

# Equal to the Task? Re-Examining EU Equality Law in Light of the United Nations Convention on the Rights of Persons with Disabilities

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# **EQUAL TO THE TASK? RE-EXAMINING EU EQUALITY LAW IN LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES**

Lisa Waddington<sup>1</sup>

## **1. INTRODUCTION**

The European Union (EU) concluded the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in December 2010, with the Convention coming into force for the EU a month later, in January 2011. The European Community, represented by the Commission, had previously played an important role in the negotiation of the Convention, and the Community signed the Convention in 2007. Following the conclusion of the Convention, the EU is bound by the obligations therein to the extent of its competences. Amongst the core principles of the CRPD are equality and non-discrimination, and these find repeated references throughout the Convention. They are addressed in both Article 3 CRPD (general principles) and Article 4 (general obligations), as well as meriting ‘first place’ amongst the substantive provisions in Article 5, and frequent explicit or implied reference in many of the remaining articles.

Combating discrimination on the grounds of disability is also a field that falls within the competence of the EU. Article 10 Treaty on the Functioning of the European Union (TFEU) specifies that ‘[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on ... disability’ and Article 19 TFEU provides for the power to ‘take appropriate action to combat discrimination based on ... disability’. Moreover, secondary legislation, prohibiting disability discrimination with regard to employment and vocational training, was adopted even before the negotiations on the present Convention commenced. The European Court of Justice has also rendered a number of judgments in the context of disability and discrimination. Lastly, 2008 saw the proposal by the Commission of a second directive addressing discrimination on several grounds, including disability, and covering fields such as access to goods and services, social security and social advantages.

The purpose of this article is to reflect on the possible implications for European Union disability equality law resulting from the conclusion of the

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<sup>1</sup> European Disability Forum Chair in European Disability Law, Maastricht University (NLs). This article was completed in April 2012 and does not take account of subsequent developments. This article has been subject to independent and anonymous peer review.

CRPD by the EU. The article begins with a general examination of the legal implications of the conclusion of the CRPD for the EU. This is followed by an examination of both the CRPD provisions relating to non-discrimination and equality, and EU law, including case law, in this field. The article concludes with a reflection on the possible tensions between EU law and the CRPD with regard to non-discrimination and equality, and the implications of the conclusion of the CRPD for this particular area of EU law.

## 2. THE STATUS OF THE CRPD UNDER EU LAW<sup>2</sup>

Many of the international agreements that the EU enters into, including the CRPD, involve concurrent jurisdictions of both the Member States and the EU. 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, or possibly four, 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; the EU and the Member States share the competence to act; and lastly the EU can support and supplement the action of the Member States.

The CRPD fields in which the EU has exclusive competence are fairly limited, whilst a much broader set of fields fall within the areas of shared competence with 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>3</sup>

Following the adoption of the CRPD in 2006, the European Community (EC), along with all of its Member States, quickly proceeded to sign the Convention. The Council Decision<sup>4</sup> on the signing of the Convention by the Community has, as its legal basis both Articles 13 EC (now Article 19 TFEU) and 95 EC (now Article 114 TFEU).<sup>5</sup> The former article addresses combating discrimination on the grounds of *inter alia* disability, whilst the latter covers the establishment and functioning of the internal market. Article 13 EC had been previously referred to in this context, being mentioned *inter alia* in both the 2003 Commission Communication 'Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities'<sup>6</sup> and the Opinion

<sup>2</sup> Parts of this section are based on extracts from L. Waddington, '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* (2011), 431.

<sup>3</sup> See *Re: European Development Fund*, Case C-316/91 *European Parliament v. Council* [1994] ECR I-625.

<sup>4</sup> Council Decision (EC) on the signing, on behalf of the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, 20 March 2007, 7407/07.

<sup>5</sup> A third legal basis was Article 300(2) EC. This Article addresses the procedure to be followed when the Community makes agreements with international organizations.

<sup>6</sup> Communication from the Commission to the Council and the European Parliament of 24 January 2003, 'Towards a United Nations legally binding instrument to

of the Economic and Social Committee on the Communication,<sup>7</sup> although this was the first explicit reference to the internal market provision in Community documents on the Convention.

Whilst the intention and commitment of the EC to conclude the Convention was clear, the timeline according to when this would happen was not. Although no official statement or decision was made, there was speculation that the Community would wait until all 27 Member States had ratified the Convention before following suit.<sup>8</sup> However, this did not prove to be the case. In November 2009 the Council adopted a Decision concerning the conclusion, by the European Community, of the CRPD.<sup>9</sup> Whilst the Commission had initially proposed that this Decision have a significant number of legal bases (Articles 13, 26, 47(2), 55, 71(1), 80(2), 89, 93, 95 and 285 EC [now Articles 19, 31, 53, 62, 91(1), 100(2), 109, 113, 114 and 338 TFEU]),<sup>10</sup> the Council limited the substantive legal bases to Articles 13 and 95 EC. Under the Decision, the Council approved the CRPD on behalf of the Community.<sup>11</sup> The Decision provides:

Both the Community and its Members States have competence in the fields covered by the UN Convention. The Community and Member States should therefore become Contracting Parties to it, so that together they can fulfil the obligations laid down by the UN Convention and exercise the rights invested in them, in situations of mixed competence in a coherent manner.<sup>12</sup>

The Decision also authorized the President of the Council to deposit the instruments of formal confirmation of the Convention with the Secretary General of the United Nations.<sup>13</sup> However, this could only happen following the agreement of a Code of Conduct by the Council, Commission and the Member States. The Code was to determine ‘the appropriate arrangements for representation of the Community’s position at meetings of the bodies created by the UN Convention’ and ‘the arrangements for ensuring close cooperation’ between the Commission

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promote and protect the rights and dignity of persons with disabilities’, COM(2003) 16 final.

<sup>7</sup> Economic and Social Committee (EC) ‘Opinion on the Communication from the Commission Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities of 24 January 2003, COM(2003) 16 final’, 26 March 2003.

<sup>8</sup> See D. Ferri, ‘The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: A Constitutional Perspective’, in L. Waddington and G. Quinn (eds.) 2 *European Yearbook of Disability Law*, (Intersentia, 2010), 63.

<sup>9</sup> 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] OJ L303/16.

<sup>10</sup> In conjunction with the procedural legal bases of Articles 300(2) and 300(3) EC (now Articles 218(1) and 218(2) TFEU).

<sup>11</sup> Article 1(1).

<sup>12</sup> Preamble, Recital 7.

<sup>13</sup> Article 2(1).

and the Member States, in particular with regard to ‘monitoring, reporting and voting arrangements’.<sup>14</sup>

The Decision also specified that, when depositing the instruments of formal confirmation, the President of the Council would deposit a Declaration of Competence. This was also foreseen in Article 44 of the CRPD, which concerns regional integration organizations, and which was inserted into the Convention specifically to allow the European Community to accede thereto. Article 44 CRPD provides that regional integration organizations, meaning a regional organization to which its Member States have transferred competence in respect of matters governed by the Convention, can become a party to the Convention. When doing so, such organizations are required to declare the extent of their competences with regard to the fields covered by the Convention, and they are only bound by the Convention within the limits of their competence. The Council Decision contains, in Annex II, the necessary Declaration of Competence.

