

So, the immediate legal context. To the relationship. Between the convention and the EU legal order.

The immediate legal context to that relationship is the act of accession. It took a council decision 2010/48.

Where included with the decision was the declaration of competence. From the EU, as to its idea of its core competence in relation to the convention.

I'll come back to the declaration later. What I want to highlight now is the legal basis on which the decision is based-

As the Council decision is a binding instrument within the EU law. If you want an abiding measure, you have to justify it in a legal basis in a treaty. That provide the justification for doing that.

We can't just have any articles. It is important that you find what the court of justice describes as the center of gravity for the justification of the purpose of the instrument.

And here, the legal bases found in article 19 and 114. And they both relate to participation in the market.

And I think, that in itself gives us reinforced understanding. As to how the council of the European Union at least envisages its main contribution towards the meeting of the obligations under the convention.

Article 19 is a legal basis that allows combatting discrimination on a number of grounds, one is disability. Article 114-

is concerned with the adoption of laws with the view to facilitating the functioning of the internal market. Specifically by adopting harmonisation measures with a view to reducing disparities, national laws, inconsistencies that could create barriers to the participation of businesses in the internal market.

Combatting discrimination on grounds of disability. Again is a market participation measure. Enabling people with disabilities to participate in the labor market and participate as consumers. And producers of goods and services.

A year later the EU ratified the convention. In the hope all memberstates would ratify. The formal ratification took place on the 23rd of December 2010 for the EU. In terms of the EU's commitment legally speaking took effect an 2009, a year earlier. Previously referred to.

With the accession, the convention bound the EU institutions and the member states. The EU as a contracting party. Just like the member states. It has competence. It also has to specify monitoring mechanism and focal point. And it also obliged to attend the states bi-annual meeting. I'm sure you heard this in the previous presentation.

It bound the member states as well. The member states were already bound. They are. They are also bound, not just to the convention and the UN, but also to the EU to the extent that they can contribute or not contribute to the fulfillment o-

of the EU's obligations under the convention. And so, in terms of enforcement that's interesting. Because the EU member-states are potentially open to enforcement action against them. By the institutions. If they do not fulfill their obligations. They also have a duty of law cooperation not just to the EU, but also each other, in pursuit of the EU agenda.

So, member states might find themselves pleasing 2 paymasters in relation to the convention.

And along with the accession, the convention formed an integral part of the EU. And at that, as a result of that. A quite some would describe as a quasi constitutional status. It meant, the convention was beneath the hierarchical status of the treaty. It is above the secondary measures, such as directives and regulations and decisions.

That also means, as a minimum, that secondary EU law must be interpreted as far as possible in line with the convention.

And that duty of interpretation consistent interpretation extends not just to the EU institutions. When it is adopting

its legislation. In areas in its competence. But also the member states.

Having this status is very significant. For disabled people. Within the European Union.

Without the EU, they would have of course the innovative enforcement monitoring mechanisms that you have heard about in the earlier presentation. Supplied by the convention. But ultimately, the enforcement mechanisms that come with the EU law, are far more accessible to individuals and enforceable than the equivalent UN instruments.

Before we get too excited, what we need to remember is that this enforceability and accessibility of EU law only applies

where we are within the area of EU competence.

And, the benefit of the EU enforcement mechanisms includes direct effect. We only get the full money's worth if some of

the convention articles had direct effect. In my view, a couple of the key provisions, would satisfy the technical criteria for direct effect. The Court of Justice doesn't agree. As we will find a little

bit later.

Nonetheless, even if the convention provisions not to have direct effect, that there is this principle of interpretation

. Which can be of significant value in the application of EU law in this area.

The act of accession with the council decision is a mixed agreement. By mixed, what is meant by mixed is, it is partly

falling within the scope of EU powers, competence and partly within the powers of the member states.

