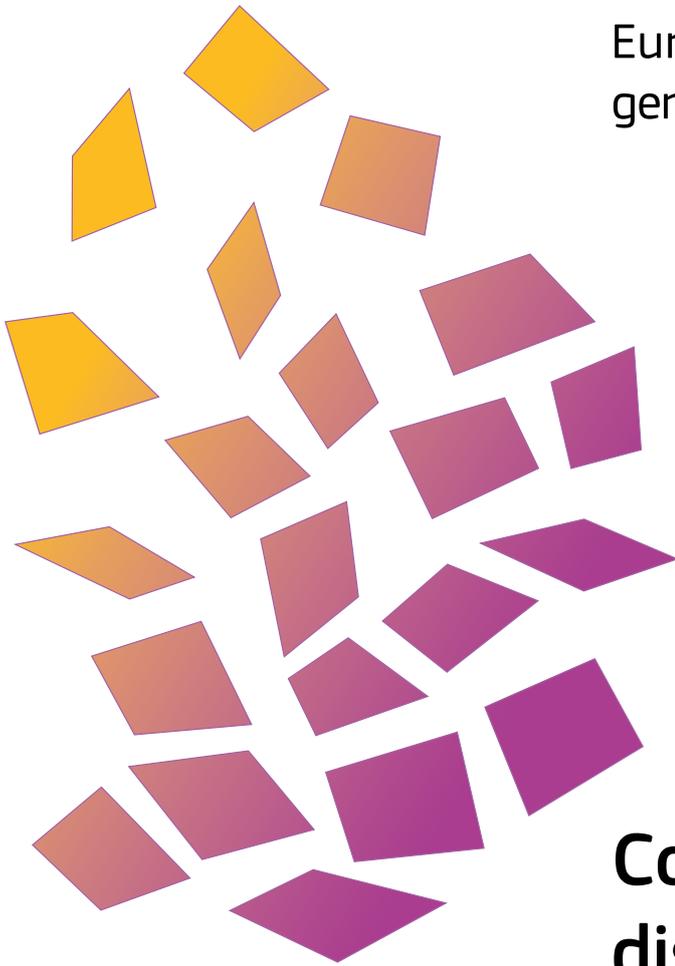




European  
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European network of legal experts in  
gender equality and non-discrimination



## **Combatting disability discrimination and realising equality**

A comparison of the UN CRPD and  
EU equality and non-discrimination  
law

Including summaries in  
English, French and German

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*European Commission*  
*B-1049 Brussels*

# **Combatting disability discrimination and realising equality**

A comparison of the UN Convention on the Rights of Persons  
with Disabilities and EU equality and non-discrimination law

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October 2018

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# Executive summary

This report analyses and compares European Union (EU) law, with a focus on the Employment Equality Directive and related case law, and the United Nations Convention on the Rights of Persons with Disabilities (CRPD), in the wider context of international human rights law, to establish how they address disability equality and non-discrimination. The report identifies particular areas where the approaches of the UN and the EU to disability equality and non-discrimination law are compatible, and it also identifies the areas where compatibility appears to be lacking.

In December 2010, the EU became a party to the CRPD, with the Convention coming into force for the EU in January 2011. The conclusion of the CRPD means that the EU is now bound by the obligations of the Convention to the extent of its competences. This includes an obligation on the EU not to act in a manner which is incompatible with the Convention and an obligation on the Court of Justice of the European Union (CJEU) to interpret EU legislation, including the Employment Equality Directive, which prohibits discrimination on the ground of disability, in a manner which is compatible with the CRPD as far as possible. Disability equality and combating discrimination are areas of shared competence. This means that the EU shares responsibility for complying with the CRPD with its 28 Member States, all of which have now ratified the Convention.

Section I of the report explores the principle of equality and non-discrimination in UN human rights conventions, with a particular focus on the obligations found in the CRPD. Section II of the report explores how the EU addresses disability equality and non-discrimination in primary EU law (the Treaties) and in secondary legislation (mainly the Employment Equality Directive). Section III of the report compares the requirements and standards inherent in the EU and UN legal frameworks.

## Section I – The principles of equality and non-discrimination in the UN treaties

The adoption of the CRPD caused a paradigm shift in the approach to disability and equality at the international level. Pre-CRPD, the medical or individual model of disability had informed international human rights law. This model of disability focuses on functional limitations or impairments and on attempts to ‘cure’ those limitations. The CRPD rejects the medical model and endorses instead a social-contextual understanding of disability (the social model), which recognises that disability arises from the interaction between individuals with impairments and the social, attitudinal and environmental barriers which hinder a person with a disability. In addition, the CRPD embraces the human rights model of disability, which builds on the social model and, furthermore, recognises human diversity and intersectional forms of discrimination.

The adoption of the CRPD also saw a shift in international human rights law: from the formal model of equality, which fails to take into account differential characteristics in the form of physical, intellectual, psychosocial and sensory impairments, to the substantive model of equality, which factors in the disadvantage encountered by persons with disabilities due to overt and covert forms of discrimination and physical, attitudinal and legal barriers in society. The CRPD goes even further than substantive equality to embrace a model of inclusive equality. According to the CRPD Committee, inclusive equality embraces: i) a fair redistributive dimension; ii) a recognition dimension; iii) a participative dimension; and iv) an accommodating dimension.<sup>1</sup>

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<sup>1</sup> Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 11.

The human rights model of disability and the model of inclusive equality underpin Article 5 CRPD, which contains the rights to equality and non-discrimination, and Article 6, which contains the first prohibition of multiple and intersectional discrimination against women and girls in international human rights law. Multiple discrimination constitutes ‘a situation where a person can experience discrimination on two or several grounds, in the sense that discrimination is compounded or aggravated’. Intersectional discrimination ‘refers to a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable and thereby expose relevant individuals to unique types of disadvantage and discrimination’.<sup>2</sup>

The non-discrimination principle and the duty of reasonable accommodation apply across the material scope of the CRPD, which is very broad, covering both civil and political rights, as well as economic, social and cultural rights. The definition of disability-based discrimination in the CRPD covers *all* forms of discrimination, including denial of reasonable accommodation. The CRPD Committee has highlighted that the CRPD covers direct and indirect discrimination. Harassment is also regarded by the CRPD Committee as a form of discrimination that is implicitly covered under the CRPD. In addition, the Committee has confirmed that the definition of discrimination on the basis of disability in the CRPD includes not only those who have an impairment themselves, but also those who are discriminated against on account of their association with a person with a disability, or those who encounter discrimination as a result of a perceived impairment or who have multiple disabilities.<sup>3</sup> The Committee has further noted that discrimination on the basis of disability can arise with regard to those who ‘had a disability in the past or who have a disposition to a disability that lies in the future’.<sup>4</sup>

In addition to prohibiting the forms of discrimination mentioned above, Article 5(4) CRPD allows for ‘specific measures’ – in other words, positive action involving both temporary and permanent measures, the latter being necessary in cases of severe (intellectual) impairments.

The CRPD Committee calls for a reversal in the burden of proof in civil procedures from the claimant to the respondent where there are facts from which it may be presumed that there has been discrimination.<sup>5</sup> The Committee has also asked States Parties to ensure that the burden of proof rests with the duty bearer who argues that his or her burden would be disproportionate in claims for a reasonable accommodation. The Committee further recommends that States Parties put in place ‘effective, proportionate and dissuasive sanctions’<sup>6</sup> and ‘adequate remedies’.<sup>7</sup>

## Section II – The EU context: addressing disability equality and combating disability discrimination at EU level

The Employment Equality Directive is the key EU instrument with regard to addressing disability discrimination. Where the EU has adopted legislation which falls within the scope of the Convention, the CJEU has the exclusive jurisdiction to interpret that legislation and determine the relevance of the CRPD.

2 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 19.

3 Committee on the Rights of Persons with Disabilities (2011), Concluding Observations on the initial report of Spain, UN Doc. CRPD/C/ESP/CO/1, para. 20.

4 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 20.

5 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on Equality and Non-Discrimination, UN Doc. CRPD/C/GC/6, para. 73(i).

6 Committee on the Rights of Persons with Disabilities (2017), Concluding Observations on the initial report of Luxembourg, UN Doc. CRPD/C/LUX/CO/1, paras. 10-11; Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 31(f).

7 Committee on the Rights of Persons with Disabilities (2013), Concluding Observations on the initial report of Austria, UN Doc. CRPD/C/AUT/CO/1, para. 13. Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 31(f).

The sub-sections below address the eight key areas of disability equality under EU law which are expanded upon in this report.

## The definition of disability

Whilst the Employment Equality Directive prohibits discrimination on the ground of disability, it does not define the concept of 'disability'. In the *Chacón Navas*<sup>8</sup> case, the Court defined disability in the context of the Employment Equality 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'.<sup>9</sup> This definition reflects the individual or medical model of disability, and is not in line with the CRPD. In 2013, after the EU had become a party to the CRPD, the CJEU revisited its definition of disability for the purposes of the directive in *HK Danmark (Ring and Skouboe Werge)*.<sup>10</sup> The Court drew closely on Article 1 CRPD and held that the concept of 'disability' must be understood as 'a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers'.<sup>11</sup> The Court has repeated this definition in a number of cases.<sup>12</sup>

## The definition of discrimination

The Employment Equality Directive lists four forms of discrimination in Article 2: direct discrimination; indirect discrimination; harassment; and an instruction to discriminate.

## Reasonable accommodation

Article 5 of the directive establishes a duty to reasonably accommodate persons with disabilities in the context of employment and vocational training, but it does not provide that a breach of this duty amounts to discrimination.

## Discrimination by association and discrimination based on assumed or future disability

Although the wording of the Employment Equality Directive is silent on this point, in *Coleman*,<sup>13</sup> the CJEU held that individuals who associate with a person who has a disability are also protected from discrimination on the ground of disability. The Court in *Coleman* did not address whether a person who is discriminated against because he or she is wrongly perceived to have a disability, or is likely to acquire a disability in the future, is protected from discrimination on the ground of disability. This issue has not been clarified in subsequent case law either.

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8 Case C-13/05, *Chacón Navas v. Eures Colectividades SA*, ECLI:EU:C:2006:456.

9 Case C-13/05, *Chacón Navas v. Eures Colectividades SA*, ECLI:EU:C:2006:456, para. 43.

10 Joined Cases C-335/11 and C-337/11, *HK Danmark, acting on behalf of Jette Ring v. Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (Ring and Skouboe Werge)*, ECLI:EU:C:2013:222.

11 Joined Cases C-335/11 and C-337/11, *HK Danmark (Ring and Skouboe Werge)*, ECLI:EU:C:2013:222, para. 38.

12 The concept/definition of disability has been addressed by the CJEU in the following cases: Case C-13/05, *Chacón Navas v. Eures Colectividades SA*, ECLI:EU:C:2006:456; Case C-303/06, *Coleman v. Attridge Law*, ECLI:EU:C:2008:415; Joined Cases C-335/11 and C-337/11, *HK Danmark, acting on behalf of Jette Ring v. Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (Ring and Skouboe Werge)*, ECLI:EU:C:2013:222; Case C-363/12, *Z v. A Government department, The Board of management of a community school*, ECLI:EU:C:2014:159; Case C-354/13, *FOA acting on behalf of Karsten Kaltoft*, ECLI:EU:C:2014:2463; Case C-395/15, *Daouidi v. Bootes Plus SL and Others*, ECLI:EU:C:2016:917; Case C-270/16, *Ruiz Conejero*, ECLI:EU:C:2018:17; Case C-406/15 *Milkova*, ECLI:EU:C:2017:198.

13 Case C-303/06, *Coleman v. Attridge Law*, ECLI:EU:C:2008:415.

### Scope for positive action

Article 7 of the Employment Equality Directive allows, but does not oblige, Member States to adopt positive action measures on the ground of disability.

### Material scope of the employment equality directive

The material scope of the Employment Equality Directive is limited to employment and occupation.

### Partial reversal of the burden of proof

Article 10(1) of the Employment Equality Directive provides for a partial reversal of the burden of proof in alleged cases of discrimination under the directive. However, since an unjustified failure to make a reasonable accommodation is not explicitly identified as a form of discrimination under the directive, EU law cannot be interpreted as requiring the partial reversal of the burden of proof to apply in such cases.

### Requirements regarding compliance and sanctions

Article 16 of the Employment Equality Directive requires Member States to ensure that any provisions contrary to the principle of equal treatment are, or may be, declared null and void or are amended. Article 17 lays down rules on the sanctions to be imposed should national law implementing the directive be infringed.

## Section III – A comparison of the CRPD with EU equality and non-discrimination law

Section III of the report compares the provisions found in the CRPD and in the Employment Equality Directive in order to establish the degree of compatibility between the two. This section is structured around the eight key areas identified in section II of the report.

### The definition of disability

The definition of disability under EU law, as outlined above, is not fully compliant with the CRPD's conceptualisation of disability.

Firstly, by requiring that an individual experiences a limitation directly related to his or her impairment, the Court seems to exclude from the definition of disability individuals who are disabled by socially-created barriers, such as false assumptions and prejudices about an individual's ability, and possibly even barriers in the physical environment. This seems to be the implication of the *Kaltoft* judgment, although the issue has not been completely clarified by the Court. The Court's definition may therefore fail to embrace in full the CRPD's human rights model of disability. Clarification is required from the CJEU on this matter.

Secondly, by only regarding as disabled an individual who has a limitation which, in interaction with various barriers, is capable of hindering his or her participation in professional life, the CJEU's definition of disability is narrower than, and not in full compliance with, the CRPD's definition, which refers to 'impairments which in interaction with various barriers may hinder [...] full and effective participation in society on an equal basis with others'.<sup>14</sup>

<sup>14</sup> Article 1 CRPD.

However, EU law is in alignment with the CRPD concerning the definition of disability in the sense that the case law of the CJEU and the CRPD both require that an impairment be 'long-term', indicating that permanent and long-lasting conditions are covered.

Furthermore, EU law can be regarded as compatible with the CRPD in that both foresee that an illness, where it is sufficiently severe and long-lasting, can be regarded as a form of disability.

### **The definition of discrimination**

The Employment Equality Directive is in conformity with the CRPD in that it prohibits direct and indirect discrimination and harassment on the ground of disability.

Nonetheless, it is arguable that EU law may run counter to the CRPD by allowing a justification test for indirect discrimination. The CRPD Committee did not highlight this as an issue in its Concluding Observations to the EU, however, seemingly indicating that this is not a concern.

A prohibition of discrimination in the form of an instruction to discriminate is not referred to in the CRPD or by the CRPD Committee, and one can regard the Employment Equality Directive as providing protection, in this respect, from an additional form of disability discrimination, and therefore going beyond the requirements of the CRPD.

Thirdly, one could argue that the EU's failure to define an unjustified denial of a reasonable accommodation as a form of discrimination in the Employment Equality Directive is not a breach of the CRPD, since the Member States retain competence in this area and can therefore fill this lacuna through national law. However, the failure of the directive to define an unjustified denial of reasonable accommodation as a form of discrimination may lead the Member States to assume that such an approach is compatible with the CRPD, when in fact it is not. One reason for this is that, like the Member States, the EU is bound by the CRPD, and the Member States may assume that EU legislation in any particular field would implement the CRPD in full. The Commission has proposed a new directive which would prohibit discrimination on the ground of disability and on other grounds in several areas extending beyond employment. This proposal lists six kinds of discrimination to be prohibited, including 'denial of reasonable accommodation for persons with disabilities'.<sup>15</sup> However, for the time being, there are no signs that the new directive will be adopted.

Finally, the Employment Equality Directive does not address multiple or intersectional discrimination. One can conclude that, in this respect, EU law is not compatible with the CRPD. It should be noted that the latest publicly available version of the proposal for the new equality directive<sup>16</sup> pays significant attention to multiple discrimination, and several significant changes have recently been introduced to the proposal. To reiterate, however, there seems to be little prospect of it being adopted in the short term.

### **Reasonable accommodation**

As noted above, the failure of the Employment Equality Directive to define an unjustified denial of reasonable accommodation as a form of discrimination could possibly encourage the Member States to believe that such an approach is compatible with the CRPD, when in fact it is not.

Moreover, the CJEU's stance is out of line with that adopted by the CRPD Committee with regard to the concept of 'reasonableness'. The CRPD Committee has clearly stated that the reasonableness of

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<sup>15</sup> Version of 14 February 2018, 6073/18.

<sup>16</sup> Version of 14 February 2018, 6073/18.

an accommodation is not to be assessed with regard to cost, whereas the CJEU appears to adopt this approach.<sup>17</sup>

### **Discrimination by association and discrimination based on assumed or future disability**

Although General Comment No. 6 of the CRPD Committee does not mention sub-categories of discrimination by association, it is arguable that States Parties to the CRPD are required to target *all forms* of discrimination by association. EU law is not in full compliance with the CRPD in that it fails to define as discrimination an unjustified refusal to provide a reasonable accommodation to a person who associates with a person with a disability. Member States can fill this gap through national legislation; however, the Employment Equality Directive risks sending out the message that its approach is compatible with the CRPD.

Moreover, it is notable that the CRPD Committee includes in the definition of discrimination a person who is discriminated against because he or she is wrongly perceived to have a disability. This involves discrimination based on a false assumption about the existence of an impairment, together with an assumption about the negative impact of that non-existent impairment on ability. The Employment Equality Directive is silent on whether someone who is wrongly perceived to have a disability is protected from discrimination. The approach of the Court in the *Coleman* case (which covered discrimination by association rather than discrimination based on perceived disability) suggests that an individual who experiences discrimination due to a perceived disability is covered by the prohibition of disability discrimination. However, this is in tension with the Court's apparent exclusion, in the *Kaltoft* case, of discrimination based on false assumptions about ability from the prohibition of discrimination. This tension in the Court's case law needs to be resolved.

Although the CRPD itself does not mention genetic discrimination, the CRPD Committee regards the prohibition of genetic discrimination as being covered under the Convention. One could argue that the Employment Equality Directive should be interpreted as prohibiting discrimination on the ground of genetic makeup, as a sub-category of discrimination on the ground of disability within the prohibition of discrimination on the ground of (future) disability, since the EU Charter of Fundamental Rights (EU CFR) prohibits discrimination on the ground of 'genetic features'.<sup>18</sup> However, the legal basis for the directive, Article 19 TFEU, does not refer to genetic makeup.

### **Scope for positive action**

Positive action measures are not expressly stated to be mandatory in the Convention; however, taking the CRPD in the context of international human rights law as a whole, it is arguable that, in some circumstances, States Parties are required to adopt temporary and permanent specific measures under Article 5(4) CRPD.

The Employment Equality Directive and the CJEU,<sup>19</sup> on the other hand, adopt a permissive approach to positive action, but there is no indication under EU law that Member States are under an obligation to adopt positive action in favour of persons with disabilities in any situation. Responsibility to act falls on the Member States in this respect.

<sup>17</sup> Joined Cases C-335/11 and C-337/11, *HK Danmark (Ring and Skouboe Werge)*, ECLI:EU:C:2013:222, para. 58.

<sup>18</sup> See de Paor, A. and Ferri, D. (2015), 'Regulating genetic discrimination in the European Union: Pushing the EU into uncharted territory or ushering in a new genomic era?' *European Journal of Law Reform*, vol. 13, no. 1, pp. 14-32, at p. 29. See also Gerards, J. and Janssen, H. (2006), 'Regulation of genetic and other health information in a comparative perspective', *European Journal of Health Law*, vol. 13, pp. 372-374.

<sup>19</sup> C-406/15, *Milkova*, ECLI:EU:C:2017:198.

## **Material scope of provisions**

The material scope of the Employment Equality Directive is much more limited than that of the CRPD, which covers all human rights. The directive covers only disability discrimination in the fields of employment, occupation and vocational training. However, one cannot conclude that the EU is in breach of its obligations under the CRPD on this basis, given that this is an area of shared competence.

## **Partial reversal of the burden of proof**

There is no requirement under EU law to apply the partial reversal of the burden of proof to alleged discrimination in the form of harassment, or to an alleged unjustified failure to make a reasonable accommodation. The Employment Equality Directive only reflects partial compliance with the CRPD in this regard.

## **Requirements regarding compliance and sanctions**

The CRPD places an obligation on States Parties to modify or abolish existing laws, regulations, customs and practices that constitute discrimination. This is also reflected in Article 16 of the Employment Equality Directive. In this respect, the Employment Equality Directive is in full alignment with the CRPD.

The CRPD requires States Parties to establish criminal, civil or administrative processes through which victims can obtain remedies and perpetrators can be sanctioned.<sup>20</sup> Article 9 of the Employment Equality Directive gives Member States the freedom to adopt either judicial or administrative procedures, or both, for the enforcement of obligations under the directive, and Member States are also free to adopt criminal law procedures. The Employment Equality Directive therefore partially implements the CRPD (with regard to judicial and administrative procedures), and responsibility falls on the Member States to adopt criminal law procedures to the extent that this is required by the CRPD.

Finally, the requirements of the Employment Equality Directive on sanctions and remedies and the CJEU's interpretation of the provisions on sanctions – albeit not in cases of disability discrimination – indicate that there is compliance with the CRPD in this area.

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20 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 22.

# Résumé

Le présent rapport procède à une analyse et une comparaison entre le droit de l'Union européenne (UE) – avec un accent particulier sur la directive relative à l'égalité en matière d'emploi et la jurisprudence y afférente – et la Convention des Nations unies relative aux droits des personnes handicapées (CDPH) dans le contexte plus large du droit international des droits fondamentaux, afin de déterminer la manière dont ils abordent l'égalité et la non-discrimination sous l'angle du handicap. Le rapport recense les domaines particuliers dans lesquels les approches juridiques respectives des NU et de l'UE en la matière sont compatibles ainsi que ceux dans lesquels cette comptabilité semble faire défaut.

L'UE a adhéré à la CDPH en décembre 2010 et ladite convention a pris ses effets dans l'Union en janvier 2011. L'adhésion à la CDPH implique que l'UE est désormais liée dans la mesure de ses compétences par les obligations qui y sont énoncées, et notamment par l'obligation pour elle de ne pas agir de manière incompatible avec la Convention et par l'obligation pour la Cour de justice de l'Union européenne (CJUE) d'interpréter la législation de l'UE, y compris la directive relative à l'égalité en matière d'emploi qui interdit la discrimination fondée sur un handicap, d'une manière qui soit, autant que possible, compatible avec la CDPH. L'égalité des personnes handicapées et la lutte contre la discrimination à leur égard sont des domaines de compétence partagée, ce qui signifie que l'UE partage la responsabilité du respect de la CDPH avec ses 28 États membres, lesquels ont tous ratifié la Convention.

Le premier chapitre du rapport se penche sur le principe d'égalité et de non-discrimination figurant dans les conventions des NU relatives aux droits de l'homme avec une attention particulière aux obligations énoncées dans la CDPH. Le deuxième chapitre analyse la manière dont l'UE aborde l'égalité des personnes handicapées et la non-discrimination à leur égard à la fois dans son droit primaire (les traités) et dans son droit dérivé (la directive relative à l'égalité en matière d'emploi principalement). Le troisième chapitre du rapport compare les exigences et les normes propres aux cadres juridiques respectifs de l'UE et des NU.

## Chapitre I – Les principes de l'égalité et de la non-discrimination dans les traités des Nations unies

L'adoption de la CDPH est à l'origine d'un changement de paradigme dans l'approche du handicap et de l'égalité au niveau international. Jusque-là, c'était le modèle médical ou individuel du handicap qui étayait le droit international des droits fondamentaux – un modèle axé sur des limites ou déficiences fonctionnelles, d'une part, et, de l'autre, sur des tentatives destinées à y «remédier». La CDPH rejette le modèle médical pour lui préférer une vision socio-contextuelle du handicap (le modèle social) qui reconnaît que le handicap provient de l'interaction de personnes présentant des incapacités avec les barrières sociales, comportementales et environnementales qui leur font obstacle. La CDPH opte en outre pour un modèle de handicap axé sur les droits de l'homme, qui s'appuie sur le modèle social en reconnaissant en outre la diversité humaine et les formes croisées de discrimination.

L'adoption de la CDPH a également marqué un tournant pour le droit international des droits fondamentaux en abandonnant le modèle formel de l'égalité, qui ne prend pas en compte les caractéristiques différentielles que sont les incapacités physiques, intellectuelles, psychosociales et sensorielles, pour lui préférer le modèle substantiel de l'égalité, qui prend en compte le désavantage rencontré par les personnes handicapées en raison de formes ouvertes ou déguisées de discrimination et de barrières physiques, comportementales et juridiques au sein de la société. La CDPH va même au-delà de l'égalité substantielle pour adopter un modèle d'égalité inclusive, laquelle englobe selon le Comité institué par

la CDPH: i) une composante «redistribution équitable»; ii) une composante «reconnaissance»; iii) une composante «participation»; et iv) une composante «aménagement».<sup>1</sup>

Le modèle du handicap axé sur les droits de l'homme et le modèle de l'égalité inclusive sous-tendent l'article 5 de la CDPH, qui consacre les droits à l'égalité et à la non-discrimination, et son article 6, qui contient la première interdiction de discrimination multiple et croisée envers les femmes et les filles en droit international des droits fondamentaux. La discrimination multiple désigne «une situation dans laquelle une personne subit une discrimination fondée sur deux facteurs ou plus, en ce sens que la discrimination s'en trouve démultipliée ou aggravée». La discrimination croisée correspond à «une situation dans laquelle plusieurs motifs opèrent et interagissent simultanément, de telle façon qu'ils sont indissociables et exposent donc les personnes concernées à des types exceptionnels de désavantages et de discrimination».<sup>2</sup>

Le principe de la non-discrimination et l'obligation d'aménagement raisonnable s'appliquent à l'ensemble du champ matériel de la CDPH, lequel est extrêmement large puisqu'il couvre à la fois les droits civils et les droits politiques, de même que les droits économiques, sociaux et culturels. La définition de la discrimination fondée sur un handicap englobe dans la CDPH *toutes* les formes de discrimination, y compris le refus d'aménagement raisonnable. Le Comité de la CDPH a souligné que la Convention couvre la discrimination directe et indirecte. Il considère également que le harcèlement constitue une forme de discrimination implicitement couverte par la CDPH. Il a confirmé en outre que la définition de la discrimination fondée sur le handicap vise dans la CDPH non seulement les personnes présentant elles-mêmes une incapacité mais également celles qui sont victimes de discrimination en raison de leur association avec une personne handicapée ou qui se heurtent à une discrimination en raison d'un handicap perçu ou d'un polyhandicap.<sup>3</sup> Le Comité a fait remarquer aussi que la discrimination fondée sur le handicap peut viser des personnes «qui ont eu un handicap ou qui sont prédisposées à avoir un handicap plus tard dans leur existence».<sup>4</sup>

En sus de l'interdiction des formes de discrimination susmentionnées, la Convention prévoit en son article 5, paragraphe 4, des «mesures spécifiques» – en d'autres termes, une action positive comportant des mesures à la fois temporaires et permanentes, les secondes étant nécessaires dans les cas d'incapacités (intellectuelles) graves.

Le Comité des droits des personnes handicapées réclame le déplacement de la charge de la preuve du requérant sur le défendeur dans les procédures civiles lorsque des faits permettent de présumer l'existence d'une discrimination.<sup>5</sup> Le Comité a également invité les États parties à veiller à ce que la charge de la preuve incombe à la personne assujettie à l'obligation qui fait valoir, dans le cadre de recours en matière d'aménagement raisonnable, que celui-ci représenterait pour lui/elle une charge disproportionnée. Le Comité recommande de surcroît que les États parties instaurent des «sanctions efficaces, proportionnées et dissuasives»<sup>6</sup> et des «voies de recours adéquates».<sup>7</sup>

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1 Comité des droits des personnes handicapées, Observation générale n° 6 (2018) sur l'égalité et la non-discrimination, NU, Doc. CRPD/C/GC/6, point 11.

2 Comité des droits des personnes handicapées, Observation générale n° 6 (2018) sur l'égalité et la non-discrimination, NU, Doc. CRPD/C/GC/6, point 19.

3 Comité des droits des personnes handicapées, 2011, Observations finales sur le rapport initial de l'Espagne, NU, Doc. CRPD/C/ESP/CO/1, point 20.

4 Comité des droits des personnes handicapées, Observation générale n° 6 (2018) sur l'égalité et la non-discrimination, NU, Doc. CRPD/C/GC/6, point 20.

5 Comité des droits des personnes handicapées, Observation générale n° 6 (2018) sur l'égalité et la non-discrimination, NU, Doc. CRPD/C/GC/6, point 73 sous i).

6 Comité des droits des personnes handicapées, 2017, Observations finales sur le rapport initial du Luxembourg, NU, Doc. CRPD/C/LUX/CO/1, points 10-11; Comité des droits des personnes handicapées, Observation générale n° 6 (2018) sur l'égalité et la non-discrimination, NU, Doc. CRPD/C/GC/6, point 31 sous f).

7 Comité des droits des personnes handicapées, 2013, Observations finales sur le rapport initial de l'Autriche, NU, Doc. CRPD/C/AUT/CO/1, point 13. Comité des droits des personnes handicapées, Observation générale n° 6 (2018) sur l'égalité et la non-discrimination, NU, Doc. CRPD/C/GC/6, point 31 sous f).

## Chapitre II – Le contexte européen: l’approche de l’UE en matière d’égalité des personnes handicapées et de lutte contre la discrimination fondée sur le handicap

La directive relative à l’égalité dans le domaine de l’emploi constitue le principal instrument mis en place par l’UE pour combattre la discrimination fondée sur le handicap. Là où l’Union a adopté une législation qui entre dans le champ d’application de la Convention, la CJUE est seule compétente pour interpréter ladite législation et déterminer la pertinence de la CDPH.

Les points ci-après précisent les huit grands aspects de l’égalité des personnes handicapées qui, visés par le droit de l’UE, sont développés dans le présent rapport.

### La définition du handicap

Si la directive relative à l’égalité en matière d’emploi interdit la discrimination fondée sur le handicap, elle ne définit cependant pas la notion de «handicap». Dans l’affaire *Chacón Navas*,<sup>8</sup> la Cour de justice de l’UE définit le handicap dans le contexte de la directive comme «une limitation résultant notamment d’atteintes physiques, mentales ou psychiques et entravant la participation de la personne concernée à la vie professionnelle».<sup>9</sup> Cette définition reflète le modèle individuel ou médical du handicap et n’est pas conforme à la CDPH. En 2013, après que l’UE soit devenue partie à la CDPH, la CJUE a réexaminé sa définition du handicap au sens de la directive dans l’affaire *HK Danmark (Ring & Skouboe Werge)*.<sup>10</sup> S’inspirant fortement du premier article de la CDPH, la Cour y établit que la notion de «handicap» doit être entendue comme visant «une limitation, résultant notamment d’atteintes physiques, mentales ou psychiques, dont l’interaction avec d’autres barrières peut faire obstacle à la pleine et effective participation de la personne concernée à la vie professionnelle sur la base de l’égalité avec les autres travailleurs».<sup>11</sup> La Cour a réitéré cette définition dans une série d’autres affaires.<sup>12</sup>

### La définition de la discrimination

La directive relative à l’égalité en matière d’emploi énonce en son article 2 quatre formes de discrimination: la discrimination directe; la discrimination indirecte; le harcèlement; et l’injonction de pratiquer une discrimination.

### L’aménagement raisonnable

L’article 5 de la directive prévoit une obligation d’aménagement raisonnable en faveur des personnes handicapées dans le cadre de l’emploi et de la formation professionnelle, mais il ne précise pas que le non-respect de cette obligation constitue une discrimination.

8 Affaire C-13/05, *Chacón Navas c. Eurest Colectividades SA*, ECLI:EU:C:2006:456.

9 Affaire C-13/05, *Chacón Navas c. Eurest Colectividades SA*, ECLI:EU:C:2006:456, point 43.

10 Affaires jointes C-335/11 et C-337/11 *HK Danmark agissant pour Jette Ring c. Dansk almennyttigt Boligselskab et HK Danmark agissant pour Lone Skouboe Werge c. Dansk Arbejdsgiverforening agissant pour Pro Display A/S (Ring & Skouboe Werge)* ECLI:EU:C:2013:222.

11 Affaires jointes C-335/11 et C-337/11 *HK Danmark (Ring & Skouboe Werge)*, ECLI:EU:C:2013:222, point 38.

12 La notion/définition du handicap a été abordée par la CJUE dans les affaires suivantes: affaire C-13/05 *Chacón Navas c. Eurest Colectividades SA*, ECLI:EU:C:2006:456; affaire C-303/06 *Coleman c. Attridge Law*, ECLI:EU:C:2008:415; affaires jointes C-335/11 et C-337/11 *HK Danmark, agissant pour Jette Ring c. Dansk almennyttigt Boligselskab et HK Danmark agissant pour Lone Skouboe Werge c. Dansk Arbejdsgiverforening agissant pour Pro Display A/S (Ring & Skouboe Werge)* ECLI:EU:C:2013:222; affaire C-363/12 *Z c. A Government department, The Board of management of a community school*, ECLI:EU:C:2014:159; affaire C-354/13 *FOA agissant pour Karsten Kaltoft c. KL agissant pour la Billund Kommune*, ECLI:EU:C:2014:2463; affaire C-395/15 *Daoudi c. Bootes Plus SL et al.*, ECLI:EU:C:2016:917; affaire C-270/16 *Ruiz Conejero*, ECLI:EU:C:2018:17; affaire C-406/15 *Milkova*, ECLI:EU:C:2017:198.

## **La discrimination par association et la discrimination fondée sur un handicap présumé ou futur**

Bien que le texte de la directive relative à l'égalité en matière d'emploi soit muet sur ce point, la CJUE a considéré dans l'affaire *Coleman*<sup>13</sup> que des personnes associées à une personne handicapée sont également protégées contre la discrimination fondée sur le handicap. En l'espèce, la Cour ne s'est pas penchée sur le point de savoir si une personne qui fait l'objet d'une discrimination parce qu'elle est perçue à tort comme souffrant d'un handicap ou parce qu'elle est susceptible d'acquérir un handicap à l'avenir, est protégée contre la discrimination fondée sur le handicap. Ce point n'a pas été davantage clarifié dans la jurisprudence subséquente.

## **Le champ d'application de l'action positive**

L'article 7 de la directive relative à l'égalité en matière d'emploi autorise les États membres à prendre des mesures d'action positive fondées sur le motif du handicap, sans toutefois les y obliger.

## **Le champ d'application matériel de la directive relative à l'égalité en matière d'emploi**

Le champ d'application matériel de la directive relative à l'égalité en matière d'emploi se limite à l'emploi et au travail.

## **Le renversement partiel de la charge de la preuve**

L'article 10, paragraphe 1, de la directive relative à l'égalité en matière d'emploi prévoit un renversement partiel de la charge de la preuve en cas de présomption de discrimination au titre de la directive. Étant donné toutefois que la directive ne définit pas explicitement la non-exécution injustifiée d'un aménagement raisonnable comme une forme de discrimination, le droit de l'UE ne peut être interprété comme exigeant que le renversement partiel de la charge de la preuve s'applique dans ce cas.

## **Les exigences en matière de conformité et de sanctions**

L'article 16 de la directive relative à l'égalité en matière d'emploi exige des États membres qu'ils veillent à ce que toute disposition contraire au principe de l'égalité de traitement soit ou puisse être déclarée nulle et non avenue ou soit modifiée. L'article 17 prévoit des règles concernant les sanctions à imposer en cas de violation des dispositions législatives nationales transposant la directive.

## **Chapitre III – Une comparaison entre la CDPH et la législation de l'UE relative à l'égalité et la non-discrimination**

Le troisième chapitre du rapport compare les dispositions respectivement contenues dans la CDPH et dans la directive relative à l'égalité en matière d'emploi aux fins d'en établir le degré de compatibilité. Il s'articule autour des huit aspects clés recensés dans le chapitre précédent.

## **La définition du handicap**

La définition du handicap figurant dans la législation de l'UE n'est pas, comme indiqué plus haut, pleinement conforme à la manière dont la CDPH conceptualise le handicap.

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13 Affaire C-303/06 *Coleman c. Attridge Law*, ECLI:EU:C:2008:415.

Premièrement, en exigeant qu'une personne connaisse une limitation directement liée à son incapacité, la Cour de justice de l'UE semble exclure de la définition du handicap les personnes invalidées par des barrières d'origine sociale (suppositions erronées ou préjugés quant à leurs capacités, par exemple), voire même par des barrières dans leur environnement physique. C'est ce que semble impliquer l'arrêt *Kaltoft*, bien que la Cour n'ait pas fait toute la lumière sur ce point. Il se pourrait donc que sa définition n'englobe pas totalement le modèle du handicap développé par la CDPH et axé sur les droits de l'homme. Une clarification est requise de la part de la CJUE en la matière.

Deuxièmement, en considérant uniquement comme handicapée une personne connaissant une limitation qui, en interaction avec d'autres barrières, peut entraver sa participation à la vie professionnelle, la définition du handicap formulée par la CJUE est plus étroite que celle de la CDPH, et n'y est pas totalement conforme dans la mesure où celle-ci fait référence à «des incapacités [...] dont l'interaction avec diverses barrières peut faire obstacle à leur pleine et effective participation à la société sur la base de l'égalité avec les autres».<sup>14</sup>

Le droit de l'UE est néanmoins aligné sur la CDPH pour ce qui concerne la définition du handicap dans la mesure où la jurisprudence de la CJUE et la CDPH exigent l'une et l'autre que l'incapacité soit «durable», précisant ainsi que les états permanents et de longue durée sont couverts.

Le droit de l'UE peut être considéré aussi comme compatible avec la CDPH dans la mesure où l'un et l'autre prévoient qu'une maladie peut être considérée comme une forme de handicap lorsqu'elle est suffisamment grave et longue.

### La définition de la discrimination

La directive relative à l'égalité en matière d'emploi est conforme à la CDPH dans ce sens qu'elle interdit la discrimination directe et indirecte et le harcèlement fondés sur le handicap.

On pourrait néanmoins faire valoir que le droit de l'UE va peut-être à l'encontre de la CDPH en autorisant un critère de justification en matière de discrimination indirecte. Le Comité de la CDPH n'a cependant pas soulevé ce point dans les observations finales qu'il a adressées à l'UE, ce qui semble indiquer qu'il ne suscite pas de préoccupation particulière.

