dismissed, effective that same day, by the Director of “El Rosal”. In the letter of dismissal that she received that day, the employer accused Ms. Carmen Ponti of breach of discipline and unwillingness to obey orders related to her job post. This had to do with her recent refusal to adhere to the school curriculum established by the administration which included several physically demanding class trips outside of the city with students who were not from her grade level or class. As a result, in accordance with Article 54(2)(b) of the recast text of the Workers' Statute, she was subject to disciplinary dismissal.

Ms. Carmen Ponti is overweight and was overweight when she first began working at the school. According to the WHO definition, her condition could be described as 'obesity'. On several occasions her superior at the school suggested that she lose weight in order to better fulfil her teaching duties. Ms. Ponti never refused to go on school trips or take part in activities outside the classroom with her grade level and class, although occasionally she did express the difficulty she experienced due to the physical demands required.

Some of Ms. Carmen Ponti's fellow primary education teachers were never asked to go on school trips outside of the city with students who were not from their grade level and class.

After her dismissal, Ms Carmen Ponti turned to the trade union called '*Unión Progresista de Enseñanza*' (Progressive Teachers' Union) for counsel and decided to file a lawsuit for wrongful dismissal before the labour court, requesting the annulment of said dismissal under Article 55 of the recast text of the Workers' Statute for breach of Articles 4(2)(c)

and 17(1) of the Statute and of Article 14 of the Spanish Constitution. She argued that her dismissal was discriminatory on the grounds of disability, considering that her condition of obesity is included under the heading 'disability' and that this was the true motive for her dismissal.

The case was assigned, on a rotating basis, to Labour Court No 7 of Madrid which decided to request a preliminary ruling on the following issues from the Court of Justice of the European Union:

1. Does discrimination in the labour market on the grounds of obesity constitute a breach of European Union law? If so, would that law be directly applicable to the relationship between a Spanish worker and his/her employer?
2. Assuming that the Court of Justice considers that discrimination in the labour market on the grounds of obesity is prohibited in the European Union, who would bear the burden of proof, i.e. who would be responsible for proving the existence of such discrimination?
3. Can obesity be considered a disability protected under Directive 2000/78 and, if so, what are the decisive criteria determining such protection? Should Directive 2000/78 be interpreted in the light of the UN Convention on the Rights of Persons with Disabilities?

In view of the above facts, explain what ruling you think will be forthcoming from the CJEU and, in the case before Labour Court No. 7 of Madrid, what positions you think will be adopted by the parties (the defence of the claimant-worker and the defence of the applicant-employer). What ruling do you think will be delivered by the judge of the labour court?

**SEMINARIO SOBRE EL DERECHO DE LA UE EN MATERIA DE DISCAPACIDAD Y LA  
CONVENCIÓN DE LAS NACIONES UNIDAS SOBRE LOS DERECHOS DE LAS PERSONAS  
CON DISCAPACIDAD (ERA, Tréveris 18 y 19 de abril de 2016)**

**“EL DERECHO A LA IGUALDAD Y LA NO DISCRIMINACIÓN EN EL ÁMBITO DEL  
EMPLEO” (19 de abril de 2016)**

**PROF. DRA. SARA ALCÁZAR ORTIZ**

**SUPUESTO DE HECHO PARA EL EJERCICIO DE SIMULACIÓN EN TRIBUNAL**

La señora Carmen Ponti trabaja en Madrid como Profesora de Educación Primaria en un centro educativo privado llamado “El Rosal”. Su prestación de servicios comenzó el 30 de abril de 1999, celebrándose para ello un contrato laboral de carácter indefinido, que se ha extendido hasta el 30 de enero de 2016, fecha en la cual fue despedida con efectos de ese mismo día por el Director del centro educativo “El Rosal”. En la carta de despido entregada a la trabajadora ese mismo día, la empresa alega que D<sup>a</sup> Carmen Ponti ha incurrido en faltas de indisciplina y desobediencia en el trabajo, puesto que en los últimos meses se ha negado a seguir la programación indicada por la Dirección del centro, que incluía realizar distintas excursiones de cierta exigencia física fuera de la ciudad con alumnos que no pertenecían a su curso y grupo, por lo que, de acuerdo con el artículo 54 .2.b) del Texto Refundido del Estatuto de los Trabajadores, se procedía a su despido disciplinario.

D<sup>a</sup> Carmen Ponti tiene sobrepeso, que se puede calificar como “obesidad” de acuerdo con la definición de la OMS, desde que empezó a trabajar en el centro educativo, habiéndosele comentado en algunas ocasiones por parte de su superior jerárquico que sería conveniente que perdiera peso para poder llevar a cabo mejor su trabajo en el entorno escolar. La trabajadora nunca se ha negado a realizar excursiones o actividades fuera de aula con su curso y grupo de alumnos, si bien en algún caso ha mostrado alguna dificultad por la exigencia física requerida.

Junto con D<sup>a</sup> Carmen Ponti prestan servicios como Profesores de Educación Primaria otros trabajadores a los que nunca se les ha solicitado que realicen excursiones fuera de la ciudad con alumnos que no sean de su curso y clase.

Tras el despido, D<sup>a</sup> Carmen Ponti se dirige al sindicato Unión Progresista de Enseñanza para que le asesore y decide interponer una demanda por despido ante la jurisdicción

social, solicitando que se declare la nulidad del mismo, en virtud del artículo 55 del Texto Refundido del Estatuto de los Trabajadores, al vulnerar los artículos 4.2.c) y 17.1 del mismo texto legal, así como el artículo 14 de la Constitución Española, por entender que su despido ha sido discriminatorio por motivo de discapacidad, al considerar comprendida la obesidad dentro del término “discapacidad” haber sido este el motivo real de su despido.

El Juzgado de lo Social nº 7 de Madrid, al que por turno ha correspondido el conocimiento del asunto, decide plantear las siguientes cuestiones prejudiciales ante el Tribunal de Justicia de la Unión Europea:

1- ¿Resulta contraria al Derecho de la Unión una discriminación por motivo de obesidad en el mercado de trabajo? Si esto fuera así, ¿sería directamente aplicable a la relación entre un trabajador de nacionalidad española y su empleador?

2- Si el Tribunal de Justicia entendiera que en la Unión Europea existe una prohibición de discriminación por motivo de obesidad en el mercado de trabajo, ¿a quién correspondería la carga de la prueba de la existencia de dicha discriminación?

3- ¿Se puede entender la obesidad como una discapacidad comprendida dentro del ámbito de protección de la Directiva 2000/78 y, en ese caso, cuáles serían los criterios determinantes para apreciar que existe dicha protección? ¿Se debe interpretar la Directiva 2000/78 a la luz de la Convención de Naciones Unidas sobre los Derechos de las Personas con Discapacidad?

A la vista de los hechos expuestos, exponga cuál cree que sería el pronunciamiento del TJUE y en la vista oral ante el Juzgado de lo Social nº 7 de Madrid, cuáles cree que serían las posiciones de las partes (la defensa del trabajador demandante y la defensa del empleador demandado) y el sentido de la sentencia del Juez de lo Social.