You might have heard that the common understanding or consensus is that the convention does not actually provide new

rights. What it does do is provide a really useful articulation of the existing human rights at international level. And ma-

And make that articulation very relevant, concrete to the context of disability. The other thing it does is that it consolidates the full range of human rights, civil and political and socio-economic and cultural wise. Disability policy is extremely wide. Extremely wide. And it will touch on areas that are outside of EU competence. At that point, then the obligations under the convention are the responsibility of the member states. How do we find out when the EU has competence and when the member states have competence? The short answer is, at this stage, it is anybody's guess. But, there is a broad structure that we can refer to. And that's the types of competences recognized in relation to the EU legal order. There are 3 types. There is exclusive competence, where the EU itself has the exclusive ability to act. Where member states cannot act. That field is occupied. But those are limited areas. Such as competition policy, fiscal policy. Outside of those very restricted areas, we have 2 other possibilities of competence. That's shared competence. One of those. And shared competence is where it is shared between the member states and the EU institutions. And the member states are free to act. Within that field. Until the EU institutions decide to act. When they can make it quite clear they intend to act. And then the third type of competence is the competence to support, coordinate and supplement national policy and law making. And with this competence, what we are talking about is the organisation of meetings, of key personnel within the member states, with a view on a particular issues, with a view on common problems, good practice. Sharing the resource, the expertise. Sharing the expertise of the Commission and its policy makers with a view to identifying areas where future collaboration may be advantageous.

Binding EU law, which is of great interest to individuals with disabilities, in respect of the convention. Binding law comes with that enforcing that was mentioned earlier. The member states obligations and the EU's commitment. Binding law can only be adopted outside of the competence to support coordinate and supplement. Binding EU law will not fall within that third category.

Disability policy stretches across all 3 of those categories. There is a declaration of competence, mentioned before, in-

Annex 2. The act of accession. And there, the community, European Union expresses its view of what is competence. And limited itself to those areas where it has legislation and made specific reference to the disability issue.

Most experts have the view that this is a restricted view of the EU's competence to act.

And that leaves us with a huge potential area of shared competence. Where maybe, arguably, in the scope of the mixed agr-

ement.

I mentioned earlier that the convention touches on a range of civil political and socio-economic rights.

And as a rule of thumb, I would suggest that the closer the particular right is to a socio-economic and cultural right and the further, the greater the distance, the issue you are thinking about, the greater distance, that issue has from the market, market participation, the more likely the issue will fall outside of the EU competence to act.

In contrast, the closer the provision is to a civil and political type of right. And the closer it is to market participation, market generally, the more likely it is that the EU will have competence in this area.

However, we could analyse this and debate this all day. But my point would be not to get hung up on the issue of competence. I would say, to disability NGO's, rather than the legal text and make legal arguments, I would focus on identifying those areas where the EU has or potentially have an interest. And make the case. Actually in the interest of the EU and the member states, that the EU takes action. That the EU has competence. If the member states decide they are going to implement an aspect of the convention and they do it differently to each other, then the chances are you are going to have inconsistencies that create problems for which the EU is designed to remove.

In terms of potential. If you look at the response of the committee on rights of people with disabilities to the report - in 2015 that was delivered by the EU institutions, in terms of what it has done in respect of the convention, the call to action in that response, the range of things, that were recommended, many of which I would not have thought of, are significant. and the reasoning the inclusion of some of these things is very well supported in terms of the point I was making. It is beneficial for the EU, for the member states and of course to business and individuals that the EU acquires - some competence in this area, acts in this area.

Assuming that there is an instrument, an action from the EU institutions that is binding, and is within its area of competence, the vital question is whether the provision in the convention has direct effect.

You can have, as the EU does have, strong enforcement machinery. But the best watchdog of individual rights are the intended beneficiaries themselves. And so if the intended beneficiaries can enforce their rights directly before national courts, then you are going to have a very high level of compliance in the long term. And it is that reasoning that the Court of Justice developed the notion or principle of direct effect.

When it comes to direct effect of mixed agreements, such as the convention, the court of justice has been rather inconsistent. National constitution courts and their approach. The nature of international provision at a national level.

In that sense the court of justice is no different. But in case Z and A, which is relevant in 2 cases. The court of justice was quite clear. In saying that none of the provision of the convention are conditional and sufficiently precise. To-

justify awarding then the status of having direct effect under EU law.