Ni la CDPH ni son Comité ne mentionnent l'interdiction de pratiquer une discrimination sous la forme d'une injonction de discriminer, et on peut considérer que la directive relative à l'égalité en matière d'emploi offre en l'occurrence une protection contre une forme supplémentaire de discrimination fondée sur le handicap et comme allant dès lors au-delà des exigences de la Convention.

Troisièmement, on pourrait avancer que ce n'est pas parce que l'UE ne définit pas, dans sa directive relative à l'égalité en matière d'emploi, le refus injustifié d'aménagement raisonnable comme une forme de discrimination, qu'elle ne respecte pas la CDPH, étant donné que les États membres restent effectivement compétents dans ce domaine et peuvent donc combler cette lacune via leur législation nationale. Il n'en reste pas moins que le fait que la directive ne définit pas un refus injustifié d'aménagement raisonnable comme une forme de discrimination pourrait conduire les États membres à supposer que cette approche est compatible avec la CDPH, alors qu'en réalité tel n'est pas le cas – en effet, l'UE est, comme les États membres, liée par la CDPH et les pays de l'UE pourraient supposer que la législation européenne applique intégralement la Convention, quel que soit le domaine considéré. La Commission a proposé une nouvelle directive qui interdirait la discrimination fondée sur le handicap et sur d'autres motifs, et qui s'étendrait à plusieurs autres domaines que l'emploi. Cette proposition énumère six types de discrimination à interdire,

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14 Article premier de la CDPH.

y compris «le refus d'aménagement raisonnable à l'intention de personnes handicapées».<sup>15</sup> Rien n'indique cependant à l'heure actuelle que la nouvelle directive sera adoptée.

Enfin, la directive relative à l'égalité en matière d'emploi ne vise pas la discrimination multiple ou croisée, ce qui pourrait conduire à penser que le droit de l'UE n'est pas compatible à cet égard avec la CDPH. Il convient de préciser que la dernière version rendue publique de la proposition de nouvelle directive relative à l'égalité<sup>16</sup> accorde une importance non négligeable à la discrimination multiple et que plusieurs changements substantiels ont été récemment apportés à la proposition. Mais il faut rappeler aussi que les chances de la voir adoptée à brève échéance restent minces.

### **L'aménagement raisonnable**

Comme signalé plus haut, le fait que la directive relative à l'égalité en matière d'emploi ne définisse pas le refus injustifié d'aménagement raisonnable comme une forme de discrimination pourrait porter les États membres à croire que cette approche est compatible avec la CDPH, alors qu'elle ne l'est pas.

De surcroît, la position de la CJUE s'écarte de celle adoptée par le Comité des droits des personnes handicapées pour ce qui concerne la notion de «caractère raisonnable». Le Comité a clairement affirmé en effet que le caractère raisonnable d'un aménagement ne devait pas être évalué au regard de son coût, alors que telle semble être l'approche adoptée par la CJUE.<sup>17</sup>

### **La discrimination par association et la discrimination fondée sur un handicap présumé ou futur**

Bien que l'observation générale n° 6 du Comité des droits des personnes handicapées ne mentionne pas de sous-catégories de discrimination par association, on peut faire valoir que les États parties à la CDPH sont tenus de cibler *toutes les formes* revêtues par ce type de discrimination. Le droit de l'UE n'est pas totalement conforme à la Convention dans la mesure où il ne fait pas une discrimination du refus injustifié de fournir un aménagement raisonnable à une personne associée à une personne handicapée. Les États membres peuvent combler cette lacune au moyen de leur législation nationale, mais la directive relative à l'égalité en matière d'emploi risque d'envoyer un message portant à croire que cette approche est compatible avec la CDPH.

Il est important de faire remarquer également que la CDPH inclut dans la définition de la discrimination une personne qui fait l'objet d'une discrimination parce qu'elle est perçue à tort comme étant handicapée – en d'autres termes, une discrimination fondée sur une supposition erronée quant à l'existence d'une incapacité, conjuguée à une supposition quant à l'incidence négative de cette déficience inexistante sur les capacités. La directive relative à l'égalité en matière d'emploi est muette sur le point de savoir si une personne perçue à tort comme handicapée est protégée contre la discrimination. L'approche de la Cour dans l'affaire *Coleman* (laquelle portait davantage sur la discrimination par association que sur la discrimination fondée sur un handicap supposé) suggère qu'une personne visée par une discrimination en raison d'un handicap supposé est couverte par l'interdiction de discrimination fondée sur le handicap. Ceci serait cependant en contradiction avec le fait que, dans l'affaire *Kaltoft*, la Cour semble exclure la discrimination fondée sur des suppositions erronées quant à un handicap de l'interdiction de discrimination. Cette contradiction au niveau de la juridiction de la CJUE doit être résolue.

Bien que la CDPH proprement dite ne mentionne pas la discrimination génétique, son Comité considère que la Convention comprend l'interdiction de ce type de discrimination. On pourrait avancer que la directive relative à l'égalité en matière d'emploi doit être interprétée comme interdisant la discrimination fondée

15 Version du 14 février 2018, 6073/18.

16 Version du 14 février 2018, 6073/18.

17 Affaires jointes C-335/11 et C-337/11 *HK Danmark (Ring & Skouboe Werge)*, ECLI:EU:C:2013:222, point 58.

sur le patrimoine génétique – au titre de sous-catégorie de la discrimination fondée sur le handicap relevant de l'interdiction de discrimination fondée sur un handicap (futur) – étant donné que la Charte des droits fondamentaux de l'UE interdit la discrimination fondée sur les «caractéristiques génétiques».<sup>18</sup> La base juridique de la directive, à savoir l'article 19 TFUE, ne mentionne cependant pas le patrimoine génétique.

### **Le champ d'application de l'action positive**

Les mesures d'action positive ne sont pas expressément énoncées comme obligatoires dans la Convention; en situant la CDPH dans le cadre général du droit international des droits fondamentaux, on peut néanmoins soutenir que, dans certaines circonstances, les États parties sont tenus d'adopter des mesures spécifiques temporaires ou permanentes au titre de son article 5, paragraphe 4.

La directive relative à l'égalité en matière d'emploi et la CJUE<sup>19</sup> adoptent, de leur côté, une approche permissive de l'action positive, mais rien n'indique dans le droit de l'UE que les États membres sont tenus d'adopter en toutes situations des actions positives en faveur des personnes handicapées. La responsabilité d'agir incombe aux États membres à cet égard.

### **Le champ d'application matériel des dispositions**

Le champ d'application matériel de la directive relative à l'égalité en matière d'emploi est beaucoup plus limité que celui de la CDPH, qui couvre l'ensemble des droits de l'homme. La directive concerne uniquement la discrimination fondée sur un handicap dans les domaines de l'emploi, du travail et de la formation professionnelle. On ne peut cependant conclure sur cette base que l'UE ne respecte pas les obligations imposées par la CDPH, étant donné qu'il s'agit d'un domaine de compétence partagée.

### **Le renversement partiel de la charge de la preuve**

Le droit de l'UE ne contient aucune exigence quant à l'application du renversement partiel de la charge de la preuve en cas de discrimination présumée prenant la forme d'un harcèlement, ni en cas de refus présumé injustifié de fournir un aménagement raisonnable. La directive relative à l'égalité en matière d'emploi ne respecte que partiellement la CDPH à cet égard.

### **Les exigences en matière de conformité et de sanctions**

La CDPH oblige les États parties à modifier ou abolir les lois, règlements, coutumes et pratiques existants qui sont source de discrimination. Cette obligation existe également à l'article 16 de la directive relative à l'égalité en matière d'emploi, laquelle est donc en totale conformité avec la CDPH à cet égard.

La CDPH invite les États parties à mettre en place des procédures pénales, civiles ou administratives qui permettent d'offrir des voies de recours aux victimes et de sanctionner les auteurs d'actes discriminatoires.<sup>20</sup> En son article 9, la directive relative à l'égalité en matière d'emploi laisse les États membres libres d'adopter des procédures judiciaires ou des procédures administratives, ou les deux, pour respecter les obligations qu'elle prévoit; les États membres sont également libres d'adopter des procédures pénales. La directive relative à l'égalité en matière d'emploi met donc partiellement en œuvre la CDPH (procédures

18 Voir de Paor, A. & Ferri, D. (2015), «Regulating genetic discrimination in the European Union: Pushing the EU into unchartered territory or ushering in a new genomic era?» *European Journal of Law Reform*, vol. 13, n° 1, p. 14-32, au point 29. Voir également Gerards, J. et Janssen, H. (2006), «Regulation of genetic and other health information in a comparative perspective», *European Journal of Health Law*, vol. 13, p. 372-374.

19 C-406/15 *Milkova*, ECLI:EU:C:2017:198.

20 Comité des droits des personnes handicapées, Observation générale n° 6 (2018) sur l'égalité et la non-discrimination, Nations unies, Doc. CRPD/C/GC/6, point 22.

judiciaires et administratives) et il incombe aux États membres d'adopter des procédures pénales dans la mesure où la CDPH l'exige.

Enfin, les exigences énoncées dans la directive relative à l'égalité en matière d'emploi concernant les sanctions et les recours, de même que l'interprétation par la CJUE des dispositions en matière de sanctions – quoique pas dans des affaires de discrimination fondée sur le handicap – attestent d'une conformité avec la CDPH dans ce domaine.

# Zusammenfassung

Der vorliegende Bericht analysiert und vergleicht das Recht der Europäischen Union (EU) – mit besonderem Schwerpunkt auf der Rahmenrichtlinie Beschäftigung und Beruf und der damit zusammenhängenden Rechtsprechung – und das Übereinkommen der Vereinten Nationen (VN) über die Rechte von Menschen mit Behinderungen (Behindertenrechtskonvention, im Folgenden abgekürzt „VN-BRK“) im breiteren Kontext des internationalen Menschenrechts, um herauszufinden, wie sie mit der Gleichheit und Nichtdiskriminierung von Menschen mit Behinderungen umgehen. Der Bericht identifiziert sowohl solche Bereiche, in denen die jeweiligen Ansätze der Vereinten Nationen und der EU bezüglich der rechtlichen Gleichstellung und Nichtdiskriminierung von Menschen mit Behinderungen vereinbar sind, als auch solche, in denen diese Vereinbarkeit zu fehlen scheint.

Im Dezember 2010 wurde die EU Vertragspartei der VN-BRK, und im Januar 2011 trat das Übereinkommen für die EU in Kraft. Der Beitritt zur VN-BRK bedeutet, dass die Union im Rahmen ihrer Zuständigkeiten seither an die Verpflichtungen aus dem Übereinkommen gebunden ist. Dazu gehören unter anderem die Verpflichtung der EU, Handlungen zu unterlassen, die mit dem Übereinkommen unvereinbar sind, und die Verpflichtung des Gerichtshofs der Europäischen Union (EuGH), die Rechtsvorschriften der EU – darunter auch die Rahmenrichtlinie Beschäftigung und Beruf, die Diskriminierung aufgrund von Behinderung verbietet – in einer Weise auszulegen, die so weit wie möglich mit der VN-BRK vereinbar ist. Die Gleichstellung von Menschen mit Behinderungen und die Bekämpfung von Diskriminierung sind Bereiche geteilter Zuständigkeit. Die Union trägt die Verantwortung für die Einhaltung der VN-BRK daher gemeinsam mit ihren 28 Mitgliedstaaten, die das Übereinkommen inzwischen allesamt ratifiziert haben.

Kapitel I des Berichts untersucht den Grundsatz der Gleichheit und Nichtdiskriminierung in den VN-Menschenrechtsabkommen, mit besonderem Schwerpunkt auf den in der VNBRK enthaltenen Verpflichtungen. Kapitel II des Berichts widmet sich der Frage, wie die EU mit der Gleichheit und Nichtdiskriminierung von Menschen mit Behinderungen in ihrem Primärrecht (die Verträge) und in ihrem Sekundärrecht (in erster Linie die Rahmenrichtlinie Beschäftigung und Beruf) umgeht. Kapitel III des Berichts vergleicht die Anforderungen und Standards, die für die jeweiligen Rechtsrahmen der EU und der VN spezifisch sind.

## Kapitel I – Die Grundsätze der Gleichheit und Nichtdiskriminierung in den Verträgen der Vereinten Nationen

Die Unterzeichnung der VN-BRK führte zu einem Paradigmenwechsel im Umgang mit Behinderung und Gleichstellung auf internationaler Ebene. Bis zu diesem Zeitpunkt hatte sich das internationale Menschenrecht auf das medizinische oder individuelle Modell von Behinderung gestützt. Dieses Modell konzentriert sich auf funktionale Einschränkungen oder Beeinträchtigungen und auf Versuche, diese Einschränkungen zu „heilen“. Die VNBRK lehnt das medizinische Modell ab und befürwortet stattdessen ein sozial-kontextuelles Verständnis von Behinderung (das soziale Modell), das davon ausgeht, dass Behinderung aus der Interaktion zwischen Menschen mit Beeinträchtigungen und den sozialen, mentalen und umweltbedingten Barrieren entsteht, die diese Menschen behindern. Die VN-BRK macht sich auch das menschenrechtliche Modell von Behinderung zu eigen, das auf dem sozialen Modell aufbaut und darüber hinaus der menschlichen Vielfalt und intersektionellen Formen von Diskriminierung Rechnung trägt.

Die Unterzeichnung der VN-BRK markierte auch eine Wende im internationalen Menschenrecht: weg vom Modell der formalen Gleichheit, das unterscheidende Merkmale in Form von körperlichen, intellektuellen, psychosozialen und sensorischen Beeinträchtigungen nicht berücksichtigt, hin zum Modell der substantiellen Gleichheit, das die Benachteiligung mit einbezieht, die Menschen mit Behinderungen

aufgrund offener und verdeckter Formen von Diskriminierung sowie physischer, mentaler und rechtlicher Barrieren in der Gesellschaft erleiden. Die VN-BRK geht sogar über die substantielle Gleichheit hinaus und macht sich ein Modell der inklusiven Gleichheit zu eigen. Nach Ansicht des Fachausschuss der Vereinten Nationen für die Rechte von Menschen mit Behinderungen (im Folgenden „CRPD-Ausschuss“) beinhaltet inklusive Gleichheit i) eine Dimension des fairen Ausgleichs, ii) eine Dimension der Anerkennung, iii) eine Dimension der Teilhabe und iv) eine Dimension der Anpassung.<sup>1</sup>

Das menschenrechtliche Modell von Behinderung und das Modell der inklusiven Gleichheit untermauern Artikel 5 der VN-BRK, der das Recht auf Gleichheit und Nichtdiskriminierung enthält, und Artikel 6, der das erste Verbot von Mehrfachdiskriminierung und intersektioneller Diskriminierung von Frauen und Mädchen im internationalen Menschenrecht enthält. Mehrfachdiskriminierung liegt vor, wenn eine Person Diskriminierung aus zwei oder mehr Gründen erfährt und die Diskriminierung damit verstärkt oder verschärft wird. Intersektionelle Diskriminierung liegt vor, wenn mehrere Gründe gleichzeitig wirken und so miteinander interagieren, dass sie nicht voneinander zu trennen sind und die Betroffenen dadurch speziellen Arten von Benachteiligung und Diskriminierung ausgesetzt sind.<sup>2</sup>

Der Grundsatz der Nichtdiskriminierung und die Pflicht zum Treffen angemessener Vorkehrungen gelten für den gesamten sachlichen Anwendungsbereich der VN-BRK, der sehr weit gefasst ist und sowohl bürgerliche und politische als auch wirtschaftliche, soziale und kulturelle Rechte mit einbezieht. Die in der VN-BRK angewandte Definition von Diskriminierung aufgrund von Behinderung erstreckt sich auf *alle* Formen von Diskriminierung, einschließlich der Versagung angemessener Vorkehrungen. Der CRPD-Ausschuss hat unterstrichen, dass sich die VN-BRK sowohl auf unmittelbare als auch auf mittelbare Diskriminierung bezieht. Auch Belästigung sieht der CRPD-Ausschuss als eine Form von Diskriminierung an, die von der VN-BRK implizit erfasst wird. Darüber hinaus hat der Ausschuss zum Ausdruck gebracht, dass die in der VN-BRK enthaltene Definition von Diskriminierung aufgrund von Behinderung sich nicht nur auf Personen bezieht, die selbst eine Beeinträchtigung haben, sondern auch auf Personen, die aufgrund ihrer Assoziierung mit einer Person mit Behinderung diskriminiert werden, und auf Personen, die aufgrund einer vermeintlichen Behinderung diskriminiert werden oder weil sie mehrere Behinderungen haben.<sup>3</sup> Der Ausschuss hat ferner festgestellt, dass Diskriminierung aufgrund von Behinderung Personen betreffen kann, die in der Vergangenheit eine Behinderung hatten oder die eine Veranlagung für eine Behinderung haben, die in der Zukunft liegt.<sup>4</sup>

Neben dem Verbot der oben genannten Diskriminierungsformen sieht die VN-BRK in Artikel 5 Absatz 4 die Möglichkeit vor, „besondere Maßnahmen“ zu treffen – anders ausgedrückt: positive Maßnahmen sowohl befristeter als auch dauerhafter Natur, wobei letztere in Fällen schwerer (geistiger) Beeinträchtigungen erforderlich sein können.

Der CRPD-Ausschuss fordert in Zivilverfahren eine Umkehrung der Beweislast von der beschwerdeführenden auf die beschwerte Partei, wenn es Tatsachen gibt, die das Vorliegen einer Diskriminierung vermuten lassen.<sup>5</sup> Der Ausschuss hat die Vertragsstaaten ferner aufgefordert, dafür zu sorgen, dass in Verfahren zur Durchsetzung angemessener Vorkehrungen die Beweislast bei der verpflichteten Person liegt, die vorbringt, dass die Belastung für sie unverhältnismäßig sei. Weiter empfiehlt der Ausschuss den Vertragsstaaten,

- 1 Ausschuss für die Rechte von Menschen mit Behinderungen (2018), 6. Allgemeine Bemerkungen (Gleichheit und Nichtdiskriminierung), UN-Dok. CRPD/C/GC/6, Nr. 11.
- 2 Ausschuss für die Rechte von Menschen mit Behinderungen (2018), 6. Allgemeine Bemerkungen (Gleichheit und Nichtdiskriminierung), UN-Dok. CRPD/C/GC/6, Nr. 19.
- 3 Ausschuss für die Rechte von Menschen mit Behinderungen (2011), Abschließende Bemerkungen zum ersten Staatenbericht Spaniens, UN-Dok. CRPD/C/ESP/CO/1, Nr. 20.
- 4 Ausschuss für die Rechte von Menschen mit Behinderungen (2018), 6. Allgemeine Bemerkungen (Gleichheit und Nichtdiskriminierung), UN-Dok. CRPD/C/GC/6, Nr. 20.
- 5 Ausschuss für die Rechte von Menschen mit Behinderungen (2018), 6. Allgemeine Bemerkungen (Gleichheit und Nichtdiskriminierung), UN-Dok. CRPD/C/GC/6, Nr. 73 Pkt. i.

wirksame, verhältnismäßige und abschreckende Sanktionen<sup>6</sup> sowie angemessene Abhilfemaßnahmen<sup>7</sup> einzuführen.

## Kapitel II – Der EU-Kontext: Gleichstellung von Menschen mit Behinderungen und Bekämpfung von Diskriminierung aufgrund von Behinderung auf EU-Ebene

Die Rahmenrichtlinie Beschäftigung und Beruf ist das wichtigste Instrument der EU, um gegen Diskriminierung aufgrund von Behinderung vorzugehen. Dort, wo die Union Rechtsvorschriften erlassen hat, die in den Geltungsbereich der VN-BRK fallen, ist ausschließlich der EuGH dafür zuständig, diese Rechtsvorschriften auszulegen und die Relevanz des Übereinkommens zu beurteilen.

In den folgenden Abschnitten wird auf die acht im Unionsrecht verankerten Schlüsselaspekte der Gleichstellung von Menschen mit Behinderungen eingegangen, die der Bericht näher beleuchtet.

### Die Definition von Behinderung

Die Rahmenrichtlinie Beschäftigung und Beruf verbietet zwar Diskriminierung aufgrund von Behinderung, definiert aber nicht den Begriff „Behinderung“. In der Rechtssache *Chacón Navas*<sup>8</sup> definierte der Gerichtshof Behinderung im Kontext der Rahmenrichtlinie Beschäftigung und Beruf als „eine Einschränkung [...], die insbesondere auf physische, geistige oder psychische Beeinträchtigungen zurückzuführen ist und die ein Hindernis für die Teilhabe des Betroffenen am Berufsleben bildet“.<sup>9</sup> Diese Definition spiegelt das individuelle oder medizinische Modell von Behinderung wider und steht nicht im Einklang mit der VN-BRK. 2013, nachdem die EU der VN-BRK beigetreten war, hat der EuGH seine Definition von Behinderung für die Zwecke der Richtlinie in *HK Danmark (Ring und Skouboe Werge)* überprüft.<sup>10</sup> Er stützte sich dabei stark auf Artikel 1 der VN-BRK und stellte fest, dass der Begriff „Behinderung“ so zu verstehen sei, dass er „eine Einschränkung erfasst, die insbesondere auf physische, geistige oder psychische Beeinträchtigungen zurückzuführen ist, die in Wechselwirkung mit verschiedenen Barrieren den Betroffenen an der vollen und wirksamen Teilhabe am Berufsleben, gleichberechtigt mit den anderen Arbeitnehmern, hindern können“.<sup>11</sup> Der Gerichtshof hat diese Definition in einer Reihe von Fällen wiederholt.<sup>12</sup>

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- 6 Ausschuss für die Rechte von Menschen mit Behinderungen (2017), Abschließende Bemerkungen zum ersten Staatenbericht Luxemburgs, UN-Dok. CRPD/C/LUX/CO/1, Nrn. 10-11; Ausschuss für die Rechte von Menschen mit Behinderungen (2018), 6. Allgemeine Bemerkungen (Gleichheit und Nichtdiskriminierung), UN-Dok. CRPD/C/GC/6, Nr. 31 Pkt. f.
- 7 Ausschuss für die Rechte von Menschen mit Behinderungen (2013), Abschließende Bemerkungen zum ersten Staatenbericht Österreichs, UN-Dok. CRPD/C/AUT/CO/1, Nr. 13; Ausschuss für die Rechte von Menschen mit Behinderungen (2018), 6. Allgemeine Bemerkungen (Gleichheit und Nichtdiskriminierung), UN-Dok. CRPD/C/GC/6, Nr. 31 Pkt. f.
- 8 Rechtssache C-13/05, *Chacón Navas / Eures Colectividades SA*, ECLI:EU:C:2006:456.
- 9 Rechtssache C-13/05, *Chacón Navas / Eures Colectividades SA*, ECLI:EU:C:2006:456, Rn. 43.
- 10 Verbundene Rechtssachen C-335/11 und C-337/11, *HK Danmark, handelnd für Jette Ring / Dansk almennyttigt Boligselskab und HK Danmark, handelnd für Lone Skouboe Werge / Dansk Arbejdsgiverforening, handelnd für Pro Display A/S (Ring und Skouboe Werge)*, ECLI:EU:C:2013:222.
- 11 Verbundene Rechtssachen C-335/11 und C-337/11, *HK Danmark (Ring und Skouboe Werge)*, ECLI:EU:C:2013:222, Rn. 38.
- 12 Der Begriff bzw. die Definition von Behinderung wurde vom EuGH in folgenden Rechtssachen thematisiert: Rechtssache C-13/05, *Chacón Navas / Eures Colectividades SA*, ECLI:EU:C:2006:456; Rechtssache C303/06, *Coleman / Attridge Law*, ECLI:EU:C:2008:415; Verbundene Rechtssachen C-335/11 und C337/11, *HK Danmark, handelnd für Jette Ring / Dansk almennyttigt Boligselskab und HK Danmark, handelnd für Lone Skouboe Werge / Dansk Arbejdsgiverforening, handelnd für Pro Display A/S (Ring und Skouboe Werge)*, ECLI:EU:C:2013:222; Rechtssache C-363/12, *Z / A Government department, The Board of management of a community school*, ECLI:EU:C:2014:159; Rechtssache C-354/13, *FOA, handelnd für Karsten Kaltoft*, ECLI:EU:C:2014:2463; Rechtssache C-395/15, *Daouidi / Bootes Plus SL u.a.*, ECLI:EU:C:2016:917; Rechtssache C-270/16, *Ruiz Conejero*, ECLI:EU:C:2018:17; Rechtssache C406/15, *Milkova*, ECLI:EU:C:2017:198.

## Die Definition von Diskriminierung

Die Rahmenrichtlinie Beschäftigung und Beruf nennt in Artikel 2 vier verschiedene Formen von Diskriminierung: unmittelbare Diskriminierung, mittelbare Diskriminierung, Belästigung und Anweisung zur Diskriminierung.

## Angemessene Vorkehrungen

Artikel 5 der Richtlinie verpflichtet dazu, im Rahmen einer beruflichen Tätigkeit oder Weiterbildung angemessene Vorkehrungen für Menschen mit Behinderungen zu treffen, sieht aber nicht vor, dass ein Verstoß gegen diese Pflicht eine Diskriminierung darstellt.

## Diskriminierung durch Assoziierung und Diskriminierung aufgrund einer vermuteten oder künftigen Behinderung

Obwohl die Rahmenrichtlinie Beschäftigung und Beruf zu diesem Punkt nichts enthält, hat der EuGH in *Coleman*<sup>13</sup> festgestellt, dass Personen, die mit einem Menschen mit Behinderung in Beziehung stehen, ebenfalls vor Diskriminierung aufgrund von Behinderung geschützt sind. Der Gerichtshof ging in *Coleman* nicht auf die Frage ein, ob eine Person, die diskriminiert wird, weil fälschlicherweise angenommen wird, dass sie eine Behinderung hat, oder weil sie zukünftig wahrscheinlich eine Behinderung erwerben wird, vor Diskriminierung aufgrund von Behinderung geschützt ist. Auch in der späteren Rechtsprechung wurde diese Frage nicht geklärt.

## Die Möglichkeit positiver Maßnahmen

Artikel 7 der Rahmenrichtlinie Beschäftigung und Beruf erlaubt es den Mitgliedstaaten, positive Maßnahmen aufgrund von Behinderung zu ergreifen, verpflichtet sie aber nicht dazu.

## Der sachliche Geltungsbereich der Rahmenrichtlinie Beschäftigung und Beruf

Der sachliche Geltungsbereich der Rahmenrichtlinie Beschäftigung und Beruf beschränkt sich auf Beschäftigung und Beruf.

## Die teilweise Umkehrung der Beweislast

Artikel 10 Absatz 1 der Rahmenrichtlinie Beschäftigung und Beruf sieht eine teilweise Umkehrung der Beweislast in Fällen von mutmaßlicher Diskriminierung im Sinne der Richtlinie vor. Da die Richtlinie das ungerechtfertigte Nichttreffen angemessener Vorkehrungen jedoch nicht ausdrücklich als eine Form von Diskriminierung definiert, kann das Unionsrecht nicht dahin ausgelegt werden, dass es in solchen Fällen die teilweise Umkehrung der Beweislast verlangt.

## Die Anforderungen bezüglich Einhaltung und Sanktionen

Nach Artikel 16 der Rahmenrichtlinie Beschäftigung und Beruf haben die Mitgliedstaaten sicherzustellen, dass Vorschriften, die dem Gleichbehandlungsgrundsatz zuwiderlaufen, für nichtig erklärt werden oder erklärt werden können bzw. geändert werden. Artikel 17 sieht die Festlegung von Sanktionen vor, die bei einem Verstoß gegen die nationalen Umsetzungsvorschriften zur Rahmenrichtlinie Beschäftigung und Beruf zu verhängen sind.

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13    Rechtssache C-303/06, *Coleman / Attridge Law*, ECLI:EU:C:2008:415.

## Kapitel III – Vergleich der VN-BRK mit dem Gleichstellungs- und Nichtdiskriminierungsrecht der EU

Kapitel III des Berichts vergleicht die in der VN-BRK und in der Rahmenrichtlinie Beschäftigung und Beruf enthaltenen Bestimmungen, um den Grad ihrer Vereinbarkeit zu ermitteln. Es gliedert sich entlang der acht Schlüsselaspekte, die im vorherigen Kapitel identifiziert wurden.

### Die Definition von Behinderung

Die oben beschriebene Definition von Behinderung im Unionsrecht ist mit der Konzeptualisierung von Behinderung in der VN-BRK nicht vollständig vereinbar.

Erstens: Indem der Gerichtshof verlangt, dass eine Person eine Einschränkung erfährt, die unmittelbar mit ihrer Beeinträchtigung zusammenhängt, scheint er Menschen, die durch gesellschaftlich geschaffene Barrieren (falsche Annahmen, Vorurteile hinsichtlich ihrer Fähigkeiten usw.) oder sogar durch Barrieren in ihrer physischen Umwelt behindert werden, von der Definition von Behinderung auszuschließen. Dies scheint sich aus dem *Kaltoft*-Urteil zu ergeben, auch wenn die Frage vom Gerichtshof letztlich nicht völlig geklärt wurde. Möglicherweise wird das in der VN-BRK vertretene menschenrechtliche Modell von Behinderung von der Definition des Gerichtshofs daher nicht vollständig erfasst. Dieses Thema erfordert eine Klärung seitens des EuGH.

Zweitens: Indem die vom EuGH formulierte Definition von Behinderung nur Personen als behindert einstuft, die eine Einschränkung haben, die sie, in Wechselwirkung mit verschiedenen Barrieren, an der Teilnahme am Berufsleben hindern kann, ist sie enger gefasst als die Definition der VN-BRK und stimmt nicht vollständig mit dieser überein, da letztere sich auf Beeinträchtigungen bezieht, „welche [...] in Wechselwirkung mit verschiedenen Barrieren an der vollen, wirksamen und gleichberechtigten Teilhabe an der Gesellschaft hindern können“.<sup>14</sup>

Das Unionsrecht steht, was die Definition von Behinderung betrifft, jedoch insofern mit der VN-BRK in Einklang, als sowohl die Rechtsprechung des EuGH als auch die VNBRK verlangen, dass die Beeinträchtigung „von langer Dauer“ sein muss, woraus sich ergibt, dass dauerhafte und lang anhaltende Zustände abgedeckt sind.

Das Unionsrecht kann auch insofern als mit der VN-BRK vereinbar angesehen werden, als beide vorsehen, dass Krankheiten, die ausreichend schwer und dauerhaft sind, als eine Form von Behinderung gelten können.

### Die Definition von Diskriminierung

Die Rahmenrichtlinie Beschäftigung und Beruf steht mit der VN-BRK in Einklang, indem sie unmittelbare und mittelbare Diskriminierung sowie Belästigung aufgrund von Behinderung verbietet.

Es stellt jedoch die Frage, ob das Unionsrecht der VN-BRK möglicherweise zuwiderläuft, indem es einen Rechtfertigungstest für mittelbare Diskriminierung zulässt. Der CRPD-Ausschuss hat dies in seinen Abschließenden Bemerkungen gegenüber der Union jedoch nicht thematisiert, was darauf hindeutet, dass es kein Problem darstellt.

Ein Verbot von Diskriminierung in Form einer Anweisung zur Diskriminierung wird weder in der VN-BRK noch vom CRPD-Ausschuss erwähnt; die Rahmenrichtlinie Beschäftigung und Beruf bietet diesbezüglich

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14 Art. 1 VN-BRK.

also Schutz vor einer zusätzlichen Form von Diskriminierung aufgrund von Behinderung und geht somit über die Anforderungen der VN-BRK hinaus.

Drittens: Es ließe sich argumentieren, dass die Union dadurch, dass sie eine ungerechtfertigte Versagung angemessener Vorkehrungen in der Rahmenrichtlinie Beschäftigung und Beruf nicht als eine Form von Diskriminierung definiert, nicht gegen die VN-BRK verstößt, da die Mitgliedstaaten in diesem Bereich nach wie vor zuständig sind und diese Lücke somit durch innerstaatliche Rechtsvorschriften schließen können. Die Tatsache, dass die Richtlinie eine ungerechtfertigte Versagung angemessener Vorkehrungen nicht als eine Form von Diskriminierung definiert, könnte die Mitgliedstaaten jedoch dazu veranlassen anzunehmen, dass dieser Ansatz mit der VNBRK vereinbar ist, obwohl dies in Wirklichkeit nicht der Fall ist. Grund dafür ist, dass die EU, ebenso wie die Mitgliedstaaten, an die VN-BRK gebunden ist und die Mitgliedstaaten davon ausgehen können, dass die unionsrechtlichen Vorschriften, egal in welchem Bereich, die VN-BRK vollständig umsetzen. Die Kommission hat eine neue Richtlinie vorgeschlagen, die Diskriminierung aufgrund von Behinderung und aus anderen Gründen in mehreren Bereichen, die über den Beschäftigungsbereich hinausgehen, verbietet. Der Vorschlag zählt sechs Arten von Diskriminierung auf, die verboten werden sollen, darunter die „Versagung angemessener Vorkehrungen für Menschen mit Behinderungen“.<sup>15</sup> Derzeit gibt es allerdings keine Anzeichen dafür, dass die neue Richtlinie verabschiedet wird.

Schließlich berücksichtigt die Rahmenrichtlinie Beschäftigung und Beruf weder Mehrfachdiskriminierung noch intersektionelle Diskriminierung. Daraus lässt sich der Schluss ziehen, dass das Unionsrecht diesbezüglich nicht mit der VN-BRK vereinbar ist. Es ist zu beachten, dass die letzte öffentlich zugängliche Fassung des Vorschlags für eine neue Gleichbehandlungsrichtlinie<sup>16</sup> dem Thema Mehrfachdiskriminierung große Aufmerksamkeit widmet und dass kürzlich mehrere wichtige Änderungen an dem Vorschlag vorgenommen wurden. Es sei jedoch daran erinnert, dass die Chancen für eine Annahme des Vorschlags in naher Zukunft gering sind.

### **Angemessene Vorkehrungen**

Wie bereits erwähnt, könnte die Tatsache, dass die Rahmenrichtlinie Beschäftigung und Beruf eine ungerechtfertigte Versagung angemessener Vorkehrungen nicht als eine Form von Diskriminierung definiert, die Mitgliedstaaten dazu verleiten anzunehmen, dass dieser Ansatz mit der VN-BRK vereinbar ist, obwohl dies in Wirklichkeit nicht der Fall ist.

Zudem weicht die Position des EuGH, was den Begriff „Angemessenheit“ betrifft, von der des CRPD-Ausschusses ab. Der CRPD-Ausschuss hat ausdrücklich festgestellt, dass die Angemessenheit von Vorkehrungen nicht anhand der Kosten bewertet werden darf, wohingegen dies der Ansatz des EuGH zu sein scheint.<sup>17</sup>

### **Diskriminierung durch Assoziierung und Diskriminierung aufgrund einer angenommenen oder zukünftigen Behinderung**

Obwohl in den 6. Allgemeinen Bemerkungen des CRPD-Ausschusses keine Unterkategorien von Diskriminierung durch Assoziierung erwähnt werden, spricht vieles dafür, dass die Vertragsstaaten der VN-BRK verpflichtet sind, gegen *alle Formen* von Diskriminierung durch Assoziierung vorzugehen. Das Unionsrecht steht mit der VNBRK insofern nicht vollständig in Einklang, als es die Tatsache, dass einer Person mit Behinderung angemessene Vorkehrungen ungerechtfertigterweise versagt werden, nicht als Diskriminierung definiert. Die Mitgliedstaaten können diese Lücke mithilfe innerstaatlicher

15 Fassung vom 14. Februar 2018, 6073/18.

16 Fassung vom 14. Februar 2018, 6073/18.

17 Verbundene Rechtssachen C-335/11 und C-337/11, *HK Danmark (Ring und Skouboe Werge)*, ECLI:EU:C:2013:222, Rn. 58.

Rechtsvorschriften schließen; die Rahmenrichtlinie Beschäftigung und Beruf läuft jedoch Gefahr, die Botschaft zu vermitteln, dass ihr Ansatz mit der VNBRK vereinbar ist.

Beachtenswert ist auch, dass der CRPD-Ausschuss Personen in die Definition von Diskriminierung einbezieht, die diskriminiert werden, weil fälschlicherweise angenommen wird, dass sie eine Behinderung haben. Es handelt sich hierbei um eine Form von Diskriminierung, die auf einer falschen Annahme über das Vorliegen einer Beeinträchtigung, verbunden mit einer Annahme über die negativen Auswirkungen dieser nicht existierenden Beeinträchtigung auf Fähigkeiten, beruht. Die Rahmenrichtlinie Beschäftigung und Beruf schweigt zu der Frage, ob Personen, von denen fälschlicherweise angenommen wird, dass sie eine Behinderung haben, vor Diskriminierung geschützt sind. Der Ansatz des EuGH in der Rechtssache *Coleman* (in der es um Diskriminierung durch Assoziierung, nicht um Diskriminierung aufgrund einer vermeintlichen Behinderung ging) legt nahe, dass eine Person, die aufgrund einer vermeintlichen Behinderung Diskriminierung erfährt, unter das Verbot von Diskriminierung aufgrund von Behinderung fällt. Dies steht jedoch mit der Tatsache in Konflikt, dass der Gerichtshof, in der Rechtssache *Kaltoft*, Diskriminierung aufgrund falscher Annahmen über Fähigkeiten scheinbar vom Diskriminierungsverbot ausnimmt. Dieser Konflikt in der Rechtsprechung des EuGH muss aufgelöst werden.

Obwohl die VN-BRK selbst genetische Diskriminierung nicht erwähnt, wird das Verbot genetischer Diskriminierung nach Ansicht des CRPD-Ausschusses vom Geltungsbereich des Übereinkommens erfasst. Man könnte geltend machen, die Rahmenrichtlinie Beschäftigung und Beruf sollte dahin ausgelegt werden, dass sie Diskriminierung wegen der genetischen Ausstattung – als eine Unterkategorie von Diskriminierung aufgrund von Behinderung innerhalb des Verbots von Diskriminierung aufgrund einer (zukünftigen) Behinderung – verbietet, da die EU-Grundrechtecharta Diskriminierung wegen der „genetischen Merkmale“ untersagt.<sup>18</sup> Die Rechtsgrundlage der Richtlinie, Artikel 19 AEUV, enthält jedoch keinerlei Bezugnahme auf genetische Ausstattung.

