



Non-discrimination and reasonable accommodation under EU Law and beyond: definitions, scope, interpretation by the Court of Justice and the possible impact of the CRPD

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Structure of Presentation:

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

1. The EU and the CRPD

- Nov. 2009 - the Council adopted a Decision to conclude – or ratify – the Convention.
- Dec. 2010 - the EU concluded the Convention.
- The Convention is a “mixed agreement” – an international agreement covering fields in which both the EU and the Member States have competence to act.

1. The EU and the CRPD (2)

- Three possible scenarios describe the respective competence of the EU and the Member States:
- EU has exclusive competence to act in a certain area
- Member States have competence to act in a certain area
- EU and Member States share the competence to act in a certain area
- Combating discrimination is an area of shared competence.

2. CRPD, Non-Discrimination and Reasonable Accommodation

A. Specific CRPD Articles

- Article 2 of the Convention defines “discrimination on the basis of disability” very broadly to mean: “any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation”

2. CRPD, Non-Discrimination and Reasonable Accommodation (2)

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

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

2. CRPD, Non-Discrimination and Reasonable Accommodation (3)

Article 5 – equality and non-discrimination

- (1) State Parties recognise that all persons are equal before and under the law
- (2) States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
- (3) States parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
- (4) Measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination.

- Article 9 – accessibility.
- Article 27 – employment.
- Non-discrimination is an obligation that applies across the Convention.

B. Reasonable Accommodation

- CRPD defines a failure to make a reasonable accommodation as a form of discrimination.
- Reasonable accommodation builds on the understanding that only applying a formal approach to non-discrimination will do little to help many people with disabilities.
- Reasonable accommodation recognizes the relevance of “impairment” - if one ignores the impact of an impairment, and treats a person with a disability in exactly the same way as one treats a person without a disability, a *de facto* situation of inequality will arise.

B. Reasonable Accommodation (2)

- The notion of reasonable accommodation was developed to address this situation.
- Requires a covered party to take account of the characteristics related to disability, and to accommodate them by, e.g. changing the physical environment.
- “Instead of requiring disabled people to conform to existing norms, the aim is to develop a concept of equality which requires adaptation and change.” (Sandra Fredman).
- This obligation to accommodate is not unlimited – and is subject to the requirement that the accommodation does not result in a disproportionate burden.

C. Concept of disability under CRPD

- The Convention is clearly founded upon the social model of disability:
- “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

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

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

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

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

Direct discrimination

- “where one person is treated less favourably than another is, has been or would be treated in a comparable situation” on the ground of disability
- It is important that the less favourable treatment is on the ground of disability. It is not necessary that the person complaining of direct discrimination actually has a disability him or herself.

Indirect Discrimination

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

Harassment

- where unwanted conduct related to the ground of disability takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.
- Harassment needs to be on the ground of disability - individuals are protected from harassment on the grounds of disability, even if they are not disabled themselves.

Instruction to discriminate

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

B. Reasonable Accommodation (1)

- “In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to provide training for such a person, unless such measures would impose a disproportionate burden on the employer. When this burden is, to a sufficient extent, remedied by existing measures as an element of disability policy in the Member State, it should not be considered disproportionate.”

B. Reasonable Accommodation (2)

- The Directive requires an individualised accommodation to meet the needs of a particular individual.
- The Directive does not explicitly define a denial of an accommodation as a form of discrimination.

What is an accommodation?

- *Recital 20:*
"Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources."
- Accommodation requirement applies to all aspects of the employment *and* employment related benefits.

What is a disproportionate burden?

- *Recital 21:*

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

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

- Case C-13/05, *Chacón Navas*

Court defined disability for the purposes of the Directive as:

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

For any limitation to be regarded as a “disability”, “it must be probable that it will last for a long time” (para. 45).

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

- “Disability” is different from “sickness”, and there is nothing in the Directive “to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness”.
- Court’s definition of disability is “autonomous and uniform”.
- Sickness could not be added to the list of grounds covered by the Directive.

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

- But judgment may leave the way open for people who have a long term illness which does cause the required degree of limitation to be regarded as disabled for the purposes of the directive.

4. Possible tensions between EU law and CRPD with regard to non-discrimination and reasonable accommodation

A. CRPD does not refer to direct and indirect discrimination explicitly

- CRPD prohibits all forms of discrimination – but is not specific in listing particular kinds of discrimination, such as direct and indirect.
- The EU directive specifically refers to direct and indirect discrimination, harassment and instruction to discriminate.
- The EU approach is still fully compatible with the Convention.

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

- CRPD specifically defines a failure to make a reasonable accommodation as a form of discrimination.
- The EU directive is not specific on this point. However, Article 5 of the directive is clearly framed in terms of the equality paradigm.

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

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

C. CRPD approach to disability v. definition of disability in the Chacón Navas judgment (1)

- Court of Justice defined disability as, “a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life”
- This definition is based on medical model of disability.

C. CRPD approach to disability v. definition of disability in the Chacón Navas judgment (2)

- CRPD: “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”
- This is based on the social model of disability.

D. Broad scope of CRPD v. Limitation of EU Disability Non-Disability Law to Employment and Vocational Training

- The 2008 Commission proposal for a further non-discrimination directive going beyond employment is controversial and unlikely to be adopted.
- Combatting discrimination is an area of shared competence. As long as the EU has not acted, competence and responsibility lies with the individual Member States, most of which are bound by the CRPD.
- For the future: an EU Accessibility Act?