It reasoned that the convention addressed to the states.

This international agreement addressed to the state.

It referred to article 4.1, which includes the general obligations under the convention. And within that, the obligation-

of states for example which would include to implement, take action, to prohibit discrimination for example.

But if the reference to states. And if direction to states is enough to prevent an international human rights instrument-

, which is designed to advance the rights of individuals. If it is enough to prevent that from being effective, from ena-

bling them to enforce their rights, that would also exclude a range of other international instruments, including human -

rights instruments, where the status of self executing has been given by one or more constitutional courts. And similar-

y, in other decisions on the court of justice, it did not preclude the court of justice analysing the provision in ui in-

instruments were also to state parties.

I note here, article 44.2 of the convention makes it very clear that to the extent the EU has competence it is a contrac-

ting state under the convention. So the direction in the treaty provisions are not just going to the member states, but -

to the EU institutions themselves.

And if you look at article 4.1.B, the convention itself says, within the obligations of contracting states, including th-

e EU, it is not to implement laws, but also to review laws and amend laws where they are incompatible with the conventio-

n. Which was the very reason why the court was considering this issue in Z and

A. This issue involved a lady who due to -

an impairment could not get pregnant and as a result give birth. She

commissioned a surrogate mother to perform that rol-

e for her. She was seeking equal treatment with other mothers in respect of maternity leave.

And because she was unable to get pregnant, the Court of Justice was of view that she could not rely on this extra quali-

ty provisions under EU law. The next question was whether she was being treated less favourably on the basis of disabili-

ty. The question was, is she disabled, we' ll talk about in a minute. And if the argument went that if she was not with,-

did not come in the definition of disability, should the framework directive itself, which prohibits discrimination. Should that directive be reviewed? In the context of the convention. The Court of Justice was very clear. None of the provisions were of direct effect.

I refer to article 5.2 of the convention on the slide. If you look at the text. State 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. We have discussed the issue of state, the inclusion of the word state party. And compare it to article 18. Discrimination based on nationality under EU law. You see the wording is similar. It is no less precise or clear. And yes, one could argue that the direction in the convention is for the state parties, including the EU - institutions to take action. My response would be, with the EU directives. And, in any event, included within the institutions that have an obligation to implement the convention is the Court of Justice, in what better way could the Court of Justice implement its obligations under the convention. To provide direct effect to an article such as article 5.2 from the convention.

I was disappointed with the judgement. On reflection, it does make sense in that the member states, also signatories to the convention, some of, many of them would not allow automatic incorporation of the convention's provisions into their national law. So, the effect of the Court of Justice allowing direct effect to be given to provision in the convention would be to bring direct effect in through the EU legal order and through the backdoor.

And, perhaps, at the back of its mind, the Court of Justice is also aware that by giving direct effect to provisions such as article 5.2, it will give a legal status to human rights and the context of disability that would not exist within the EU legal order for other grounds.

And for other human rights. There is an issue of autonomy and legitimacy. So, whilst the convention provisions despite being as clear as some of them are, are not directly effective under EU law.

. There is duty of consistent interpretation. And that means that whenever there is some room for interpretation, in respect of secondary EU law, interpretation should be given, as far as possible, in line with the convention.

So far, the opportunity, the best opportunity as far as I'm concerned, the court has had in realising this principle, is in the context of the definition of disability at EU level.

A range of cases, related to this issue. Some of were before the convention.

Those that are listed in the brackets there-

, under the first bullet point, are the cases, the instances where the definition of disability has been relevant, subse-

quent to the convention being binding on the EU institutions.

And, in summary, the Court of Justice views disability as impairment that is long term, undefined. And which in its interaction with professional life, hinders an individual's access to participation in, or advancement in employment. We are going to look at the definition of disability. And the way it has been and can be implemented at national level. In the workshop. But what I will say at this stage. This definition makes inevitable consideration of individual's limitations actually perceived. Particularly the third subbullet point. In the interaction hinders. Participation in, or advancement in employment.