### Die Möglichkeit positiver Maßnahmen

Positive Maßnahmen werden in der VN-BRK nicht ausdrücklich als obligatorisch bezeichnet; stellt man das Übereinkommen in den Kontext des internationalen Menschenrechts als Ganzem, ließe sich jedoch argumentieren, dass die Vertragsstaaten unter bestimmten Umständen verpflichtet sind, vorübergehend oder dauerhaft besondere Maßnahmen im Sinne von Artikel 5 Absatz 4 VN-BRK zu ergreifen.

Die Rahmenrichtlinie Beschäftigung und Beruf und der EuGH<sup>19</sup> verfolgen gegenüber positiven Maßnahmen zwar einen permissiven Ansatz, es gibt im Unionsrecht aber keine Hinweise darauf, dass die Mitgliedstaaten verpflichtet sind, in irgendeiner Situation positive Maßnahmen zugunsten von Menschen mit Behinderungen zu treffen. Die Verantwortung, zu handeln, liegt diesbezüglich bei den Mitgliedstaaten.

### Der sachliche Geltungsbereich der Vorschriften

Der sachliche Geltungsbereich der Rahmenrichtlinie Beschäftigung und Beruf ist weitaus beschränkter als der der VN-BRK, der sämtliche Menschenrechte abdeckt. Die EU-Richtlinie deckt lediglich Diskriminierung aufgrund von Behinderung in den Bereichen Beschäftigung, Beruf und berufliche Bildung ab. Daraus lässt sich jedoch nicht der Schluss ziehen, dass die Union gegen ihre Verpflichtungen aus der VN-BRK verstößt, da es sich um einen Bereich geteilter Zuständigkeit handelt.

18 Vgl. de Paor, A. und Ferri, D. (2015), „Regulating genetic discrimination in the European Union: Pushing the EU into uncharted territory or ushering in a new genomic era?“, *European Journal of Law Reform*, Bd. 13, Nr. 1, S. 14-32, auf S. 29; vgl. ebenso Gerards, J. und Janssen, H. (2006), „Regulation of genetic and other health information in a comparative perspective“, *European Journal of Health Law*, Bd. 13, S. 372-374.

19 Rechtssache C-406/15, *Milkova*, ECLI:EU:C:2017:198.

## Die teilweise Umkehrung der Beweislast

Das Unionsrecht enthält keine Bestimmung, der zufolge bei mutmaßlicher Diskriminierung in Form von Belästigung oder bei mutmaßlichem ungerechtfertigtem Nichttreffen angemessener Vorkehrungen die teilweise Umkehrung der Beweislast anzuwenden ist. Die Rahmenrichtlinie Beschäftigung und Beruf setzt die VNBRK diesbezüglich nur teilweise um.

## Die Anforderungen bezüglich Einhaltung und Sanktionen

Die VN-BRK verpflichtet die Vertragsstaaten, bestehende Gesetze, Verordnungen, Gepflogenheiten und Praktiken, die eine Diskriminierung darstellen, zu ändern oder aufzuheben. Dies spiegelt sich auch in Artikel 16 der Rahmenrichtlinie Beschäftigung und Beruf wider. Diesbezüglich steht die Richtlinie in vollem Einklang mit der VNBRK.

In der VN-BRK werden die Vertragsstaaten aufgefordert, straf, zivil und verwaltungsrechtliche Verfahren einzurichten, mittels derer Opfer ihre Rechte durchsetzen und Täter bestraft werden können.<sup>20</sup> Artikel 9 der Rahmenrichtlinie Beschäftigung und Beruf stellt es den Mitgliedstaaten frei, zur Durchsetzung von Verpflichtungen aus der Richtlinie Gerichts- und/oder Verwaltungsverfahren zur Verfügung zu stellen; den Mitgliedstaaten steht es auch frei, Strafverfahren zur Verfügung zu stellen. Die Rahmenrichtlinie Beschäftigung und Beruf setzt die VNBRK somit teilweise (in Bezug auf Gerichts- und Verwaltungsverfahren) um, und es liegt in der Verantwortung der Mitgliedstaaten, in dem nach der VN-BRK erforderlichen Maße Strafverfahren zur Verfügung zu stellen.

Die Anforderungen der Rahmenrichtlinie Beschäftigung und Beruf in Bezug auf Sanktionen und Rechtsdurchsetzung sowie die Auslegung der Sanktionsvorschriften durch den EuGH – wenn auch nicht in Fällen von Diskriminierung aufgrund von Behinderung – bestätigen schließlich, dass in diesem Bereich Übereinstimmung mit der VN-BRK besteht.

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20 Ausschuss für die Rechte von Menschen mit Behinderungen (2018), 6. Allgemeine Bemerkungen (Gleichheit und Nichtdiskriminierung), UN-Dok. CRPD/C/GC/6, Nr. 22.

## Introduction

European Union (EU) law, and specifically the Employment Equality Directive,<sup>1</sup> has set the framework for disability equality and non-discrimination law within the 28 Member States. The directive, which was adopted in 2000, required all Member States to adopt national legislation prohibiting disability discrimination with regard to employment and vocational training. Many Member States extended that legislation to prohibit disability discrimination in other fields, such as access to goods and services, and used the same approach as that required under EU law with regard to employment. Since its transposition, the directive has been the subject of a number of significant rulings by the Court of Justice of the European Union (CJEU), several of which have interpreted the directive from a disability perspective, and these have influenced the interpretation and application of national disability equality and non-discrimination law. In short, the EU, through the Employment Equality Directive and the related case law, has exerted a significant influence on developments within the Member States regarding disability equality. Indeed, the directive was the trigger which led to the adoption of disability equality legislation for the first time in most Member States.<sup>2</sup>

Whilst the EU has imposed requirements regarding disability equality on the Member States, in recent years the EU itself has been subject to requirements regarding disability equality from a higher legal source. In December 2010, some 10 years after the EU adopted the Employment Equality Directive, the EU became a party<sup>3</sup> to the United Nations Convention on the Rights of Persons with Disabilities (CRPD, or the Convention),<sup>4</sup> with the Convention coming into force for the EU a month later, in January 2011. The CRPD is the first human rights convention to be open to signature and ratification by regional integration organisations. Indeed, this possibility was explicitly provided for in order to allow the EU to become a party to the Convention. The EU, through the European Commission in cooperation with its Member States, played an important role in the negotiation of the Convention, and it was always envisaged that the EU would conclude (or ratify) the CRPD. The Commission's input to the negotiations was heavily influenced by the content of its own Employment Equality Directive, and it has been argued that the Commission initially sought to transpose the EU approach, as embodied in that directive, to the international level.<sup>5</sup> However, the resulting Convention is significantly broader than the Employment Equality Directive and is notably not confined to addressing disability discrimination, although that is a highly important element of the Convention.

The conclusion of the CRPD by the EU is very significant from the perspective of the EU's disability policy, and the Employment Equality Directive in particular, since the directive can be regarded as the centrepiece in the EU's body of legislation on disability. While 'the European Union [...] has traditionally rooted its human rights obligations within its own legal order',<sup>6</sup> conclusion of the CRPD means that the EU is now bound by the obligations of the Convention to the extent of its competences. This includes an obligation on the EU not to act in a manner which is incompatible with the Convention (a negative obligation), and an obligation on the CJEU to interpret EU legislation, including the directive, in a manner which is compatible with the CRPD as far as possible (a positive obligation). The EU also clearly takes the

- 1 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (*Employment Equality Directive*), OJ L 303. 2.12.2000, pp. 16-22. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000L0078>.
- 2 At the time the Employment Equality Directive was adopted, only three Member States (Ireland, Sweden and the United Kingdom) had already adopted comparable disability non-discrimination legislation.
- 3 See Council decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC), OJ L 23. 27.1.2010, pp. 35-36. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010D0048>.
- 4 UN Convention on the Rights of Persons with Disabilities, resolution/adopted by the UN General Assembly, 24 January 2007, UN Doc. A/RES/61/106.
- 5 De Búrca, G. (2010), 'The EU in the Negotiation of the UN Disability Convention', *European Law Review*, vol. 35, No. 2, pp. 174-196.
- 6 Ahmed, T. and de Jesús Butler, I. (2006), 'The European Union and human rights: An international law perspective', *The European Journal of International Law*, vol. 17, No. 4, pp. 771-801, at p. 771.

Convention into account when developing its disability policy.<sup>7</sup> In addition, as a party to the Convention, the EU is obliged, like all other States Parties, to submit reports to the Committee monitoring the Convention – the Committee on the Rights of Persons with Disabilities – on the action it has taken in order to comply with the Convention. The Committee then issues Concluding Observations, identifying strengths and, in particular, weaknesses with the State Party's approach and policy, and makes recommendations for how to bring national policy and legislation into line with the Convention. In 2015, the EU underwent such a review, and the CRPD issued Concluding Observations to the EU, some of which address the issue of disability equality.<sup>8</sup>

It is worth stressing that the EU does not bear responsibility for complying with the CRPD on its own. Indeed, this would be impossible, given that the EU has limited competences in many of the fields covered by the Convention. Instead, the EU shares that responsibility with its 28 Member States, all of which have now ratified the CRPD. This means that the EU and its Member States have, in combination, accepted all the obligations flowing from the CRPD, including those which relate to disability equality. This is important because the Employment Equality Directive, as noted above, only covers discrimination with regard to employment and vocational training, whilst the scope of the duty to prohibit and combat disability discrimination under the CRPD is much broader. The directive can, therefore, never fulfil all the obligations in the CRPD regarding a legislative prohibition of disability discrimination. Having said that, combating discrimination on the ground of disability is an area where the EU does have significant powers and has already acted, so it is a field which is particularly relevant from the perspective of the CRPD.

In light of the developments and initiatives described above, this thematic report seeks to compare EU law and the CRPD with regard to how they address disability equality and non-discrimination. Whilst the focus will be on the Employment Equality Directive and related case law, the report will also refer to other EU equality directives and case law where these inform the interpretation to be given to the Employment Equality Directive.<sup>9</sup> As regards the United Nations (UN) level, the report will focus on the equality and non-discrimination provisions of the CRPD, as well as the related General Comment, Concluding Observations and decisions of the CRPD Committee on individual communications. Where relevant, the CRPD's approach will also be placed in the broader context of other UN human rights instruments.

Section I of the report explores the principle of equality and non-discrimination in UN human rights conventions, with a particular focus on the obligations found in the CRPD.<sup>10</sup> In section II, the report explores how the EU addresses disability equality and non-discrimination in the Treaties and the Employment Equality Directive, taking related CJEU case law into account, and considers the relevance of the EU's conclusion of the CRPD for EU disability equality and non-discrimination law. This section of the report identifies key elements of EU disability equality and non-discrimination law, which will be compared in the subsequent section to the requirements flowing from the CRPD. Having introduced the relevant EU and UN legal framework, the report proceeds to compare the two in section III. A number of possible findings

7 See for example, the *European Disability Strategy 2010-2020: A renewed commitment to a barrier-free Europe*, Brussels 15.11.2010, COM (2010) 636 final.

8 Committee on the Rights of Persons with Disabilities (2015), Concluding Observations on the initial report of the European Union, CRPD/C/EU/CO/1.

9 On the whole, EU equality directives adopt the same general framework or approach, with many of the provisions in the Employment Equality Directive being mirrored in, for example, the Racial Equality Directive (Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (*Racial Equality Directive*), OJ L 180, 19.7.2000, pp. 22-26, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0043&from=EN>); and the Gender Equality Directive (Directive 2010/41/EU of the European Parliament and of the Council on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180, 15.7.2010, pp. 1-6, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010L0041>). Case law regarding some of the other directives may be relevant in understanding the Employment Equality Directive if it concerns a provision which is also found in the Employment Equality Directive, but which has not been subject to interpretation by the CJEU in the context of that directive. In such cases, the interpretation given by the CJEU to the comparable or parallel provision in another equality directive is likely also to apply to the relevant provision in the Employment Equality Directive.

10 See generally Lawson, A. (2018), 'United Nations Convention on the Rights of Persons with Disabilities', in: Edoardo Ales, E. Bell, M., Deinert, O. and Robin-Olivier, S., *International and European labour law: A commentary* (Nomos).

can result from this comparison. For a specific field, such as the definition of disability or the definition of discrimination, there may be complete coherence between EU law and the CRPD. Alternatively, EU law may fail to address a specific area covered by the CRPD because that area falls outside the competence of the EU, or EU law may exceed the requirements set out in the CRPD. However, particular attention in the comparison will be paid to a fourth category, namely those areas falling within the competence of the EU (and where the EU has acted) where there seems to be a tension between EU law and the CRPD in terms of guaranteeing disability equality and combating discrimination. The thematic report will therefore result in an extensive comparison between EU (disability) equality and non-discrimination law and the CRPD, and will identify specific areas where there is compatibility and coherence, and specific areas where that compatibility and coherence appears to be lacking.

## Section I – The principles of equality and non-discrimination in the UN treaties

The principles of equality and non-discrimination run through the CRPD like a ‘red thread’<sup>11</sup> and have been described as the ‘leitmotif’ of the Convention.<sup>12</sup> In order to fully understand the equality and non-discrimination norms enshrined in the CRPD, this section of the report examines how the CRPD’s understanding of those principles evolved as a logical step in the development of those norms in older UN human rights treaties.<sup>13</sup> While the developments which took place in international human rights law pre-CRPD were usually unrelated to disability, those developments are nonetheless relevant to the understanding of discrimination enshrined in the CRPD, since the CRPD’s provisions on equality and non-discrimination represent a logical further development of those norms. The developments that took place pre-CRPD are also relevant to the specific challenges posed by ‘difference’ in the discrimination ground of disability. Persons with disabilities have differential characteristics (by virtue of physical, intellectual, or other impairments), and the application of the equality and non-discrimination norms must be tailored to those differences.<sup>14</sup> This section of the report also analyses the obligations stemming from the equality and non-discrimination norms in the CRPD, and outlines how the model of equality contained in the CRPD may impact on the interpretation of the rights contained in other UN human rights treaties.

### 1 The evolution of the equality norm pre-CRPD

Equality and non-discrimination constitute fundamental tenets of international human rights law. This first sub-section analyses the evolution of the equality norm at the international level before the adoption of the CRPD.<sup>15</sup> Before the CRPD entered into force, the rights of persons with disabilities were deemed to be protected under the existing core human rights treaties.<sup>16</sup> This protection stemmed from the universality of human rights and the cross-cutting application of the equality and non-discrimination norms in the core human rights treaties. In spite of this protection in theory, disability-based discrimination has in the past been described as ‘one of the black holes of UN equality law’.<sup>17</sup>

The non-discrimination norm in international human rights law underwent an evolution in the decades leading up to the adoption of the CRPD, from embracing the formal model of equality to endorsing a more substantive conception of equality. Formal equality requires that ‘individuals are treated in the same manner, if they are situated in a similar situation, and that laws and policies are formulated in

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- 11 Bell, M. and Waddington, L. (2016), *The Employment Equality Directive and supporting people with psychosocial disabilities in the workplace: a legal analysis of the situation in the EU Member States*, report commissioned by the European Commission and the European network of legal experts in gender equality and non-discrimination, p. 38. Available at: [https://cris.maastrichtuniversity.nl/portal/en/publications/the-employment-equality-directive-and-supporting-people-with-psychosocial-disabilities-in-the-workplace\(187f433e-83cf-4fcf-8de2-a2b78fd0a539\).html](https://cris.maastrichtuniversity.nl/portal/en/publications/the-employment-equality-directive-and-supporting-people-with-psychosocial-disabilities-in-the-workplace(187f433e-83cf-4fcf-8de2-a2b78fd0a539).html).
  - 12 Arnardóttir, O.M. (2009), *A future of multidimensional disadvantage equality*, in: *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Brill), pp. 41-66, at p. 41.
  - 13 See also, Farrow, S. (2015), *Equality and non-discrimination under International Law*, vol. 2 (Routledge).
  - 14 Rioux et al. argue that ‘where people are differently situated, it is essential to establish the extent to which the difference needs to be taken into account if equality is to be [realised fully]’: Rioux, M.H., Bassier, L.A. and Jones, M. (2011), (eds.), *Critical perspectives on human rights and disability policy* (Martinus Nijhoff).
  - 15 This sub-section of the report draws on Broderick, A. (2015), *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities*, (Intersentia).
  - 16 There are nine core human rights treaties: the International Convention on the Elimination of all Forms of Racial Discrimination (1965), the International Convention on Civil and Political Rights (1966), the International Convention on Economic, Social and Cultural Rights (1966), the International Convention on the Elimination of All Forms of Discrimination against Women (1979), the UN Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (1984), the UN Convention on the Rights of the Child (1989), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), the International Convention for the Protection of All Persons from Enforced Disappearance (2006), and the Convention on the Rights of the Persons with Disabilities (2006).
  - 17 Vandenhoe, W. (2005), *Non-discrimination and equality in the view of the UN human rights treaty bodies* (Intersentia), p. 2.

a neutral manner'.<sup>18</sup> The formal equality model fails to take into account differential characteristics. Persons with disabilities have differential characteristics in the form of physical, intellectual, psychosocial and sensory impairments, among others, and the formal model of equality fails to take into account the disadvantage encountered by persons with disabilities in their everyday lives. Fredman refers to the relevance of difference in her argument that: 'characterising disability as an irrelevant characteristic removes the underlying justification for detrimental treatment, but insisting on similar treatment simply reinforces a particular norm and perpetuates disadvantage'.<sup>19</sup>

By way of contrast to the formal model, the substantive model of equality factors in the disadvantage encountered by persons with disabilities due to overt and covert forms of discrimination and various barriers that exist in society – physical, attitudinal and legal. Substantive equality looks further than differential characteristics; rather, according to Broderick, it:

seeks to determine the effects of particular measures on vulnerable or disadvantaged groups. Substantive equality also calls for special measures of protection for those with differential characteristics in order to correct for factual inequalities.<sup>20</sup>

The evolution of the equality norm can be linked to different eras in the history of international human rights law. According to Arnardóttir, the earliest human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR), belong to the era of 'universal sameness'.<sup>21</sup> During that era, 'the universal equality norm applied to everyone in the same manner, regardless of difference'.<sup>22</sup> She argues that the non-discrimination norms contained in the ICCPR and the ICESCR are 'open-ended' and contain 'no accommodation for difference'.<sup>23</sup> The next era in international human rights law has been termed the 'specific difference'<sup>24</sup> equality era. The specific difference model of equality focuses on specific personal characteristics and acknowledges that some differences, characterised generally by biological factors, must be taken into account in the quest for equality.<sup>25</sup> Notably, however, the 'specific difference' model of equality does not view special treatment (in other words, the adoption of additional preferential or positive measures for persons with disabilities) as desirable, but rather as an exception to the mandate of equal treatment. Positive measures are only mandated in exceptional circumstances under the 'specific difference' approach.<sup>26</sup> The non-discrimination provisions in both the UN Convention on the Elimination of all Forms of Racial Discrimination (CERD)<sup>27</sup> and the UN Convention on the Elimination of all forms

18 Broderick, A. (2015), *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities*, (Intersentia), p. 31. See also Lawson, A. (2008), *Disability and equality law in Britain: The role of reasonable adjustment* (Hart), p. 19.

19 Fredman, S. (2005), 'Disability equality: A challenge to the existing anti-discrimination paradigm?', in: *Disability rights in Europe: From theory to practice*, (Hart), p. 203.

20 Broderick, A. (2015), 'A reflection on substantive equality jurisprudence: The standard of scrutiny at the ECtHR for differential treatment of Roma and persons with disabilities' *International Journal of Discrimination and the Law*, vol. 15, Nos. 1-2, p. 102; see also United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 16, UN Doc. E/C.12/2005/4, 13 May 2005, para. 7.

21 Arnardóttir, O.M. (2009), 'A future of multidimensional disadvantage equality', in: Arnardóttir, O.M. and Quinn, G., *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Martinus Nijhoff), p. 47.

22 Arnardóttir, O.M. (2009), 'A future of multidimensional disadvantage equality', in: Arnardóttir, O.M. and Quinn, G., *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Martinus Nijhoff), p. 47.

23 Arnardóttir, O.M. (2009), 'A future of multidimensional disadvantage equality', in: Arnardóttir, O.M. and Quinn, G., *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Martinus Nijhoff), p. 47.

24 Arnardóttir, O.M. (2009), 'A future of multidimensional disadvantage equality', in: Arnardóttir, O.M. and Quinn, G., *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Martinus Nijhoff), p. 49.

25 Arnardóttir, O.M. (2009), 'A future of multidimensional disadvantage equality', in: Arnardóttir, O.M. and Quinn, G., *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Martinus Nijhoff), pp. 49-50. See further Broderick, A. (2015), *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities*, (Intersentia), pp. 42-44.

26 Arnardóttir, O.M. (2009), 'A future of multidimensional disadvantage equality', in: Arnardóttir, O.M. and Quinn, G., *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Martinus Nijhoff), pp. 50-53.

27 International Convention on the Elimination of All Forms of Racial Discrimination, adopted by UN General Assembly Resolution 2106 of 21 December 1965, U.N. Doc. A/6014.

of Discrimination Against Women (CEDAW)<sup>28</sup> incorporate the ‘specific difference’ model of equality, according to Arnardóttir. CERD and CEDAW both contain protection against indirect discrimination,<sup>29</sup> and those treaties also permit the taking of ‘special measures’ or positive action.<sup>30</sup> However, the focus under CERD and CEDAW is not on factors causing disadvantage in mainstream society, but rather on specific personal characteristics (race and gender).

The model of equality embraced by international human rights law pre-CRPD largely reflects the model of disability which was adopted in international law and policy, namely the individual or medical model of disability. This model:

focused on the actual health condition of the particular person and on the treatments that could be provided to ‘repair’ or alleviate the impairment. It conceptualized disability as a negative condition and identified disability with an individual impairment completely independent from any other external or environmental element.<sup>31</sup>

According to Degener, the individual or medical model is best seen in the three ‘traditional research themes of disability programs: 1) [the] definition of disability; 2) prevention of disability; and 3) rehabilitation of disability’.<sup>32</sup> Degener claims that the medical model ‘prevented the conceptualization of disability as a human rights subject’.<sup>33</sup>

## 2 Introduction to the equality and non-discrimination obligations in the CRPD

The adoption of the CRPD in the international legal sphere caused a paradigm shift or profound change in the approach to disability and equality. The CRPD built on the provisions contained in the core human rights treaties,<sup>34</sup> and its equality norm has ‘evolved as a logical progression from previous developments at the international level’.<sup>35</sup> In this sub-section of the report, the rights to equality and non-discrimination in the CRPD are presented, and the obligations stemming from those rights are analysed. Among other sources, this section of the report draws on the interpretation of the CRPD’s equality and non-discrimination norms contained in the CRPD Committee’s General Comment No. 6 (2018).<sup>36</sup>

The CRPD marks a shift away from the individual model of disability towards a social model of disability.<sup>37</sup> According to the social model, impairment can be described as the functional limitation that a particular individual has, whereas disability is conceived of as ‘the loss or limitation of opportunities to take part

28 UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted by UN General Assembly Resolution 2106 on 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

29 The notion of indirect discrimination is included in the definition of discrimination in Article 1 CERD and Article 1 CEDAW, both of which refer to the ‘effect’ of discrimination, which is taken to mean indirect discrimination.

30 See Articles 1(4) and 2(2) CERD and Article 4 CEDAW.

31 Favalli, S. and Ferri, D. (2016), ‘Defining disability in the European Union non-discrimination legislation: Judicial activism and legislative restraints’, *European Public Law*, vol. 22, No. 3, pp. 537–564, at p. 538.

32 Degener T. (2018), General Comment No. 6 of the United Nations Committee on the Rights of Persons with Disabilities, 16 May 2018, Berkeley Comparative Disability Rights – webinar, available at: <https://www.law.berkeley.edu/research/berkeley-comparative-equality-anti-discrimination-law-study-group/our-library/study-group-workshops/>.

33 Degener T. (2018), General Comment No. 6 of the United Nations Committee on the Rights of Persons with Disabilities, 16 May 2018, Berkeley Comparative Disability Rights – webinar, available at: <https://www.law.berkeley.edu/research/berkeley-comparative-equality-anti-discrimination-law-study-group/our-library/study-group-workshops/>.

34 See footnote 16 above.

35 Broderick, A. (2015), *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities*, (Intersentia), p. 42.

36 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6.

37 There is a wealth of literature addressing theoretical models of disability. See, among others, Oliver, M. (2009), *Understanding disability: From theory to practice* (Palgrave, 2nd edition); see also Priestley, M. (1998), ‘Constructions and creations: idealism, materialism and disability theory’, *Disability and Society*, vol. 13, No. 1, pp. 75–94; and Barnes, C. (2012), ‘The social model of disability: valuable or irrelevant?’, in: Watson, N. Roulstone, A. and Thomas, C., *The Routledge Handbook of Disability Studies* (Routledge).

in the normal life of the community on an equal level with others due to physical and social barriers'.<sup>38</sup> During the negotiation sessions leading up to the adoption of the CRPD, States Parties were eager to avoid making reference to the 'pure' social model of disability in the Convention. Broderick states that one of the 'inherent limitations' of a strict version of the social model stems from the fact that it is 'not well disposed to accommodate disadvantages that result directly from an impairment, as opposed to those which arise from a socially-constructed barrier'.<sup>39</sup> The understanding of disability espoused by the Convention is one that is based on the interactional relationship between people with impairments and the wider environment. This has been termed 'a social-contextual understanding of disability'.<sup>40</sup> Consequently, the CRPD recognises that 'disability stems primarily from the failure of the social environment to meet the needs and aspirations of people with impairments'.<sup>41</sup>

During the sessions of the Ad-Hoc Committee, a panel of experts was convened to discuss the concept of disability to be enshrined in the Convention. The panel stated that the aim of the discussion was:

Not to derive an international definition for disability that would be employed as a mechanism for determining who is covered under a disability/human rights convention. Rather, the purpose of examining concepts of disability was to aid in the systematic determination of the Convention's scope, because the viewpoint of what disability is may determine the actual rights that are conferred.<sup>42</sup>

During the negotiation sessions, there was 'fierce debate'<sup>43</sup> regarding the decision as to whether a definition of disability should be included in the final text of the CRPD.<sup>44</sup> Trömel states that 'it was clear from the start of the negotiation process that to try to arrive at an internationally agreed definition of disability would be an almost impossible task'.<sup>45</sup> As Waddington points out, 'the inclusion and setting of a definition was ultimately regarded as too controversial, and was not supported by all parties'.<sup>46</sup>

Favalli and Ferri note that the CRPD 'provides a sort of open-ended conceptualization of disability in the preamble and in Article 1 UNCRPD, whilst Article 2, devoted to definitions, does not mention disability, nor people with disabilities'.<sup>47</sup> Preamble recital (e) of the CRPD recognises that:

38 Barnes C. (1991), *Disabled people in Britain and Discrimination* (Hurst and Co.), p. 2.

39 Broderick, A. (2015), *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities*, (Intersentia), p. 28. See further on this point, J. Morris (1991), *Pride against prejudice: Transforming attitudes to disability – A personal politics of disability* (Women's Press), p. 10.

40 Broderick, A. (2015), *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities*, (Intersentia), p. 77.

41 Waddington, L. and Broderick, A. (2016), 'Disability law and the duty to reasonably accommodate beyond employment: A legal analysis of the situation in EU Member States', report commissioned by the European Commission and the European network of legal experts in gender equality and non-discrimination, p. 38. Available at: <http://www.equalitylaw.eu/>

42 Second Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, New York, 16-27 June 2003, Report of the Committee, UN Doc. A/58/118 & Corr.1, July 2003. Available at: <http://hr-travaux.law.virginia.edu/document/crpd/a58118/nid-1469>.

43 Favalli, S. and Ferri, D. (2016), 'Defining disability in the European Union non-discrimination legislation: Judicial activism and legislative restraints', *European Public Law*, vol. 22, No. 3, pp. 537-564, at p. 544.

44 See further: Broderick, A. (2015), *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities*, (Intersentia), pp. 77-79.

45 Trömel, S. (2009), 'A personal perspective on the drafting history of the United Nations Convention on the Rights of Persons with Disabilities', in: Quinn, G. and Waddington, L. (eds.), *European Yearbook of Disability Law*, vol. 1 (Intersentia), pp. 115-138, at p. 121.

46 Waddington, L. (2013), 'Equal to the task: Re-examining EU equality law in light of the United Nations Convention on the Rights of Persons with Disabilities', *European Yearbook of Disability Law*, vol. 4 (Intersentia), pp. 169-200, at p. 192. See also Trömel, S. (2009), 'A personal perspective on the drafting history of the United Nations Convention on the Rights of Persons with Disabilities', in: Quinn, G. and Waddington, L. (eds.), *European Yearbook of Disability Law*, vol. 1 (Intersentia), pp. 115-138, at pp. 121-122.

47 Favalli, S. and Ferri, D. (2016), 'Defining disability in the European Union non-discrimination legislation: Judicial activism and legislative restraints', *European Public Law*, vol. 22, No. 3, pp. 537-564, at p. 55.

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.

Furthermore, Article 1 of the CRPD, which has been termed a 'non-definition of disability',<sup>48</sup> provides that:

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.<sup>49</sup>

Both the preamble to the Convention and Article 1, therefore, acknowledge 'the interactional nature of the concept of disability', noting 'the role of societal barriers in the process of disablement' as well as 'the relevance of individual impairments' in determining the extent to which a person with a disability can participate in society.<sup>50</sup> Clifford asserts that, as a result of defining disability in this way, the CRPD 'entitles a broad range of people who are vulnerable to discrimination on grounds of disability to protection'.<sup>51</sup>

On the whole, the Convention endorses what the CRPD Committee and others<sup>52</sup> term the 'human rights model of disability'. In the Committee's view, the human rights model of disability 'requires the diversity of persons with disabilities to be taken into account [preamble recital (i)] together with the interaction between individuals with impairments and attitudinal and environmental barriers [preamble recital (e)]'.<sup>53</sup>

The Committee argues that the human rights model recognises disability as a 'social construct'.<sup>54</sup> Moreover, this model acknowledges the fact that persons with disabilities are holders of rights on an equal basis with others and that they are not objects of charity. The human rights model also recognises that 'disability is one of several layers of identity. Hence, disability laws and policies must take the diversity of persons with disabilities into account'.<sup>55</sup>

The CRPD Committee's human rights-based model of disability is complementary to the model of equality embraced by the CRPD, that of inclusive equality.<sup>56</sup> According to the Committee, inclusive equality embraces some of the elements of a substantive model of equality, but 'extends and elaborates on the content of equality' by means of:

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48 Schulze, M. (2010), *Understanding the UN Convention on The Rights of Persons with Disabilities: A Handbook on the Human Rights of Persons with Disabilities*, p. 16, available at: [https://iddccconsortium.net/sites/default/files/resources-tools/files/hi\\_crpd\\_manual\\_sept2009\\_final.pdf](https://iddccconsortium.net/sites/default/files/resources-tools/files/hi_crpd_manual_sept2009_final.pdf).

49 Article 1 CRPD.

50 Broderick, A. (2015), *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities*, (Intersentia), p. 79.

51 Clifford, J. (2011), 'The UN Disability Convention and its impact on European equality law', *The Equal Rights Review*, vol. 6, p. 11-25, at p. 12.

52 Broderick, A. (2015), *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities*, (Intersentia), p. 79. Other authors highlight the CRPD's 'disability human rights paradigm' – see Stein, M.A. and Stein, P.J.S. (2007), 'Beyond Disability Civil Rights', *Hastings Law Journal*, vol. 58, pp. 1203-1240, at p. 1224. See also Degener, T. (2017), 'A new human rights model of disability', in: Della Fina, V., Cera R. and Palmisano, G. (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: A commentary* (Springer), pp. 41-59.

53 UN Committee on the Rights of Persons with Disabilities (2013), Individual Communication, *S.C. v. Brazil* (2014), UN. Doc. CRPD/C/12/D/10/2013, para. 6.3.

54 UN Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 9.

55 Committee on the Rights of Persons with Disabilities, General Comment No. 6 on equality and non-discrimination (2018), UN Doc. CRPD/C/GC/6, para. 9.

56 For more information, see Degener, T. (2018), General Comment No. 6 of the United Nations Committee on the Rights of Persons with Disabilities, 16 May 2018, Berkeley Comparative Disability Rights – webinar, available at: <https://www.law.berkeley.edu/research/berkeley-comparative-equality-anti-discrimination-law-study-group/our-library/study-group-workshops/>. See also: Committee on the Rights of Persons with Disabilities, General Comment No. 6 on equality and non-discrimination (2018), UN Doc. CRPD/C/GC/6, paras. 8-11.

- a fair redistributive dimension: to address socioeconomic disadvantages;
- a recognition dimension: to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality;
- a participative dimension: to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and
- an accommodating dimension: to make space for difference as a matter of human dignity.<sup>57</sup>

The human rights model of disability and this ‘new’<sup>58</sup> model of inclusive equality underpin Article 5 CRPD, which contains the rights to equality and non-discrimination, and Article 6, which contains the prohibition of multiple and intersectional discrimination against women and girls. Article 5 is broken into four subparagraphs, each dealing with a different aspect of the equality/non-discrimination norm: i) equality before and under the law; and equal protection and benefit of the law; ii) equal and effective legal protection against disability-based discrimination; iii) reasonable accommodation; and iv) positive action.

According to the CRPD Committee, ‘promoting equality and tackling discrimination’ are considered to be ‘cross-cutting obligations of immediate realization’.<sup>59</sup> The objective of Article 5 CRPD is to ensure the exercise and enjoyment by persons with disabilities of all human rights without any discrimination, as well as to guarantee equality of opportunities and *de facto* equality.

The definition of discrimination contained in the CRPD is a broad one. Article 2 of the Convention notes that ‘discrimination on the basis of disability’ encompasses:

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.<sup>60</sup>

The wording of the definition above is mirrored in that employed in other human rights treaties at the international level, notably the definitions contained in CERD<sup>61</sup> and CEDAW.<sup>62</sup> Although neither direct nor indirect discrimination, nor harassment, are explicitly mentioned in the wording of the Convention itself, the CRPD Committee draws attention to the fact that ‘international human rights practice identifies four main forms of discrimination, which can occur individually or simultaneously’, namely: i) direct discrimination; ii) indirect discrimination; iii) denial of reasonable accommodation; and iv) harassment.<sup>63</sup>

The CRPD Committee defines ‘direct discrimination’ as occurring when ‘persons with disabilities are treated less favourably than other persons because of a different personal status in a similar situation for

57 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 11.

58 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 11.

59 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 12.

60 For information on the drafting history of this article, see, Trömel, S. (2009), ‘A personal perspective on the drafting history of the United Nations Convention on the Rights of Persons with Disabilities’, in: Quinn, G. and Waddington, L. (eds.), *European Yearbook of Disability Law*, vol. 1 (Intersentia), pp. 115-138. See also Schulze, M. (2010), *Understanding the UN Convention on The Rights of Persons with Disabilities: A Handbook on the Human Rights of Persons with Disabilities*, available at: [https://iddconsortium.net/sites/default/files/resources-tools/files/hi\\_crpd\\_manual\\_sept2009\\_final.pdf](https://iddconsortium.net/sites/default/files/resources-tools/files/hi_crpd_manual_sept2009_final.pdf).

61 Article 1(1) CERD defines the term ‘racial discrimination’ as: ‘Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life’.

62 Article 1 CEDAW defines discrimination against women as: ‘Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’.

63 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 18.

a reason related to a prohibited ground'.<sup>64</sup> It includes 'detrimental acts or omissions based on prohibited grounds where there is no comparable similar situation'.<sup>65</sup> Moreover, the Committee has stated that the motive or intention of the discriminating party 'is not relevant to a determination of whether discrimination has occurred'.<sup>66</sup>

According to the CRPD Committee, 'indirect discrimination' under the CRPD denotes situations in which 'laws, policies or practices appear neutral at face value but have a disproportionate negative impact on a person with a disability'.<sup>67</sup> According to Waddington, the focus of indirect discrimination lies 'on the adverse impact on persons with disabilities of the action in question, rather than on the intention or purpose behind the action'.<sup>68</sup>

Notably, the definition of disability-based discrimination in the CRPD goes beyond that contained in previous human rights treaties, since it includes 'all forms of discrimination, including denial of reasonable accommodation as a distinct form of discrimination'.<sup>69</sup> Article 2 CRPD defines 'reasonable accommodation' as entailing:

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.<sup>70</sup>

Article 5(3) CRPD requires States Parties to ensure that reasonable accommodations are provided to persons with disabilities, by both public and private entities. Since the duty to reasonably accommodate forms part of the non-discrimination norm, it is an obligation having immediate effect,<sup>71</sup> and States Parties are required expressly to recognise the unjustified denial of reasonable accommodation as discrimination.<sup>72</sup>

It is significant to point out that the material scope of the CRPD is very broad, since the duty to prohibit discrimination and provide reasonable accommodation 'spans all human rights'.<sup>73</sup> Article 2 of the Convention requires the prohibition of discrimination on the basis of disability with regard to both civil and political rights, as well as economic, social and cultural rights. Thus, 'a wide variety of social actors will be required to modify existing policies, practices or environments in order to ensure that persons with disabilities can participate, and be included in, mainstream society'.<sup>74</sup> This covers state organs, private employers, healthcare providers, providers of goods and services and education providers, among others.<sup>75</sup>

64 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 18(a).

65 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 18(a).

66 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 18(a).

67 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 18(b).

68 Waddington, L. (2013), 'Equal to the task: Re-examining EU equality law in light of the United Nations Convention on the Rights of Persons with Disabilities', *European Yearbook of Disability Law*, vol. 4 (Intersentia), pp. 169-200, at p. 189.

69 Article 2 CRPD. Emphasis added. The classification of an unjustified denial of reasonable accommodation as a form of discrimination had already been provided for in secondary treaty documents: see Committee on Economic, Social and Cultural Rights General Comment No. 5 (1994) on persons with disabilities, U.N. Doc E/1995/22, para. 9.

70 Article 2 CRPD.

71 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 23.

72 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 67(d). See the definition of 'harassment' in para. 18(d) of the Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on Equality and Non-Discrimination, UN Doc. CRPD/C/GC/6.