The Declaration of Competences contains a list of areas where the EC/EU shares competence with the Member States. Amongst these are combating discrimination on the grounds of disability, as well as free movement of goods, persons, services and capital; agriculture; transport; taxation; internal market; equal pay for men and women; trans-European network policy; and statistics. The Declaration also contains a list of EC legislative instruments which illustrate the competence of the EC/EU with regard to fields falling under the CRPD, and this list refers to the Employment Equality Directive,<sup>15</sup> which prohibits discrimination on the ground of *inter alia* disability with regard to employment and vocational training. This Directive is examined further below.

The aforementioned Code of Conduct<sup>16</sup> was adopted in November 2010. As noted above, the Code is an agreement between the Council, the Member States and the Commission that sets out the internal arrangements for the implementation by, and representation of, the EU relating to the CRPD. Following the adoption of the Code, the EU quickly deposited the instruments of formal confirmation of the Convention with the Secretary General of the United Nations, as provided for in the Council Decision.

Following the conclusion of the CRPD by the EU, and the adoption of the Council Decision and Code of Conduct, a key question concerns the extent to which the EU is bound to take action in the fields covered by the Convention which fall within its competence. Where the EU has exclusive competence to act, it must clearly fulfil all relevant obligations in the Convention in their entirety. The question is somewhat more vexed with regard to those many areas which involve a shared competence of the EU and the Member States. One point of view is that the EU is only obliged not to hamper the fulfillment of CRPD obligations by the Member States in such fields. The EU may adopt policy and legislation in such areas, and these should take the CRPD into account, but there is no obligation

<sup>14</sup> Articles 4(2) and 4(3).

<sup>15</sup> Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16.

<sup>16</sup> Council Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ C340/11.

to implement the relevant provisions of Convention in their entirety through EU instruments, since the 'default' position is that the Member States that have ratified the CRPD bear the end responsibility for ensuring full compliance. At the other extreme, one could argue that whenever the EU adopts policy or legislation which relates to a field covered by the CRPD in an area of shared competence, it should do its utmost to ensure full compliance. The EU is, after all, bound by the Convention. Moreover, there is a risk that an EU instrument that refers to the CRPD<sup>17</sup> but which only sets, for example, minimum standards, and does not ensure full compliance with the CRPD, could leave the Member States with the impression that nothing more than transposition of the EU instrument is needed, and this would also secure compliance with the CRPD, which the State ratified independently. An intermediate position argues that whilst the EU is not obliged to implement fully the Convention in areas falling within its shared competence, it must also not give the impression to Member States that transposition or implementation of an EU measure which *de facto* only secures partial compliance will be adequate in terms of meeting their obligations under the Convention. In such situations Member States must be aware of their additional and remaining commitments under the CRPD.

Such issues, in the context of *inter alia* the European Convention of Human Rights and the UN Convention on the Rights of the Child, were considered by the European Court of Justice in Case C-540/03 *Parliament v. Council*.<sup>18</sup> The case concerned a challenge by the European Parliament to Council Directive 2003/86/EC on the right of family reunification.<sup>19</sup> The Directive determines the conditions for exercising the right to family reunification for third-country nationals residing in the EU. The Parliament sought annulment of a number of provisions<sup>20</sup> which provided for derogations from some provisions in the Directive. These derogations allowed Member States to apply national law in such a way as to restrict family reunification in certain situations where the children in question were over 12 years of age, or, in certain cases, over 15, and to impose certain waiting periods prior to permitting reunification. The Parliament alleged that these provisions permitted Member States to apply national legislation which did not respect fundamental rights, including Article 8 of the ECHR and the Convention on the Rights of the Child. Unlike the CRPD, the EU is not a party to either of these instruments. However, fundamental rights, as guaranteed by the ECHR and the constitutional traditions of the Member States, are amongst the general principles of EU law, and the Parliament noted that the Union had a duty to respect them pursuant to Article 6(2) EU (now Art. 6(3) Treaty on the European Union (TEU)).

Following a detailed examination, the Court found that none of the challenged provisions amounted to a breach of fundamental rights, and based this on an examination of the ECHR and its case law. However, in doing so, it noted that: 'It must be determined in particular whether [a challenged provision of the Directive] expressly or impliedly authorizes the Member States not to observe

<sup>17</sup> For example in the preamble.

<sup>18</sup> Case C-540/03 *Parliament v. Council* [2006] ECR I-5769. I am grateful to Prof. Bruno de Witte, of Maastricht University and the European University Institute, for bringing this case to my attention.

<sup>19</sup> Directive 2003/86/EC on the right to family reunification, [2003] OJ L251/12.

<sup>20</sup> Specifically the final subparagraph of Article 4(1), Article 4(6) and Article 8.

those fundamental principles ...'.<sup>21</sup> Whilst the Court found that the provisions in question did not do this, the implication of this statement may be that where an EU instrument does (appear to) give such an authorization, it can breach fundamental rights as guaranteed and protected by EU law.

It is worth noting that the Court did not follow the Opinion of Advocate General Kokott<sup>22</sup> in this case. The Advocate General firstly advised that the application was inadmissible, as annulment of the contested provisions would alter the substance of the Directive, and it was also not possible to annul the Directive as a whole. However, in the alternative, the Advocate General did consider the merits of the case and, here too, she differed from the line subsequently taken by the Court. She found that Article 8 ECHR may exceptionally found an entitlement to family reunification in the host State<sup>23</sup> and that 'Community provisions are compatible with fundamental rights if they are capable of being interpreted in a way which produces the outcome which those rights require'.<sup>24</sup> Similarly, when Member States implement a directive, they must ensure that they 'do not rely on an interpretation of it which would be in conflict with the fundamental rights protected by the Community legal order or with any other general principles of Community law'.<sup>25</sup> The question is therefore 'what rules Member States may lawfully adopt if the Community provisions in question are interpreted in conformity with fundamental rights'.<sup>26</sup>

Whilst the Advocate General went on to find that the provisions relating to family reunification of children were in conformity with human rights law, she regarded Article 8 of the Directive, which allows Member States to require that a sponsor has resided lawfully in the territory for a period of two, or even three years, before being joined by family members, as being more problematic. She found that Article 8 'empowered' Member States to provide for such waiting periods, and that, where this was done without consideration of human rights obligations, it would fail to allow for the possibility, as required by the European Court of Human Rights, to consider hardship cases and allow for more rapid reunification.<sup>27</sup> She even found that:

The reference to human rights in the second recital in the preamble to the Directive even fosters misconceived and one-dimensional transposition of this kind. Instead of reminding Member States of their responsibilities in regard to fundamental and human rights, the recital asserts that the Directive, as drafted, is compatible with them. If Member States rely on that assessment on the part of the Community legislature, they have no reason to consider any issues of fundamental and human rights not addressed in terms of the Directive.<sup>28</sup>

<sup>21</sup> Para. 84 of judgment.