Essentially, the question is: How disabled are you? The inescapable question. I ask you to think about another ground. Your

our favourite, and consider whether you can imagine the court asking an individual who is seeking protection under religious belief, how religious are you? To qualify as a person that is protected. I do have some friends who would be happy to demonstrate to the court how latently gay they are. They love the attention. I don't think it would go down very well. I think, if you ask that question. In those terms. Why is it necessary to demonstrate how disabled they are, in order to get protection from the personal scope, in order to come in. Not to make the argument, the merits. Just looking to come within the personal scope. This problem has arisen at national experience. And you have situations where individuals have been fired because they are disabled. But are not able to get protection under the law because they do not have the right type of disability.

I don't think it would go down very well.

Why is it necessary to demonstrate how disabled they are, in order to get protection from the personal scope, in order to come in. Not to make the argument, the merits. Just looking to come within the personal scope. This problem has arisen at national experience. And you have situations where individuals have been fired because they are disabled. But are not able to get protection under the law because they do not have the right type of disability.

Now, article 1 of the convention, provides the definition of disability.

Persons with disabilities include, I have emphasized 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.

My interpretation of that definition, it provides or whether or not to include a reference to an individual's functional limitations.

The Court of Justice decided not to take that option.

Does it mean that the definition in the convention is problematic? It is not ideal.

But we need to remember the convention is not just concerned with anti discrimination.

It is concerned with different types of laws with different purposes.

The allocation of resources. Disability welfare and assistance. Assistance and insurance programs in the context of disability.

There it is appropriate to ask an individual how disabled are you. Because you have resources based on needs. In the con-

text of anti discrimination law it is not about needs, but about opportunity. Which should be available to everybody.

In the Kaltoft case. Involved an individual. His employer didn't agree with his obesity. He wasn't able to make an argument on the merits. To force the employer, to justify the treatment. He didn't come within the scope of the anti discrimination law.

And he would also come within the scope if the national court determined his obesity was significant enough to generate functional impairment. Functional limitations.

So this is focused, pre occupation with functional limitations. Which is inappropriate at the personal scope. Functional limitations, may be relevant at the merit's state. If I'm seeking an accommodation. On the basis of my religion of belief. For my sabbath I need to have that time away from work. And that work has a strict schedule. Having the sabbath will cause a lot of problems, but doesn't fit with the usual ways. It could be a reasonable adjustment if the rest of the workforce could work around it, for me to have time to practice my belief. If I'm using that day to play golf, then my lack of religious adherence is actually relevant, isn't it?

Equally, if I'm seeking to be a fireman. And I can't get out of a wheelchair, then the extent of my functional limitations is relevant to the decision not to employ me. But first, let's get past that personal scope stage and give me the protection. It might be I'm not protected in this instance. There might not be discrimination in this case, but might be in the future cases.

Going forward.

In addition to understanding the nature better from a legal perspective.

For Ngo's to be clear as to the relevance of social model, of disability. To anti discrimination law.

The social construct. Saying it is created by the environment. In many cases it is. The social construct is the discrimination.

It seems to be this desire within the definition to include the fact that people will interact with barriers. Which is what the definition at the EU level and in the convention do.

There is no need to recognize that within the recognition. It is anti discrimination law. Designed to remove the social construct. Don't have to ignore that every part of the law.

There is a need I think to be very clear about this issue. It is a vital issue. It is not just in terms of anti discrimination law.

But in terms of the other aspects of disability policy. If you are unclear of one aspect. And have an impact on other laws as well. In the workshop, we will probably consider this.

Also wants to highlight the importance of collective management.

When the EU ratified the convention and submitted its formal confirmation, ratification, it includes as it was obliged to, a code of conduct to explain how its formal relations would work among the member states. How they would deal with their obligations. And work out who is doing what. Also, how the EU would have a voice. And the member states would have a voice in the UN.

But, code of conduct is about managing the competence issues. Managing responsibilities.

This responsibility, sorry, this need is not limited to the, member states and the EU institutions.

All of us have an obligation. NGO's, academics. To help with the collective management of the convention.

And in particular, to help identify areas where EU level action would actually provide an added value to the various parties.