73 Waddington, L. and Broderick, A. (2017), *Promoting equality and non-discrimination for persons with disabilities*, report commissioned by the Council of Europe, p. 7. Available at: <https://rm.coe.int/168070d7f6>.

74 Broderick, A. (2017), Report on reasonable accommodation under the CRPD: the Georgian context, p. 15, available at: <http://ewmi-prolog.org/images/files/5816RepotonReasonableAcommodationinGeorgiaENG.pdf>.

75 Broderick, A. (2017), Report on reasonable accommodation under the CRPD: the Georgian context, p. 15, available at: <http://ewmi-prolog.org/images/files/5816RepotonReasonableAcommodationinGeorgiaENG.pdf>.

On the nature of the reasonable accommodation duty itself, the CRPD Committee has clarified that it is an ‘individualised’, ‘reactive’ and ‘*ex nunc* duty’ that is ‘applicable from the moment a request for accommodation is received’.<sup>76</sup> Reasonable accommodation ‘requires the duty bearer to enter into dialogue with the individual with a disability’, and it is ‘not limited to situations in which the person with a disability has asked for an accommodation or in which it could be proved that the alleged duty bearer was actually aware that the person in question had a disability’.<sup>77</sup> The duty to reasonably accommodate differs from the CRPD’s accessibility obligations,<sup>78</sup> which usually require ‘compliance with set standards, e.g. installing ramps or providing certain information in Braille or large print’.<sup>79</sup> Compliance with accessibility standards is intended to ‘ensure overhaul of the environment in general’ and to ‘ensure the transformation of social structures’<sup>80</sup> in a progressive manner, unlike the immediate duty of reasonable accommodation.

The duty to reasonably accommodate persons with disabilities under the CRPD is not absolute; rather, it is subject to the limitation that a duty bearer is not required to provide an accommodation where to do so would result in a ‘disproportionate or undue burden’.<sup>81</sup> Therefore, if there are two (or more) accommodation options, both of which can achieve the same result, the duty bearer may opt for the less burdensome accommodation’.<sup>82</sup> According to the drafting history of the CRPD, the concepts of ‘disproportionate’ and ‘undue’ burden would appear to be interchangeable terms. The CRPD Committee also refers interchangeably to the terms in its individual communications,<sup>83</sup> and the Committee’s General Comment No. 6 confirms the fact that ‘both terms should be considered synonyms insofar as they refer to the same idea’, setting a limit to the duty.<sup>84</sup> Potential factors to be considered under the limitation to the accommodation duty include financial costs; resources available (including public subsidies); the size of the accommodating party (in its entirety); the effect of the modification on the institution or the enterprise; third-party benefits; negative impacts on other persons; and reasonable health and safety requirements.<sup>85</sup>

Other than specifying that a denial of reasonable accommodation is a form of discrimination, the CRPD itself does not elaborate further on the forms of discrimination to be prohibited by States Parties. However, as outlined above, ‘harassment’ is conceived of by the CRPD Committee as a form of discrimination that is implicitly covered under Article 2 CRPD. The Committee defines this form of discrimination as one that arises when ‘unwanted conduct related to disability or other prohibited grounds 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’.<sup>86</sup>

76 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on Equality and Non-Discrimination, UN Doc. CRPD/C/GC/6, para. 24(b).

77 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on Equality and Non-Discrimination, UN Doc. CRPD/C/GC/6, para. 24(b).

78 See Committee on the Rights of Persons with Disabilities (2014), General Comment No. 2 on Article 9 (Accessibility), UN Doc. CRPD/C/GC/2.

79 Waddington, L. and Broderick, A. (2016), *Disability law and the duty to reasonably accommodate beyond employment: A legal analysis of the situation in EU Member States*, report commissioned by the European Commission and the European network of legal experts in gender equality and non-discrimination, p. 45. Available at: <http://www.equalitylaw.eu/>.

80 Broderick, A. (2017), Report on reasonable accommodation under the CRPD: the Georgian context, p. 20, available at: <http://ewmi-prolog.org/images/files/5816RepotonReasonableAcommodationinGeorgiaENG.pdf>.

81 Article 2 CRPD.

82 Waddington, L. and Broderick, A. (2017), *Promoting equality and non-discrimination for persons with disabilities*, report commissioned by the Council of Europe, p. 17. Available at: <https://rm.coe.int/168070d7f6>.

83 See paras. 10.5 and 10.6 of Committee on the Rights of Persons with Disabilities (2014), individual communication, *Marie-Louise Jungelin (represented by the Swedish Association of Visually Impaired Youth (US) and the Swedish Association of the Visually Impaired (SRF)) v. Sweden*, UN Doc. No. 5/2011.

84 Committee on the Rights of Persons with Disabilities, General Comment No. 6 on equality and non-discrimination (2018), UN Doc. CRPD/C/GC/6, para. 25(b).

85 See Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 26(e). See also Broderick, A. (2015), *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (Intersentia), pp. 163-174.

86 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 18(d).

In addition to the foregoing forms of discrimination, the CRPD Committee has confirmed that the definition of ‘discrimination on the basis of disability’ can be interpreted as including not only those who have an impairment themselves, but also those who are discriminated against on account of their association with a person with a disability, or those who encounter discrimination as a result of a perceived impairment or who have multiple disabilities.<sup>87</sup> The Committee has further noted that discrimination ‘on the basis of disability’ can arise with regard to ‘persons who have a disability at present, who have had a disability in the past [or] who have a disposition to a disability that lies in the future’.<sup>88</sup>

Notably, the Committee does not mention an instruction to discriminate (namely, where one individual gives another individual an instruction to discriminate) as a prohibited form of discrimination in its General Comment No. 6.

States Parties are required expressly to prohibit multiple and intersectional discrimination.<sup>89</sup> It is noteworthy that the CRPD is the first binding human rights agreement to explicitly contain a prohibition of multiple and intersectional discrimination. While Article 6 CRPD refers only to ‘multiple discrimination’, the CRPD Committee reads a prohibition of intersectional discrimination into the Convention’s provisions.<sup>90</sup> The two forms of discrimination are not identical, and the CRPD Committee distinguishes between them in its General Comment No. 6 on equality.<sup>91</sup> In that regard, the Committee states that ‘multiple discrimination’ constitutes ‘a situation where a person can experience discrimination on two or several grounds, in the sense that discrimination is compounded or aggravated’. Intersectional discrimination, on the other hand, ‘refers to a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable and thereby expose relevant individuals to unique types of disadvantage and discrimination’.<sup>92</sup>

Article 6 CRPD is a cross-cutting article, which seeks to combat multiple and intersectional discrimination against women and girls with disabilities. Furthermore, preamble recital (p) expresses concern about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status. The Committee notes that ‘intersectional discrimination’ occurs when a person with a disability or associated to disability suffers discrimination of any form on the basis of disability, combined with, colour, sex, language, religion, ethnic, gender or other status.<sup>93</sup> Notably, according to the Committee, intersectional discrimination can occur as direct or indirect discrimination, denial of reasonable accommodation or harassment.<sup>94</sup>

In addition to prohibiting the above types of discrimination, Article 5 CRPD allows ‘specific measures’ – in other words, positive (or affirmative) action, involving both temporary and permanent measures, the latter being necessary in cases of severe (intellectual) impairments.<sup>95</sup> Barmes describes positive action as activity ‘designed to improve the position, in terms of the distribution of benefits or dis-benefits,

87 Committee on the Rights of Persons with Disabilities (2011), Concluding Observations on the initial report of Spain, UN Doc. CRPD/C/ESP/CO/1, para. 20.

88 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 20.

89 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 68(d).

90 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 36.

91 It is noteworthy that, in the decision of the Committee on the Elimination of all Forms of Discrimination against Women, individual communication, *R.P.B. v. Philippines* (2014), UN Doc. CEDAW /C/57/D/34/2011, the Committee also referred to the CRPD in the context of gender and disability stereotyping in a rape trial.

92 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 19.

93 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 19.

94 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 19.

95 Article 5(4) CRPD. Committee on the Rights of Persons with Disabilities, General Comment No. 6 on equality and non-discrimination (2018), UN Doc. CRPD/C/GC/6, para. 28.

of a given social group or sub-group (or of several such groups), on the basis that its members suffer systematic disadvantage in that regard'.<sup>96</sup> Positive action clauses can be found in several provisions in international human rights treaties, such as in Article 1 CERD<sup>97</sup> and Article 4 CEDAW.<sup>98</sup> Unlike the CRPD, CERD and CEDAW allow for positive action in the form of 'special measures'. In the disability context, the term 'special' has sometimes had a derogatory meaning, as pointed out by the Working Group of the Ad-Hoc Committee involved in the drafting process of the CRPD,<sup>99</sup> and this is the reason for which the term 'specific measures' was adopted in the CRPD.

The UN Committee on Economic, Social and Cultural Rights (UNCESCR) had already recognised, in its General Comment No. 5 (1994), that positive action is not to be regarded as discrimination against those not benefitting from the measure adopted,<sup>100</sup> and the CRPD Committee has confirmed this, noting that positive or affirmative measures 'aim to accelerate or achieve *de facto* equality of persons with disabilities'.<sup>101</sup>

Article 5(4) of the CRPD is aimed at equalising opportunities and accelerating *de facto* equality for people with disabilities. It is well established that positive action is usually temporary in nature. Cook states that:

generally speaking, temporary special measures are time-limited positive measures intended to enhance opportunities for historically and systematically disadvantaged groups, with a view to bringing group members into the mainstream of political, economic, social, cultural and civil life.<sup>102</sup>

There are, however, some instances in which ongoing or permanent positive action measures are deemed necessary under the CRPD. This may arise, for instance, in the context of persons with severe intellectual impairments.

The CEDAW Committee has stated that positive action 'encompasses a wide variety of legislative, executive, administrative and other regulatory instruments, policies and practices'.<sup>103</sup> The CRPD Committee gives various examples of the types of positive measures that States can take to ensure substantive equality as follows: outreach and support programmes, allocation and/or reallocation of resources; targeted recruitment; hiring and promotion; quota systems, advancement and empowerment measures; and respite

96 Barmes, L. (2009), 'Equality law and experimentation: The positive action challenge', *Cambridge Law Journal*, vol. 68, pp. 623-654, at p. 623.

97 Article 1(4) CERD provides that: 'Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved'.

98 Article 4 CEDAW provides that (1): 'Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved'; and (2): 'Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory'.

99 Footnote 28, Report of the Working Group to the Ad Hoc Committee, Annex I: 'Draft articles for a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities', available at: <https://www.un.org/development/desa/disabilities/resources/ad-hoc-committee-on-a-comprehensive-and-integral-international-convention-on-the-protection-and-promotion-of-the-rights-and-dignity-of-persons-with-disabilities.html>.

100 Committee on Economic, Social and Cultural Rights (1994), General Comment No. 5, UN Doc E/1995/22, para. 18.

101 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on Equality and Non-Discrimination, UN Doc. CRPD/C/GC/6, para. 28. Italics added.

102 Cook R. (2003), 'Obligations to adopt temporary special measures under the Convention on the Elimination of All Forms of Discrimination Against Women', in: Boerefijn, I., Coomans, F., Goldschmidt, J., Holtmaat, R. and Wolleswinkel, R. (eds.), *Temporary special measures: Accelerating de facto equality of women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (Intersentia), p. 119.

103 Committee on the Elimination of All Forms of Discrimination Against Women (2004), General recommendation 25: Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, UN Doc. HRI/GEN/1/Rev. 7 at p. 282, para. 22.

care and technological aids.<sup>104</sup> An example of a temporary specific measure in the disability context is 'setting and reporting on goals and timetables for the advancement of people with disabilities in social and political institutions or helping persons with disabilities to gain further educational qualifications'. In addition, 'a targeted recruitment campaign raising awareness about employment opportunities amongst persons with disabilities would qualify as a type of temporary specific measure under the CRPD'.<sup>105</sup>

With regard to the general obligations of States Parties to the CRPD, as with all human rights under the core international treaties, States Parties to the CRPD have an obligation to respect, protect and fulfil the right of all persons with disabilities to non-discrimination and equality. In that regard, States Parties must refrain from any action that discriminates against persons with disabilities. In addition, States Parties are required to modify or abolish existing laws, regulations, customs and practices that constitute discrimination.<sup>106</sup> Furthermore, the CRPD Committee calls for the adoption of enforcement measures in order to ensure the effective enjoyment of the rights to equality and non-discrimination. In that regard, the Committee urges States Parties to enact 'specific rules relating to evidence and proof to ensure that stereotyped attitudes about the capacity of persons with disabilities do not result in victims of discrimination being inhibited in obtaining redress'.<sup>107</sup> In particular, the Committee calls for procedural rules which 'shift the burden of proof in civil procedures from the claimant to the respondent in cases where there are facts from which it may be presumed that there has been discrimination'.<sup>108</sup> The Committee has also asked States Parties to ensure that the burden of proof 'rests with the duty bearer who claims that his or her burden would be disproportionate or undue' in claims for a reasonable accommodation. In addition to laying down procedural rules on the burden of proof, the Committee recommends, in its General Comment and Concluding Observations, that States Parties put in place 'effective, proportionate and dissuasive sanctions'<sup>109</sup> in respect of a breach of the right to equality as well as 'adequate remedies'.<sup>110</sup> The Committee recommends that States Parties review the remedies provided for by law to ensure that complainants are able to seek injunctions and can receive damages once their claims for discrimination have been proven in court.<sup>111</sup>

Importantly, in the implementation of all Convention provisions, States Parties must consult with and actively involve persons with disabilities through their representative organisations.<sup>112</sup>

### 3 Significance of the CRPD's understanding of equality for the UN legal order

The inclusive equality model which underpins the CRPD has great relevance for the understanding of equality contained in the UN legal order. Degener underlines the fact that 'the most obvious proof' that the CRPD's equality concept extends the existing international concept of equality is the definition of discrimination

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104 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on Equality and Non-Discrimination, UN Doc. CRPD/C/GC/6, para. 28.

105 Examples drawn from Broderick, A. (2015), *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities* (Intersentia), p. 129.

106 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on Equality and Non-Discrimination, UN Doc. CRPD/C/GC/6, para. 30.

107 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on Equality and Non-Discrimination, UN Doc. CRPD/C/GC/6, para. 31(e).

108 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on Equality and Non-Discrimination, UN Doc. CRPD/C/GC/6, para. 73(i).

109 Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Luxembourg, UN Doc. CRPD/C/LUX/CO/1, paras. 10-11; Committee on the Rights of Persons with Disabilities, General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 31(f).

110 Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Austria, UN Doc. CRPD/C/AUT/CO/1, para. 13. Committee on the Rights of Persons with Disabilities, General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 31(f).

111 Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Belgium, UN Doc. CRPD/C/BEL/CO/1, para. 12.

112 Article 4(3) and Article 33(3) of the UN Convention emphasise the important role that organisations of persons with disabilities play in the implementation and monitoring of the Convention.

contained in Article 2 CRPD, particularly the fact that the ‘denial of reasonable accommodation is now officially recognized as a form of discrimination in international law’.<sup>113</sup> Degener claims that the explicit recognition of multidimensional discrimination and, thus, intersectionality, underpins inclusive equality as well as the fact that ‘none of the other human rights treaties emphasize human dignity as much as the CRPD does’.<sup>114</sup> Degener also refers to the fact that the CRPD recognises that combating discrimination requires ‘group-oriented’ (as evidenced by its accessibility obligations contained in Article 9) as well as ‘individual-oriented measures’ (contained in Article 5 CRPD).<sup>115</sup> Finally, the concept of inclusive equality espoused by the CRPD ‘is based on a clear understanding that both sets of human rights, economic, cultural and social rights and civil and political rights are interrelated and indivisible’.<sup>116</sup>

The meaning of equality contained in the CRPD holds great significance for the application of the non-discrimination norm in international human rights law. The spirit of inclusion underpinning the equality norm in the CRPD promotes a greater understanding of the barriers faced by marginalised groups and those under-represented in all areas of life. Degener claims that, if inclusive equality becomes the ‘new’ model of equality, as the CRPD Committee terms it,<sup>117</sup> then ‘it is of utmost importance, to ensure that it is widely applied and not restricted to disabled persons only’ and that ‘it would be contrary to the harmonization of international human rights law as well as to the mainstreaming of disability into human rights law if inclusive equality were not applied broadly’.<sup>118</sup> This aligns with the synergistic approach to human rights elaborated by the Office of the United Nations High Commissioner for Human Rights (OHCHR), whereby all of the international human rights treaties are mutually re-enforcing and that ‘rather than being separate, free-standing treaties, the treaties complement each other, with a number of principles binding them together’.<sup>119</sup>

Having formed a clear picture of the equality and non-discrimination norms in the CRPD, the next section of this report examines the EU context and the manner in which disability equality is addressed and disability discrimination is combated at the EU level.

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- 113 Degener, T. (2018), General Comment No. 6 of the United Nations Committee on the Rights of Persons with Disabilities, 16 May 2018, Berkeley Comparative Disability Rights – webinar, at: <https://www.law.berkeley.edu/research/berkeley-comparative-equality-anti-discrimination-law-study-group/our-library/study-group-workshops/>.
- 114 Degener, T. (2018), General Comment No. 6 of the United Nations Committee on the Rights of Persons with Disabilities, 16 May 2018, Berkeley Comparative Disability Rights – webinar, at: <https://www.law.berkeley.edu/research/berkeley-comparative-equality-anti-discrimination-law-study-group/our-library/study-group-workshops/>.
- 115 Degener, T. (2018), General Comment No. 6 of the United Nations Committee on the Rights of Persons with Disabilities, 16 May 2018, Berkeley Comparative Disability Rights – webinar, at: <https://www.law.berkeley.edu/research/berkeley-comparative-equality-anti-discrimination-law-study-group/our-library/study-group-workshops/>.
- 116 Degener, T. (2018), General Comment No. 6 of the United Nations Committee on the Rights of Persons with Disabilities, 16 May 2018, Berkeley Comparative Disability Rights – webinar, at: <https://www.law.berkeley.edu/research/berkeley-comparative-equality-anti-discrimination-law-study-group/our-library/study-group-workshops/>.
- 117 Committee on the Rights of Persons with Disabilities, General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 11.
- 118 Degener, T. (2018), General Comment No. 6 of the United Nations Committee on the Rights of Persons with Disabilities, 16 May 2018, Berkeley Comparative Disability Rights – webinar, at: <https://www.law.berkeley.edu/research/berkeley-comparative-equality-anti-discrimination-law-study-group/our-library/study-group-workshops/>.
- 119 Office of the High Commissioner for Human Rights (2005), *The United Nations Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies*, p. 20, available at: <http://www2.ohchr.org/english/bodies/docs/OHCHR-FactSheet30.pdf>.

## Section II – The EU context: addressing disability equality and combating disability discrimination at EU level

### 4 The EU's competence to address disability equality and non-discrimination: the Treaties, the Charter of Fundamental Rights of the EU and the EU's disability policy

For most of the history of the EU,<sup>120</sup> the founding Treaties contained no explicit reference to disability, and therefore no disability-specific competence existed.<sup>121</sup> Nevertheless, occasional references to disability and to disabled people could be found in a handful of legal instruments and soft law initiatives, although these did not initially amount to an attempt to develop a broad disability policy or programme, nor did these initiatives focus on disability equality or non-discrimination. From a competence-related perspective, the major breakthrough occurred with the Amsterdam Treaty, which came into force in 1999 and which included the first explicit mention of disability. The most significant reference to disability occurred in the context of a general non-discrimination article,<sup>122</sup> which is now found in Article 19 of the Treaty on the Functioning of the European Union (TFEU). This article provides the EU with the competence to take action to combat discrimination on a number of enumerated grounds, including disability. Such action can be taken in all the fields in which the EU has competence. The article provided the legal basis for the Employment Equality Directive, which prohibits not only disability discrimination, but also discrimination on the grounds of religion or belief, age and sexual orientation with regard to employment, and for a 2008 proposal for a directive<sup>123</sup> covering, *inter alia*, access to goods and services, which again addressed disability amongst a number of other grounds. Article 19 TFEU also provided the legal basis for the Racial Equality Directive,<sup>124</sup> which contains many provisions which are comparable to those found in the Employment Equality Directive.

The Lisbon Treaty, which came into force in 2009, introduced some further important changes with regard to disability. Article 10 TFEU contains a kind of mainstreaming provision, which provides that in 'defining and implementing its policies and activities, the Union shall aim to combat discrimination based on [...] disability'. The Lisbon Treaty also changed the status of the EU Charter of Fundamental Rights, which had first been adopted in 2003, at the same time as the Nice revision to the EU Treaties. Under Article 6(1) of the Treaty on the European Union (TEU), the Charter now has the same legal value as the Treaties, and the EU is obliged to comply with the Charter in all its activities, as are the Member States when they are implementing EU law. The Charter itself specifically addresses the rights of people with disabilities in a number of articles. Under Article 21, discrimination on any ground, including disability, shall be prohibited, whilst under Article 26, the Union recognises and respects the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community. The latter article is intended to guide the EU

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120 As well as its predecessors, the EC and EEC.

121 For a much more detailed examination of the evolution of the EC/EU's competences with regard to disability, and the development of the EC/EU's disability policy, see: Waddington, L. (2006), *From Rome to Nice in a wheelchair, The Development of a European disability policy* (Europa Law Publishing). Parts of this sub-section draw on Waddington, L. (2011), 'The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A story of exclusive and shared competences', *Maastricht Journal of European and Comparative Law*, vol. 18, issue 4, pp. 431-453.

122 Waddington, L. (1999), 'Article 13 EC: Mere rhetoric or a harbinger of change?', in: Dashwood, A. and Ward, A. (eds.), *The Cambridge Yearbook of European Legal Studies*, (Hart), pp. 175-198 and Bell, M. (1999), 'The New Article 13 EC Treaty: A Sound basis for European anti-discrimination law?', *Maastricht Journal of European and Comparative Law*, vol. 6, issue 1, pp. 5-23.

123 European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM (2008) 425. Available at: <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX%3A52008PC0426>.

124 Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (*Racial Equality Directive*), OJ L 180, 19.7.2000, pp. 22-26. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0043&from=EN>.

institutions when they adopt legislation, but it does not impose any obligation on them to act and is not directly enforceable, as was highlighted by the CJEU in *Glatzel*.<sup>125</sup>

The EU's overall disability strategy, as set out in the document 'The European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe',<sup>126</sup> pays specific attention to issues of equality and non-discrimination. Equality is one of the eight areas for action by the EU and the Member States, as identified in the Strategy. The Strategy foresees a two-pronged approach by the European Commission to promoting the equal treatment of people with disabilities, which involves 'using existing EU legislation to provide protection from discrimination, and implementing an active policy to combat discrimination and promote equal opportunities in EU policies'.<sup>127</sup> The Strategy also foresees that the Commission will ensure that the Employment Equality Directive is 'fully implemented'.<sup>128</sup>

## 5 The Employment Equality Directive

As noted in the introduction to this report, the Employment Equality Directive can be regarded as the centrepiece in the EU's body of legislation on disability, and it is certainly the key EU instrument for addressing disability discrimination. The following sub-sections of the report will introduce some of the key provisions in the directive and will lay the ground for a further examination of the provisions. A comparison with the CRPD will be presented in section III of this report.<sup>129</sup>

### 5.1 The definition of disability

Whilst the directive prohibits discrimination on the grounds of disability, it does not define the concept of disability, or indeed any of the other protected grounds. In the context of disability, this has led to a number of preliminary references to the CJEU in which national courts have asked for guidance on how to interpret the concept of disability. The first case to reach the Court on this matter (before the CRPD was concluded by the EU) was *Chacón Navas*.<sup>130</sup> This 2006 case concerned a woman who, as a result of illness, had not been able to work for her employer for some time and was dismissed after a period of absence. Ms Chacón Navas challenged the dismissal, *inter alia* on the grounds that it was incompatible with the Employment Equality Directive. The national court referred two questions to the CJEU, in essence asking whether the provision of the directive which prohibits disability discrimination also included within its protective scope a worker who had been dismissed solely because she was sick. The court also asked if, alternatively, sickness could be regarded as an additional ground of protection under the directive.

In response, the Court stated that the Employment Equality Directive was designed to combat employment discrimination, and the Court defined disability in that context as 'a limitation which results in particular

125 Case C 356/12, *Glatzel*, EU:C:2014:350, para. 78.

126 The European Disability Strategy 2010-2020: A renewed commitment to a barrier-free Europe, Brussels 15.11.2010, COM(2010) 636 final.

127 The European Disability Strategy 2010-2020: A renewed commitment to a barrier-free Europe, Brussels 15.11.2010, COM(2010) 636 final, p. 6.

128 The European Disability Strategy 2010-2020: A renewed commitment to a barrier-free Europe, Brussels 15.11.2010, COM(2010) 636 final. In light of this commitment, the Commission published a report on, *inter alia*, the implementation of the Employment Equality Directive in January 2014. Report from the Commission to the European Parliament and the Council, Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive'), SWD(2014) 5 final, Brussels, 17.1.2014, COM(2014) 2 final.

129 This section of the report draws on text from a number of other publications: Waddington, L. (2015), 'Fine-tuning non-discrimination law: Exceptions and justifications allowing for different treatment on the ground of disability', *International Journal of Discrimination and the Law*, vol. 15, Nos. 1-2, pp. 11-37, at p.11; Waddington, L. (2013), 'Equal to the task? Re-examining EU equality law in light of the United Nations Convention on the Rights of Persons with Disabilities', in: Waddington, L., Quinn, G. and Flynn, E. (eds.), *European Yearbook of Disability Law*, vol. 4 (Intersentia), pp. 169-200, at p. 169; and Muir, E. and Waddington, L. (2018), 'Commentary on the Employment Equality Directive (Directive 2000/78/EC)', in: Edoardo Ales, E., Bell, M., Deinert, O. and Robin-Olivier, S., *International and European labour law: A commentary* (Nomos).

130 Case C-13/05 *Chacón Navas v. Eures Colectividades SA*, ECLI:EU:C:2006:456.

from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'.<sup>131</sup> For any limitation to be regarded as a 'disability', 'it must be probable that it will last for a long time'.<sup>132</sup> The Court also held that, for the purposes of the directive, 'disability' is different from 'sickness',<sup>133</sup> and there was 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'.<sup>134</sup> The Court also held that sickness could not be added to the list of grounds covered by the directive, since it was not explicitly mentioned in the directive or the EC Treaty (now TFEU).<sup>135</sup>

The definition developed by the Court in *Chacón Navas* was based on the individual or medical model of disability, defined above in section I of this report. According to the definition developed by the Court, the cause of the disadvantage (or the 'limitation') was the 'impairment' which the individual had, and it was the 'impairment' which hindered participation in professional life. Therefore, the problem lay in the impaired individual and not in the reaction of society to the impairment or structures in society. As can be seen from the discussion in section I of this report, such an approach is not in line with the CRPD.

It was only in 2013, after the EU had become a party to the CRPD, that the CJEU was again asked to reflect on the concept of disability in the Employment Equality Directive in the case of *HK Danmark (Ring and Skouboe Werge)*.<sup>136</sup> Like *Chacón Navas*, this case concerned individuals who had been absent from work and on sick leave, and who were subsequently dismissed. The advocate general therefore noted in her Opinion that the question that lay at the 'heart' of the preliminary ruling proceedings was:

when is there a disability within the meaning of Directive 2000/78/EC [...] and how is the concept of disability to be distinguished from that of sickness?<sup>137</sup>

Ms Ring and Ms Skouboe Werge both argued that they had a disability and were, consequently, protected by the Danish anti-discrimination law,<sup>138</sup> which transposed the Employment Equality Directive. In response, their former employers claimed that both workers were not disabled within the meaning of the Employment Equality Directive, since 'the only incapacity that affects them is that they are not able to work full-time'.<sup>139</sup>

The Danish court submitted several preliminary questions to the CJEU. The most elaborate set of questions related to the concept of disability, and essentially sought clarification as to the meaning of this concept in light of the *Chacón Navas* judgment. In responding to these questions, the CJEU explicitly took account of the CRPD. Drawing closely on Article 1 CRPD, the Court held that the concept of 'disability' must be understood as:

a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.<sup>140</sup>

The Court has subsequently repeated this definition in a number of cases concerning the Employment Equality Directive, and has provided additional details, for example on the need for the limitation to be

131 Case C-13/05 *Chacón Navas v. Eures Colectividades SA*, para. 43.

132 Case C-13/05 *Chacón Navas v. Eures Colectividades SA*, para. 45.

133 Case C-13/05 *Chacón Navas v. Eures Colectividades SA*, para. 44.

134 Case C-13/05 *Chacón Navas v. Eures Colectividades SA*, para. 46.

135 Case C-13/05 *Chacón Navas v. Eures Colectividades SA*, paras. 55-57.

136 Joined Cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Jette Ring v. Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (Ring and Skouboe Werge)* ECLI:EU:C:2013:222.

137 Opinion of Advocate General Kokott in Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)* ECLI:EU:C:2012:77, para. 1. Footnotes omitted from quotation.

138 Law No. 1417 amending the law on the prohibition on the labour market.

139 Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, para. 24.

140 Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, para. 38.

long-term.<sup>141</sup> The compatibility of this definition with the CRPD, and the way the CJEU applies it in its case law, is examined in section III.7.

## 5.2 The definition of discrimination

The Employment Equality Directive defines four kinds of action as discrimination in Article 2: direct discrimination; indirect discrimination; harassment; and an instruction to discriminate.

### 5.2.1 Direct discrimination (Article 2(2)(a))

Under the directive, direct discrimination involves a difference of treatment based on the disability of the person. In other words, the concept of ‘direct discrimination’ encompasses measures that explicitly refer to or target disability. The definition of direct discrimination in the directive places particular emphasis on the choice of comparator. An investigation into the existence of direct discrimination therefore requires drawing a parallel between the treatment of the person bringing the claim and someone in a ‘comparable situation’. Such comparator may be present, past or hypothetical. Under the directive, direct discrimination is strictly prohibited, with little possibility of escaping the prohibition.<sup>142</sup>

### 5.2.2 Indirect discrimination (Article 2(2)(b))

Indirect discrimination occurs under the directive when ‘an apparently neutral provision, criterion or practice’ would put persons having a disability at a particular disadvantage compared with other persons. A ‘provision, criterion or practice’ is ‘apparently neutral’ where it does not explicitly refer to or target disability. Nevertheless, in practice, such a ‘provision, criterion or practice’ is more likely to disadvantage (or does in fact disadvantage) persons with a disability (or persons with another protected characteristic) than other persons. It is sufficient if only a sub-group of members of a group covered by EU non-discrimination law are (potentially) disadvantaged, e.g. if only people with a visual impairment are (potentially) disadvantaged by the measure, rather than all disabled people.<sup>143</sup>

A measure which would otherwise amount to indirect discrimination is permissible if it is ‘objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’.<sup>144</sup> This implies that the measure in question must not go beyond what is necessary to achieve the aim pursued.<sup>145</sup> Each of these elements must be considered individually, and all elements of the test must be satisfied if a measure which would otherwise amount to indirect discrimination is to be justified.

Lastly, under the Employment Equality Directive, a measure which would otherwise amount to indirect discrimination against persons with disabilities can be subject to a second justification. In essence, the justification provides that a provision, criterion or practice will not be regarded as amounting to indirect discrimination against the group of disabled people if an employer or other covered party makes a reasonable accommodation or adjustment for a specific individual with a disability to eliminate the disadvantages resulting from the provision, criterion or practice for that individual. In such situations, the otherwise indirectly discriminatory provision can continue to apply, as long as disadvantaged disabled individuals are accommodated.

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141 Case C-395/15 *Daouidi v. Bootes Plus SL and Others* ECLI:EU:C:2016:917.

142 See Article 4 of the Employment Equality Directive and the genuine occupational requirement exception.

143 On the concept of indirect discrimination, see Ellis, E. and Watson, P. (2012), *EU anti-discrimination law* (Oxford University Press), p. 95 onwards.

144 Paragraph 2(1)(b) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (*Employment Equality Directive*), OJ L 303. 2.12.2000, pp. 16-22. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000L0078>.

145 As stated in joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, para. 77.

### 5.2.3 Harassment (Article 2(3))

Harassment involves unwanted conduct which has either the purpose or effect of 'violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment', and is a prohibited form of discrimination under the directive.

### 5.2.4 Instruction to discriminate (Article 2(4))

An instruction to a second person to discriminate is also a prohibited form of discrimination. This may occur in an employment relationship where a senior member of staff instructs a subordinate to discriminate – for example by not recruiting anyone who is disabled. In such a case, the instructor is liable for discrimination.

The compatibility of these definitions of discrimination with the CRPD is examined in section III. 8.

## 5.3 Reasonable accommodation

Article 5 of the directive establishes a duty to make a reasonable accommodation in favour of persons with disabilities, and specifies that:

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 undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

Whilst the directive clearly establishes the duty to make a reasonable accommodation in the context of employment and vocational training, it does not provide that a breach of this duty amounts to discrimination.

Recital 20 of the directive provides some guidance on what amounts to an accommodation. It states as follows: '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 and integration resources'. Employers are not under a duty to accommodate when doing so would cause a 'disproportionate burden'. Recital 21 of the directive elaborates on some factors which should be taken into account to determine whether a measure amounts to a disproportionate burden. These are 'the financial and other costs entailed, the scale and financial resources of the organization or undertaking and the possibility of obtaining public funding or any other assistance'.

The compatibility of the reasonable accommodation provision of the Employment Equality Directive with the CRPD is examined in section III. 9.

## 5.4 Discrimination by association and discrimination based on assumed or future disability

Although the wording of the Employment Equality Directive is silent on this point, in some instances, individuals who associate with a person who has a disability are also protected from discrimination

on the ground of disability. In *Coleman*,<sup>146</sup> the CJEU held that protection from direct discrimination and harassment extended to a mother who claimed to have been the victim of such discrimination at the hands of her employer because of her relationship with her disabled son. The Court did not consider whether protection from indirect discrimination extends to those who associate with a person with a disability, although this may be a consequence of the later *CHEZ* case, which concerned indirect discrimination by association on the grounds of racial or ethnic origin under the Racial Equality Directive.<sup>147</sup>

On the basis of the *Coleman* reasoning, it might be expected that a person who is discriminated against because she is wrongly perceived to have a disability, or is likely to acquire a disability in the future, is also protected from discrimination on the ground of disability. The CJEU has not ruled on this to date. However, ‘the [European] Commission considers that the [Racial and Employment Equality] Directives also prohibit a situation where a person is directly discriminated against on the basis of a wrong perception or assumption of protected characteristics [...]’.<sup>148</sup>

The compatibility of the CJEU’s case law on these issues with the CRPD is examined in section III. 10.

### 5.5 Scope for positive action

Article 7(1) of the Employment Equality Directive provides that Member States are free to maintain or adopt positive action measures which ‘prevent or compensate for disadvantages linked to any of the grounds’ covered by the directive, including disability. However, there is no obligation to take such action.

Article 7(2) of the directive addresses the scope for positive action measures specifically in favour of disabled people, and provides that:

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.

This provision can be interpreted as allowing for a greater scope of action than is applicable under Article 7(1) and in the context of other grounds covered by the directive. Whilst the CJEU has not ruled on the issue, it is likely that employment quota laws targeting disabled people, which are in common use across the EU, are compatible with the directive as a result of this article.

The compatibility of these provisions on positive action with the CRPD is examined in section III.11.

### 5.6 Material scope of the Employment Equality Directive

The prohibition of discrimination under the Employment Equality Directive only relates to employment and occupation. It covers both the public and private sectors. Article 3 sets out the material scope of the directive and provides that:

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146 Case C-303/06 *Coleman v. Attridge Law*, ECLI:EU:C:2008:415.

147 Case C-83/14 *CHEZ Razpredelenie Bulgaria*, ECLI:EU:C:2015:480.

148 Report from the Commission to the European Parliament and the Council on the application of the Racial Equality Directive and the Employment Equality Directive, COM(2014) 2 final, Brussels, 17.1.2014, p. 10. Available at: <https://eur-lex.europa.eu/procedure/EN/1041602>.

1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
  - (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
  - (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
  - (c) employment and working conditions, including dismissals and pay;
  - (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.
- [...]
3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.
4. Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces.

Article 3(1) provides guidance on the type of rights and benefits deriving from employment and occupation that are subject to the equal treatment obligation, while cases decided by the CJEU illustrate that this may cover a broad range of situations and benefits,<sup>149</sup> such as access to employment, recruitment and pay,<sup>150</sup> and the duration of employment contracts.<sup>151</sup>

One key component of employment-related benefits is pay. Recital 13 of the preamble to the Employment Equality Directive makes it clear that the definition of income shall be aligned to that provided in Article 157 TFEU (on equal pay for work of equal value between men and women). According to that article, 'pay' means 'the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer'. In the context of the Employment Equality Directive, equal treatment in matters of pay, as well as in relation to any other employment condition, does not directly relate to the actual content of the entitlement or setting of levels of pay. The directive merely requires equal application of pre-established rights.

Recital 13 and Article 3(3) of the Employment Equality Directive indicate that the directive does not apply to social security and social protection schemes (defined in the negative as not being part of 'income' or 'pay'), nor to any kind of payment by the state aimed at providing access to employment or maintaining employment. In addition, Member States may choose not to apply the provisions of the directive concerning disability to all or part of their armed forces.<sup>152</sup> The material scope of the Employment Equality Directive is therefore limited, and does not cover important areas such as education, healthcare and access to goods and services.

149 Examples of situations falling outside the material scope of the directive are found in Case-262/14 *SCMD* ECLI:EU:C:2015:336, paras. 33-36; and Case C423/15 *Kratzer* ECLI:EU:C:2016:604 paras. 29, 34-35.

150 E.g. *Tyrolean Airways*, paras. 24-25; Case C-88/08 *Hütter* ECLI:EU:C:2009:381, para. 35; Case C-229/08 *Wolf* ECLI:EU:C:2010:3, para. 27; Joined Cases C-501-506/12 and C-540-1/12 *Specht et al.*, ECLI:EU:C:2014:2005, para. 37; C-546/11 *Dansk Jurist-ogØkonomforbund*, ECLI:EU:C:2013:603, para. 30 and Case C-476/11 *HK Danmark v. Experian A/S* ECLI:EU:C:2013:590 para. 30.