<sup>22</sup> Opinion of Advocate General Kokott, delivered 8 September 2005.

<sup>23</sup> Para. 72 of the Opinion.

<sup>24</sup> *Ibid.*, para. 80.

<sup>25</sup> *Ibid.*, para. 81.

<sup>26</sup> *Ibid.*, para. 82.

<sup>27</sup> *Ibid.*, para. 103.

<sup>28</sup> *Ibid.*, para. 104.



Consequently, Advocate General Kokott concluded that Article 8 of the Directive was ‘liable at least to be misunderstood’<sup>29</sup> and this increased ‘the risk that human rights will be infringed’.<sup>30</sup> In that case, responsibility would lie with both the national and the Community legislature. ‘Since human rights must be protected effectively, and the law has to be clear, Article 8 of the Directive is contrary to Community law.’<sup>31</sup> However, as noted, the Court did not follow this line of reasoning, and concluded that the provision did not amount to a breach of fundamental rights. Nevertheless, both the Court and the Advocate General seemed to agree that a provision of EU law must not ‘expressly or impliedly authorize ... the Member States not to observe those fundamental principles ...’.<sup>32</sup> They differed in their assessment of whether Article 8 of the Directive did in fact do this.

This requirement is important in the context of the CRPD. Having concluded the CRPD, the EU is referring to the Convention in the preambles of instruments which it adopts and which relate to the rights of persons with disabilities.<sup>33</sup> This is also the case for those instruments which relate to the shared competence of the EU, and which may not necessarily fully implement the relevant provisions of the Convention. Caution must be exercised here in order to ensure that Member States are not being lulled into a false sense of security, and left with the belief that compliance with EU law is equivalent to compliance with the Convention in areas of shared competence, where the EU has not fully implemented CRPD provisions.

### 3. THE CRPD, THE SOCIAL MODEL OF DISABILITY AND THE PRINCIPLES OF NON-DISCRIMINATION AND EQUALITY

The Convention, as is appropriate for a human rights instrument, strongly reflects the social model of disability.<sup>34</sup> Explicit recognition is made of the fact that ‘disability results from the interaction between persons with impairments and

<sup>29</sup> Ibid., para. 105.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Para. 84 of judgment.

<sup>33</sup> See e.g. the ‘Better Regulation Directive’ (Directive 2009/140/EC of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services [2009 OJ L337/37], which provides in Recital 22: ‘In line with the objectives of the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of Persons with Disabilities, the regulatory framework should ensure that all users, including disabled end-users, the elderly, and users with special social needs, have easy access to affordable high quality services. ...’

<sup>34</sup> The social model of disability can be contrasted with the medical model of disability. The latter argues that a disability is a direct consequence of an impairment, and is the result of an incapacity caused by an impairment. There is a wealth of literature addressing theoretical models of disability. See e.g. M. Oliver, *Understanding Disability: from theory to practice*, (Macmillan Press Ltd., 1996), and M. Priestley,

attitudinal and environmental barriers'.<sup>35</sup> Whilst the concept of disability is not defined in the Convention, Article 1 does provide:

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.

The Convention therefore reflects the reality that disability stems primarily from the failure of the social environment to meet the needs and aspirations of people with impairments, and is the highest legal manifestation and confirmation of the social model of disability on the international stage.

The principles of equality and non-discrimination run through the Convention like a red thread. They find their anchor in Article 3, which Gerard Quinn has described as providing the 'moral compass for change'<sup>36</sup> which the Convention embraces. This article refers not only to non-discrimination and equality of opportunity, but to a series of other principles which 'animate' the Convention, including dignity; individual autonomy; full and active participation and inclusion; respect for difference; and accessibility. The principles of non-discrimination and equality find repeated reference elsewhere in the Convention. In light of this, Article 2, which elaborates on key terms used in the Convention, contains a broad definition of 'discrimination on the basis of disability' as meaning:

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>37</sup>

The article goes on to define reasonable accommodation as meaning:

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to

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'Constructions and creations: idealism, materialism and disability theory', 13 *Disability and Society* 1 (1998), 75.

<sup>35</sup> Preamble, Recital (e) and Article 1.

<sup>36</sup> G. Quinn, 'The UN Convention on the Human Rights of Persons with Disabilities', 10 June 2007, paper on file with author, at 3.

<sup>37</sup> For information on the drafting history of this article see: S. Trömel, 'A Personal Perspective on the Drafting of the United Nations Convention on the Rights of Persons with Disabilities', in G. Quinn and L. Waddington (eds.), 1 *European Yearbook of Disability Law*, (Intersentia, 2009), 115 at 122–124, and M. Schulze, *Understanding the UN Convention on the Rights of Persons with Disabilities A Handbook on the Human Rights of Persons with Disabilities*, (Handicap International September, 2009), available at: <[www.enablement.nl/pdf/HI\\_CRPD\\_Manual\\_sept2009\\_final.pdf](http://www.enablement.nl/pdf/HI_CRPD_Manual_sept2009_final.pdf)> at 34–36 (accessed 27 June 2012).

ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

The principles of equality and non-discrimination also receive specific attention in Article 5.<sup>38</sup> This article embraces both a formal approach to equality ('equal before and under the law');<sup>39</sup> and a more substantive approach ('prohibit discrimination on the basis of disability';<sup>40</sup> provision of 'reasonable accommodation';<sup>41</sup> and positive action measures<sup>42</sup> 'shall not be considered discrimination'). States Parties are under an obligation to recognize and ensure protection of these rights. Elsewhere the Convention is 'sprinkled' liberally with references to non-discrimination, equality and reasonable accommodation. Article 6, another transversal article addressing the particular needs of women with disabilities, specifies that States Parties recognize that women and girls with disabilities are subject to multiple discrimination. Eliminating discrimination, in the sense of removing obstacles and barriers to accessibility, lies at the heart of Article 9.

A key principle found in many Convention articles is that people with disabilities should have access to rights 'on an equal basis with others'. For example, Article 12, on equal recognition before the law, and Article 13, on access to justice, refer to the need to recognize that people with disabilities 'enjoy legal capacity on an equal basis with others in all aspects of life', and that they have 'effective access to justice ... on an equal basis with others', respectively. The relative nature of the right to equality is hereby stressed. The implication is that, in order to enable people with disabilities to enjoy equal rights or equal access, States Parties will sometimes be under an obligation to take additional measures. These could be individualized reasonable accommodations, or more general measures to provide accessibility, which are not directed at specific individuals.