Of course, a need to meet existing commitments. That is on the book since 2008. There is the proposed European accessibility act. Which is still to be adopted. And would make significant improve access to markets. And removing barriers, inconsistencies in national laws and national standards in relation to products. That would regularly problems experienced by the individuals and business.

In terms to sell the services outside one member state.

And that brings me on beyond the legal recognition. There is a point where I think the value of legal recognition runs out. And where market recognition kicks in. And the convention is a prime example of the legal issue.

But, what's needed to take disability policy forward in my view. In terms of achieving better standard of rights for people with disabilities, is the markets themselves. Businesses themselves. To recognize the value of disability as a market factor. The value of disabled customers. The value of friends and relatives of disabled customers.

The advantages of designing for all, increasing the take up of your product. Not just for people with disabilities, but everybody.

And there where I think the EU can have huge impact. In identifying, producing EU level standards. Which remove discrepancies in national laws and remove barriers to market participation of businesses, which in turn have greater economies, greater investment. And cheaper products for people with disabilities. And more products that, not are just for disabled people. For people with different functional abilities can use.

Thank you very much. Apologies for the shaky performance.

(applause)

- Thank you very much for that informative talk about the EU and the UNCRPD. I'll open for discussion. If there are que-

stions. Give your name and where you are from. And start questions and discussion. Thank you.

Over there.

- I'm a lawyer and legal advisor in Cyprus. My question is, it must be read in line with discrimination laws in order to have some sort of legal application. I would like to define the link between the convention and discrimination laws. If that's possible.

- At the EU level?

- Yes, at EU level.

- Well, one of the two competences or justifications, legal bases of the treaties that was used to enable the EU to exceed to the convention was concerned with discrimination. The convention itself is because of involvement of the EU institutions in the developments of the convention, the convention itself puts a high place on the notion of equality.

The relevance to the convention to anti discrimination laws is that the convention provided, if nothing else, the EU institutions with an opportunity to clarify some of the issues with, or problems with its own legislation. Such as the framework employment. And from which the member states have been obliged to comply with that national level. So that there is an opportunity to clarify some things of the anti discrimination law at EU level and the core concepts. It doesn't matter it is restricted to the context of concept. The concepts would be equally applicable beyond employment and occupation.

And on the agenda, the EU agenda, is extending the grounds, the scope of existing anti discrimination law at EU level which would then require an extension of scope, with those member states that provide greater coverage than employment.

The existence of the convention makes it embarrassing for the EU institutions and the member states to have a proposal for the future, that has been around since 2008. In some member states, individuals may have through the convention access to the article that I referred to, article 5.2. And may have the ability through that address discrimination experiences in all areas, covered by the convention. As a result of the incorporation of international law, but for that we have to wait for those jurisdictions open to it. For their constitutional courts, to determine whether the convention is itself automatically applicable and directly effective within the jurisdiction. I don't know if that answers your question.

- Yes, perfect. Thank you.

Because I have as a lawyer some parts used. Like at the beginning. At some point.

I was thinking what you said. Looking forward to recognize some of the specific articles of the convention.

That's why I asked the link. As I said, it is at the preliminary stages. It will come up in the next few months. Thank - you for that.

- Next person please?

Declan?

- Thanks, Richard for that presentation. Really interesting.

I have a question about something that troubles me. It is a therapy session. The definition of the convention is free floating. The definition of disability.. Is freefloating. And not tied to participation in professional life and activity.

I have read the cases, as putting the limitation on. That's the context of the directive. I was very happy with this theory. Until I came across the case Gladsel. It is about driving licenses and visual acuity. And is nothing, as far as I -

could see to do with participation in a job or professional life. It isn't.

Nonetheless the Court of Justice goes back to Educate Denmark and specifically brings in this idea of participation and professional life.

Despite all that, I stick to my theory, that the limitation to participation in professional life is

not a limitation on the definition of disability. What does it mean in practical terms? If I'm arguing a case for a person with a disability, I will put evidence on how they are at home.

About the impairment and how it affects them individually in terms of concentration for example. Depression, something like that.