151 Case C-144/04 *Mangold* ECLI:EU:C:2005:709, para. 56.

152 Recital 19 and Article 3(4). The EU also submitted a reservation to the CRPD on this issue when it ratified or concluded the CRPD. This provides as follows: 'The European Community states that pursuant to Community law (notably Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation), the Member States may, if appropriate, enter their own reservations to Article 27(1) of the Disabilities Convention to the extent that Article 3(4) of the said Council Directive provides them with the right to exclude non-discrimination on the grounds of disability with respect to employment in the armed forces from the scope of the Directive. Therefore, the Community states that it concludes the Convention without prejudice to the above right, conferred on its Member States by virtue of Community law'. Available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&lang=en&clang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en&clang=en#EndDec).

The compatibility of EU law and the material scope of its prohibition of disability discrimination with the CRPD is examined in section III.12.

### 5.7 Partial reversal of the burden of proof

Article 10(1) of the Employment Equality Directive provides for a partial reversal of the burden of proof. This reduces the burden on the claimant, who merely needs to establish a presumption of discrimination. For instance, while an employer is not obliged to disclose the criteria and outcome of a recruitment process to someone whose application has been rejected,<sup>153</sup> the refusal to disclose information may contribute to shifting the burden of proof to the employer.<sup>154</sup> This applies to alleged cases of discrimination under the directive. However, since an unjustified failure to make a reasonable accommodation is not explicitly identified as a form of discrimination under the directive, EU law cannot be interpreted as requiring the partial reversal of the burden of proof to apply in such cases.

The compatibility of the Employment Equality Directive's provision on the partial reversal of the burden of proof with the CRPD is examined in section III.13

### 5.8 Requirements regarding compliance and sanctions

Article 16 of the Employment Equality Directive requires Member States to take the necessary measures to ensure that any provisions contrary to the principle of equal treatment are, or may be, declared null and void or are amended. Article 17 further lays down rules on sanctions for infringements of national law implementing the directive; such sanctions must be 'effective, proportionate and dissuasive'. Purely symbolic sanctions do not comply with the directive.<sup>155</sup> The Court will be concerned that claimants might be reluctant to assert their rights if sanctions are not genuinely dissuasive.<sup>156</sup> The mere fact that a specific sanction is not pecuniary in nature does not necessarily mean that it is purely symbolic, but the question of whether it is an appropriate sanction depends on the exact context.<sup>157</sup>

The compatibility of the Employment Equality Directive's provisions on compliance and sanctions with the CRPD is examined in section III.14.

## 6 The relevance of the EU's conclusion of the CRPD for EU disability equality and non-discrimination law<sup>158</sup>

Whilst the EU has become a party to the CRPD, it is only bound by the Convention to the extent of its competences. This reflects the fact that the EU has no powers to adopt legislation in some of the areas covered by the Convention, and shares powers with its Member States in many of the other areas covered. As is the case with many of the international agreements that the EU enters into, the CRPD involves concurrent jurisdictions of both the Member States and the EU.<sup>159</sup> Such 'mixed agreements' have been described as unique in international relations since they 'involve [...] a shared contractual relationship between an international organisation and its members and one or more third countries and/

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153 Case C415/10 *Meister*, ECLI:EU:C:2012:217, para. 46.

154 Case C415/10 *Meister*, ECLI:EU:C:2012:217, para. 44.

155 Case C-81/12 *Accept*, ECLI:EU:C:2013:275, para. 64

156 Case C-81/12 *Accept*, ECLI:EU:C:2013:275, para. 67.

157 Case C-81/12 *Accept*, ECLI:EU:C:2013:275, para. 69; See also Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV* ECLI:EU:C:2008:397.

158 This sub-section draws on text in: Waddington, L. (2018), 'The European Union', in: Waddington, L. and Lawson, A. (eds.), *The UN Convention on the Rights of Persons with Disabilities in practice: A comparative analysis of the role of courts*, pp. 131-152 (Oxford University Press).

159 For an analysis of the complex nature of shared competences and implementation of the CRPD, see Pohjankoski, P. (2017), 'UN Disability Convention through the prism of EU law: boosting human rights but blurring responsibilities?' *Anti-Discrimination Law Review*, vol. 2, pp. 28-43.

or international organisations'.<sup>160</sup> In the context of the CRPD, the full range of competences of both the EU and the Member States are engaged. Specifically, one of three scenarios can describe the respective competence of the EU and its Member States with regard to individual provisions of the Convention: namely, the EU has exclusive competence to act; the Member States have exclusive competence to act; or the EU and the Member States share the competence to act. Disability equality and combating discrimination are areas of shared competence, meaning that both the EU and the Member States have the power to act in this field, including through the adoption of legislation. In addition, the EU can support and supplement the action of the Member States. Where the EU's competence to act is not exclusive, including with regard to shared competences, the Member States remain free to act collectively, individually or jointly with the Union to fulfil obligations under international agreements.<sup>161</sup>

Where the EU has adopted legislation which falls within the scope of the Convention, the CJEU has the exclusive jurisdiction to interpret that legislation and to determine the relevance of the CRPD. Since as early as 1974, the Court has held that international agreements concluded by the EU 'form an integral part of the Community [now Union] legal system'<sup>162</sup> and that the Court has the jurisdiction to interpret the provisions of such agreements.<sup>163</sup> The TFEU briefly addresses the status of international agreements to which the EU is a party in Article 216(2) TFEU, which provides that 'Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States'. This does not explicitly indicate the hierarchy of such agreements and treaties within the EU legal order. However, the Court of Justice has addressed this lacuna in its case law. The Court has therefore established a hierarchy of norms, whereby international agreements concluded by the EU are inferior to primary law but superior to secondary law.<sup>164</sup> Since the EU has become a party to the CRPD, the CJEU has endeavoured to interpret the Employment Equality Directive in light of the Convention, and has made a number of references to the Convention in its case law. The impact of the CRPD on the case law of the CJEU is explored further in section III below.

It is worth noting that the status of the CRPD under EU law is significantly different from that of the UN's other core human rights treaties, including those which contain explicit prohibitions of discrimination on grounds covered by EU law, such as CEDAW and CERD. Whilst both of these treaties overlap with current EU law in terms of their prohibitions of discrimination against women and discrimination on the ground of racial and ethnic origin, the EU (formerly EC) was not a party to their negotiations, and neither Convention allows regional integration organisations such as the EU to accede. As a consequence, the EU is not bound by either of these conventions or by the other core UN human rights treaties, with the exception of the CRPD – although the EU's Member States, which have widely ratified these treaties, are bound by them. That means that the CJEU is not under an obligation to interpret EU law in line with CERD or CEDAW. Nevertheless, this does not preclude these UN human rights treaties from having an indirect influence on EU policy,<sup>165</sup> and the Court may opt to refer to such treaties in its judgments.

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160 Verwey D. (2004), *The European Community, the European Union and the international law of treaties: A comparative legal analysis of the Community and Union's external treaty-making practice* (T.M.C. Asser Press), p. 35.

161 See *Re: European Development Fund*, Case C-316/91 *European Parliament v. Council*, ECLI:EU:C:1994:76.

162 Case 181/73 *Haegeman v. Belgium*, ECLI:EU:C:1974:41, para. 5

163 Case 181/73 *Haegeman v. Belgium*, ECLI:EU:C:1974:41, para. 6; Case 12/86 *Demirel v. Stadt Schwäbisch Gmünd*, ECLI:EU:C:1987:400.

164 For a more recent restatement of this principle, see Case C-366/10 *Air Transport Association of America and Others*, ECLI:EU:C:2011:864, para. 50. See also Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, ECLI:EU:C:2013:222, paras. 28-29.

165 See e.g. Holtmaat, R. and Tobler, C. (2005), 'CEDAW and the European Union's Policy in the field of combating gender discrimination', *Maastricht Journal of European and Comparative Law*, vol. 12, issue 4, pp. 399-425. It is worth noting that recital paragraph 4 in the preamble to the Employment Equality Directive refers explicitly to CEDAW alongside a number of other human rights treaties.

## Section III – A comparison of the CRPD with EU equality and non-discrimination law

### 7 The definition of disability

The previous two sections have provided an overview of how the UN human rights treaties, in particular the CRPD, and EU law, in particular the Employment Equality Directive, address disability equality and non-discrimination. In line with the overall goal of this thematic report, this section compares the provisions found in the CRPD and the Employment Equality Directive in order to establish the degree of coherence and compatibility between the two.

This section of the report is structured around the eight key areas of EU disability equality and non-discrimination law identified in section II above. For each area, the report first sets out the position in the CRPD, taking account of General Comment No. 6, individual communications of the CRPD Committee and Concluding Observations issued by the Committee, where relevant. The report then examines further the relevant provisions of EU law, based on the Employment Equality Directive and the relevant case law of the CJEU. The report seeks to determine the level of compatibility of EU law with the CRPD in the fields covered.

#### 7.1 The definition of disability under the CRPD

Waddington points to the fact that while ‘the legal impact of the Convention will differ within the various domestic systems, courts often endeavour to interpret and apply domestic law in a manner which is compatible with a state’s international human rights obligations’. She notes that ‘those same courts [in EU Member States] will also be bound to apply the interpretation of the CJEU when applying national law transposing the Employment Equality Directive’.<sup>166</sup> Thus, it is important to consider whether the CRPD’s conceptualisation of disability is compatible with the concept/definition of disability applicable under EU law.

An explicit definition of disability is notably absent from the CRPD. As outlined in section I of this report, the CRPD does not follow the individual or medical model of disability. According to Waddington, the concept of disability in the CRPD ‘is not assessed purely in terms of the existence of an impairment, which restricts the functional ability of an individual’; rather, it is assessed with attention being paid to ‘the relevance of social and environmental factors in limiting – or disabling’ individuals.<sup>167</sup> Preamble recital (e) of the CRPD and Article 1 of the CRPD confirm this. Those provisions demonstrate the paradigm shift from the individual model of disability to what the CRPD Committee terms the human rights model of disability and ‘inclusive equality’. This shift in models of disability and equality is relevant to the CJEU’s interpretation of disability, as the Court must give adequate recognition to socially created barriers in its interpretation of the concept of ‘disability’ under the Employment Equality Directive.

The ‘non-definition of disability’<sup>168</sup> contained in Article 1 CRPD ‘provides guidance’<sup>169</sup> regarding the concept of disability, confirming that those covered by the Convention include individuals with ‘long-term physical, mental, intellectual or sensory impairments’. This is an ‘open-ended’ conceptualisation of disability ‘in so

166 Waddington, L. (2015), ‘Saying all the right things and still getting it wrong: The Court of Justice’s definition of disability and non-discrimination law’, *Maastricht Journal of European and Comparative Law*, vol. 22, issue 4, pp. 576-591, at p. 591.

167 Waddington, L. (2015), ‘Saying all the right things and still getting it wrong: The Court of Justice’s definition of disability and non-discrimination law’, *Maastricht Journal of European and Comparative Law*, vol. 22, issue 4, pp. 576-591, at p. 583.

168 Schulze, M. (2010), *Understanding The UN Convention on the Rights Of Persons With Disabilities: A Handbook on the Human Rights of Persons with Disabilities*, p. 39, available at: [https://iddccconsortium.net/sites/default/files/resources-tools/files/hi\\_crpdc\\_manual\\_sept2009\\_final.pdf](https://iddccconsortium.net/sites/default/files/resources-tools/files/hi_crpdc_manual_sept2009_final.pdf).

169 Waddington, L. (2015), ‘Saying all the right things and still getting it wrong: The Court of Justice’s definition of disability and non-discrimination law’, *Maastricht Journal of European and Comparative Law*, vol. 22, issue 4, pp. 576-591, p. 581.

far as the category of persons with disabilities intended to be covered by the wording of that provision is not exhaustive'.<sup>170</sup> Notably, while the Convention casts disability in terms of long-term impairments, the open-ended nature of the concept of disability in the CRPD means that it is an inclusive and flexible concept. This is also relevant to the interpretation of the concept of 'disability' under EU law, given the fact that there may be divergences among EU Member States with regard to who is covered by the term itself. Notably, in the individual communication, *S.C. v. Brazil*,<sup>171</sup> the CRPD Committee concluded that people with illnesses are not automatically excluded from the scope of the UN Convention. In that decision, the Committee remarked that the difference between illness and disability is 'a difference of degree and not a difference of kind, and that a health impairment which is initially conceived of as illness can develop into an impairment in the context of disability because of its duration or its chronic development'.<sup>172</sup> This provides wide scope for the incorporation of several different types of medically-diagnosed illnesses under the concept of 'disability'.

While the CRPD does not explicitly define disability, the guidance provided by Article 1 and the understanding of disability espoused by preamble recital (e) are broad. Both provisions refer to the fact that disability occurs at the moment that an impairment hinders an individual's participation 'in society' in general. In other words, the CRPD provides a wide-ranging protection from discrimination that is not confined, in any way, to those persons with disabilities whose participation is hindered in a particular area of life.

## 7.2 The definition of disability under EU law<sup>173</sup>

The overview of the CRPD's approach to 'defining' disability, provided above, highlights a number of different issues, which are considered in turn below. At the outset, it is useful to recall that the CJEU has defined disability as:

a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.<sup>174</sup>

This definition was first set out in 2013 in *HK Danmark (Ring and Skouboe Werge)* and, in defining disability in this way, the CJEU explicitly took the CRPD into account. In the judgment, the Court noted that, under Article 216(2) TFEU, international agreements concluded by the EU are part of EU law and are binding on its institutions, and prevail over acts of the EU.<sup>175</sup> In addition, given the primacy of international agreements over instruments of EU secondary law, such law must be interpreted, as far as possible, in a way which is consistent with international agreements.<sup>176</sup> The Court subsequently took both preamble recital (e) and Article 1 of the CRPD into account in developing its definition of disability, cited above, and explicitly intended for its definition to be fully aligned to, and compatible with, the CRPD.

170 Broderick, A. (2015), *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities*, (Intersentia), p. 79.

171 Committee on the Rights of Persons with Disabilities, individual communication, *S.C. v. Brazil*, communication No. 10/2013, UN Doc. CRPD/C/12/D/10/2013. The case concerned a woman who had been demoted after taking more than three months of medical leave in accordance with her employer's policy, following a series of injuries which led to chronic illness and the permanent impairment of her knee. While the Committee found the complaint inadmissible for non-exhaustion of domestic remedies, it nevertheless explored whether the complaint fell within the scope of the Convention.

172 Committee on the Rights of Persons with Disabilities, individual communication, *S.C. v. Brazil*, communication No. 10/2013, UN Doc. CRPD/C/12/D/10/2013, para. 6.3.

173 Parts of this section draw on text in: Waddington, L. (2015), 'Saying all the right things and still getting it wrong: the Court of Justice's definition of disability and non-discrimination law' *Maastricht Journal of European and Comparative Law*, vol. 22, issue 4, pp. 576-591 and Waddington, L. (2017), 'Case note on Case C-395/15 *Daouidi*', *European Human Rights Cases*, vol. 2, pp. 92-96.

174 Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, ECLI:EU:C:2013:222, para. 38.

175 Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, ECLI:EU:C:2013:222, para. 28.

176 Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, ECLI:EU:C:2013:222, para. 29. See also Ferri, D. (2010), 'The conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: A constitutional perspective', in: Waddington, L. and Quinn, G. (eds.), *European Yearbook of Disability Law*, vol. 2 (Intersentia), pp. 47-71, at pp. 66-68.

### 7.2.1 *The role of socially created barriers in the creation of disability*

The definition of disability developed by the CJEU in *HK Danmark (Ring and Skouboe Werge)* clearly reflects the social-contextual approach to disability and recognises that disability results from an interaction between an impairment and the environment. Socially created barriers are, therefore, explicitly acknowledged as a factor which leads to disability. By adopting this definition, the Court recognised that, unlike under the individual or medical view which underlay the judgment in *Chacón Navas*, disability should not be assessed purely in terms of the existence of an impairment that restricts the functional ability of an individual. The Court therefore recognised the relevance of social and environmental factors in limiting – or disabling – people. The CRPD was determinant in bringing about this change.

Nevertheless, the way in which the Court has applied this definition in practice has led to questions and concerns regarding the extent to which socially created barriers are recognised as an element of the definition of disability, especially in cases where an impairment does not lead to a specific limitation and an individual is only disadvantaged by socially created barriers. Unlike the CRPD, which refers to the interaction between ‘impairments’ and ‘various barriers’, the CJEU’s definition of disability refers to the interaction between ‘limitations’ resulting from impairments and ‘various barriers’. The possible implication of this seemingly insignificant addition is illustrated by a close reading of the *Kaltoft* case,<sup>177</sup> which was decided in 2014.

Mr Karsten Kaltoft was dismissed from his job as a childminder, after 15 years of employment, by a Danish local authority. Mr Kaltoft was obese, weighing over 150 kilos and having a body mass index of 54, with 20-25 generally being regarded as a healthy body mass index.<sup>178</sup> The parties disputed whether Mr Kaltoft’s obesity was related to the decision to dismiss him, although there was certainly evidence that the employer had had concerns about Mr Kaltoft’s weight for some time. According to the employer, Mr Kaltoft was dismissed because of a decline in the number of children requiring care. He was the only childminder to be dismissed on this ground, and he had not been given specific reasons as to why he had been chosen for dismissal. Mr Kaltoft claimed that his obesity had no negative impact on his ability to do his job and that his dismissal was discriminatory.<sup>179</sup>

The preliminary reference received by the CJEU sought to establish, *inter alia*, whether obesity could be regarded as a disability under the Employment Equality Directive. In addressing this question, the Court held that obesity constitutes a ‘disability’ within the context of the directive, where:

it entails a limitation resulting 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.<sup>180</sup>

The Court therefore repeated its definition as first set out in *HK Danmark (Ring and Skouboe Werge)*.

The CJEU’s definition of disability refers to a limitation resulting from an impairment which, in interaction with other barriers, hinders professional participation. In *Kaltoft*, the Court gave some examples of relevant limitations applicable in the context of obesity. These examples all concerned physical limitations directly caused by obesity. In this respect the Court referred to: ‘reduced mobility or the onset, in that person, of

177 Case C-354/13 *FOA acting on behalf of Karsten Kaltoft v. Kommunernes Landsforening*, ECLI:EU:C:2014:2463.

178 *The Daily Telegraph*, “‘I don’t feel my weight is a big problem’ says Dane in EU obesity ruling”; available at: <https://www.telegraph.co.uk/lifestyle/wellbeing/diet/11302442/I-dont-feel-my-weight-is-a-big-problem-says-Dane-in-EU-obesity-ruling.html>.

179 *The Daily Telegraph*, “‘I don’t feel my weight is a big problem’ says Dane in EU obesity ruling”; available at: <https://www.telegraph.co.uk/lifestyle/wellbeing/diet/11302442/I-dont-feel-my-weight-is-a-big-problem-says-Dane-in-EU-obesity-ruling.html>.

180 The advocate general in this case opined that only the most severe form of obesity (WHO class III obesity, or severe, extreme or morbid obesity) would always meet the definition of disability developed by the Court (para. 56). The Court was not so prescriptive or precise in its judgment.

medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity'.<sup>181</sup> Mr Kaltoft claimed that he had no such limitations and was perfectly able to do his job. However, if this is true, and he was nevertheless dismissed because of his obesity, then he clearly did face a barrier – in the form of negative attitudes and prejudices on the part of his employer. Many disabled people face such barriers – in essence, discrimination resulting from false assumptions and prejudices about an individual's ability – and it is clear that the CRPD is designed to address this.

The Court did not state in its judgment whether the 'various barriers which hinder the full and effective participation of the person concerned in professional life' include or exclude such discriminatory attitudes. However, the Court's approach emphasises the need for limitations resulting from impairments (which, in interaction with various barriers, hinder participation in professional life). The examples given by the Court of such limitations in the context of obesity are clearly physical, and are directly connected to obesity or a related medical condition. This seems to make it difficult to interpret the Court's definition of disability as embracing individuals who have an impairment but experience no related limitations, and who are only hampered by the discriminatory attitudes of others, discriminatory rules or provisions.<sup>182</sup> In essence, it seems that individuals who are 'disabled' by the false assumptions and prejudice of others about their ability – by discrimination – but who do not experience a physical or mental limitation linked to their impairment, may be excluded from protection from disability discrimination under the Court's definition of disability. Such individuals would only be protected if they did experience a limitation which, in combination with various barriers, hindered their participation in professional life. This appears to be the implication of *Kaltoft*, although the issue has not been completely clarified by the Court.

In this respect, it should be noted that the CRPD refers to two elements which contribute to disability: 'impairment' and 'various barriers' which, in combination, hinder a person's 'effective participation in society on an equal basis with others'. As noted above, the CRPD does not require that the relevant impairment actually leads to a limitation, such as a reduced ability or inability to walk, read or understand. Whilst such a limitation will usually result from an impairment, it is possible to envisage impairments which do not have this kind of effect, such as visible scars or injuries, asymptomatic HIV<sup>183</sup> and other conditions. People of particularly low or high stature may also be regarded in this light – they may not experience limitations directly related to their height,<sup>184</sup> but they do experience limitations when interacting with an inaccessible physical environment.

By requiring that an individual not only has an impairment but also experiences a limitation directly related to that impairment, the Court's definition seems to exclude from the definition of disability individuals who are disabled simply because of socially created barriers, such as false assumptions and prejudices about an individual's ability, and possibly even barriers in the physical environment. In this sense, the Court's definition arguably fails to embrace in full the human rights model of disability embodied by the CRPD. This seems to recognise as disabled those people with an impairment who are disadvantaged purely by environmental factors ('various barriers').

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181 Case C-354/13 *FOA acting on behalf of Karsten Kaltoft*, ECLI:EU:C:2014:2463, para. 60.

182 The role of discrimination and prejudice with regard to people who are obese was raised by Mr Kaltoft. Mr Kaltoft's argument was noted by Advocate General Jääskinen in his Opinion in the following way: 'it [obesity] can equally entail limitations on the employment market by reason of prejudice on the basis of physical appearance' (para. 52).

183 See Elliott, R., Utyasheva, L. and Zack, E. (2009), 'HIV, disability and discrimination: making the links in international and domestic human rights law', *Journal of the International Aids Society*, vol. 12, No. 1, pp. 29-44. See also the judgment of the European Court of Human Rights in *Kiyutin v. Russia* [*Kiyutin v. Russia*, application No. 2700/10, judgment 10 March 2011], at para. 47, where the third party intervener in the case, Interights, argued that the disability anti-discrimination framework established under the CRPD should be applicable to people living with HIV/AIDS, contending that this had been endorsed by the United Nations Office of the High Commissioner for Human Rights, the World Health Organization and UN AIDS in their joint report, *Disability and HIV Policy Brief* [2009]. Available at [http://www.who.int/disabilities/jc1632\\_policy\\_brief\\_disability\\_en.pdf?ua=1](http://www.who.int/disabilities/jc1632_policy_brief_disability_en.pdf?ua=1). See also United Nations Commission on Human Rights, Resolution No. 1995/44, 'The protection of human rights in the context of HIV and AIDS' (adopted at its 53rd meeting on 3 March 1995).

184 Such individuals naturally experience limitations in their ability to reach and extend their limbs, but all individuals, irrespective of height, experience such limitations – rather, in the context of particularly tall or short people, environmental factors, and the fact that the environment is designed with people of average height in mind, are the primary (or only) disabling factors.

However, this assessment of the Court's approach is somewhat tentative, since the Court did not explicitly reach such a finding in *Kaltoft*. Nevertheless, the judgment is certainly open to this interpretation, and it will be important for the Court explicitly to align its definition to the CRPD as soon as possible. While the Court has dealt with a number of cases concerning the definition of disability since *Kaltoft*, it has not clarified this point, and it remains an area where EU law and the CRPD are, at present, seemingly not in alignment. Clarification is therefore required by the CJEU on this matter.

### 7.2.2 Hindrance to participation in society versus hindrance to participation in professional life

The CJEU defines disability as comprising a 'hindrance' to the exercise of professional life. This is unlike the CRPD, which uses participation in society as a reference point. The consequences of this limitation became apparent in the CJEU's judgment in *Z v. A Government Department and the Board of Management of a Community School*.<sup>185</sup>

*Z* concerned a woman who had no uterus and was unable to become pregnant. Ms Z and her husband arranged for a surrogate mother in California to carry their genetic child. Following the birth of the child, Ms Z's employer in Ireland refused her a period of paid leave equivalent to maternity or adoption leave, on the grounds that she qualified for neither, and the law did not provide for paid leave following the birth of a child through surrogacy. The case was referred to the CJEU to establish, *inter alia*, whether this situation amounted to discrimination on the ground of disability under EU law, including the Employment Equality Directive, as well as to determine the relevance of the CRPD.

The CJEU in *Z* reiterated the importance of interpreting EU law in a manner compatible with the CRPD, and restated its definition of disability set out in *HK Danmark (Ring and Skouboe Werge)*. The Court also noted that the concept of disability not only refers to the impossibility of exercising a professional activity, but also to 'a hindrance to the exercise of such an activity'.<sup>186</sup> The Court recognised that Ms Z's lack of a uterus and the inability to give birth naturally amounted to an impairment and stated as follows:

it is not disputed that such a condition constitutes a limitation which results in particular from physical, mental or psychological impairments, or that it is of a long-term nature. In particular, it cannot be disputed that a woman's inability to bear her own child may be a source of great suffering for her.<sup>187</sup>

However, implicitly recalling its own definition of disability, the Court stated that: 'the concept of "disability" within the meaning of Directive 2000/78 presupposes that the limitation from which the person suffers, in interaction with various barriers, may hinder that person's full and effective participation in professional life on an equal basis with other workers'.<sup>188</sup> The Court proceeded to agree with its advocate general,<sup>189</sup> finding that:

the inability to have a child by conventional means does not in itself, in principle, prevent the commissioning mother from having access to, participating in or advancing in employment. In the present case, it is not apparent from the order for reference that Ms Z's condition by itself made it impossible for her to carry out her work or constituted a hindrance to the exercise of her professional activity.<sup>190</sup>

185 Case C-363/12 *Z v. A Government department, The Board of management of a community school*, ECLI:EU:C:2014:159.

186 Case C-363/12 *Z v. A Government department, The Board of management of a community school*, ECLI:EU:C:2014:159, para. 77. This was repeated in the *Kaltoft* case in para. 54.

187 Case C-363/12 *Z v. A Government department, The Board of management of a community school*, ECLI:EU:C:2014:159, para.79.

188 Case C-363/12 *Z v. A Government department, The Board of management of a community school*, ECLI:EU:C:2014:159, para. 80.

189 See paras. 82-98 of Advocate General Wahl's Opinion, ECLI:EU:C:2013:604.

190 Case C-363/12 *Z v. A Government department, The Board of management of a community school*, ECLI:EU:C:2014:159, para. 81.

As a result, the Court found that Ms Z did not have a ‘disability’ within the meaning of the directive.<sup>191</sup> It seems that the Court recognised that Z may have been disabled, and indeed implied that she may have been recognised as disabled under the CRPD,<sup>192</sup> but did not find that her condition amounted to a disability for the purposes of the Employment Equality Directive, because it did not impact on her ability to work. This is in spite of the fact that the benefits at stake in this case – namely a period of paid leave to bond with and care for a new baby – were clearly employment-related. This disadvantage was particularly likely to affect someone in Ms Z’s position (who was unable to have a child naturally) and could, therefore, be regarded as indirectly discriminatory.

In brief, by only regarding as disabled an individual who has a limitation which, in interaction with various barriers, is capable of hindering their participation in professional life, the CJEU’s definition of disability is narrower than that found in the CRPD. In contrast, the CRPD refers to ‘impairments which in interaction with various barriers may hinder [...] full and effective participation in society on an equal basis with others’.<sup>193</sup> The Court seems to justify this limitation on the grounds that the Employment Equality Directive only covers discrimination with regard to employment and occupation. However, as seen from the Z case, this narrow approach can lead to individuals being denied employment-related benefits covered by the directive on the grounds that they do not meet the definition of disability adopted by the Court.

Such an approach is also reflected in the finding of Advocate General Jääskinen in the *Kaltoft* case, in which he stated that the

absence of a bodily function or organ, or an illness requiring particular attention, continuous medication and control may be a physiological or psychological burden to the person concerned, but not render impossible the full and effective carrying out of work, or hinder participation on an equal basis in professional life in general.<sup>194</sup>

One can conclude that the definition of disability developed by the CJEU for the purposes of the Employment Equality Directive does not fully comply with the CRPD, even though it was explicitly adapted with this goal in mind. Specifically, under the EU definition, a person can only be regarded as disabled if they are potentially hindered in exercising professional life, whilst the CRPD adopts a broader perspective and recognises as disabled individuals whose participation is hindered with regard to society in general. Consequently, those individuals who are not disabled with regard to professional activities, but who are disabled in other fields of life, will not be covered under the CJEU’s definition, whilst they would fall within the scope of the CRPD.

### 7.2.3 Permanent or temporary impairment

As noted above, the CRPD Committee refers, in both preamble recital (e) and Article 1, to ‘long-term impairments’ as contributing to disability. The CJEU’s definition of disability also requires that the relevant impairment be ‘long-term’, indicating that both permanent and long-lasting conditions are covered. The Court elaborated on the concept of a ‘long-term’ impairment in a 2016 case, *Daouidi*.<sup>195</sup>

Mr Daouidi was dismissed, ostensibly on disciplinary grounds, approximately eight weeks after an accident at work which left his elbow in plaster and during which time he had been on full-time sick leave. His performance had been satisfactory prior to the accident, and the court which made the preliminary reference found that the real reason for the dismissal was his temporary inability to work for an indeterminate period as a result of the accident. Mr Daouidi challenged the dismissal on the grounds

191 Case C-363/12 *Z v. A Government department, The Board of management of a community school*, ECLI:EU:C:2014:159, para. 82.

192 This was also recognised by Advocate General Wahl in his Opinion, at para. 93.

193 Article 1 CRPD.

194 Opinion of Advocate General Jääskinen in Case C-354/13 *FOA v. Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund*, delivered on 17 July 2014, at para. 34.

195 Case C-395/15 *Mohamed Daouidi v. Bootes Plus SL and Others*, ECLI:EU:C:2016:917.

that it amounted to discrimination under the Employment Equality Directive, and he argued that he was a person with a disability under that directive. The national court had to decide whether the dismissal amounted to discrimination based on disability. In essence, that assessment turned on whether or not Mr Daouidi had a disability, and that came down to whether or not his temporary incapacity to work was sufficiently long-term to amount to a disability.

In responding to the preliminary reference, the CJEU focused on the concept of disability and considered whether a person who is temporarily unable to work for an indeterminate period of time as a result of an accident at work could be regarded as having a limitation which is regarded as 'long-term' under the definition of disability used for the purposes of the directive.<sup>196</sup> It noted that, in principle, Mr Daouidi's injury was not permanent, although his elbow was still in plaster some six months after the accident. It also noted that neither the CRPD nor the directive defines the concept of 'long-term'.

The CJEU found that it was for the referring court to determine whether the limitation of the capacity of the person concerned is 'long-term' or not, and that that assessment is primarily factual in nature.<sup>197</sup> However, the Court went on to give some guidance to national courts on which issues they should take into account in making this assessment. Firstly, a limitation of a person's capacity may be regarded as 'long-term' if, at the time of the allegedly discriminatory act, 'the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress or [...] the fact that that incapacity is likely to be significantly prolonged before the person has recovered'.<sup>198</sup> Moreover, the national court must 'base its decision on all of the objective evidence before it, in particular on documents and certificates relating to that person's condition, established on the basis of the current medical and scientific knowledge and data'.<sup>199</sup>

In terms of the duration of time for which a limitation of capacity needs to last before it can be regarded as a disability, the CJEU was not precise. In essence, the judgment implies that a limitation can be regarded as long-term if its duration is uncertain, i.e. 'does not display a clearly defined prognosis as regards short-term progress' or if it is likely to last a long time, i.e. 'incapacity is likely to be significantly prolonged'. In essence, it seems that any limitation which is not expected to be short-term can be regarded as long-term, with the assessment having to be made from the point when the alleged discriminatory act took place.<sup>200</sup> This will mean that limitations which were only expected to be short-term when the alleged discrimination took place, but which in fact turned out to be long-term, are not initially regarded as disabilities, while limitations which were expected to be long-lasting, but where the individual in question made an unexpectedly quick recovery, are to be regarded as disabilities. The CJEU left it open as to the amount of time that has to be expected to pass for a limitation to be regarded as long-term (or 'significantly prolonged').

In assessing the expected duration of the limitation of a person's capacity, the CJEU requires national courts to base their decisions on 'all of the objective evidence'.<sup>201</sup> In this context, the CJEU places a particular emphasis on medical evidence – referring to 'documents and certificates relating to that person's condition, established on the basis of current medical and scientific knowledge and data'.<sup>202</sup> This emphasis may seem to be at odds with the human rights model of disability found in the CRPD and now ostensibly incorporated within the CJEU's definition of disability. However, it should be borne in mind that the CJEU is referring to such evidence to establish the expected duration of the limitation of a person's capacity – which is presumably a reference to the 'impairment' rather than the impact of environmental factors and their contribution to causing the disability.

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196 Case C-395/15 *Mohamed Daouidi v. Bootes Plus SL and Others*, ECLI:EU:C:2016:917, para. 37.

197 Case C-395/15 *Mohamed Daouidi v. Bootes Plus SL and Others*, ECLI:EU:C:2016:917, para. 55.

198 Case C-395/15 *Mohamed Daouidi v. Bootes Plus SL and Others*, ECLI:EU:C:2016:917, para. 56.

199 Case C-395/15 *Mohamed Daouidi v. Bootes Plus SL and Others*, ECLI:EU:C:2016:917, para. 57.

200 Case C-395/15 *Mohamed Daouidi v. Bootes Plus SL and Others*, ECLI:EU:C:2016:917, para. 56.

201 Case C-395/15 *Mohamed Daouidi v. Bootes Plus SL and Others*, ECLI:EU:C:2016:917, para. 57.

202 Case C-395/15 *Mohamed Daouidi v. Bootes Plus SL and Others*, ECLI:EU:C:2016:917, para. 57.

In spite of this, such a narrow medical view may lead to problems. Firstly, it requires an individual to establish what they cannot do and to provide proof of that in order to argue that they are able to qualify for employment and are protected under the Employment Equality Directive. This might create tensions when individuals are arguing that they have been victims of disability discrimination following dismissal or denial of an employment benefit in instances where they claim that they were able to work or have been denied a reasonable accommodation which they claim would have allowed them to work.<sup>203</sup>

Moreover, the CJEU seems to assume that medical and scientific knowledge will provide 'objective evidence' and that it will be possible for medical professionals to identify and diagnose an impairment (or limitation in capacity) and predict its longevity – or at least establish that it is not short-term in nature. However, it may not always be easy for individuals to obtain such evidence or for medical professionals to provide it and agree about it among themselves. This may be a particular problem for some people with psychosocial disabilities. Given uncertainties regarding the exact diagnosis of psychological impairments or mental health problems, medical documentation confirming the existence of an impairment may be more contentious compared with some physical impairments. Moreover, given the fluctuating and unpredictable nature of many mental health conditions, it may be difficult for individuals to establish that their condition is expected to be sufficiently long-term to qualify as a disability.<sup>204</sup> The CJEU's judgment seems to assume the lack of contentiousness of such evidence and the ability of national courts easily to assess and evaluate such material. However, one can expect medical professionals to differ in their opinions in a significant number of cases of this nature.

Nevertheless, in terms of recognising that a disability can be related to an impairment which is of long-term duration, as is required under the CRPD, it must be observed that EU law, the case law of the CJEU and the CRPD seem to be in alignment.

#### 7.2.4 Status of people with illnesses

As noted above, in the individual communication *S.C. v. Brazil*, the CRPD Committee found that people with illnesses are not automatically excluded from the scope of the Convention, and that, in some circumstances, an illness could be equated to a disability for the purposes of the Convention. Moreover, the Committee noted that an illness could develop into a disability depending on its duration and degree of severity. As stated above, this demonstrates the inclusive and flexible nature of the concept of disability under the CRPD.

The Employment Equality Directive does not prohibit discrimination on the ground of illness, and it is silent as to whether and when an illness can be regarded as a disability. However, this issue has been addressed in the case law of the CJEU, which has adopted a somewhat 'flexible' approach to the issue of whether an illness can fall within the concept of disability for the purposes of the directive, albeit within the boundaries of the Court's own definition of disability. In *HK Danmark (Ring and Skouboe Werge)*, the Court, following the advice of its advocate general, held that a curable or incurable illness which led to the required degree of limitation on a long-term basis did fall within the concept of 'disability' within the meaning of the directive.<sup>205</sup> It clarified its ruling in *Chacón Navas*, and stated that an illness which did not entail such a limitation was not covered by the concept of 'disability'.<sup>206</sup>

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203 For a broader discussion of how courts can adopt a narrow view of disability and the problems this can lead to, see Waddington, L. (2015), "Not disabled enough": How European courts filter non-discrimination claims through a narrow view of disability; *European Journal of Human Rights*, vol. 15, No. 1, pp. 11-35.

204 On this point, see Bell, M. and Waddington, L. (2016), 'The Employment Equality Directive and supporting people with psychosocial disabilities in the workplace: a legal analysis of the situation in the EU Member States', report commissioned by the European Commission and the European network of legal experts in gender equality and non-discrimination. Available at: <http://www.equalitylaw.eu/>.

205 Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, ECLI:EU:C:2013:222, para. 41.

206 In fact, the judgment states that 'an illness not entailing such a limitation is not covered by the concept of "discrimination" within the meaning of Directive 2000/78'. Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, ECLI:EU:C:2013:222, para. 42.

In the later case of *Kaltoft*, the Court held that obesity does not in itself constitute a ‘disability’, since it does not necessarily involve a limitation which results from an impairment and which, in interaction with various barriers, hinders participation in professional life.<sup>207</sup> However, obesity should be regarded as a disability where it does lead to such a limitation. In the recent case of *Ruiz Conejero*,<sup>208</sup> which also concerned an individual who was obese, the Court repeated this ‘test’.<sup>209</sup>

In short, an illness can be regarded as a disability for the purposes of EU disability non-discrimination law where it complies with the definition of disability developed by the Court. Therefore, aside from more general concerns regarding the compatibility of that definition with the CRPD,<sup>210</sup> EU law can be regarded as compatible with the CRPD in that both foresee that an illness, where it is sufficiently severe and long-lasting, can be regarded as a form of disability.