Lastly, one should note that the scope of the Convention is extremely broad.<sup>43</sup> The Convention does not simply prohibit disability discrimination, nor does it only cover civil or political rights, or economic, cultural or social rights. Instead the principles of non-discrimination and equality underpin the Convention, and, as noted above, these are linked to a broad group of rights. These rights are both

<sup>38</sup> See J. Kumpuvuori and M. Scheinin, 'Treating the Different One Differently – a Vehicle for Equality for Persons with Disabilities? Implications of Article 5 of the Convention on the Rights of Persons with Disabilities', in J. Kumpuvuori and M. Scheinin (eds.), *United Nations Convention on the Rights of Persons with Disabilities, Multidisciplinary Perspectives*, (The Center for Human Rights of Persons with Disabilities (VIKE), Publications Series of VIKE No. 5, undated), 54.

<sup>39</sup> Article 5(1).

<sup>40</sup> Article 5(2).

<sup>41</sup> Article 5(3).

<sup>42</sup> The Convention does not refer to positive action, but instead speaks of 'Specific measures which are necessary to accelerate or achieve de facto equality', Article 5(4).

<sup>43</sup> G. Quinn, 'The UN Convention on the Human Rights of Persons with Disabilities', 10 June 2007, paper on file with author, at 9, and T. J. Melish, 'Perspectives on the UN Convention on the Rights of Persons with Disabilities: The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify', 14 *Human Rights Brief* (2007), 37, who describes the Convention as adopting a 'hybrid approach'.

civil and political, such as the right to liberty,<sup>44</sup> as well as more substantive, such as the right to education.<sup>45</sup>

#### 4. EU DISABILITY NON-DISCRIMINATION AND EQUALITY LAW

##### 4.1. GENERAL OVERVIEW

For most of the history of the EU,<sup>46</sup> the founding Treaties contained no explicit reference to disability, and therefore no disability-specific competence existed.<sup>47</sup> Nevertheless, occasional references to disability, and disabled people, were found in a handful of legal instruments and soft law initiatives, although these did not amount to an attempt to develop a broad disability policy or strategy until relatively recently. 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 occurred in the context of a general non-discrimination article, which is now found in Article 19 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 the power to act. The article<sup>48</sup> provided the legal basis for the Employment Equality Directive of 2000, which prohibits disability discrimination, as well as discrimination on the grounds of sexual orientation, age and religion or belief, with regard to employment, and for a 2008 proposal for a directive,<sup>49</sup> which covers, *inter alia*, access to goods and services, and which again addresses disability amongst a number of other grounds.

The Lisbon Treaty, which came into force in 2009, introduced some further important changes with regard to disability. Article 10 TFEU contains a mainstreaming provision, which provides that in ‘defining and implementing its policies and activities, the Union shall aim to combat discrimination based on ... disability’. Rather than relying only on disability-specific measures, mainstreaming implies that disability-related needs will be pursued in all activities. The Lisbon Treaty also changed the status of the EU Charter of Fundamental Rights, which had first been adopted at Nice. Under Article 6(1) 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

<sup>44</sup> Article 14, which covers liberty and security of the person.

<sup>45</sup> Article 24.

<sup>46</sup> And its predecessors, the EC and EEC.

<sup>47</sup> 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: L. Waddington, *From Rome to Nice in a Wheelchair, The Development of a European Disability Policy*, (Europa Law Publishing, 2006).

<sup>48</sup> In its previous form as Article 13 EC.

<sup>49</sup> 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, Brussels, 2 July 2008. Following the coming into force of the Lisbon Treaty, the legal basis of this proposal was changed from Article 13 EC to Article 19 TFEU.

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 recognizes 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.

In addition to these disability-specific references in the Treaties (TFEU and TEU) and Charter, the EU has adopted a number of legal instruments that pay particular attention to the situation of people with disabilities. On occasions disability-specific references have been included in such instruments on a structural basis, and a generally successful mainstreaming approach has been pursued. This is largely the case with regard to instruments related to transport, where references to disability have been included in mainstream secondary legislation establishing, for example, technical standards applicable to transport modes and infrastructure,<sup>50</sup> and general passenger rights.<sup>51</sup> In contrast, one disability-specific instrument, a Regulation relating to the rights of air passengers with reduced mobility, has also been adopted.<sup>52</sup> It is worth noting that all of these instruments have been adopted in the absence of any explicit reference to disability in the Treaty Chapter relating to transport. The TFEU<sup>53</sup> has therefore explicitly given the EU the competence to legislate in the field of transport, and the EU has exercised this competence by, *inter alia*, including references to the needs of passengers with a disability, and disability accessibility, in some of the secondary legislation adopted under this Chapter.

In contrast, in some other areas, disability seems to have been addressed in a rather ad hoc and perhaps random manner. One example of such a field is the internal market, where occasional references to disability are found in instruments based on (what is now) Article 114 TFEU. For example, Directive 95/16/EC<sup>54</sup> on

<sup>50</sup> See, for example, Regulation (EC) No. 1899/2006 of the European Parliament and of the Council of 12 December 2006 amending Council Regulation (EEC) No. 3922/91 on the harmonization of technical requirements and administrative procedures in the field of civil aviation, [2006] OJ L377/1; Directive 2006/87/EC of the European Parliament and of the Council of 12 December 2006 laying down technical requirements for inland waterway vessels and repealing Council Directive 82/714/EEC, [2006] OJ L389/1; and Commission Regulation (EC) No. 8/2008 of 11 December 2007 amending Council Regulation (EEC) No. 3922/91 as regards common technical requirements and administrative procedures applicable to commercial transportation by aeroplane, [2008] OJ L10/1.

<sup>51</sup> See, for example, Regulation (EC) No. 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos. 1191/69 and 1107/70, [2007] OJ L315/1 and Regulation (EC) No. 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations.

<sup>52</sup> Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2007] OJ L315/14.

<sup>53</sup> And its predecessors, the EC and EEC Treaties.

<sup>54</sup> Directive 95/16/EC on the approximation of the laws of the Member States relating to lifts, [1995] OJ L213/1 as amended.

lifts refers to the need to ensure accessibility for disabled persons; Directives 2004/17<sup>55</sup> and 2004/18<sup>56</sup> on public procurement provide that, whenever possible, technical specifications relating to public procurement contracts should take into account accessibility for disabled people and design for all requirements;<sup>57</sup> and Directive 2002/22<sup>58</sup> on universal services and users' rights relating to electronic communication networks and services requires Member States to ensure that covered services are affordable for disabled users and that they have the same conditions of access as others. All of these instruments have, as their legal basis, Article 114 TFEU (ex 95 EC),<sup>59</sup> and therefore recognize the disability dimension to securing the internal market. However, there are many other internal market provisions which would seem to offer the potential to mainstream disability issues, such as the General Product Safety Directive,<sup>60</sup> but which fail to do so, and the inclusion of appropriate provisions relating to disability in internal market provisions does not seem (yet) to be an automatic process.