Because all of these things happen all over the place. They don't just happen at work. I'd be interested in your views -

. It is a difficult problem. I'd love to think there is a smooth life of judicial reasoning. I just don't think there -

is. I'd be interesting on your views how we square this circle. They are very clear. They refer to participation in professional life.

EU competence is much broader than that.

- Should it matter in order to come within the ground of sex, that you are a woman in the context of employment?

In the US, they have a definition. Since being corrected. This part. Definition which required showing of substantial li-

mitation with a major life activity. Unlike the UK approach, the intention was that it would be the activity could be a -

range of activities. But, the American Supreme Court, in the early 2000's took the view it had to be an activity in the-

context of work. What you have described. And my point being, they have corrected that.

My point would be, why not stop at the point of impairment? Fullstop. Why would you need to show any activity limitation-

s? That would be my point. If you incorporate a need to connect the impairment with an impact, that is a problem.

But then connect it as a court of justice has done it with a particular context.

Clearly, an individual such as Kalfort, is obese. It wasn't disputed. Should it matter in his claim of discrimination? - Whether he'd be obese enough. And obese in relation, with the problem with work. His argument was, it doesn't affect me at work. If he had to show it affected him at work, wouldn't he be showing he isn't qualified to do the job? Are we - creating a Catch 22 situation? As soon as you make a reference to any need to show some limitation, in respect of it is causing a problem. Any need to show a limitation is to say how disabled are you. And the personal scope stage is irrelevant in my view. I agree, you can't reconcile the cases. It is the approach taken is problematic.

- Next question?

In the back first.

- Hello. I come from the university of Barcelona. I'm a research professor. Thank you for the presentation. It was very-interesting. I have 2 questions I would like to put in front of the table. Just to discuss about it. The first one was - the definition of long term. What is your opinion of the circumstance to determine what is long term impairment? In opinion, Kalfort puts on the table the relationship in employment. It is a relevant circumstance. But I don't know. Maybe we have an impairment that puts an individual access. Maybe the religion is not so longer than the kind of judgement. I would like to know your opinion about this issue. And also, I have another question. About when an employee assumed that - has a disability. In fact, doesn't have it. Do you think the protection of the directive is extended to this kind of situations or not?

- Turn off your mike please.

There are 2 other questions. 4 minutes left. I'll take those questions now. Steven?

- In terms of long term. It might be interested to know the specialists at the World Health Organisation who produced the ICF, the international classification of health, which has a sensible model. Their recommendation in respect of the convention was not to include a reference to long term. My view is in line with that.

It is a concern, I believe, to stop the floodcase. Reduce the numbers of people that are potentially entitled to protection under the law. And that would be fine if the law was concerned with allocating resources. The purpose of anti discrimination law is different.

I had another moment. I have been up all night. Working. That's the reason. I have a good point. It is up here somewhere. Hang on.

When it comes back to me, I will mention it.

The recommendation is not to have the inclusion of long term.

Can you remind you, what was your second question?

- Certainly. The second question is, if we have an employee for example. It is supposed to have a disability, or maybe, -
I don't know. That it has a disability. In fact, it doesn't have. Do you think the protection of the directive is extensive to that kind of situations?

- Okay. Before I forget, again, there is a connection. Incorrectly regarded as disabled.

My point was about concern to limit the protected class. If I was to ask everybody in this room if they have a biological

sex, I hope to get everybody's hands up. We all have a biological sex. We are entitled by protection.

But how many have taken the claim? Seriously? Of discrimination. Only those of us that feel aggrieved would take the claim.

We are all entitled to protection under the sex law.

Coming back to the long term thing. Limiting, due to the floodcase. My response is: Nonsense.

If you regarded as in the definition, then the existence of impairment, long term or not, is irrelevant.

So, if your question is, do I think the court of justice following the common line of reasoning will prevent. If you follow

the line of reasoning, I would say yes. They would prevent it. They would not include regarded as within the definition.

But logically speaking. I would hope they would include it. They would have to do some acrobatics in logic and reasoning. To achieve that.

Does it answer your question?