## 8 The definition of discrimination

### 8.1 The definition of discrimination under the CRPD

As noted in section I of this report, the definition of discrimination contained in Article 2 CRPD is a broad one, which covers a wide range of forms of discrimination.

The duty to prohibit discrimination under the CRPD includes all forms of discrimination. Although neither direct nor indirect discrimination, nor harassment, are explicitly mentioned in the wording of the Convention itself, the CRPD Committee draws attention to the fact that ‘international human rights practice identifies four main forms of discrimination, which can occur individually or simultaneously’, namely: i) direct discrimination; ii) indirect discrimination; iii) denial of reasonable accommodation; and iv) harassment.<sup>211</sup> Under the CRPD, direct discrimination is absolutely prohibited, with no justification possible for such discrimination. In a similar vein to direct discrimination, the CRPD Committee does not refer to any justification for indirect discrimination under the Convention. However, one could argue, based on the General Comments of the other human rights treaty bodies, that ‘not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [treaty]’.<sup>212</sup> Some authors argue, however, that these General Comments must be read with caution in light of the absence in the CRPD of an explicit justification in the text of the Convention.<sup>213</sup>

207 Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, ECLI:EU:C:2013:222, para. 58.

208 C-270/16 *Ruiz Conejero*, ECLI:EU:C:2018:17.

209 C-270/16 *Ruiz Conejero*, ECLI:EU:C:2018:17, para. 32.

210 See e.g. the sub-sections above: *The Role of Socially Created Barriers in the Creation of Disability and Hindrance to Participation in Society versus Hindrance to Participation in Professional Life* above.

211 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 18

212 See Human Rights Committee, General Comment 18 (1994), UN Doc. U.N. Doc. HRI/GEN/1/Rev.1 at 26, para. 13. See also the comments of the Committee on Economic, Social and Cultural Rights, General Comment 20 (2009), UN Doc. E/C.12/GC/20, para. 13, where the Committee states that ‘differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects’. See also the comments of Lawson, A. (2009), ‘Disability and employment in the Equality Act 2010: Opportunities seized, lost and generated’, *Industrial Law Journal*, vol. 40, No. 4, pp. 359-383, at p. 366.

213 See the comments of Fraser Butlin, S. (2011), ‘The UN Convention on the Rights of Persons with Disabilities: Does the Equality Act 2010 measure up to UK international commitments?’ *Industrial Law Journal*, vol. 40, No. 4, pp. 428-438, at pp. 437-438. Fraser Butlin argues that ‘the absence of a specific justificatory provision in the CRPD is in itself noteworthy’ and that, ‘had the drafters intended discrimination to be unlawful only where it is unjustified, one would expect that to be reflected within the Convention. This is further emphasised by the drafters’ avoidance of any reference to, and distinction between, direct and indirect discrimination’. Consequently, she argues that ‘an interpretation of the CRPD that rejects the justification of discrimination cannot simply be dismissed. If such an interpretation is accepted, as on a purely textual analysis it should be, it would remove any possibility of justifying either discrimination arising from disability or indirect discrimination. The legitimacy or otherwise of the discrimination would be irrelevant thus setting the bar much higher before discriminatory practices were condoned’.

A particular novelty of the CRPD when compared with previous binding international human rights law lies in the fact that it defines an unjustified failure to provide reasonable accommodation as a distinct form of discrimination. In other words, the unjustified denial of reasonable accommodation is a separate or third form of discrimination, which does not fall under the heading of direct or indirect discrimination. The duty to reasonably accommodate will be described below in further detail.<sup>214</sup>

With regard to the fourth form of discrimination which is explicitly covered under international human rights law, namely harassment, this is implicitly covered under Article 2 CRPD according to the CRPD Committee, as noted in section I above.

As well as covering direct and indirect discrimination, an unjustified denial of reasonable accommodation and harassment, an instruction to discriminate may also be deemed to be covered implicitly as a form of discrimination under Article 2 CRPD; however, this last form of discrimination is notably absent from the CRPD Committee's General Comment No. 6 on equality.

As outlined in section I above, the CRPD Committee has confirmed this wide understanding of the definition of 'discrimination on the basis of disability' contained in Article 2 CRPD and has furthermore stated that multiple or intersectional discrimination is covered implicitly under the definition of discrimination in Article 2 CRPD and explicitly under Article 6 CRPD on women with disabilities.

## 8.2 The definition of discrimination under EU law

As noted directly above, the duty to prohibit discrimination under the CRPD covers four separate forms of discrimination: i) direct discrimination; ii) indirect discrimination; iii) denial of reasonable accommodation; and iv) harassment.

### 8.2.1 Prohibition of four forms of discrimination

The Employment Equality Directive prohibits discrimination in the form of direct and indirect discrimination and harassment. The CJEU has recognised all three forms of discrimination in the context of disability in its case law. In *Coleman*,<sup>215</sup> the Court found that the alleged less favourable treatment of a woman returning to work after a period of maternity leave could amount to direct discrimination and harassment. Ms Coleman made a number of allegations of adverse treatment. These included claims that she was not allowed to return to her original job following her maternity leave, whilst parents of non-disabled children were allowed to do this; that she was not allowed the same flexibility regarding her working hours as parents of non-disabled children; that she was described as 'lazy' for requesting time off to care for her child, and was threatened with dismissal when she occasionally arrived late because of the need to care for her child, whereas parents of non-disabled children were not treated in this way; and, furthermore, that highly abusive comments were made about her and her child. Since the treatment in question was allegedly linked to the disability of Ms Coleman's son, the Court found that Ms Coleman was protected from discrimination on the ground of disability under the directive.

Indirect discrimination on the ground of disability was addressed, *inter alia*, in the case of *HK Danmark (Ring and Skouboe Werge)*.<sup>216</sup> In this case, the CJEU found that a measure which allowed for a shortened period of notice if the employee had been on sick leave for a period of 120 days over a 12-month period potentially discriminated against workers with a disability. The Court found that the relevant law applied in the same way to disabled and non-disabled workers and therefore did not amount to direct

214 See section III.9 of this report.

215 Case C-303/06 *Coleman v. Attridge Law* ECLI:EU:C:2008:415.

216 This discussion of *HK Danmark (Ring and Skouboe Werge)* draws on Waddington, L. (2015), 'Fine-tuning non-discrimination law: Exceptions and justifications allowing for different treatment on the ground of disability', *International Journal of Discrimination and the Law*, vol. 15, Nos. 1-2, pp. 11-37, at p. 11.

discrimination. However, the Court went on to hold that '[a] worker with a disability is more exposed to the risk of application of the shortened notice period [...] than a worker without a disability' as, 'compared with such a worker, a worker with a disability has the additional risk of an illness connected with his disability'.<sup>217</sup> For this reason, the Court found that the national law in question potentially amounted to indirect discrimination based on disability,<sup>218</sup> and it had to be considered whether the difference in treatment was 'objectively justified' in line with the directive.

The Danish Government argued that the law aimed to encourage employers to recruit and employ workers who were likely to be repeatedly absent from work as a result of illness<sup>219</sup> and that the measure was in line with the Danish approach to labour market regulation based on flexicurity.<sup>220</sup> The Court found that these aims could, in principle, be regarded as objectively justifying a difference in treatment on the grounds of disability, such as that provided for by the law at issue.<sup>221</sup>

The second element of the justification test requires that the means used to achieve the aim be appropriate.<sup>222</sup> The Danish Government argued that the relevant provision was the most appropriate means for enabling the recruitment and retention in employment of people who have, or potentially have, a reduced work capacity as well as meeting 'the superior objective of a flexible, contractual and secure labour market'.<sup>223</sup> In response, the Court referred to the 'broad discretion' enjoyed by Member States and concluded that 'it does not appear unreasonable' to consider that the provision 'might be appropriate for achieving the aims mentioned'.<sup>224</sup>

As to whether the provision went beyond what was necessary to achieve the aims pursued, the Court held that the measure 'must be placed in its context and the adverse effects it is liable to cause for the persons concerned must be considered'.<sup>225</sup> This was a matter for the referring court to decide on, and that court had to examine:

whether the Danish legislature, in pursuing the legitimate aims of, first, promoting the recruitment of persons with illnesses and, secondly, striking a reasonable balance between the opposing interests of employees and employers with respect to absences because of illness, omitted to take account of the relevant factors relating in particular to workers with disabilities.<sup>226</sup>

In that respect, the Court stated that 'the risks run by disabled persons, who generally face greater difficulties than non-disabled persons in re-entering the labour market and have specific needs in connection with the protection their condition requires, should not be overlooked'.<sup>227</sup>

In conclusion, the Employment Equality Directive is in conformity with the CRPD in that it prohibits direct and indirect discrimination and harassment on the ground of disability. Furthermore, the definitions of the relevant forms of discrimination and the way in which they are interpreted by the CJEU seem to be broadly in line with the requirements of the CRPD. The only issue on which EU law may run counter to the CRPD is with regard to the justification test for indirect discrimination. As outlined above, there are differing opinions in the legal scholarship regarding this issue. On the one hand, it could be argued that, since neither the CRPD nor the CRPD Committee explicitly prohibits a justification test with regard to indirect discrimination, appropriate justifications are allowed, and therefore EU law is compliant with

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217 *HK Danmark (Ring and Skouboe Werge)*, para. 76.

218 *Joined Cases C-335/11 and C-337/11 HK Danmark (Ring and Skouboe Werge)*, ECLI:EU:C:2013:222, para. 76.

219 *Joined Cases C-335/11 and C-337/11 HK Danmark (Ring and Skouboe Werge)*, ECLI:EU:C:2013:222, para. 78.

220 *Joined Cases C-335/11 and C-337/11 HK Danmark (Ring and Skouboe Werge)*, ECLI:EU:C:2013:222, para. 79.

221 *Joined Cases C-335/11 and C-337/11 HK Danmark (Ring and Skouboe Werge)*, ECLI:EU:C:2013:222, para. 83.

222 *Joined Cases C-335/11 and C-337/11 HK Danmark (Ring and Skouboe Werge)*, ECLI:EU:C:2013:222, para. 84.

223 *Joined Cases C-335/11 and C-337/11 HK Danmark (Ring and Skouboe Werge)*, ECLI:EU:C:2013:222, para. 85.

224 *Joined Cases C-335/11 and C-337/11 HK Danmark (Ring and Skouboe Werge)*, ECLI:EU:C:2013:222, para. 87.

225 *Joined Cases C-335/11 and C-337/11 HK Danmark (Ring and Skouboe Werge)*, ECLI:EU:C:2013:222, para. 89.

226 *Joined Cases C-335/11 and C-337/11 HK Danmark (Ring and Skouboe Werge)*, ECLI:EU:C:2013:222, para. 90.

227 *Joined Cases C-335/11 and C-337/11 HK Danmark (Ring and Skouboe Werge)*, ECLI:EU:C:2013:222, para. 91.

the Convention in this regard. On the other hand, since neither the text of the Convention nor the CRPD Committee specifically refers to a justification test for indirect discrimination (unlike for the reasonable accommodation duty), one could argue that justifications of any kind are not permitted, and therefore EU law is not compliant with the CRPD. However, it is difficult to understand how a prohibition of indirect discrimination could work without some form of justification test. Moreover, the CRPD Committee did not highlight this as an issue in its Concluding Observations to the EU, seemingly indicating that it is not an issue of concern.

Unlike the CRPD, the Employment Equality Directive prohibits discrimination in the form of an instruction to discriminate. This form of discrimination is not referred to in the CRPD or by the CRPD Committee, and one can regard the Employment Equality Directive as providing protection from an additional form of disability discrimination, and therefore going beyond the requirements of the CRPD in this respect.

Turning now to the fourth form of discrimination recognised in the CRPD: an unjustified denial of a reasonable accommodation. The Employment Equality Directive clearly requires that Member States establish a duty to make a reasonable accommodation with regard to the fields of employment and occupation. However, an unjustified denial of an accommodation is not explicitly defined as a form of discrimination in the directive, and there is no obligation under EU law for the Member States to classify or treat such a denial in this way, although some have opted to do so. The EU and the Member States share the competence to address disability equality and non-discrimination, and therefore are jointly responsible for complying with the CRPD. On that basis, one could argue that the EU's failure to define an unjustified denial of a reasonable accommodation as a form of discrimination in the Employment Equality Directive is not a breach of the CRPD, since the Member States retain competence in this area and can therefore fill this lacuna through national law. However, at the very least, the failure of the directive to define an unjustified failure to make a reasonable accommodation as a form of discrimination can be regarded as misleading and as possibly encouraging the Member States to believe that it is acceptable to take such an approach. One reason for this is that, like the Member States, the EU is bound by the CRPD, and the Member States may assume that EU legislation in any particular field would implement the CRPD in full, rather than partially. Nevertheless, one should recall that the directive was adopted before the CRPD was negotiated and came into force, and that the EU was not in a position to take the CRPD's definition of discrimination into account when drafting and adopting the directive. In spite of this, the failure to classify an unjustified denial of a reasonable accommodation as a form of discrimination in the directive is an issue of concern, and EU legislation addressing disability equality and non-discrimination should now aim to be in full compliance with the CRPD with regard to the definitions of discrimination which it uses. This is not the case with regard to the Employment Equality Directive and reasonable accommodation at present, and there seems to be no consideration given to revising the directive to align with the CRPD.

It is worth noting that the Commission has proposed a new directive which would prohibit discrimination on the ground of disability – and a variety of other grounds – in a broad field of areas extending beyond employment. This new directive, if adopted, would complement the Employment Equality Directive. The Commission's original 2008 proposal<sup>228</sup> did take the CRPD into account.<sup>229</sup> It clearly defined an unjustified failure to make a reasonable accommodation as a form of discrimination, and linked this to the Convention. Later versions of the proposal maintain the link between reasonable accommodation and discrimination. Article 2(1)(a) of the proposal now lists six kinds of discrimination which are to be prohibited, including 'denial of reasonable accommodation for persons with disabilities'.<sup>230</sup> However, for the time being, there are no signs that the new directive will be adopted.

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228 European Commission, 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation' COM(2008) 426 final. Available at: <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX%3A52008PC0426>.

229 Waddington, L. (2018), 'The influence of the UN Convention on the Rights of Persons with Disabilities on EU non-discrimination law', in: Belavusau, U. and Henrard, K. (eds.), *EU anti-discrimination law beyond gender* (Hart).

230 Version of 14 February 2018, 6073/18.

### 8.2.2 Prohibition of multiple and intersectional discrimination

As noted above in section II, the CRPD Committee has stated that multiple or intersectional discrimination is covered implicitly under the definition of discrimination in Article 2 CRPD and explicitly under Article 6 CRPD on women with disabilities. As is also noted above, ‘multiple discrimination’ encompasses situations where a person can experience discrimination on two or more grounds, leading to compounded discrimination, while intersectional discrimination covers situations where several prohibited grounds of discrimination interact with each other at the same time and are inseparable.<sup>231</sup>

While the Employment Equality Directive prohibits discrimination on multiple grounds (religion or belief, age and sexual orientation as well as disability), it does not explicitly address multiple or intersectional discrimination involving two or more of these grounds, nor is this the case for the other EU equality directives. However, recital 3 of the preamble to the Employment Equality Directive makes a passing reference to multiple (although not intersectional) discrimination involving women, by noting the ‘aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination’.<sup>232</sup> Aside from this non-binding reference, existing EU legislation, whilst addressing discrimination on a variety of different grounds, has not attempted to deal with the issue of multiple or intersectional discrimination, although it has been referred to in soft law instruments,<sup>233</sup> the Commission has funded research on the topic,<sup>234</sup> and it has been the subject of much academic debate.<sup>235</sup>

The fragmentation in the way in which EU law addresses discrimination, with a number of instruments addressing different grounds and with different material scope, poses challenges when it comes to addressing multiple and intersectional discrimination. Xenidis has argued that the system of justifications ‘is so complex and differentiated for each ground [...] that it renders multiple discrimination analyses very challenging’.<sup>236</sup> In 2009, Mark Bell not surprisingly described the failure to address multiple discrimination as a ‘[lacuna] in the existing [EU] legal framework [which has] frustrated the ability of the law to respond effectively to situations where individuals face discrimination on more than one ground’.<sup>237</sup>

Given the important role which the CJEU plays in interpreting EU legislation, it would seem to have been possible for the Court to have taken the lead on tackling multiple and intersectional discrimination on the basis of current EU equality and non-discrimination law. However, to date, this has not happened.<sup>238</sup> This

231 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 19.

232 A comparable reference is found in recital 14 of the Racial Equality Directive. Xenidis argues that multiple discrimination has been framed from the perspective of women’s rights because the feminist movement, and particularly the European Women’s Lobby, has been key in pushing for recognition of multiple discrimination in EU equality directives. Xenidis, R. (2018), ‘Multiple discrimination in EU equality law: Much ado about nothing?’, in: Belavusau, U. and Henrard, K. (eds.) (2018), *EU anti-discrimination law beyond gender* (Hart), forthcoming.

233 For example: Council Decision 2000/750/EC establishing a Community action programme to combat discrimination (2001 to 2006) [2000], OJ L 303, 2.12.2000, pp. 23–28, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32000D0750>; Commission Green Paper on Equality and non-discrimination in an enlarged European Union COM (2004) 379 final, 28 May 2004. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A114157>.

234 European Commission (2007), *Multiple discrimination: practices, policies and laws* (research carried out by the Danish Institute for Human Rights). The EU Fundamental Rights Agency has also published on this topic: *Data in focus report multiple discrimination, EU-MIDIS: European Union minorities and discrimination survey* (2010).

235 See Fredman S. (2016), Intersectional discrimination in EU gender equality and non-discrimination law, EU network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/publications/thematic-reports>. Other relevant publications include Xenidis, R. (2018), ‘Multiple discrimination in EU equality law: Much ado about nothing?’, in: Belavusau, U. and Henrard, K. (eds.) (2018), *EU anti-discrimination law beyond gender* (Hart), forthcoming; Verloo, M. (2006), ‘Multiple inequalities, intersectionality and the European Union’ *European Journal of Women’s Studies*, vol.13, No. 2, pp. 211–228; Schiek, D. and Mulder, J. (2011), ‘Intersectionality in EU law: A critical re-appraisal’, in: Lawson, A. and Schiek, D., *European Union non-discrimination law and intersectionality*, (Routledge), pp. 259–273, at p. 273.

236 Xenidis, R. (2018), ‘Multiple discrimination in EU equality law: Much ado about nothing?’, in: Belavusau, U. and Henrard, K. (eds.), *EU anti-discrimination law beyond gender* (Hart), forthcoming.

237 Bell, M. (2009), ‘Advancing EU anti-discrimination law: The European Commission’s 2008 proposal for a new Directive’, *The Equal Rights Review*, vol. 3, pp. 7–18, at p. 9.

238 Xenidis, R. (2018), ‘Multiple discrimination in EU equality law: Much ado about nothing?’, in: Belavusau, U. and Henrard, K. (eds.), *EU anti-discrimination law beyond gender* (Hart), forthcoming.

is evidenced by the 2016 case of *Parris*,<sup>239</sup> in which the Court was asked for the first time in a preliminary reference to consider whether treatment which linked to a combination of grounds (age and sexual orientation) could amount to discrimination. In response, the CJEU found that the Employment Equality Directive did not prohibit such discrimination, and held:

While discrimination may indeed be based on several of the grounds set out in Article 1 of Directive 2000/78, there is, however, no new category of discrimination resulting from the combination of more than one of those grounds, such as sexual orientation and age, that may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established.<sup>240</sup>

More broadly, Xenidis argues that discrimination cases tend to be examined by the Court through a 'single-ground lens', meaning that where cases reveal the possible existence of discrimination linked to two grounds, only one ground, e.g. sex, is addressed, and the other ground, e.g. age, is ignored altogether.<sup>241</sup> However, one case where the Court considered discrimination arguments related to two grounds, albeit separately, is *Z*.<sup>242</sup> As noted above, this case involved a woman who was unable to have a child naturally, and arranged for a surrogate mother to give birth to her child. Her subsequent request to take a period of paid leave from work to care for the new baby was refused. The referring court submitted a series of preliminary references relating to both sex discrimination and disability discrimination, but did not ask about intersectional or multiple discrimination. The Court considered both sets of questions and found that there was neither discrimination on the ground of sex nor discrimination on the ground of disability. While arguments regarding intersectional discrimination were brought during the oral proceedings,<sup>243</sup> the Court only addressed the issue from the perspective of the two separate grounds, first comparing Ms Z to a man who had become the father of a child born through a surrogacy arrangement; and, secondly, finding that Ms Z was not disabled for the purposes of the Employment Equality Directive. However, this was a clear case where intersectionality was relevant, in that Ms Z was disadvantaged because she was a woman who, as a result of an impairment, was unable to become pregnant, and the disadvantageous treatment she experienced was clearly linked to her identity as a woman with a disability. Therefore, and in spite of encouragement from some of its advocates general to do this,<sup>244</sup> the Court has thus far failed to engage with issues of intersectional and multiple discrimination, involving disability or any other ground. This has led Xenidis to argue that 'to this day, there exists neither a doctrinal framework nor appropriate remedies to deal with [multiple discrimination]'.<sup>245</sup>

One can conclude that, in this respect, EU law is not compatible with the CRPD, which requires that multiple and intersectional discrimination involving disability be recognised and addressed. Given that the EU has already opted to establish a degree of minimum harmonisation in its equality and non-discrimination law, through the Employment Equality Directive, one can argue that it should also address multiple and intersectional discrimination. Rectifying this lacuna at the purely national level is not as straightforward as, for example, extending the material scope of equality and non-discrimination law to cover all fields where discrimination can take place, and not just employment and occupation, and independent national action could lead to divergent responses and approaches.<sup>246</sup> Given that the EU has opted to prohibit disability discrimination in the field of employment, it should, in order to be in alignment with the CRPD, also prohibit intersectional and multiple discrimination which involves disability in this field. The failure

239 Case C-443/15, *David L. Parris v. Trinity College Dublin and Others*, ECLI:EU:C:2016:897.

240 Case C-443/15, *David L. Parris v. Trinity College Dublin and Others*, ECLI:EU:C:2016:897, para. 80.

241 Xenidis, R. (2018), 'Multiple discrimination in EU equality law: Much ado about nothing?', in: Belavusau U. and Henrard, K. (eds.), *EU Anti-discrimination law beyond gender* (Hart), forthcoming.

242 This is also acknowledged by Xenidis: Xenidis, R. (2018), 'Multiple discrimination in EU equality law: Much ado about nothing?', in: Belavusau U. and Henrard, K. (eds.), *EU Anti-discrimination law beyond gender*, (Hart), forthcoming; Case C-363/12 *Z v. A Government department, The Board of management of a community school*, ECLI:EU:C:2014:159.

243 Xenidis, R. (2018), 'Multiple discrimination in EU equality law: Much ado about nothing?', in: Belavusau, U. and Henrard, K. (eds.), *EU anti-discrimination law beyond gender*, (Hart), forthcoming.

244 Specifically, Advocate General Kokott in the *Parris* case, Opinion of Advocate General Kokott, ECLI:EU:C:2016:493

245 Xenidis, R. (2018), 'Multiple discrimination in EU equality law: Much ado about nothing?', in: Belavusau, U. and Henrard, K. (eds.), *EU anti-discrimination law beyond gender* (Hart), forthcoming.

246 See section III.12.

of EU law explicitly to address this is leading to situations in which individuals with disabilities who are confronted with this kind of discrimination are left unprotected. This situation led the CRPD Committee, in its Concluding Observations to the EU, to specifically recommend that the EU should ensure that discrimination on the grounds of disability is prohibited in all its distinct forms, including multiple and intersectional discrimination.<sup>247</sup>

However, it should be noted that the latest publicly available version of the proposal for a new equality directive,<sup>248</sup> which covers disability as well as a number of other grounds, does pay significant attention to multiple discrimination, and many important changes have been introduced to the proposal relatively recently. A series of references are made to multiple discrimination in the non-binding preamble to the proposed directive. However, more significantly, and reflecting recent changes, Article 1, in setting out the purpose of the proposed directive, notes that it lays down a framework, *inter alia* for combating discrimination on multiple grounds. Article 2 then explicitly prohibits and contains a definition of multiple discrimination, which covers discrimination based on any combination of grounds covered by EU equality and non-discrimination law (sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation). The latest version of the proposal states that ‘multiple discrimination may occur on the basis of any such combination also where discrimination would not occur on one or more of the grounds when taken separately’.<sup>249</sup> Intersectional discrimination is not mentioned. This proposal is, however, currently blocked, and there seems to be little prospect of it being adopted in the short term. Moreover, it does not address the material scope of the Employment Equality Directive, and that directive would remain unchanged even if this proposal were adopted.

## 9 Reasonable accommodation

### 9.1 Reasonable accommodation under the CRPD

Under Article 5(3), the CRPD places an obligation on States Parties to ensure that reasonable accommodation is provided, by both public and private enterprises. The aim of the reasonable accommodation duty under the UN Convention is clearly stated in Article 5(3) to be the promotion of equality and the elimination of discrimination.

The CRPD is unambiguous in defining an unjustified denial of a reasonable accommodation – one where the duty-bearer does not encounter a disproportionate or undue burden – as a form of discrimination,<sup>250</sup> and so is the CRPD Committee.<sup>251</sup> The Convention does not classify the unjustified failure to make a reasonable accommodation as a sub-category of direct or indirect discrimination but rather as a third and separate form of discrimination.

The importance of the Convention’s definition of an unjustified denial of reasonable accommodation as a form of discrimination (as opposed to some other prohibited act) cannot be underestimated. Waddington argues that ‘(significant) consequences’ attach to this classification. In the first instance, she argues that:

identifying a failure to provide a reasonable accommodation as discrimination may result in, on the one hand, an increased awareness of the rights-based nature of the duty to accommodate,

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247 Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of the European Union, UN Doc. CRPD/C/EU/CO/1, para. 19.

248 Version of 14 February 2018, 6073/18.

249 Article 2(3)(a), version of 14 February 2018, 6073/18.

250 Article 2 CRPD.

251 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 17.

and on the other, a recognition, amongst both people with disabilities and [duty-bearers] of the seriousness of a failure to comply with the duty.<sup>252</sup>

Waddington also argues that there can ‘be more practical implications’<sup>253</sup> inherent in identifying an unjustified denial of reasonable accommodation as a form of discrimination. Such a classification could lead, according to Waddington, ‘to the rule on the burden of proof, which favours the complainant, being extended to cases of alleged failures to make a reasonable accommodation’.<sup>254</sup> In addition, Waddington and Broderick argue that the ‘the way in which a breach of the duty to accommodate is classified can have consequences for the remedies available to the victim, and the sanctions that can be imposed’.<sup>255</sup> In other words, ‘judges may be empowered or inclined to order more far-reaching sanctions and remedies in cases of discrimination than in cases of other wrongs’.<sup>256</sup>

In addition to the issues of classification highlighted above, the nature of the reasonable accommodation duty has been clarified by the CRPD Committee, which has drawn attention to the fact that ‘reasonable accommodation is a single term’, and that the concept of ‘reasonableness’ should ‘not be misunderstood as an exception clause’, and that it ‘should not act as a distinct qualifier or modifier’ to the duty itself.<sup>257</sup> In other words, ‘it is not a means by which the costs of accommodation or the availability of resources can be assessed’;<sup>258</sup> rather, the reasonableness of an accommodation is ‘a reference to its relevance, appropriateness and effectiveness for the person with a disability’.<sup>259</sup> The Committee further notes that an accommodation is reasonable ‘if it achieves the purpose (or purposes) for which it is being made, and is tailored to meet the requirements of the person with a disability’.<sup>260</sup> This serves to emphasise both the suitability of the measures adopted by public or private entities with a view to facilitating the participation of persons with disabilities in mainstream society and the individualised nature of the duty itself.

## 9.2 Reasonable accommodation under EU law

The Employment Equality Directive requires EU Member States to establish a duty to provide a reasonable accommodation with the aim of guaranteeing ‘compliance with the principle of equal treatment’. Under Article 5 of the directive, and as highlighted in section II of this report, employers are required to take appropriate, individualised measures to enable a person with a disability ‘to have access to, participate in, or advance in employment, or to undergo training, as long as those measures do not impose a disproportionate burden on the employer’.

### 9.2.1 Denial of reasonable accommodation as a form of discrimination

As Lawson notes, the significance of this obligation at the EU level should not be ‘underestimated’, since the directive gave ‘binding legal force to the concept of reasonable accommodation’ for the first time, and

252 Waddington, L. (2013), ‘Equal to the task: Re-examining EU equality law in light of the United Nations Convention on the Rights of Persons with Disabilities’, *European Yearbook of Disability Law*, vol. 4 (Intersentia), pp. 169-200, at p. 190.

253 Waddington, L. (2013), ‘Equal to the task: Re-examining EU equality law in light of the United Nations Convention on the Rights of Persons with Disabilities’, *European Yearbook of Disability Law*, vol. 4 (Intersentia), pp. 169-200, at p. 190.

254 Waddington, L. (2013), ‘Equal to the task: Re-examining EU equality law in light of the United Nations Convention on the Rights of Persons with Disabilities’, *European Yearbook of Disability Law*, vol. 4 (Intersentia), pp. 169-200, at p. 190.

255 Waddington, L. and Broderick, A. (2016), *Disability law and the duty to reasonably accommodate beyond employment: A legal analysis of the situation in EU Member States*, report commissioned by the European Commission and the European network of legal experts in gender equality and non-discrimination, p. 114. Available at: <http://www.equalitylaw.eu/>.

256 Waddington, L. (2013), ‘Equal to the task: Re-Examining EU equality law in light of the United Nations Convention on the Rights of Persons with Disabilities’, *European Yearbook of Disability Law*, vol. 4 (Intersentia), pp. 169-200, at p. 190.

257 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 25(a).

258 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 25(a).

259 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 25(a).

260 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 25(a).

this 'represents a significant deepening and enriching of the principle of equal treatment which underlies [EU] equality law'.<sup>261</sup> By way of contrast with the CRPD, however, the directive does not define an unjustified failure to make a reasonable accommodation as a form of discrimination. It is notable that, while the directive itself does not require that Member States define a failure to reasonably accommodate as a form of discrimination, States Parties to the CRPD, including EU Member States, are certainly required to define the duty as such. Notwithstanding the absence of an explicit link between a breach of the duty to provide a reasonable accommodation and discrimination under EU law, some EU Member States have classified a breach of the duty to provide a reasonable accommodation as a form of discrimination. However, not all EU Member States have done so.<sup>262</sup>

The CJEU could, of course, interpret Article 5 of the Employment Equality Directive as meaning that a failure to accommodate should be regarded as a form of discrimination, in addition to the four forms of discrimination which are mentioned explicitly in Article 2 of the directive. A preliminary reference from the Danish courts, in the *HK Danmark (Ring and Skouboe Werge)* case, outlined above,<sup>263</sup> provided the first opportunity for the Court to comment on the classification of the reasonable accommodation duty under EU law. In that case, the Danish court had not asked the CJEU directly to determine whether a failure to make a reasonable accommodation amounted to a form of discrimination, and while the Court did have the opportunity to clarify the nature of the duty in the context of the preliminary reference, it did not enter into a discussion on issues of classification. It focused instead, *inter alia*, on whether a reduction in working hours could be regarded as a measure of reasonable accommodation. The Court observed that a reduction in working hours may be deemed a reasonable accommodation in a situation where the reduction makes it possible for the worker to continue in his employment, and the Court referred to the CRPD in the context of relevant international law.<sup>264</sup> The Court held, however, that it was for the national court to assess whether a reduction in working hours, as an accommodation measure, represents a disproportionate burden on employers.

As it currently stands, therefore, neither the Employment Equality Directive itself nor the CJEU defines the reasonable accommodation duty as a form of discrimination. By way of contrast, the 2008 proposal for a non-discrimination directive, *inter alia* on the ground of disability in the fields of social protection including social security, healthcare and social housing, education, and access to and supply of goods and services including housing, defined an unjustified failure to provide reasonable accommodation as a form of discrimination. Its adoption would serve to bring EU non-discrimination law closer to the requirements set out in the CRPD, at least with regard to the duty of reasonable accommodation. However, as noted by Favalli and Ferri, 'its approval and entry into force should not be expected too soon'.<sup>265</sup> Moreover, as noted above, this new directive would not result in amendments to the Employment Equality Directive.

The significant consequences which can flow from the decision to identify a failure to make a reasonable accommodation as a form of discrimination have been highlighted above.<sup>266</sup> Given the clear language of the Convention on this point as well as the remarks of the CRPD Committee, it is submitted that the Employment Equality Directive risks sending out the message that not defining an unjustified denial of reasonable accommodation as a form of discrimination is compatible with the CRPD. Since the EU has decided to legislate in this field, it is argued that the EU should ensure that its legislation is fully compliant with the CRPD in all aspects, including with regard to its definition of reasonable accommodation.

261 Lawson, A. (2009), 'The UN Convention on the Rights of Persons with Disabilities and European disability law: A catalyst for cohesion', in: *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Brill), pp. 81-109, at p. 93. See also, Waddington, L. (2007), 'Reasonable Accommodation', in: Schiek, D., Waddington, L. and Bell, M. (eds.), *Cases, materials and text on national, supranational and international non-discrimination law* (Hart).

262 For further information, see the latest version of the country reports on non-discrimination of the European network of gender experts in gender equality and non-discrimination, available at: <http://www.equalitylaw.eu/>.

263 See section II. 2.1.

264 See paragraphs 3-5 of Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)* ECLI:EU:C:2013:222.

265 Favalli, S. and Ferri, D. (2016), 'Defining disability in the European Union non-discrimination legislation: Judicial activism and legislative restraints', *European Public Law*, vol. 22, No. 3, 548.

266 See section III.9.

### 9.2.2 The 'reasonableness' of accommodation measures

As highlighted above,<sup>267</sup> the CRPD Committee has clearly stated that the reasonableness of an accommodation is not to be assessed with regard to costs and that the cost issue falls under the disproportionate/undue burden defence. By way of contrast, the Court of Justice refers to the reasonableness of accommodation measures in exactly the terms which the CRPD Committee seeks to avoid. In other words, the Court has stated that, in accordance with Article 5 of the Employment Equality Directive, the accommodation measure which a person with a disability is entitled to 'must be reasonable, in that it must not constitute a disproportionate burden on the employer'.<sup>268</sup>

This means that tension arises between EU law and the CRPD concerning the interpretation of the term 'reasonable' in the definition of the duty of 'reasonable accommodation'. If the CJEU continues to refer to the reasonableness of an accommodation measure in terms of cost, this may influence Member States' courts and legislators to do the same. Such an understanding of the reasonableness of accommodation measures is not desirable, since it deflects attention away from the necessity (under the CRPD) for an accommodation to be relevant, appropriate and effective for a particular individual with a disability.

In order to ensure consistency with the CRPD and to guide the EU Member States on this particular issue, the Court of Justice should adopt an understanding of the concept of reasonable accommodation and the nature of the duty itself, which is in line with the CRPD and with the remarks of the CRPD Committee on this issue. At present, the Court's stance is out of line with EU law on this point.

## 10 Discrimination by association and discrimination based on assumed or future disability

### 10.1 Discrimination by association and discrimination based on assumed or future disability under the CRPD

It is evident from section I above that the wide scope of Articles 2 and 5 CRPD seeks to eradicate all discriminatory situations and conduct of a discriminatory nature that is linked to an individual's disability. For that reason, the CRPD Committee has confirmed that the Convention prohibits any discrimination against individuals who associate with a person who has a disability, the latter being the main target of the perpetrator's prejudice.

The broad remit of the definition of discrimination in the CRPD is evidenced by the inclusion of the phrase 'on the basis of disability' in Article 2 of the CRPD. Trömel points to the fact that the incorporation of this phrase has implications for UN Member States 'when implementing the Convention and, in particular, when drafting national anti-discrimination legislation' and should not be overlooked. He further acknowledges that legislation prohibiting discrimination on the basis of disability 'has to put the focus not on whether the person who has been discriminated [against] has or has not a (legally certified) disability, but on whether the situation faced by the person is a discriminatory situation based on disability'.<sup>269</sup>

Although General Comment No. 6 of the CRPD Committee does not mention distinct sub-categories of discrimination by association, it is arguable that States Parties to the CRPD are required to target *all forms* of discrimination by association. In other words, States Parties should prohibit discrimination experienced directly by association, and they should also provide protection from indirect discrimination against those who associate with a person with a disability. The first type of discrimination could arise where a person with a disability is refused access to a venue because of his/her disability and the second individual is

267 See section III.9.1

268 Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, ECLI:EU:C:2013:222, para. 58.

269 Trömel, S. (2009), 'A Personal Perspective on the Drafting History of the United Nations Convention on the Rights of Persons with Disabilities', in: *European Yearbook of Disability Law*, vol. 1 (Intersentia), pp. 115-138, at p. 124.

also refused entrance to the venue on account of having attended with the individual who has a disability. The latter type of discrimination – indirect discrimination by association – arises in a situation whereby an individual cares for, or otherwise associates with, a person with a disability and endures a particular disadvantage as a result of an apparently neutral law, policy or practice that also has a disproportionate effect upon the individual with a disability.<sup>270</sup>

A person who associates with an individual who has a disability can also encounter discrimination by harassment or an unjustified denial of reasonable accommodation. While the CRPD Committee's General Comment No. 6 does not expressly refer to this, by virtue of the broad remit of the CRPD's non-discrimination provision and the reference in Article 2 CRPD to 'all forms of discrimination', it would appear that an individual can claim protection under the CRPD from harassment by association and can also claim a right to a reasonable accommodation because of their association with an individual with a disability. However, neither the CRPD nor the CRPD Committee has stated this explicitly. The issue of reasonable accommodation by association could occur, for instance, where a carer requests flexibility with regard to his/her working hours, or long advance notice of the planned work schedule, in order to make it possible or easier to provide assistance to a person with a disability at particular times. This could be the case – even if the assistance to the person with the disability could be provided without this accommodation – where the provision of the accommodation makes it far easier for the non-disabled carer to combine work and care-related tasks. In this sense, the accommodation benefits both the non-disabled individual who requests it and the person with the disability.