#### 4.2. THE EMPLOYMENT EQUALITY DIRECTIVE<sup>61</sup>

The most significant piece of secondary legislation relating to disability is arguably the aforementioned Employment Equality Directive. The Directive prohibits discrimination on the grounds of religion or belief, disability, age and sexual orientation with regard to employment and vocational training. The related Racial Equality Directive<sup>62</sup> prohibits discrimination on the ground of race and ethnic origin, and covers not only employment and vocational training, but also fields such as access to and supply of goods and services, social protection, social

<sup>55</sup> Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, [2004] OJ L134/1.

<sup>56</sup> Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, [2004] OJ L134/114.

<sup>57</sup> In this context see Standardization Mandate to CEN / CENELEC and ETSI in support of European Accessibility Requirements for Public Procurement in the Built Environment, M/420.

<sup>58</sup> Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), [2002] OJ L108/51.

<sup>59</sup> In the case of Directive 2004/17 and 2004/18 on public procurement, Articles 47(2) EC and 55 EC are also legal bases in addition to Article 95 EC.

<sup>60</sup> Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, [2002] OJ L11/4.

<sup>61</sup> See also R. Whittle, 'The Framework Directive for Equal Treatment in Employment and Occupation: An Analysis from a Disability Rights perspective', 27 *European Law Review* 3 (2002), 303, and D. L. Hoskins, 'Great Expectations: Protection from Discrimination Because of Disability in Community Law', 31 *European Law Review* 5 (2006), 667; and, for a more general perspective, L. Waddington and M. Bell, 'More Equal than Others: Distinguishing European Union Equality Directives', 38 *Common Market Law Review* (2001), 587.

<sup>62</sup> Directive 2000/43/EC implementing the principle of Equal Treatment between persons irrespective of racial or ethnic origin, [2000] OJ L180/22.

advantages and education. Additional Directives prohibit gender discrimination,<sup>63</sup> and have a similar material scope to the Racial Equality Directive.

#### 4.2.1. *Definition of Discrimination*

All of the aforementioned equality directives contain definitions of the concept of discrimination. For all grounds, and in all areas, four forms of discrimination are prohibited: direct discrimination; indirect discrimination; harassment; and an instruction to discriminate.

Consequently, the Employment Equality Directive defines direct discrimination on the ground of disability as occurring:

where one person is treated less favourably than another is, has been, or would be treated in a comparable situation on [the ground of disability].<sup>64</sup>

Direct discrimination therefore involves adverse treatment that is directly motivated by the covered ground, *in casu* disability. Comparison is at the heart of the definition of direct discrimination under EU law, and a person who alleges direct discrimination must be compared to someone who does not have that characteristic. This can either be someone without a disability, or someone with a different form of disability. In addition, in order to establish direct discrimination, less favourable treatment must have occurred, and the reason for the less favourable treatment must be directly related to disability.

The Directive defines indirect discrimination on the ground of disability as occurring when:

an apparently neutral provision, criterion or practice would put persons having ... a particular disability ... at a particular disadvantage compared with other persons unless:

- (i) that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary, or
- (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 [reasonable accommodation] in order to eliminate disadvantages entailed by such provision, criterion or practice.<sup>65</sup>

This definition is based on a line of case law developed by the European Court of Justice (ECJ) in the context of indirect sex discrimination, commencing with

<sup>63</sup> Directive (EC) 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23 and Directive (EC) 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37.

<sup>64</sup> Article 2(2)(a).

<sup>65</sup> Article 2(2)(b).

the well-known judgment in *Bilka*.<sup>66</sup> This case concerned a woman who worked part-time and who, as a result, found it more difficult than full-time workers to qualify for a supplementary occupational pension scheme, which is regarded as a form of pay under EU law. Article 119 of the EEC Treaty, which was in force at the time, required that men and women received equal pay for equal work. The employee in this case, Karin Weber von Hartz, argued that the occupational pension scheme, which was operated by the employer, indirectly discriminated against women, as 75% of women employed by the company worked part-time, in comparison with only 10% of male employees. As a result, female employees were much less likely to qualify for the pension than male employees. The Court found that:

If ... it should be found that a much lower proportion of women than of men work full time, the exclusion of part-time workers from the occupational pension scheme would be contrary to Article 119 of the Treaty where, taking into account the difficulties encountered by women workers in working full time, that measure could not be explained by factors which exclude any discrimination on grounds of sex.

The Court then went on to establish a three-pronged test to establish an objective justification for an impugned measure. In order to be justified, and therefore not indirectly discriminatory, the measure had to correspond to a real need on the part of the undertaking, be appropriate with a view to achieving the objectives pursued, and be necessary to that end.<sup>67</sup> Schiek has stated: 'From this, one can conclude that, where there is a less discriminatory alternative, the measure is not objectively justified.'<sup>68</sup>

In the context of disability and the Employment Equality Directive, indirect discrimination involves an apparently neutral provision, criterion or practice. The condition of neutrality is met where the measure in question makes no explicit reference to disability. However, where that measure is more likely to lead to a disadvantage for persons with disabilities, or for persons with particular forms of disability, it will be *prima facie* discriminatory. For example, a requirement that all employees possess a driving licence will be more difficult, or impossible, for persons with certain disabilities, such as a significant visual impairment or uncontrolled epilepsy, to comply with, than for other persons. Such measures can nevertheless be permitted, and therefore not amount to indirect discrimination, if they are 'objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'. This is a cumulative requirement, involving an aim which is legitimate, as well as a demonstration that the means of achieving the aim are both appropriate and necessary. For example, a driving licence requirement may serve the legitimate aim of ensuring staff are able to drive around the locality on work-related business, and, in that respect, it would be appropriate. However, if a staff member without a driving licence could be

<sup>66</sup> Case 170/84 *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz* [1986] ECR 1607.

<sup>67</sup> Para. 56.

<sup>68</sup> D. Schiek, 'Chapter Three, Indirect Discrimination', in D. Schiek, L. Waddington and M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, (Hart Publishing, 2007), 323 at 357.



excused this task, or allowed to use a taxi, it would not be regarded as necessary, and would therefore amount to indirect discrimination. Second, under the Directive a measure which indirectly discriminates against a disabled person will also be justified if the employer or other covered party provides the affected disabled persons with a reasonable accommodation, and thereby removes the disadvantage for those individuals.

The third form of discrimination which is prohibited under the Employment Equality Directive is harassment. This occurs:

where unwanted conduct related to [the ground of disability] takes place with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.<sup>69</sup>

The conduct in question can take many forms, and include words, actions or pictures. Unlike direct and indirect discrimination, no comparator is needed to establish that harassment has occurred.