According to the Committee's General Comment No. 6, and as highlighted above in section I of this report, a person who is discriminated against because he or she is wrongly perceived to have a disability, or is likely to acquire a disability in the future, is also protected from discrimination on the ground of disability. The first prohibition of discrimination endeavours to protect persons with disabilities from the assumed perceptions of others with regard to impairment. The latter form of prohibition of discrimination is relevant to instances of genetic discrimination<sup>271</sup> and also highlights the need for privacy with regard to the personal health data of persons who are likely to acquire a disability in the future. Notably, the CRPD Committee has stated in General Comment No. 6 that:

States Parties to the Convention must ensure protection against 'discrimination on all grounds', which, according to the Committee means that all possible grounds of discrimination and their intersections must be taken into account. Possible grounds include but are not limited to: disability; health status; and genetic status.<sup>272</sup>

While none of the above forms of discrimination is referred to specifically in the CRPD itself, they have been read into the Convention by the CRPD Committee. This reading of the Convention is linked to the concept of disability outlined in section I of the report – an open-ended, inclusive and flexible conceptualisation.

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270 For more on the topic of indirect discrimination by association, see Honeyball, S. (2007), 'Discrimination by association', [2007] 4 *Web Journal of Current Legal Issues*. Available at: <http://webjcli.ncl.ac.uk/2007/issue4/honeyball4.html>.

271 See de Paor, A. and O'Mahony, C. (2016), 'The need to protect employees with genetic predisposition to mental illness? The UN Convention on the Rights of Persons with Disabilities and the case for regulation', *Industrial Law Journal*, vol. 45, pp. 525–555. See also de Paor, A. and Ferri, D. (2015), 'Regulating genetic discrimination in the European Union: Pushing the EU into uncharted territory or ushering in a new genomic era?' *European Journal of Law Reform*, vol. 13, No. 1, pp. 14–32.

272 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 21.

## 10.2 Discrimination by association and discrimination based on assumed or future disability under EU law

### 10.2.1 Discrimination by association

The Employment Equality Directive is silent as to whether discrimination by association or based on assumed or future disability is prohibited.<sup>273</sup> Instead, it simply prohibits discrimination on the ground of disability. However, as noted above, the CJEU has ruled on the issue of disability discrimination by association in the case of *Coleman*.<sup>274</sup> The case concerned a mother who was allegedly subject to direct discrimination and harassment because she had a child with a disability. The mother, Ms Coleman, was not disabled herself.

The Opinion of Advocate General Póitres Maduro was particularly important in this case.<sup>275</sup> The role of the advocate general is to advise the Court on how to resolve the case, although there is no obligation on the Court to follow this advice. Advocate General Póitres Maduro commenced his analysis by noting that the Employment Equality Directive had to be interpreted in light of the goals pursued by Article 13 EC (now Article 19 TFEU), which provided its legal basis, and against the background of the Court's case law on the principles of equal treatment and non-discrimination. He recalled that equality is one of the fundamental principles of Community (now EU) law, and that, 'In order to determine what equality requires in any given case it is useful to recall the values underlying equality. These are human dignity and personal autonomy'.<sup>276</sup>

The advocate general went on to elaborate on what he felt these two concepts involved. He found that, 'at a bare minimum, human dignity entails the recognition of the equal worth of every individual' and that 'individuals and political institutions must not act in a way that denies the intrinsic importance of every human life'.<sup>277</sup> Meanwhile, personal autonomy 'dictates that individuals should be able to design and conduct the course of their lives through a succession of choices among different valuable options'.<sup>278</sup>

Advocate General Póitres Maduro noted that a person's dignity and autonomy could be undermined when that person is directly targeted, and disadvantaged, because he or she possessed one of the characteristics covered by non-discrimination law.<sup>279</sup> He also noted that 'more subtle and less obvious ways' existed in which a person could be discriminated against:

One way of undermining the dignity and autonomy of people who belong to a certain group is to target not them, but third persons who are closely associated with them and do not themselves belong to the group. A robust conception of equality entails that these subtler forms of discrimination should also be caught by anti-discrimination legislation, as they, too, affect persons belonging to suspect classifications.<sup>280</sup>

He argued that discrimination against such third persons undermined the dignity and autonomy of the individuals who possessed the covered characteristic as much as any discrimination experienced directly

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273 Parts of this text draw on Waddington, L. (2009), 'Case C-303/06, *S. Coleman v. Attridge Law and Steve Law*, Judgment of the Grand Chamber of the Court of Justice of 17 July 2008', *Common Market Law Review*, vol. 46, No. 2, pp. 665-681.

274 Case C-303/06 *Coleman v. Attridge Law* ECLI:EU:C:2008:415.

275 Case C-303/06 *Coleman v. Attridge Law*, Opinion of Advocate General Póitres Maduro ECLI:EU:C:2008:61.

276 Case C-303/06 *Coleman v. Attridge Law*, Opinion of Advocate General Póitres Maduro ECLI:EU:C:2008:61, para. 8.

277 Case C-303/06 *Coleman v. Attridge Law*, Opinion of Advocate General Póitres Maduro ECLI:EU:C:2008:61, para. 9.

278 Case C-303/06 *Coleman v. Attridge Law*, Opinion of Advocate General Póitres Maduro ECLI:EU:C:2008:61, para. 9.

279 Borrowing from the terminology of the US Supreme Court, the Advocate General described these grounds of discrimination as 'suspect classifications'. Case C-303/06 *Coleman v. Attridge Law*, Opinion of Advocate General Póitres Maduro ECLI:EU:C:2008:61, para. 10.

280 Case C-303/06 *Coleman v. Attridge Law*, Opinion of Advocate General Póitres Maduro ECLI:EU:C:2008:61.

by them, and served to exclude the person with the covered characteristic from a range of possibilities and choices that they would otherwise have had.<sup>281</sup>

Having set out this conceptual analysis, the advocate general turned his attention to the Employment Equality Directive more specifically. He began by noting that the directive was adopted to protect people belonging to ‘suspect classifications’ and to ensure that their dignity and autonomy was not compromised.<sup>282</sup> In order to achieve this aim, the directive lay down a general framework for combating discrimination ‘on the grounds’ of religion or belief, disability, age and sexual orientation.<sup>283</sup> By using the phrase ‘on the grounds of’, the directive sought to distinguish between discrimination that is prohibited and differences in treatment motivated by other characteristics, such as trustworthiness and politeness, which are permitted.<sup>284</sup>

Turning to the case at hand, the advocate general found that, should Ms Coleman be able to establish that she was adversely treated because of the disability of her son, then she should fall within the protection of the directive. He noted that it is the ground of discrimination which is the focus of the directive, not the question of whether the alleged victim actually possesses that ground or characteristic herself. He concluded that the directive removes ‘religion, age, disability and sexual orientation completely from the range of grounds an employer may legitimately use to treat some people less well’,<sup>285</sup> and, in the context of the specific preliminary reference, he advised the Court to hold that the directive ‘protects people who, although not disabled themselves, suffer direct discrimination and/or harassment [...] because they are associated with a disabled person’.<sup>286</sup>

The Court endorsed the Opinion of its advocate general and had regard to the directive’s objectives and intended effect.<sup>287</sup> It held that the directive excludes disability ‘from the range of permissible reasons an employer may legitimately rely upon in order to treat one employee less favourably than another’.<sup>288</sup> Accordingly, the treatment that Ms Coleman had allegedly received was ‘on the ground’ of disability – albeit that it was her son, and not herself, who was disabled. Thus, what mattered was not whether the claimant fell into a ‘particular category of person’ but whether she had been treated less favourably ‘by reference to the grounds [...] [of disability]’.<sup>289</sup> The Court consequently held that the protection from direct discrimination and harassment found in the Employment Equality Directive is not limited to people who are themselves disabled. The Court held that the directive also applies when an employer directly discriminates against or harasses an employee where that discrimination or harassment is based on the disability of the employee’s child, whose care is provided primarily by the employee.

This judgment contains an explicit recognition that direct discrimination and harassment by association on the ground of disability is prohibited under EU equality and non-discrimination law. This also seems to be reflected in the proposal for a new equality directive, as proposed by the Commission in 2008. That proposal identified ‘direct discrimination and harassment by association’ as one of six forms of prohibited discrimination.<sup>290</sup> Notably, it did not explicitly prohibit indirect discrimination by association. However, it has been argued that the CJEU in the *CHEZ* case,<sup>291</sup> which concerned discrimination on the ground of racial or ethnic origin, accepted that the concept of discrimination by association applied in

281 Case C-303/06 *Coleman v. Attridge Law*, Opinion of Advocate General Poiares Maduro ECLI:EU:C:2008:61, paras. 13 and 14.

282 Case C-303/06 *Coleman v. Attridge Law*, Opinion of Advocate General Poiares Maduro ECLI:EU:C:2008:61, para. 15.

283 Article 1 of the Employment Equality Directive and para. 15 of the Opinion.

284 Case C-303/06 *Coleman v. Attridge Law*, Opinion of Advocate General Poiares Maduro ECLI:EU:C:2008:61, para. 16.

285 Case C-303/06 *Coleman v. Attridge Law*, Opinion of Advocate General Poiares Maduro ECLI:EU:C:2008:61, para. 22.

286 Case C-303/06 *Coleman v. Attridge Law*, Opinion of Advocate General Poiares Maduro ECLI:EU:C:2008:61, para. 25.

287 Case C-303/06 *Coleman v. Attridge Law* ECLI:EU:C:2008:415, paras. 48-51.

288 Case C-303/06 *Coleman v. Attridge Law* ECLI:EU:C:2008:415, para. 18.

289 Case C-303/06 *Coleman v. Attridge Law* ECLI:EU:C:2008:415, para. 38.

290 Article 2(1a)(iv), version of 14 February 2018, 6073/18.

291 Case C-83/14 *CHEZ Razpredelenie Bulgaria*, ECLI:EU:C:2015:480. See Benedi Lahuerta, S. (2016), ‘Ethnic discrimination, discrimination by association and the Roma community: CHEZ’, *Common Market Law Review*, vol. 53, No. 3, pp. 1-15.

the case of indirect discrimination as well.<sup>292</sup> In *CHEZ*, the Court accepted that the claimant could claim that she had suffered indirect racial discrimination, even though she was not a Roma herself, because her business was located in an area which was predominantly inhabited by Roma, and the adverse treatment at issue, which was linked to the high number of Roma residents, had affected all people who resided in or occupied property in the neighbourhood.<sup>293</sup> Assuming that indirect discrimination by association is prohibited under EU equality and non-discrimination law, and that this also applies in the case of disability discrimination, one can conclude that direct and indirect discrimination and harassment by association linked to disability are all prohibited under the Employment Equality Directive, and that EU equality and non-discrimination law is in line with the CRPD to that extent.

With regard to a right to a reasonable accommodation by association, the Court noted in *Coleman* that Article 5 of the directive, on reasonable accommodation, only applies to disabled people, implying that a non-disabled person does not have a right to a reasonable accommodation because of their association with a disabled person under the directive.<sup>294</sup> This seems to be the case even if the reasonable accommodation is needed in order to assist the disabled person (e.g. by ensuring that a non-disabled worker is available to assist or care for a disabled person at specific times). Consequently, EU law, as it presently stands, is not fully in compliance with the CRPD in that it fails to define as discrimination an unjustified refusal to provide a reasonable accommodation to a person who associates with a person with a disability, whereas it is arguable, as outlined above, that the CRPD establishes such a duty. Once again, Member States can fill this gap through national legislation – however, as noted elsewhere in this report, it is submitted that the Employment Equality Directive risks sending out the message that this approach is compatible with the CRPD. It is submitted that, having decided to legislate in a field, the EU should ensure that its legislation is fully compliant with the CRPD in all respects.

### 10.2.2 Discrimination based on assumed or perceived disability

The Employment Equality Directive is also silent on whether someone who is discriminated against because he or she is wrongly perceived to have a disability is protected from discrimination.<sup>295</sup> The CJEU has not explicitly addressed this issue with regard to disability or any other ground, although there was an opportunity to address this matter in *Kaltoft*.<sup>296</sup> In that case, Mr Kaltoft claimed that he did not experience any work-related limitation or restriction, but was nevertheless dismissed because he was obese. While the Court was not asked to consider this issue, and did not do so, the Advocate General Jääskinen did address this matter in his Opinion on the case. However, he held:

It is not necessary to take a stand on this difficult legal question in the context of the present preliminary reference. This is because it is not contested that Mr Kaltoft is obese. If the national court finds that his condition amounts to a disability, and that Mr Kaltoft has been dismissed because of it, then any difference in treatment will be on the basis of real and not only presumed disability.<sup>297</sup>

The advocate general did not continue by recognising that the national court could find that Mr Kaltoft was not disabled, but that his employer had viewed him in such a light – so had wrongly assumed him to

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292 Benedi Lahuerta, S. (2018), 'Directive 2000/43/EC on Racial Equality', in: Edoardo Ales, E., Bell, M., Deinert, O. and Robin-Olivier, S., *International and European Labour Law: A commentary* (Nomos).

293 See Benedi Lahuerta, S. (2016), 'Ethnic discrimination, discrimination by association and the Roma community: CHEZ', *Common Market Law Review*, vol. 53, No. 3, pp. 1-15.

294 Case C-303/06 *Coleman v. Attridge Law*, para. 39.

295 Text in this paragraph draws on: Waddington, L. (2015), 'Saying all the right things and still getting it wrong: The Court of Justice's definition of disability and non-discrimination law', *Maastricht Journal of European and Comparative Law*, vol. 22, issue 4, pp. 576-591.

296 Case C-354/13 *FOA acting on behalf of Karsten Kaltoft v. Kommunernes Landsforening*, ECLI:EU:C:2014:2463.

297 Opinion, Advocate General Jääskinen, Case C-354/13 *FOA acting on behalf of Karsten Kaltoft v. Kommunernes Landsforening*, ECLI:EU:C:2014:2106, para. 49.

have a disability. In such a scenario, clear guidance on the issue of assumed disability would have been both appropriate and necessary.

The Court in *Coleman* (which related to discrimination by association) also did not address whether a person who is discriminated against because he or she is wrongly perceived to have a disability, or is likely to acquire a disability in the future, is protected from discrimination on the ground of disability. This issue has not been clarified in subsequent case law either.

Nevertheless, in light of the focus in the *Coleman* judgment on the need for less favourable treatment on the ground of disability, rather than for a requirement that the claimant actually be disabled, it is arguable that individuals who experience discrimination because they are perceived to have a disability are protected from discrimination as required under the CRPD. Discrimination based on a perception of disability can be distinguished from discrimination based on false assumptions, since the former involves discrimination based on a false assumption about the existence of an impairment, together with an assumption about the negative impact of that non-existent impairment on an individual's ability; while the latter involves discrimination based on false assumptions about an individual's ability alone. The European Commission also seems to be of the view that individuals who experience discrimination because they are perceived to have a disability are protected under EU law.<sup>298</sup> However, this presumption remains to be tested before the CJEU.

Interestingly, the only reference to the perception of an alleged discriminator in the proposed Equality Directive relates to discrimination by association. The latest version of the proposal provides as follows:

Discrimination by association shall be taken to occur where a person is discriminated against on one of the grounds referred to in Article 1 or multiple grounds due to an association which that person has or is perceived to have with persons of a certain religion or belief, persons with a disability, persons of a given age, and/or persons of a certain sexual orientation.<sup>299</sup>

The proposed directive therefore does not explicitly address other forms of discrimination which result from an incorrect perception that an individual has a disability, which may hint that this issue is not clear under EU equality and non-discrimination law after all.

Furthermore, the approach of the Court in the *Coleman* case seems to be in tension with the Court's apparent exclusion, in the *Kaltoft* case, of discrimination based on false assumptions about ability from the prohibition of discrimination. This tension in the Court's case law needs to be resolved.

### 10.2.3 Discrimination based on future disability

In the view of the CRPD Committee, the Convention protects from discrimination individuals who are likely to acquire a disability in the future. Thus, although the UN Convention itself does not mention genetic discrimination, the CRPD Committee clearly includes the prohibition of genetic discrimination in the wide-ranging grounds prohibited under the Convention.

Article 21(1) of the EU Charter of Fundamental Rights (EU CFR) prohibits discrimination based on 'genetic features'. In spite of this protection in the Charter, no secondary EU legislation has been adopted on this matter to date.<sup>300</sup> Notably, the proposed new non-discrimination directive does not mention genetic data, nor does it mention genetic discrimination. De Paor and Ferri assert that there is a 'scattered and dissimilar legislative response to questions of genetic privacy and genetic discrimination' in EU Member

298 Report from the Commission to the European Parliament and the Council on the application of the Racial Equality Directive and the Employment Equality Directive, COM(2014) 2 final, Brussels, 17.1.2014, p. 10. Available at: <https://eur-lex.europa.eu/procedure/EN/1041602>.

299 Article 2(2)(e), version of 14 February 2018, 6073/18.

300 On genetic discrimination in general, see Quinn, G., de Paor, A. and Blanck, P. (2015), *Genetic Discrimination: Transatlantic perspectives on the case for a European level legal response* (Routledge).

States, which has resulted in a 'patchwork' of national legislative acts 'with no common ground'.<sup>301</sup> They argue that 'there is a general perception that this legislative "patchwork" is detrimental to the actual protection of EU citizens and is a threat to the principle of non-discrimination, which is deeply rooted in the EU legal order'.<sup>302</sup>

The Employment Equality Directive itself does not prohibit discrimination on the ground of future disability or genetic makeup, and it is unclear whether such a prohibition can be implied from the case law of the Court, particularly *Kaltoft*. The EU CFR specifically mentions a prohibition of discrimination on the grounds of 'genetic features', and Article 51(1) states that the provisions of the Charter are addressed to the Member States when they implement Union law. In contrast, Article 19 TFEU does not refer to genetic makeup, and this characteristic ground cannot be added to the Employment Equality Directive as a free-standing protected ground. However, one could argue that the directive should be interpreted as including discrimination on the grounds of genetic makeup within the ground of (future) disability.<sup>303</sup> In that case, the Member States are obliged to interpret the directive as also including a prohibition of genetic discrimination. This has not been established or recognised under EU law to date. However, should the directive be interpreted by the CJEU as not covering such discrimination, it would not be in compliance with the CRPD, and Member States may not opt to fill in this gap through national legislation and case law.

## 11 Scope for positive action

### 11.1 Positive action under the CRPD<sup>304</sup>

Article 5(4) of the CRPD provides that 'specific measures which are necessary to accelerate or achieve *de facto* equality of persons with disabilities shall not be considered discrimination'. As outlined above in section I, the reference to 'specific measures' in Article 5(4) encompasses 'positive action' measures.

An important question arises as to whether the adoption of specific measures under the CRPD is mandatory or optional. Unlike the duty to reasonably accommodate under the Convention, positive action measures are not stated expressly on the face of the Convention to be mandatory. However, the CRPD Committee has stated that, in some circumstances, permanent positive action measures 'are required, depending on context and circumstances, including by virtue of a particular impairment or the structural barriers of society'.<sup>305</sup> Taking this statement in the context of international human rights law as a whole, it is arguable that there are circumstances in which the adoption of specific measures under Article 5(4) of the CRPD is an obligation of States Parties to the Convention. Nonetheless, it will be extremely difficult, if not impossible, to assert an individual claim/right to positive action measures under Article 5(4).<sup>306</sup>

The core human rights treaty bodies have elaborated on the circumstances in which the adoption of temporary special measures is required under other international treaties. The Committee on the Elimination of Discrimination against Women has pointed to the fact that:

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301 de Paor, A. and Ferri, D. (2015), 'Regulating genetic discrimination in the European Union: Pushing the EU into uncharted territory or ushering in a new genomic era?' *European Journal of Law Reform*, vol. 13, No. 1, pp. 14-32, at p. 15.

302 de Paor, A. and Ferri, D. (2015), 'Regulating genetic discrimination in the European Union: Pushing the EU into uncharted territory or ushering in a new genomic era?' *European Journal of Law Reform*, vol. 13, No. 1, pp. 14-32, at p. 15.

303 See de Paor, A. and Ferri, D. (2015), 'Regulating genetic discrimination in the European Union: Pushing the EU into uncharted territory or ushering in a new genomic era?' *European Journal of Law Reform*, vol. 13, No. 1, pp. 14-32, at p. 29. See also, Gerards, J. and Janssen, H. (2006), 'Regulation of genetic and other health information in a comparative perspective', *European Journal of Health Law*, vol. 13, pp. 372-374.

304 This section draws on Broderick, A. (2015), *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (Intersentia), pp. 163-175.

305 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 28.

306 On the impossibility of bringing an individual claim, see Committee on the Rights of Persons with Disabilities, *A.F. v. Italy*, UN Doc. CRPD/C/13/D/9/2012.

the practice of treaty monitoring bodies, including the Committee on the Elimination of Racial Discrimination, the Committee on Economic, Social and Cultural Rights, and the Human Rights Committee, shows that these bodies consider the application of temporary special measures as *mandatory* to achieve the *purposes of the respective treaties*.<sup>307</sup>

The purpose of the CRPD is, *inter alia*, ‘to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities’.<sup>308</sup> It is arguable that the overall aim of the Convention, as outlined above, mandates that temporary specific measures may be obligatory in circumstances where discrimination must be eliminated at a structural level. According to de Schutter, the ‘defining characteristic’<sup>309</sup> of structural discrimination is that ‘it cuts across different spheres (education, employment, housing and access to health care in particular), resulting in a situation where the prohibition of discrimination in any one of these spheres or, indeed, in all of them, will not suffice to ensure effective equality’.<sup>310</sup> One type of structural discrimination is the long-standing exclusion of persons with disabilities from mainstream education systems and the mainstream labour market, and the associated difficulties which they have encountered in seeking access thereto.

Nowak confirms the interpretation of positive action above when he states that ‘in the event of traditional, structural discrimination, protection against discrimination also includes temporary special measures (privileges) aimed at accelerating the attainment of *de facto* equality’.<sup>311</sup> These observations regarding the arguably mandatory nature of positive action under international human rights law would also appear to be confirmed by the comments of the core human rights treaty bodies. In General Comment No. 18 (1989) of the Human Rights Committee, which monitors the ICCPR, it is stated that ‘the principle of equality sometimes *requires* States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant’.<sup>312</sup> Moreover, in its General Comment No. 20 (2009), the United Nations Committee on Economic, Social and Cultural Rights elaborates on the circumstances in which the adoption of ‘special measures’ may be deemed obligatory. The Committee notes that, ‘in order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination’.<sup>313</sup> In his report to the UN Sub-Commission for the Promotion and Protection of Human Rights, Mr Marc Bossuyt (special rapporteur) summed up the status of positive action measures under international law. He stated that:

a persistent policy in the past of systematic discrimination of certain groups of the population may justify – *and in some cases even require* – special measures intended to overcome the sequels of a condition of inferiority which still affects members belonging to such groups.<sup>314</sup>

Rebecca Cook points to the fact that there is generally a ‘margin of appreciation or discretion’<sup>315</sup> for States Parties with regard to the most appropriate action to be taken under the relevant treaty. However,

307 Committee on the Elimination of All Forms of Discrimination Against Women (2004), General recommendation 25: Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, UN Doc. HRI/GEN/1/Rev. 7 at p. 282, footnote 3. Emphasis added.

308 Article 1 CRPD.

309 De Schutter, O., ‘Positive Action’, in: Schiek, D., Waddington, L. and Bell, M. (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Oxford, Hart Publishing, 2007), p. 793.

310 De Schutter, O., ‘Positive Action’, in: Schiek, D., Waddington, L. and Bell, M. (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Oxford, Hart Publishing, 2007), p. 793.

311 Nowak, M. (2005), *UN Covenant on Civil and Political Rights: CCPR commentary* (N.P Engel), p. 631. Emphasis in original

312 Human Rights Committee, General Comment No. 18 on non-discrimination (1994), U.N. Doc. HRI/GEN/1/Rev.1 at 26, para. 10. Emphasis added.

313 Committee on Economic, Social and Cultural Rights (2009), General Comment No. 20 on non-discrimination in economic, social and cultural rights, UN Doc. E/C.12/GC/20, para. 9.

314 Bossuyt, M., ‘The concept and practice of affirmative action’, UN Doc. E/CN.4/Sub.2/2002/21, para. 101. Emphasis added.

315 Cook R. (2003), ‘Obligations to adopt temporary special measures under the Convention on the Elimination of All Forms of Discrimination Against Women’, in: Boerefijn, I., Coomans, F., Goldschmidt, J., Holtmaat, R. and Wolleswinkel, R. (eds.), *Temporary special measures: Accelerating de facto equality of women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (Intersentia), p. 132.

she contends that ‘where it can be shown that temporary special measures are particularly effective in achieving a treaty objective, the latitude left to States parties in choosing remedial measures, particularly where they are demonstrably less effective, might be narrower’.<sup>316</sup>

Thus, while there is no concrete positive obligation on States to take temporary or ongoing positive action on the face of the CRPD itself or in the CRPD Committee’s General Comment No. 6 on equality, it is arguable that positive action is required under the CRPD to eliminate structural discrimination or discrimination which cuts across several spheres, particularly where such structural discrimination cannot be eliminated by a mere prohibition of discrimination in one or all of those fields. Positive action may therefore be required in instances where it is necessary to suppress the conditions that contribute to such structural discrimination.

## 11.2 Positive action under EU law

Article 7(1) of the Employment Equality Directive provides that Member States are free to maintain or adopt positive action measures which ‘prevent or compensate for disadvantages linked to any of the grounds’. Article 7(2) further states that the directive is without prejudice to the right of Member States ‘to maintain or adopt provisions [...] for safeguarding or promoting [the] integration into the working environment’ of disabled persons. This second paragraph therefore specifically addresses positive action targeted at people with disabilities. The Employment Equality Directive hence adopts a permissive approach, meaning that Member States are allowed, but not required, to adopt positive action measures. There is no indication under EU law that Member States are under an obligation to adopt positive action in favour of persons with disabilities in any situation.

The CJEU has recently provided some guidance on the meaning and scope of positive action in the context of persons with disabilities under Article 7(2) of the directive in the case of *Milkova*.<sup>317</sup> That case concerned a protection – ‘specific advance protection in the event of dismissal’<sup>318</sup> – granted in Bulgarian national legislation to employees with a disability. The CJEU confirmed that the

purpose of Article 7(2) of Directive 2000/78 is to authorise specific measures aimed at effectively eliminating or reducing actual instances of inequality affecting people with disabilities, which may exist in their social lives and, in particular, their professional lives, and to achieve substantive, rather than formal, equality by reducing those inequalities.<sup>319</sup>

The Court affirmed that this interpretation is supported by the CRPD,<sup>320</sup> and confirmed that the legislation at issue fell within the scope of Article 7(2) of the Employment Equality Directive 2000/78.<sup>321</sup> The Court further remarked that, under Article 7(2) of the directive, Member States are ‘not required to maintain or adopt measures such as those provided for under that provision, but have discretion in that regard’.<sup>322</sup>

As noted above, the CRPD Committee, in line with other human rights treaty bodies, seems to regard positive action as mandatory in certain situations of persistent and structural discrimination or where the severity of a particular impairment requires it. This is clearly not the case for EU law. However, in this instance, EU law would only be in breach of the UN Convention if it hampered or prohibited Member States from taking positive action, and this is not the case. However, one can conclude that EU law is

316 Cook R. (2003), ‘Obligations to adopt temporary special measures under the Convention on the Elimination of All Forms of Discrimination Against Women’, in: Boerefijn, I., Coomans, F., Goldschmidt, J., Holtmaat, R. and Wolleswinkel, R. (eds.), *Temporary special measures: Accelerating de facto equality of women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (Intersentia), p. 132.

317 C-406/15 *Milkova* ECLI:EU:C:2017:198.

318 C-406/15 *Milkova* ECLI:EU:C:2017:198, para. 32(1).

319 C-406/15 *Milkova* ECLI:EU:C:2017:198, para. 47.

320 C-406/15 *Milkova* ECLI:EU:C:2017:198, para. 48.

321 C-406/15 *Milkova* ECLI:EU:C:2017:198, para. 50.

322 C-406/15 *Milkova* ECLI:EU:C:2017:198, para. 52.

not in alignment with the CRPD on the issue of positive action; but, given that this is an area of shared competence, responsibility falls on the Member States to take positive action where this is required under the CRPD. What distinguishes this area from others where it is argued that the silence of the Employment Equality Directive in not addressing a specific area could lead Member States to assume that no further action is needed, is that EU equality and non-discrimination directives have always adopted a permissive approach to positive action. Member States are therefore already aware that they have responsibility for adopting positive action measures, subject to any limitations imposed by EU law.

As noted above, EU law, and the Employment Equality Directive in particular, do not seem to place any hurdles in the way of Member States adopting positive action to benefit persons with disabilities with regard to employment and occupation. Nevertheless, this is an area where Member States could benefit from exchanges of experience and dissemination of good practice, and there is a role for the EU to play in this respect.<sup>323</sup>

## 12 Material scope of provisions

### 12.1 Material scope of the equality provisions under the CRPD

The material scope of the Convention is extremely broad. The CRPD ‘does not simply prohibit disability discrimination. Rather, it tailors the equality norm to the lived reality of persons with disabilities’.<sup>324</sup> The CRPD therefore creates a ‘broad and far-reaching duty’<sup>325</sup> to prohibit discrimination and to provide reasonable accommodations. These duties span all human rights, both civil and political rights (such as the right to freedom of expression, the right to liberty and the right to legal capacity) and economic, social and cultural rights (such as the right to education, the right to work and the right to health). Under the CRPD, States Parties must ensure that a wide range of duty-bearers in both the public and private sectors, including employers, schools, healthcare providers, suppliers of services and public officials, are prohibited from discriminating.

### 12.2 Material scope of the equality provisions under EU law

The material scope of the Employment Equality Directive is much more limited than the CRPD, covering only disability discrimination in the fields of employment, occupation and vocational training (although Article 13 EC, now Article 19 TEU, which provided its legal basis, extends beyond those fields).<sup>326</sup> The Commission’s 2008 proposal for a new non-discrimination directive addresses, *inter alia*, disability in fields beyond employment, such as access to goods and services, healthcare, education, and social security. It therefore has a more extensive material scope than the Employment Equality Directive.<sup>327</sup>

323 Action to implement the EU Pillar of Social Rights could potentially be relevant in this respect, although the authors of this report are not currently aware of any relevant initiatives. For a detailed analysis of the Pillar from a disability perspective see: The Academic Network of European Disability Experts (ANED), *Mainstreaming disability rights in the European Social Pillar*, February 2018. Available at: <https://www.disability-europe.net/theme/social-protection>.

324 Waddington, L. and Broderick, A. (2016), *Disability law and the duty to reasonably accommodate beyond employment: A legal analysis of the situation in EU Member States*, report commissioned by the European Commission and the European network of legal experts in gender equality and non-discrimination, p. 46. Available at: <http://www.equalitylaw.eu>.

325 Waddington, L. and Broderick, A. (2016), *Disability law and the duty to reasonably accommodate beyond employment: A legal analysis of the situation in EU Member States*, report commissioned by the European Commission and the European network of legal experts in gender equality and non-discrimination, p. 48. Available at: <http://www.equalitylaw.eu>.

326 See Waddington, L. and Lawson, A. (2009), *Disability and non-discrimination law in the European Union: An analysis of disability discrimination law within and beyond the employment field*, report commissioned by the European Commission and European network of legal experts in gender equality and non-discrimination, p. 40. Available at: <http://www.equalitylaw.eu>.

327 For a discussion of the impact which the CRPD has had on the Commission’s 2008 proposal, see Waddington, L. (2011), ‘Future Prospects for EU Equality Law. Lessons to be Learnt from the Proposed Equal Treatment Directive’, *European Law Review*, vol. 2, pp. 163-184.

The fields covered by the 2008 proposal address several of the areas covered in the CRPD.<sup>328</sup> Therefore, should the 2008 proposal be adopted, it would bring EU equality and non-discrimination law more in line (although not fully in line) with the CRPD's requirement to prohibit disability discrimination across a broad range of areas.<sup>329</sup> As mentioned above, however, the 2008 proposal has not been adopted to date, and it is unlikely to be adopted in the near future in light of significant opposition from some Member States to extending the scope of current EU equality and non-discrimination law.<sup>330</sup>

### 12.2.1 The extension of current EU equality and non-discrimination law

There is clearly considerable divergence between the material scope of the CRPD and EU law related to the field of non-discrimination and equality.<sup>331</sup> As noted above,<sup>332</sup> disability equality and combating disability discrimination are areas of shared competence. Thus, the Member States have the power to adopt legislation in this field as long as the EU has not taken action in that regard.<sup>333</sup> In view of the foregoing, it is difficult to argue that the EU is under an obligation under international law to legislate in areas going beyond the 2008 proposal, or indeed to extend the material scope of current EU equality and non-discrimination law by adopting the 2008 proposal.<sup>334</sup> It is also worth noting that the Employment Equality Directive provides for minimum harmonisation only, and several EU Member States have extended the material scope of the directive to other areas beyond the field of employment. Nonetheless, 'those EU Member States which have not expanded their legal provisions relating to non-discrimination and reasonable accommodation for people with disabilities to cover areas outside employment and occupation, will be required to do so' under the Convention.<sup>335</sup> In other words, it is for those EU Member States which have ratified the CRPD to extend the material scope of their disability non-discrimination legislation to cover the full material scope of the CRPD where they have not yet done so. Since the concept of disability contained in the UN Convention is grounded in the human rights model, States Parties to the CRPD must take all necessary measures to remove barriers which hinder the participation and inclusion of persons with disabilities in society so that they can be in a position to enjoy *all* human rights on an equal basis with others.

In spite of the fact that the obligation to align with the CRPD's material scope does not fall upon the EU alone, Waddington has argued<sup>336</sup> that it can, nevertheless, 'be highly desirable for the EU to act in such areas of shared competence'.<sup>337</sup> She notes that this is also acknowledged by the European Commission in its staff working paper<sup>338</sup> accompanying the proposed non-discrimination directive. In that working paper, the European Commission points to the fact that:

328 For further analysis on this point, see Waddington, L. and Broderick, A. (2016), '*Disability law and the duty to reasonably accommodate beyond employment: A legal analysis of the situation in EU Member States*' (European Commission), p. 46. Available at: <http://www.equalitylaw.eu>.

329 Waddington, L. and Broderick, A. (2016), '*Disability law and the duty to reasonably accommodate beyond employment: A legal analysis of the situation in EU Member States*' (European Commission), p. 46. Available at: <http://www.equalitylaw.eu>.

330 See Waddington, L. (2011), 'Future Prospects for EU Equality Law. Lessons to be Learnt from the Proposed Equal Treatment Directive', *European Law Review*, vol. 2, pp. 163-184.

331 Waddington, L. and Broderick, A. (2016), '*Disability law and the duty to reasonably accommodate beyond employment: A legal analysis of the situation in EU Member States*' (European Commission), pp. 8-9. Available at: <http://www.equalitylaw.eu>.

332 See section 3 of the report.

333 This is the principle of subsidiarity, enshrined in Article 5(3) TFEU.

334 See the arguments of Waddington, L. (2013), 'Equal to the Task: Re-Examining EU Equality Law in Light of the United Nations Convention on the Rights of Persons with Disabilities', *European Yearbook of Disability Law*, vol. 4 (Intersentia), pp. 169-200, at p. 197.

335 A. Broderick (2015), *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (Intersentia), p. 106.

336 Waddington, L. (2011), 'The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A story of exclusive and shared competences', *Maastricht Journal of European and Comparative Law*, vol. 18, issue 4, pp. 431-453, at p. 431.

337 Waddington, L. (2013), 'Equal to the Task: Re-Examining EU Equality Law in Light of the United Nations Convention on the Rights of Persons with Disabilities', *European Yearbook of Disability Law*, vol. 4 (Intersentia), pp. 169-200, at p. 197.

338 Commission staff working document accompanying the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Impact Assessment, Brussels, 2 July 2008, SEC (2008) 426 final. Available at: [http://www.europarl.europa.eu/registre/docs\\_autres\\_institutions/commission\\_europeenne/sec/2008/2181/COM\\_SEC%282008%292181\\_EN.pdf](http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/sec/2008/2181/COM_SEC%282008%292181_EN.pdf).

although there is no obligation to use EC-level legislation to implement the rights and obligations arising from the UN Convention, this would be a logical step [...]. Through transposing an EC directive prohibiting disability (sic) the Member States would implement those parts of the Convention which are included in the directive, such as the prohibition of discrimination in access to goods and services, health care, education, as well as the obligation to provide reasonable accommodation. Such partial implementation of the UN Convention by EC legislation could help to mitigate the risk of divergent national implementation measures.<sup>339</sup>

In terms of what steps the EU should take under the UN Convention, in its Concluding Observations to the EU, the CRPD Committee recommended that the EU should adopt the proposed directive on equal treatment,<sup>340</sup> extending protection against discrimination to persons with disabilities, including by the provision of reasonable accommodation in all areas of its competence.

Moreover, the Committee has expressed concern that the Racial Equality Directive,<sup>341</sup> the Gender Equality Goods and Services Directive<sup>342</sup> and the Gender Equality Employment (Recast) Directive<sup>343</sup> fail explicitly to prohibit discrimination on the grounds of disability and to provide reasonable accommodation to persons with disabilities in the areas of social protection, healthcare, (re)habilitation, education and the provision of goods and services such as housing, transport and insurance.<sup>344</sup>

The adoption of these measures would ensure that the EU achieved greater alignment with the CRPD. As stated above, the material scope of EU equality and non-discrimination law is much narrower than the wide scope of the UN Convention. However, one cannot conclude that the EU is in breach of its obligations under the Convention in this respect, given that this is an area of shared competence.