Lastly, the Employment Equality Directive prohibits an ‘instruction to discriminate against persons [on the ground of disability]’.<sup>70</sup>

One point of note is that while direct discrimination and harassment are prohibited on ‘the ground of disability’, under the Directive only individuals who have ‘a particular disability’ are protected from indirect discrimination. This is significant because individuals who are not disabled themselves can nevertheless experience discrimination on the grounds of disability, and, by using this terminology in the context of direct discrimination and harassment, the Directive has allowed for a broader personal scope, in terms of protection. Consequently, individuals who experience direct discrimination or harassment because they associate with a disabled person are protected by the Directive.<sup>71</sup> In contrast the Convention, rather tersely, simply requires States Parties to ‘prohibit *all* discrimination on the basis of disability’.<sup>72</sup> The possible significance of this difference will be explored later.

#### 4.2.2. Reasonable Accommodation

The Employment Equality Directive also imposes a requirement on Member States to establish an obligation to make reasonable accommodations to meet the needs of disabled individuals, unless this would amount to a disproportionate burden. This obligation, which does not extend to the other grounds covered by EU equality law, is found in Article 5. The article provides:

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,

<sup>69</sup> Article 2(3).

<sup>70</sup> Article 2(4).

<sup>71</sup> See Case C-303/06 *Coleman v. Attridge Law and Steve Law*, [2008] ECR I-5603, discussed below.

<sup>72</sup> Article 5(2), CRPD. Italics added.

where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to provide training for such a person, unless such measures would impose a disproportionate burden on the employer. When this burden is, to a sufficient extent, remedied by existing measures as an element of disability policy in the Member State, it should not be considered disproportionate.

The obligation to make a reasonable accommodation on the grounds of disability, which is also found in the CRPD, is based on the recognition that, on occasions, the interaction between an individual's impairment and the physical or social environment can result in the inability to perform a particular function, job or activity in the conventional manner. The characteristic of impairment is relevant in that it can lead to an individual being faced with a barrier that prevents him or her from benefiting from an employment or other opportunity that is open to others who do not share that characteristic.

However, non-discrimination law is traditionally underpinned by the idea that the protected characteristic, such as race or gender, is rarely relevant to the employment or other decision, and only in exceptional circumstances, such as the bona fide occupational qualification situation, does it allow for different or unequal treatment. Therefore the protected characteristic should be ignored. However, ignoring, by failing to accommodate, the characteristic of impairment, can result in denying an individual equal opportunity. In this respect, Fredman has argued:

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>73</sup>

A reasonable accommodation requirement in the employment context therefore prohibits an employer from denying an individual with a disability an employment opportunity by failing to take account of the individual's impairment, when taking account of it – in terms of changing tasks or the physical environment of the workplace – would enable the individual to do the work.<sup>74</sup> Clearly, this requires an individualized analysis, both in terms of the abilities of the recipient of the accommodation, and the work-related skills and activities that are required.

Lastly, it is worth noting that, while Article 5 clearly establishes the duty to make a reasonable accommodation, and specifies that this is necessary 'in order to guarantee compliance with the principle of equal treatment', it does not state that failure to comply with the duty amounts to a form of discrimination. This can be contrasted with the Convention, which clearly specifies, in Article 2, that denial of a reasonable accommodation amounts to discrimination.

<sup>73</sup> S. Fredman, 'Disability Equality, A Challenge to the Existing Anti-Discrimination Paradigm?', in A. Lawson and C. Gooding (eds.), *Disability Rights in Europe. From Theory to Practice*, (Hart, 2005), 199 at 203.

<sup>74</sup> P. S. Karlan and G. Rutherglen, 'Disabilities, Discrimination and Reasonable Accommodation', 46 *Duke Law Journal* (1996), 9.

4.2.3. *Case Law of the European Court of Justice Interpreting the Personal Scope of the Disability Provisions of the Employment Equality Directive*<sup>75</sup>

Thus far the European Court of Justice has considered the disability-related provisions of the Employment Equality Directive in only two cases, both of which concerned the personal scope of the Directive. In *Chacón Navas*<sup>76</sup> the Court had to consider the meaning of the term ‘disability’ and determine what amounted to a disability for the purposes of the Directive, whilst in *Coleman*<sup>77</sup> the Court had to rule on whether a mother who claimed she had been discriminated against because of her connection with her disabled son was protected by the Directive.

The *Chacón Navas* case concerned a woman who, as a result of illness, had not been able to work for her employer for some time. She was dismissed after a period of absence. Ms. Chacón Navas challenged the decision to dismiss her *inter alia* on the grounds that it was incompatible with the Employment Equality Directive. The national court decided to stay the proceedings and referred two questions to the Court of Justice. In essence the national court asked 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. In the alternative, could sickness ‘be regarded as an identifying attribute in addition to the ones in relation to which Directive 2000/78 prohibits discrimination?’<sup>78</sup>

In response, the Court stated the Directive was designed to combat employment discrimination and defined disability in that context 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>79</sup> For any limitation to be regarded as a ‘disability’, ‘it must be probable that it will last for a long time’.<sup>80</sup> In addition the Court held that for the purposes of the Directive, ‘disability’ is different from ‘sickness’,<sup>81</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>82</sup> The Court further stated that its definition of disability was ‘autonomous and uniform’.<sup>83</sup> The Court also held that sickness could not be added to the list of grounds covered

<sup>75</sup> This section is based on extracts from L. Waddington ‘Case C-13/05, *Chacón Navas v. Eurest Colectividades SA*, judgment of the Grand Chamber of 11 July 2006’, 44 *Common Market Law Review* 2 (2007), 487, and L. Waddington, ‘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’, 46 *Common Market Law Review* 2 (2009), 665.

<sup>76</sup> Case C-13/05, *Chacón Navas v. Eurest Colectividades SA*, [2006] ECR I-6467.

<sup>77</sup> Case C-303/06 *Coleman v. Attridge Law and Steve Law*, [2008] ECR I-5603.

<sup>78</sup> Para. 25.

<sup>79</sup> Para. 43.

<sup>80</sup> Para. 45.

<sup>81</sup> Para. 44.

<sup>82</sup> Para. 46.

<sup>83</sup> Paras. 40 and 42.

by the Directive, since it was not explicitly mentioned in the Directive or the EC Treaty (now TFEU).<sup>84</sup>

The definition of disability developed by the Court in *Chacón Navas* is based on the medical or individual model of disability. According to the definition developed by the Court the cause of the disadvantage (or the 'limitation') is the 'impairment' which an individual has, and it is the 'impairment' which hinders participation in professional life. Therefore, the problem lies in the impaired individual, and not in the reaction of society to the impairment or the organization of society.

This model can be contrasted with a social model of disability, which is reflected in the CRPD. The social model is based on a socio-political approach which argues that disability stems primarily from the failure of the social environment to adjust to the needs and aspirations of people with impairments, rather than from the inability of people with impairments to adapt to the environment. According to this model, disability is the result of an interaction between an impairment and an inaccessible and discriminatory environment, rather than being the consequence of a medical condition which results in reduced ability.

The second case, *Coleman*, concerned a woman who was a legal secretary and the mother of a disabled child who required specialized care. She alleged that, on returning to work after having given birth to her child, she was treated less favourably than other employees in comparable positions because she was the primary carer of a child with a disability. She made a number of allegations of adverse treatment, including 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; she was not allowed the same flexibility regarding her working hours as parents of non-disabled children; she was described as 'lazy' for requesting time off to care for her child, and threatened with dismissal when she occasionally arrived late because of the need to care for her child, when parents of non-disabled children were not treated in this way; and that highly abusive comments were made about her and her child. Ultimately Ms. Coleman accepted voluntary redundancy, and subsequently lodged a claim before an Employment Tribunal in London that she had been subject to unfair constructive dismissal<sup>85</sup> and had been discriminated against because she was the primary carer of a disabled child.

The Employment Tribunal which heard the case had to determine if the Disability Discrimination Act 1995 (DDA) provided protection from such discrimination. The Act clearly prohibited discrimination against individuals who had a disability themselves, but was silent as to whether individuals who experienced discrimination not because they had a disability themselves, but because they associated with an individual with a disability, were protected. It was accepted by all parties that, on a literal interpretation of the relevant wording of the DDA, only those individuals who had a disability themselves were protected from discrimination. However, a European dimension also arose because the DDA had

<sup>84</sup> Paras. 55–57.

<sup>85</sup> A constructive dismissal occurs where an employee 'resigns' following illegal behaviour by the employer, such as discrimination, which leads the employee to conclude that continued employment with this employer is impossible. The former employee can challenge such unfair constructive dismissals before the courts.

been amended<sup>86</sup> with effect from 2004 in order to comply with the Employment Equality Directive. The question of whether the Employment Equality Directive prohibited discrimination in such circumstances was therefore of significance, and the claimant's case turned on this matter.<sup>87</sup>

As noted above, the Directive prohibits direct discrimination and harassment 'on ... the grounds' of *inter alia* disability. Protection is not explicitly confined to individuals who have a disability, and the claimant's lawyers argued that, by virtue of using this language, the Directive prohibited 'associative discrimination' with regard to direct discrimination and harassment, and the DDA should also be interpreted in this way. The Employment Tribunal concluded that guidance from the European Court of Justice was required on this matter in order for it to proceed,<sup>88</sup> and forwarded a number of preliminary references which, in essence, asked whether the Employment Equality Directive prohibited direct discrimination and harassment against employees who, although not themselves disabled, were subject to the less favourable treatment on the grounds that they associated with a person who was disabled.

In response, the Court began by recalling the purpose of the Directive, which it found to be 'to combat all forms of discrimination on grounds of disability' with regard to employment and occupation.<sup>89</sup> Following its Advocate General, it noted that the 'principle of equal treatment ... applies not to a particular category of person but by reference to the grounds mentioned in Article 1.'<sup>90</sup> However, the Court went on to note that some provisions of the Directive, including Article 5 relating to reasonable accommodation, did only apply to disabled people. It then noted that the existence of such disability-specific measures in the Directive could not lead to the conclusion that the protection from discrimination provided by the Directive as a whole should also be confined to people who actually had a disability themselves.

The Court then addressed a second argument raised by some Member States:<sup>91</sup> that, in light of the Court's earlier judgment in *Chacón Navas*, the concept of disability should be interpreted very 'strictly'.<sup>92</sup> In response, the Court acknowledged that it had held that the personal scope of the Directive could not be extended beyond the grounds enumerated in the Directive and Article 13 EC in *Chacón Navas*. However, it stressed that, in that case, it had not held that the grounds that were covered by the Directive had to be interpreted 'strictly'.<sup>93</sup>

<sup>86</sup> By the Disability Discrimination Act 1995 (Amendment) Regulations 2003, which came into force on 1 October 2004.

<sup>87</sup> In the words of Advocate General Poiares Maduro: 'Ms. Coleman can succeed in her case only if the Directive is to be interpreted as prohibiting discrimination by association', (para. 5).

<sup>88</sup> Employment Tribunal, Case Number 2303745/2005, 17 February 2006.

<sup>89</sup> Para. 38.

<sup>90</sup> Ibid.

<sup>91</sup> United Kingdom, Italy and the Netherlands.

<sup>92</sup> The term 'strictly' is used by the Court in its judgment. However, as pointed out by an anonymous peer reviewer of this article, it might be more appropriate to refer to a 'narrow' interpretation of the concept of disability in this context. I am grateful to the peer reviewer for this comment.

<sup>93</sup> Paras. 44–47.

The Court continued by considering the argument that the objectives and effectiveness of the Directive would be undermined if someone in Ms. Coleman's position could not rely on the prohibition of direct discrimination. The Court recalled that Ms. Coleman alleged that she suffered less favourable treatment on the ground of disability, and noted once again that the Directive functions by reference to the covered grounds, and not with regard to a particular category of person. The Court concluded that, when an employee suffers direct discrimination on the grounds of disability, an interpretation of the Directive which limited its application only to people who had a disability themselves 'is liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.'<sup>94</sup>

Turning to the matter of harassment by association, the Court applied a similar line of reasoning as with regard to direct discrimination, and concluded its judgment by ruling that the protection from direct discrimination and harassment found in the Employment Equality Directive is not limited to people who are themselves disabled, but 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.

## **5. POSSIBLE TENSIONS BETWEEN THE CRPD AND EU NON-DISCRIMINATION AND EQUALITY LAW**

The previous two sections of the paper have examined the key provisions in the CRPD and EU law relating to non-discrimination and equality, including reasonable accommodation. In this section a comparison will be made between CRPD and EU law with a view to identifying relevant differences and possible tensions in the fields of non-discrimination and equality. Where such differences or tensions are identified, the section reflects on the possible consequences for EU law, and, in light of the fact that non-discrimination is an area of shared competence, for the Member States. As will be revealed, a failure by EU law to meet in full the standards set by the CRPD with regard to non-discrimination and equality does not necessarily mean that the EU is in breach of the Convention, but instead can lead to an obligation falling on the Member States to fill the remaining 'gap' through national legislation and policy.

### **5.1. PROHIBITION OF DISCRIMINATION – DIRECT AND INDIRECT DISCRIMINATION**

As will be recalled, the CRPD requires States Parties to 'prohibit all discrimination'<sup>95</sup> and discrimination itself is defined as '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 ...'.<sup>96</sup> The Convention

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<sup>94</sup> Para. 51.

<sup>95</sup> Article 5(2), CRPD.

<sup>96</sup> Article 2, CRPD.

therefore does not explicitly refer to direct or indirect discrimination, and nor does it mention harassment as a form of discrimination.