## 13 Partial reversal of the burden of proof

### 13.1 Partial reversal of the burden of proof under the CRPD

States Parties to the CRPD are required, according to the CRPD Committee, to enact procedural rules regarding the burden of proof which is applicable in claims of discrimination.<sup>345</sup> In particular, the CRPD Committee has called for rules which partially reverse the burden of proof from the claimant to the respondent in civil procedures in circumstances where there is evidence from which it may be presumed that there has been an instance of discrimination. This partial reversal of the burden of proof arguably applies in all instances of discrimination covered under the CRPD, namely direct and indirect discrimination, harassment, discrimination by association, and so forth. While this is not stated explicitly by the CRPD Committee, it is inferred from the broad remit of the non-discrimination provision in the CRPD and the

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339 Commission staff working document accompanying the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Impact Assessment, Brussels, 2 July 2008, SEC(2008) 426 final. Available at: [http://www.europarl.europa.eu/registre/docs\\_autres\\_institutions/commission\\_europeenne/sec/2008/2181/COM\\_SEC%282008%292181\\_EN.pdf](http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/sec/2008/2181/COM_SEC%282008%292181_EN.pdf).

340 Proposal for Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Brussels, 2 July 2008, COM(2008) 426 final. Available at: <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX%3A52008PC0426>.

341 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (*Racial Equality Directive*), OJ L 180, 19.7.2000, pp. 22-26. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0043&from=EN>.

342 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. OJ L 373, 21.12.2004, pp. 135-141. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0113>.

343 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment, OJ L 204, 26.7.2006, pp. 23-36. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0054>.

344 Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of the European Union, UN Doc. CRPD/C/EU/CO/1, para. 18.

345 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on Equality and Non-Discrimination, UN Doc. CRPD/C/GC/6, para. 73(i).

fact that States Parties are also specifically required, according to the CRPD Committee and as outlined in section I above, to ensure that the burden of proof in reasonable accommodation claims falls on the duty bearer who claims to encounter a disproportionate or undue burden.

### 13.2 Partial reversal of the burden of proof under EU law

As noted in section II above, the Employment Equality Directive provides for a partial reversal of the burden of proof in discrimination cases in Article 10(1). Benedi Lahuerta, writing about the comparable provision in the Racial Equality Directive,<sup>346</sup> notes that a two-stage procedure is provided for if the burden of proof is to be passed onto the alleged discriminator.<sup>347</sup> In the first instance, the claimant must ‘establish [...] facts from which it may be presumed that there has been [...] discrimination’. Once this has happened, the respondent must ‘prove that there has been no breach of the principle of equal treatment’ if they are to avoid a finding of discrimination.<sup>348</sup> Benedi Lahuerta argues that, in practice, where the alleged discrimination is covert or where the claimant lacks key information needed to establish or indicate discrimination, the Court is willing to ‘set a lower threshold to establish the existence of a *prima facie* case of discrimination’.<sup>349</sup> This relates to the first stage of the procedure. Lahuerta also notes that, where, in contrast, the discrimination is obvious, the CJEU ‘considers it appropriate to bypass the first stage of the burden of proof test’.<sup>350</sup> *Firma Feryn* is an example of such a case, where the employer had publicly stated that he was not willing to hire immigrants, which was sufficient to provide clear evidence of direct discrimination.<sup>351</sup>

The set of requirements outlined above seem to be fully compliant with the requirements under the CRPD regarding the reversal of the burden of proof. However, under the Employment Equality Directive, the provisions regarding the burden of proof only explicitly apply to direct and indirect discrimination. There is no requirement under EU law to apply the partial reversal of the burden of proof to alleged discrimination in the form of harassment, or to an alleged unjustified failure to make a reasonable accommodation. The directive does not prevent this,<sup>352</sup> and while Member States are free to apply rules establishing a partial reversal of the burden of proof to these forms of discrimination, they are not obliged to do so. Some Member States have provided for a partial reversal of the burden of proof in such instances, but this is not the case across the EU. Those Member States which have not adopted this approach are now under a duty to do so under the CRPD. However, one should nevertheless conclude that the Employment Equality Directive only reflects partial compliance with the CRPD in this respect. It is submitted that, in failing to explicitly require a partial reversal of the burden of proof in cases of alleged discrimination in the form of harassment or an unjustified failure to make a reasonable accommodation, EU law risks sending out the message that this approach is compatible with the CRPD. It is further submitted that, having decided to legislate in a given field, the EU should ensure that its legislation is fully compatible with the CRPD in all respects. That is not the case with regard to the burden of proof provisions, which fail to address harassment and the reasonable accommodation duty.

Lastly, it is worth noting that the CJEU has addressed the question of the reversal of the burden of proof in cases concerning disability discrimination by association. In *Coleman*,<sup>353</sup> the Court applied the principle

346 Article 8(1) of the Racial Equality Directive.

347 Benedi Lahuerta, S. (2018), ‘Directive 2000/43/EC on Racial Equality’, in: Edoardo Ales, E., Bell, M., Deinert, O. and Robin-Olivier, S., *International and European labour law: A commentary* (Nomos). See also Farkas, L. and O’Farrel, O., (2014), *Reversing the burden of proof: Practical dilemmas at the European and national level*, European Network of experts in gender equality and non-discrimination law, available at: <https://www.equalitylaw.eu/publications/thematic-reports>.

348 Article 10(1) Employment Equality Directive.

349 Benedi Lahuerta, S. (2018), ‘Directive 2000/43/EC on Racial Equality’, in: Edoardo Ales, E., Bell, M., Deinert, O. and Robin-Olivier, S., *International and European labour law: A commentary* (Nomos). See C415/10 *Meister* ECLI:EU:C:2012:217.

350 Benedi Lahuerta, S. (2018), ‘Directive 2000/43/EC on Racial Equality’, in: Edoardo Ales, E., Bell, M., Deinert, O. and Robin-Olivier, S., *International and European labour law: A commentary* (Nomos).

351 Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV* ECLI:EU:C:2008:397.

352 Indeed, Article 10(2) of the directive states that ‘Paragraph 1 [Art. 10(1)] shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs’.

353 Case C-303/06 *Coleman v. Attridge Law* ECLI:EU:C:2008:415.

to a case of alleged discrimination by association, meaning that it was for Ms Coleman to establish facts from which it could be presumed that direct discrimination on the grounds of disability had occurred, leaving the onus on the employer to prove that no discrimination had taken place.<sup>354</sup> This is clearly in compliance with the CRPD, although the EU was not a party to the Convention at the time the case was decided, and the Court did not refer to the Convention in this context in its judgment.

## 14 Requirements regarding compliance and sanctions

### 14.1 Requirements regarding compliance and sanctions under the CRPD

As outlined in section I above, under the CRPD, States Parties are required to modify or abolish existing laws, regulations, customs and practices that constitute discrimination.<sup>355</sup> Furthermore, the CRPD Committee calls for the adoption of enforcement measures in order to ensure the effective enjoyment of the rights to equality and non-discrimination. Specifically, States Parties are required to establish effective redress mechanisms and sanctions in the event that people with disabilities are discriminated against. States Parties should establish mechanisms for providing remedies and sanctions through criminal, civil or administrative processes, where appropriate, including with regard to intersectional discrimination.<sup>356</sup> Any remedies and sanctions put in place by States Parties to the Convention should be designed to ensure the proper application of, and effective compliance with, non-discrimination legislation, and should lead to the effective enjoyment of the rights to equality and non-discrimination. As highlighted in section I of this report, the CRPD Committee recommends, in its General Comment and Concluding Observations, that States Parties put in place ‘effective, proportionate and dissuasive sanctions<sup>357</sup> for breach of the right to equality’ as well as ‘adequate remedies’.<sup>358</sup> The Committee has given further guidance and specifications on the types of remedies to be put in place. In its Concluding Observations to Belgium, it remarked that States Parties should review the remedies provided for by law to ensure that complainants are able to seek injunctions and can receive damages once their claims for discrimination have been proven in court,<sup>359</sup> in order to remedy the disadvantage encountered by the individual with a disability. This means that it will be essential to focus on the extent of disadvantage suffered by the disabled person *vis-à-vis* a comparator, who will most likely be a person without a disability.

It is noteworthy that remedies are not deemed to stop at compensation, however. In that regard, the Committee highlights that, where discrimination ‘is of a systemic nature, the mere granting of compensation to an individual may not have any real effect in terms of changing the approach’.<sup>360</sup> In those cases, the Committee remarks that States Parties to the Convention ‘should also implement “forward-looking, non-pecuniary remedies” in their legislation, meaning that further effective protection against discrimination carried out by private parties and organizations is provided by the State party’.<sup>361</sup> This could involve, for instance, awareness-raising activities regarding discriminatory conduct against persons with disabilities.

354 Case C-303/06 *Coleman v. Attridge Law* ECLI:EU:C:2008:415, para. 54.

355 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on Equality and Non-Discrimination, UN Doc. CRPD/C/GC/6, para. 30.

356 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 22.

357 Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Luxembourg, UN Doc. CRPD/C/LUX/CO/1, paras. 10-11; Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 31(f).

358 Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Austria, UN Doc. CRPD/C/AUT/CO/1, para. 13. Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 31(f).

359 Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Belgium, UN Doc. CRPD/C/BEL/CO/1, para. 12.

360 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 22.

361 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 22.

## 14.2 Requirements regarding compliance and sanctions under EU law

### 14.2.1 Modification or abolition of existing discriminatory laws, customs and practices

The CRPD places an obligation on States Parties to modify or abolish existing laws, regulations, customs and practices that constitute discrimination.<sup>362</sup> This is also reflected in Article 16 of the Employment Equality Directive, which requires Member States to take the necessary measures to ensure that any provisions contrary to the principle of equal treatment are, or may be, declared null and void or are amended. This article does not prescribe a specific solution to be taken in the event that discrimination is found,<sup>363</sup> in particular in the event that discrimination arises from domestic legislation itself.<sup>364</sup> However, 'as long as measures reinstating equal treatment have not been adopted, [...the] persons within the disadvantaged category [must be granted] the same advantages as those enjoyed by persons within the favoured category'.<sup>365</sup> For that purpose, it is necessary to identify the advantages available to a favoured category, the latter constituting the only valid point of reference.<sup>366</sup>

Article 16 also provides that any provisions which are contrary to the principle of equal treatment in contracts and collective agreements, internal rules of undertakings and rules governing workers' or employers' organisations are or may be declared null and void, or should be amended.

With regard to requirements regarding the modification or abolition of existing discriminatory laws, customs and practices, the Employment Equality Directive is in full alignment with the CRPD.

### 14.2.2 Establishment of criminal, civil or administrative procedures

The CRPD also requires States Parties to establish criminal, civil or administrative processes through which victims can obtain remedies and perpetrators can be sanctioned.<sup>367</sup> Article 9 of the Employment Equality Directive gives Member States the freedom to adopt either judicial or administrative procedures or both, including conciliation procedures, for the enforcement of obligations under the directive. Since the directive sets minimum standards, Member States are free to adopt criminal law procedures in addition to these enforcement mechanisms. In this respect, the Employment Equality Directive reflects partial alignment with the CRPD, and the Member States retain responsibility for adopting additional procedures to the extent that this is required by the Convention.

### 14.2.3 Sanctions and remedies

As stated above, the CRPD Committee requires that States Parties put in place 'effective, proportionate and dissuasive sanctions for breach of the right to equality' as well as 'adequate remedies'.<sup>368</sup> The Committee has also recognised that States Parties to the Convention are sometimes under an obligation to establish 'forward-looking, non-pecuniary remedies'.<sup>369</sup>

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362 This paragraph draws on text in Muir, E. and Waddington, L. (2018), 'Commentary on the Employment Equality Directive (Directive 2000/78/EC)', in: Edoardo Ales, E., Bell, M., Deinert, O. and Robin-Olivier, S., *International and European labour law: A commentary* (Nomos).

363 Case C417/13, *Starjakob* ECLI:EU:C:2015:38, para. 44.

364 Case C417/13, *Starjakob* ECLI:EU:C:2015:38, para. 42.

365 Case C417/13, *Starjakob* ECLI:EU:C:2015:38, para. 46.

366 Case C417/13, *Starjakob* ECLI:EU:C:2015:38, paras. 46-48.

367 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 22.

368 Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Luxembourg, UN Doc. CRPD/C/LUX/CO/1, paras. 10-11; Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 31 (f).

369 Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 22.

Sanctions and remedies are addressed in Article 17 of the Employment Equality Directive, which provides that sanctions must be ‘effective, proportionate and dissuasive’. As Benedi Lahuerta points out, the term ‘sanctions’ should be interpreted broadly, to include not only provisions designed to punish the perpetrator, but also remedies which seek to provide redress to the victim.<sup>370</sup> The CJEU has addressed the issues of sanctions and remedies in its case law, and it has held that the extent to which national provisions comply with the requirements of being ‘effective, proportionate and dissuasive’ should be assessed in the context of each specific case.<sup>371</sup> In a 1984 case concerning sex discrimination<sup>372</sup> the Court held:

Although Directive No 76/207/EEC, for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves the Member States free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a Member State chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application. It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law.

This interpretation also applies to the relevant provisions of the more recent equality Directives, including the Employment Equality Directive.

Benedi Lahuerta notes that the remedy most frequently used is economic compensation in the form of damages, which can be supplemented by a fine in more serious cases. However, she also notes that other appropriate remedies can include a well-publicised declaration paid for by the perpetrator acknowledging the discrimination, or an injunction ordering that the discriminatory practice cease.<sup>373</sup> The requirements of the directive and the CJEU’s interpretation of the provisions on sanctions, albeit not in cases concerning disability discrimination, indicate that the Employment Equality Directive is in compliance with the CRPD in this area. While the directive, like the CRPD, is not specific as to the sanctions and remedies to be imposed, the Court’s case law sets sufficient minimum standards, requirements and guidance on these issues.

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370 Benedi Lahuerta, S. (2018), ‘Directive 2000/43/EC on Racial Equality’, in: Edoardo Ales, E., Bell, M., Deinert, O. and Robin-Olivier, S., *International and European labour law: A commentary* (Nomos). Benedi Lahuerta makes this comment with regard to the Racial Equality Directive, which contains a provision on sanctions comparable to Article 17 of the Employment Equality Directive.

371 Benedi Lahuerta, S. (2018), ‘Directive 2000/43/EC on Racial Equality’, in: Edoardo Ales, E., Bell, M., Deinert, O. and Robin-Olivier, S., *International and European labour law: A commentary* (Nomos).

372 Case C-14/83 *Von Colson and Kamann v. Lord Nordrhein-Westfalen* ECLI:EU:C:1984:153, para. 28.

373 Benedi Lahuerta, S. (2018), ‘Directive 2000/43/EC on Racial Equality’, in: Edoardo Ales, E., Bell, M., Deinert, O. and Robin-Olivier, S., *International and European labour law: A commentary*, (Nomos).

## Section IV – Conclusion and recommendations

### 15 Overview of key themes

This thematic report has analysed and compared EU law, with a focus on the Employment Equality Directive and related case law, and the CRPD in the wider context of international human rights law to establish how they address disability equality and non-discrimination. The report has identified particular areas where the approaches of the UN and the EU to disability equality are compatible and coherent, and it has also identified the areas where that compatibility and coherence appear to be lacking.

Disability equality and combating discrimination are areas of competence shared between the EU and its Member States, and this is relevant to determining the compliance of the EU with its obligations under the CRPD. Bearing this in mind, the findings emerging from this report can be broadly classified into six key themes, as follows:

- 1) In a small number of areas, EU law is in breach of its obligations under the CRPD.
- 2) In a number of other areas, the EU has legislated through the Employment Equality Directive, but has not addressed the full scope of the obligations flowing from the CRPD in that area or field. Since the EU is bound by the CRPD, this risks creating the impression that its Member States need only implement the Employment Equality Directive, and that if they do so, they will be in compliance with the CRPD in the field covered by the directive.
- 3) In several other areas, there is a lack of compatibility of EU law with the CRPD, but the EU cannot be deemed to be in breach of the CRPD in those areas; rather, those are areas where it is appropriate for the Member States to fill the existing gaps in protection.
- 4) There are certain other areas where EU law is fully compliant with the requirements of the CRPD.
- 5) There is one area where EU law goes beyond the requirements set out in the CRPD, providing additional protection to individuals from disability discrimination.
- 6) In three further areas, the situation is unclear with regard to whether EU law is in compliance with the CRPD.

These six headings will be elaborated on below. Under each heading, the current status of EU law and, in particular, the case law of the CJEU will be recalled, since the Court has played a vital role in interpreting the disability provisions of the Employment Equality Directive.

### 16 Breaches of the CRPD

#### 16.1 The definition of disability

EU law is in breach of its obligations under the CRPD regarding elements of the definition of disability. As elaborated by the CJEU in *HK Danmark (Ring and Skouboe Werge)* and affirmed in subsequent case law, a person is only regarded as disabled if they are potentially hindered in exercising professional life. By contrast, the CRPD adopts a broader perspective and recognises as disabled individuals whose participation is hindered with regard to broader areas of life – ‘society’ in general. As a result, those individuals who are not disabled in their professional activities but who are disabled in other areas of life will not be deemed to fall under the CJEU’s definition of disability. It has therefore been argued in this report that the definition of disability developed by the CJEU for the purposes of the Employment Equality Directive does not fully comply with the CRPD in this regard.

It was also contended in this report that EU law breaches the CRPD, to the extent that the Court’s definition of disability fails to embrace the human rights model of disability embodied by the CRPD. According to *HK Danmark (Ring and Skouboe Werge)*, EU law requires that an individual not only has an impairment

but also experiences a limitation directly related to that impairment in order to fall within the definition of disability. As argued in this report, the Court appears to exclude from the definition of disability individuals who are disabled simply on account of socially created barriers, such as false assumptions and prejudices about an individual's ability, and possibly even barriers in the physical environment. By way of contrast, the CRPD acknowledges as disabled those individuals with an impairment who are disadvantaged purely by environmental factors. While the Court has dealt with a number of cases concerning the definition of disability since *HK Danmark (Ring and Skouboe Werge)*, including *Kaltoft*, it has not clarified this point (and *Kaltoft* is open to the same interpretation outlined above). Therefore, this is an area where, on the basis of current case law, EU law and the CRPD are not in line, and there is a breach. Clarification is required by the CJEU on this point.

## 16.2 The understanding of reasonable accommodation

In addition, there is a breach of the CRPD with regard to the interpretation of the term 'reasonable' in the definition of the duty of 'reasonable accommodation' by the CJEU. The CRPD Committee has affirmed that the reasonableness of an accommodation should be assessed with regard to the suitability and effectiveness of measures, rather than with respect to costs. The cost issue is intended to be considered under the defence of disproportionate/undue burden. Despite this clear affirmation by the Committee, the CJEU, in *HK Danmark (Ring and Skouboe Werge)*, states that the accommodation measure which a person with a disability is entitled to must be 'reasonable', in the sense that it must not constitute a disproportionate burden on the employer. This is clearly out of line with the CRPD Committee's interpretation.

## 16.3 Recommendations

It is recommended that the CJEU should interpret the Employment Equality Directive in line with the CRPD and the CRPD Committee's understanding of disability discrimination, and with the human rights model endorsed by the CRPD. The Court should take into account the CRPD Committee's General Comment No.6 on equality and non-discrimination in this respect.<sup>374</sup>

When the opportunity presents in its case law, the Court should extend its definition of disability to recognise as disabled those individuals whose participation is hindered in areas outside of professional life. The Court should also clarify whether its definition of disability includes those who encounter socially created barriers only, as opposed to limitations resulting solely from impairments. In addition, the Court should make sure to delink the concept of 'reasonableness' in the definition of reasonable accommodation from any association with cost implications, in line with the CRPD Committee's understanding of the concept of 'reasonable accommodation'.

## 17 Failure to implement the CRPD in full in the area of employment and occupation through the Employment Equality Directive

In several areas where the EU has legislated in a particular field but has not addressed the full scope of the obligations flowing from the CRPD in that field, the EU risks misleading its Member States into regarding the approach under EU law as being compatible with the Convention. In such a situation, Member States may only transpose and implement EU law, and not take further action.

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<sup>374</sup> Although the authors of this report note that General Comments are not binding on States Parties.

### **17.1 Multiple and intersectional discrimination**

EU law fails to implement the full scope of the CRPD's requirements in the context of multiple and intersectional discrimination. The CRPD explicitly mandates, in Article 6, that multiple discrimination against women and girls with disabilities be addressed, and the CRPD Committee reads a prohibition of intersectional discrimination into the Convention, related to a wide range of intersecting grounds of discrimination, such as colour, sex, language, religion, ethnic, gender or other status. The CRPD Committee has also recommended that the EU prohibit multiple and intersectional discrimination through legislation. It has been argued in this report that, given that the EU has already opted to establish a degree of minimum harmonisation in its equality and non-discrimination law, through the Employment Equality Directive, it should also address multiple and intersectional discrimination. Rectifying this lacuna at the purely national level is not as straightforward as, for example, extending the material scope of equality and non-discrimination law to cover all fields where discrimination can take place, and not just employment and occupation, and independent national action could lead to divergent responses and approaches.

### **17.2 Failure to provide reasonable accommodation**

The failure of the Employment Equality Directive to define an unjustified failure to make a reasonable accommodation as a form of discrimination, while not in clear breach of the CRPD, may lead the Member States to assume that such an approach is compatible with the CRPD, when in fact it is not. One reason for this is that, like the Member States, the EU is bound by the CRPD, and the Member States may assume that EU legislation in any particular field would implement the CRPD in full, rather than partially.

### **17.3 Reversal of the burden of proof**

The Employment Equality Directive does not prevent the partial reversal of the burden of proof being applied to alleged cases of discrimination in the form of harassment, or to an alleged unjustified failure to make a reasonable accommodation, and Member States are free to apply the reversed burden of proof to these forms of discrimination; however, they are not obliged to do so. One can conclude that the directive only reflects partial compliance with the CRPD in this regard, as the CRPD applies the reversed burden of proof to the areas outlined above. The directive risks sending out the message that this approach is compatible with the CRPD.

### **17.4 Recommendations**

In order to be fully compliant with the CRPD, and notwithstanding that non-discrimination is an area of shared competence, the EU should fully implement the CRPD in the areas where it has opted to legislate, including under the Employment Equality Directive. In particular, it is recommended that EU law should prohibit intersectional and multiple discrimination which involves disability and should define an unjustified failure to provide reasonable accommodation as a form of discrimination. Given the complexity of amending the Employment Equality Directive and the uncertain status of the proposed new directive, the CJEU plays an important role in interpreting current EU equality legislation in line with the CRPD, including by taking the lead on tackling multiple and intersectional discrimination and by making it clear that a failure to provide reasonable accommodation is to be interpreted as a form of discrimination.

Furthermore, the Court should clarify that the partial reversal of the burden of proof under the directive also applies in cases of alleged discrimination in the form of harassment and an unjustified failure to make a reasonable accommodation.

## 18 Areas where EU law does not fully implement the CRPD and responsibility falls on Member States

This report has identified areas where EU law does not fully implement the CRPD. However, the EU cannot be deemed to be in violation of the CRPD in these areas, since it is appropriate for the Member States to fill the existing gaps in protection. This relates to the shared responsibility of the EU and the Member States to secure full compliance with the CRPD.

### 18.1 Material scope

There is clear incompatibility between EU law, specifically the Employment Equality Directive, and the CRPD with regard to the material scope of the legislation. EU law currently accords protection against disability discrimination only in the fields of employment and occupation. By contrast, the CRPD prohibits discrimination with regard to *all* human rights – both civil and political as well as economic, social and cultural rights. However, one cannot conclude that the EU is in breach of its obligations under the Convention in this respect, given that this is an area of shared competence. In that regard, the Member States are obliged to extend the material scope of their equality and non-discrimination law to cover all fields of potential discrimination to the extent that they have not done so already.

### 18.2 Positive action

EU law seems not to be in alignment with the CRPD with regard to the issue of positive action. The CRPD appears to regard positive action as mandatory in certain situations of persistent and structural discrimination or where the severity of a particular impairment requires it, while this is not the case under EU law. However, EU law does not appear to place any hurdles in the way of Member States adopting positive action to benefit persons with disabilities with regard to employment and occupation or other areas. Nevertheless, this is an area where Member States could benefit from exchanges of experience and dissemination of good practice, and there is a role for the EU to play in this respect.

### 18.3 Requirements concerning compliance

The Employment Equality Directive sets minimum standards concerning compliance, and Member States are free to adopt criminal law procedures in addition to enforcement mechanisms referred to in the Employment Equality Directive, to the extent that this is required by the CRPD.

### 18.4 Recommendations

While the EU is not under an obligation to extend its current body of equality and non-discrimination law to cover the material scope of the CRPD, EU Member States (all of which are States Parties to the UN Convention) are obliged to do so. In line with the CRPD Committee's remarks in its General Comment 6 and its Concluding Observations addressed to the EU, it is advisable for the EU to adopt the proposed equality directive to ensure that disability discrimination is prohibited in a broad area.

Since EU law is not in full alignment with the CRPD on the issue of positive action, and given that this is an area of shared competence, the Member States are under an obligation to take action on this point to ensure compliance with the Convention. This is also the case for compliance mechanisms.

## 19 Areas where EU law is in full compliance with the CRPD

### 19.1 Illness as a form of disability

EU law can be regarded as compatible with the CRPD in that both foresee that an illness, where it is sufficiently severe and long-lasting, can be regarded as a form of disability.

### 19.2 Prohibition of different forms of discrimination

The Employment Equality Directive is also compatible with the CRPD to the extent that it prohibits direct and indirect discrimination and harassment on the ground of disability. Furthermore, the definitions of the relevant forms of discrimination, and the way in which they are interpreted by the CJEU, seem to be broadly in line with the requirements of the CRPD, aside from the possible incompatibility of the EU indirect justification test with the CRPD, noted below.<sup>375</sup>

### 19.3 Prohibition of discrimination by association

With regard to discrimination by association, assuming that indirect discrimination by association is prohibited under EU law, and that this also applies in the case of disability discrimination, it can be concluded that all kinds of discrimination by association linked to disability are prohibited under the Employment Equality Directive. In that case, it is submitted that EU equality and non-discrimination law is in line with the CRPD.

### 19.4 Requirements concerning sanctions

The Employment Equality Directive's requirement for 'effective, proportionate and persuasive' sanctions and the related case law of the CJEU (albeit not in cases concerning disability discrimination) indicate that the Employment Equality Directive is in compliance with the CRPD in this area.

## 20 Area where EU law goes beyond the requirements of the CRPD

### 20.1 Instructions to discriminate

The Employment Equality Directive prohibits discrimination in the form of an instruction to discriminate. This form of discrimination is not referred to in the text of the CRPD or by the CRPD Committee. On that basis, it has been argued in this report that the Employment Equality Directive provides protection from an additional form of disability discrimination, and that it therefore goes beyond the requirements of the CRPD in this respect.

## 21 Areas where there is uncertainty

### 21.1 Discrimination on the basis of future disability

The CRPD Committee has included discrimination on the basis of future disability under the CRPD's wide prohibition of discrimination. The Employment Equality Directive itself does not prohibit discrimination on the ground of future disability or genetic makeup, and it is unclear whether such a prohibition can be implied from the case law of the Court, particularly *Kaltoft*. The EU CFR specifically mentions a prohibition of discrimination on the grounds of 'genetic features', and Article 51(1) states that the provisions of the

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375 See section 6 of the conclusions and recommendations.

Charter are addressed to the Member States when they implement Union law. In contrast, Article 19 TFEU does not refer to genetic makeup, and this characteristic ground cannot be added to the Employment Equality Directive as a free-standing protected ground. As noted in this report, one could argue that the Employment Equality Directive should be interpreted as prohibiting discrimination on the ground of future disability, including discrimination on the grounds of genetic makeup. However, the CJEU has not provided such an interpretation of the directive to date, and it is not clear if the directive will be interpreted in this way. If the directive is interpreted as not prohibiting discrimination on the basis of future disability and genetic makeup, it would not be in compliance with the CRPD, and Member States would be obliged to fill in this gap through national legislation and case law. However, this is an area of uncertainty at present, and clarity is desirable.

### 21.2 Prohibition of discrimination based on perceived disability

Concerning perceived disability, in light of the focus in the *Coleman* judgment on the need for less favourable treatment on the ground of disability, rather than for a requirement that the claimant actually be disabled, it is arguable that individuals who experience discrimination because they are perceived to have a disability are protected from discrimination as required under the CRPD. Discrimination based on a perception of disability can be distinguished from discrimination based on false assumptions. The former involves discrimination based on a false assumption about the existence of an impairment, together with an assumption about the negative impact of that non-existent impairment on an individual's ability, while the latter involves discrimination based on a false assumption about an individual's ability alone. The European Commission also seems to be of the view that individuals who experience discrimination because they are perceived to have a disability are protected under EU law.<sup>376</sup> However, this presumption remains to be tested before the CJEU.

Notably, the approach of the Court in the *Coleman* case seems to be in tension with the Court's apparent exclusion, in the *Kaltoft* case, of discrimination based on false assumptions about ability from the prohibition of discrimination. This tension in the Court's case law needs to be resolved.

### 21.3 Justification test for indirect discrimination

EU law may run counter to the CRPD with regard to the justification test that is applicable in cases of indirect discrimination. On the one hand, it could be argued that, since neither the CRPD nor the CRPD Committee explicitly prohibits a justification test for instances of indirect discrimination, EU law could be considered to be compliant with the Convention in this regard. On the other hand, since neither the text of the Convention nor the CRPD Committee specifically refers to a justification test for indirect discrimination (unlike for the reasonable accommodation duty), the justification test under EU law may not be compliant with the CRPD.

## 22 Concluding remarks

This report has provided a comprehensive analysis of the pivotal elements and requirements of EU (disability) equality and non-discrimination law and has identified, for each element, the corresponding requirements and standards contained in UN human rights law. Apart from its academic value, the findings of this report are of significance for the EU institutions and for the Member States themselves. The conclusion of the CRPD by the EU was a historic moment in the field of disability rights and, since then, the EU and its Member States have made efforts to integrate the CRPD into their legal orders. However, given that disability equality and combating disability discrimination are areas of shared competence,

<sup>376</sup> Report from the Commission to the European Parliament and the Council on the application of the Racial Equality Directive and the Employment Equality Directive, COM(2014) 2 final, Brussels, 17.1.2014, p. 10. Available at: <https://eur-lex.europa.eu/procedure/EN/1041602>.

the key question of which State Party (the EU or its Member States) should take action in a given area remains highly important.

It can be argued that, whenever the EU takes action in a field that falls under the CRPD in an area of shared competence, it should make every effort to ensure that the action is fully compliant with the UN Convention and implements the Convention in full in that field. At the very least, the EU should ensure that its actions do not risk misleading the Member States into regarding the transposition and implementation of the provisions of EU law (which do not secure full compliance with the CRPD) as being sufficient to meet their CRPD obligations. As demonstrated throughout this report, this issue is a complex one, and while considerable efforts have already been made and are ongoing, much work remains to be done to secure the full implementation of the CRPD by the EU and its Member States, including with regard to equality and non-discrimination.

The comparison conducted throughout this report of EU and UN provisions highlights that, apart from certain areas where EU law is in full compliance with the CRPD (or indeed goes further than the requirements of the CRPD), there are a number of clear breaches of the CRPD by EU law, and further areas where there is tension between EU law and the CRPD. There are also areas where incompatibility can be established between EU law and the CRPD, but where responsibility falls on the Member States, rather than the EU itself, to implement the CRPD.

In summary, EU equality and non-discrimination law exhibits several positive developments in terms of its coherence and compatibility with the CRPD, including with regard to the definition of disability as covering an illness which is sufficiently severe and long-lasting; and to the extent that it prohibits direct and indirect discrimination and harassment on the ground of disability. Furthermore, the definitions of the relevant forms of discrimination, and the way in which they are interpreted by the CJEU, appear to align with the requirements contained in the CRPD. In addition, all types of discrimination by association linked to disability appear to be prohibited under the Employment Equality Directive, and it is submitted that EU equality and non-discrimination law is in line with the CRPD in that regard. Furthermore, the requirements of the Employment Equality Directive with regard to sanctions, and the related case law of the CJEU (albeit not in cases concerning disability discrimination), indicate that the Employment Equality Directive is in compliance with the CRPD in this area.

It is notable that EU equality and non-discrimination law goes even further than the CRPD in certain respects, particularly through covering an instruction to discriminate. This form of discrimination is not referred to in the text of the CRPD or by the CRPD Committee. On that basis, it has been argued in this report that the Employment Equality Directive provides protection from an additional form of disability discrimination, over and above the CRPD's requirements.

On the other hand, work remains to be done with respect to several important areas of EU equality and non-discrimination law. EU law is in clear breach of its obligations under the CRPD regarding elements of the definition of disability, most notably by not recognising as disabled individuals whose societal participation is hindered in areas others than professional life. This is in contrast to the CRPD, which covers hindrances experienced by a person with a disability in 'society' in general. EU law also breaches the CRPD to the extent that the Court's definition of disability fails to embrace the human rights model of disability embodied by the CRPD, since EU law requires that an individual not only has an impairment but also experiences a limitation directly related to that impairment in order to fall within the definition of disability. In addition, there is a breach of the CRPD with regard to the interpretation of the term 'reasonable' in the definition of the duty of 'reasonable accommodation' by the CJEU. The Court appears to align that term with financial considerations, which is not the meaning intended by the CRPD Committee. Instead, the Committee takes such considerations into account under the disproportionate/undue burden defence. The foregoing breaches of the CRPD should be remedied in order to bring the EU into compliance with its obligations as a State Party to the Convention. The CJEU has a key role to play in this respect, and

it is submitted that these issues can be remedied through judicial interpretation, rather than (necessarily) through legislative amendments.

There are also certain instances where EU law, in particular the Employment Equality Directive, fails to implement the CRPD in full in the area of employment and occupation. There is a risk that the Member States may only transpose and implement EU law in this regard, without taking further action. In the first instance, EU law fails to implement the full scope of the CRPD's requirements in the context of multiple and intersectional discrimination. Secondly, the Employment Equality Directive fails to define an unjustified failure to make a reasonable accommodation as a form of discrimination, unlike the CRPD. One can also conclude that the directive only reflects partial compliance with the CRPD regarding the reversal of the burden of proof, since it is not explicit that the partial reversal of the burden of proof under the directive also applies in cases of alleged discrimination in the form of harassment and an unjustified failure to make a reasonable accommodation. It is submitted that, in order to avoid giving the Member States the impression that the transposition of EU law in these areas is sufficient to fulfil their obligations under the CRPD, the EU should implement the CRPD in full in those areas where it has already legislated, including under the Employment Equality Directive.

This report has also identified areas where EU law does not fully implement the CRPD, but where responsibility falls on the Member States instead. In that regard, there is clear incompatibility between the Employment Equality Directive and the CRPD with regard to the material scope of the relevant legislation. However, one cannot conclude that the EU is in breach of its obligations under the Convention in this respect, given that this is an area of shared competence. Rather, the Member States are obliged to extend the material scope of their equality and non-discrimination law to cover all fields of potential discrimination, to the extent that they have not done so already. Notably, however, according to the CRPD Committee's remarks in its General Comment 6 and its Concluding Observations addressed to the EU, it is advisable for the EU to adopt the proposed equality directive to ensure that disability discrimination is prohibited in a broad area. EU law seems not to align completely with the CRPD with regard to the issue of positive action and, given that this is an area of shared competence, the Member States are under an obligation to take action on this point to ensure compliance with the Convention. This is also the case for compliance mechanisms. The Employment Equality Directive sets minimum standards concerning compliance, and Member States are free to adopt criminal law procedures, in addition to the enforcement mechanisms referred to in the Employment Equality Directive, to the extent that this is required by the CRPD.

**ANNEX I: Table of Ratifications/Acceptance of International Human Rights Treaties and Individual Complaint Mechanisms by the EU and the 28 EU Member States**

| EU & EU Member States | UN<br>CRPD | OP-<br>CRPD | CEDAW | OP-<br>CEDAW | CERD | OP-<br>CERD | ICCPR | OP-<br>ICCPR | ICESCR | OP-<br>ICESCR |
|-----------------------|------------|-------------|-------|--------------|------|-------------|-------|--------------|--------|---------------|
| EU                    | X          |             |       |              |      |             |       |              |        |               |
| Austria               | X          | X           | X     | X            | X    | X           | X     | X            | X      |               |
| Belgium               | X          | X           | X     | X            | X    | X           | X     | X            | X      | X             |
| Bulgaria              | X          |             | X     | X            | X    | X           | X     | X            | X      |               |
| Croatia               | X          | X           | X     | X            | X    |             | X     | X            | X      |               |
| Cyprus                | X          | X           | X     | X            | X    | X           | X     | X            | X      |               |
| Czech Republic        | X          |             | X     | X            | X    | X           | X     | X            | X      |               |
| Denmark               | X          | X           | X     | X            | X    | X           | X     | X            | X      |               |
| Estonia               | X          | X           | X     |              | X    | X           | X     | X            | X      |               |
| Finland               | X          | X           | X     | X            | X    | X           | X     | X            | X      | X             |
| France                | X          | X           | X     | X            | X    | X           | X     | X            | X      |               |
| Germany               | X          | X           | X     | X            | X    | X           | X     | X            | X      |               |
| Greece                | X          | X           | X     | X            | X    |             | X     | X            | X      |               |
| Hungary               | X          | X           | X     | X            | X    | X           | X     | X            | X      |               |
| Ireland               | X          |             | X     | X            | X    | X           | X     | X            | X      |               |
| Italy                 | X          | X           | X     | X            | X    | X           | X     | X            | X      |               |
| Latvia                | X          | X           | X     |              | X    |             | X     | X            | X      |               |
| Lithuania             | X          | X           | X     | X            | X    |             | X     | X            | X      |               |
| Luxembourg            | X          | X           | X     | X            | X    | X           | X     | X            | X      |               |
| Malta                 | X          | X           | X     |              | X    | X           | X     | X            | X      |               |
| Netherlands           | X          |             | X     | X            | X    | X           | X     | X            | X      |               |
| Poland                | X          |             | X     | X            | X    | X           | X     | X            | X      |               |
| Portugal              | X          | X           | X     | X            | X    | X           | X     | X            | X      | X             |
| Romania               | X          |             | X     | X            | X    | X           | X     | X            | X      |               |
| Slovakia              | X          | X           | X     | X            | X    | X           | X     | X            | X      | X             |
| Slovenia              | X          | X           | X     | X            | X    | X           | X     | X            | X      |               |
| Spain                 | X          | X           | X     | X            | X    | X           | X     | X            | X      | X             |
| Sweden                | X          | X           | X     | X            | X    | X           | X     | X            | X      |               |
| United Kingdom        | X          | X           | X     | X            | X    |             | X     |              | X      |               |

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