In contrast, the Employment Equality Directive explicitly defines and prohibits four types of discrimination: direct and indirect discrimination, harassment and an instruction to discriminate. In spite of this difference in approach, there can be no doubt that the Directive's higher level of specificity is in line with the Convention. Indeed, one could argue that a legal system which only prohibited direct discrimination, and therefore adopted a strictly formal approach to equality, would breach the Convention, as it would fail to prohibit 'all forms of discrimination'. Moreover, the reference to 'any distinction, exclusion or restriction on the basis of disability which has the ... effect of impairing the recognition, enjoyment or exercise ... of all human rights'<sup>97</sup> in Article 2 CRPD can be interpreted as an implicit reference to indirect discrimination,<sup>98</sup> where the focus is likewise on the adverse impact on persons with disabilities of the action in question, rather than on the intention or purpose behind the action.

This understanding of the CRPD definition of discrimination is supported by a proposal made by the EC during the negotiation of the Convention. At the seventh negotiating session, the EC proposed an amendment to the definition of 'discrimination on the basis of disability' which, at that time, read:

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 a basis of equality 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 direct and indirect discrimination*.<sup>99</sup>

The EC proposed that the phrase 'including direct and indirect discrimination' should be deleted from the definition, because this was already covered by the phrase 'all forms of discrimination'.<sup>100</sup>

<sup>97</sup> Italics have been added.

<sup>98</sup> For a similar argument see: Marianne Schulze, *Understanding the UN Convention on the Rights of Persons with Disabilities, A Handbook on the Human Rights of Persons with Disabilities*, (Handicap International September 2009), at 35 available at: <[www.enablement.nl/pdf/HI\\_CRPD\\_Manual\\_sept2009\\_final.pdf](http://www.enablement.nl/pdf/HI_CRPD_Manual_sept2009_final.pdf)> (accessed 27 June 2012), and S. Trömel, 'A Personal Perspective on the Drafting of the United Nations Convention on the Rights of Persons with Disabilities', in G. Quinn and L. Waddington (eds.), 1 *European Yearbook of Disability Law*, (Intersentia, 2009), 115 at 123.

<sup>99</sup> Italics have been added.

<sup>100</sup> Article 2 – Definitions, Seventh Session, Comments, proposals and amendments submitted electronically, European Union, pages 4 and 5, available at: <[www.un.org/esa/socdev/enable/rights/ahcstata2sevscomments.htm](http://www.un.org/esa/socdev/enable/rights/ahcstata2sevscomments.htm)> (accessed 28 June 2012).

## 5.2. REASONABLE ACCOMMODATION

The CRPD clearly defines a denial of a reasonable accommodation as a form of discrimination,<sup>101</sup> and places an obligation on States Parties to ensure that reasonable accommodation is provided ‘[i]n order to promote equality and eliminate discrimination’.<sup>102</sup> In contrast, whilst the Employment Equality Directive clearly requires EU Member States to establish a duty to provide a reasonable accommodation, and this is done ‘[i]n order to guarantee compliance with the principle of equal treatment’, a failure to make a reasonable accommodation is not classified as a form of discrimination under the Directive. Whilst some Member States have chosen to make an explicit link between a breach of the duty to provide a reasonable accommodation and discrimination,<sup>103</sup> many have not done so, and have simply established the obligation, whilst not classifying a breach of that obligation as a form of discrimination.<sup>104</sup> At first sight it might appear that this distinction is relatively unimportant, and what matters is that the legislation establishes a clear obligation to provide a reasonable accommodation, and not how a breach of that duty is labelled. However, there can be (significant) consequences of identifying an action as discrimination or as some other form of prohibited act. 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, and on the other, a recognition, amongst both people with disabilities and employers, of the seriousness of a failure to comply with the duty. However, aside from these speculative arguments, there can also be more practical implications of identifying a failure to make a reasonable accommodation as a form of discrimination. EU law, including the Employment Equality Directive, provides for a partial reversal of the burden of proof with regard to allegations of direct and indirect discrimination.<sup>105</sup> Reasonable accommodation is not mentioned in this context, although Member States are free to extend this rule to other forms of prohibited activities. A classification of a failure to make a reasonable accommodation as a form of discrimination, either as a sub-category of direct or indirect discrimination or as a *sui generis* form, could lead to the rule on the burden of proof, which favours the complainant, being extended to cases of alleged failures to make a reasonable accommodation. In addition, judges may be empowered or inclined to order more far-reaching sanctions and remedies in cases of discrimination than in cases of other wrongs. Consequently, a variety of consequences can flow from the decision to identify a

<sup>101</sup> Article 2, CRPD.

<sup>102</sup> Article 5(3), CRPD.

<sup>103</sup> See, for example, the relevant legislation in Ireland, the Netherlands, Spain, Sweden, Slovakia, and the United Kingdom. For more information see D. Schiek, L. Waddington and M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, (Hart Publishing, 2007), Chapter Six, Reasonable Accommodation.

<sup>104</sup> See for example the relevant legislation in Bulgaria, Cyprus, Estonia and Finland. Nevertheless, it is possible that courts in these jurisdictions may interpret a failure to make a reasonable accommodation as a form of (direct or indirect) discrimination.

<sup>105</sup> Employment Equality Directive, Article 10.



failure to make a reasonable accommodation as a form of discrimination rather than as some other form of prohibited act.

Given the unambiguous language of the Convention, one can conclude that there is a duty on States Parties to ensure that a failure to make an accommodation is regarded as form of discrimination. However, and in spite of the comments made in the previous paragraph, it is submitted that this does not imply that the EU is in breach of its obligations under the Convention with regard to Article 5 of the Employment Equality Directive. Whilst the Directive does not explicitly define a failure to make a reasonable accommodation as a form of discrimination, it also does not exclude this possibility either, and this is demonstrated by the many Member States which have opted to transpose the Directive in this way. One could argue that, in light of the obligations on the EU and its Member States under the CRPD, Article 5 of the Directive should now be interpreted as meaning that a failure to accommodate should be regarded as a form of discrimination, in addition to those forms explicitly mentioned in Article 2 of the Directive. It would be up to the Court of Justice of the EU, as the body that gives authoritative interpretations of EU law, to read such an obligation into Article 5. Up until now the Court has not been called upon to rule on this issue, although it did make reference to the reasonable accommodation duty in the Directive in both *Chacón Navas* and *Coleman*. A preliminary reference from the Danish courts, in the joined cases of *Skouboe Werge*<sup>106</sup> and *Ring*,<sup>107</sup> may be the first opportunity for the Court to address this issue. These cases are also the first disability-related references in the context of the Employment Equality Directive to reach the Court after the conclusion of the CRPD by the EU. In *Skouboe Werge* and *Ring*, the Danish courts have asked a series of questions, related both to the concept of disability and to the duty to provide a reasonable accommodation. Whilst the Court of Justice is not asked directly to determine whether a failure to make a reasonable accommodation amounts to a form of discrimination, one question asks, in essence, whether a dismissal which follows a period of absence from work, which was itself caused by a failure to make a reasonable accommodation, is compatible with the Directive. This question could open the door for the Court to clarify the nature of the duty to accommodate.

However, even if the Court declines to interpret Article 5 of the Employment Equality Directive in this way, this would still not rule out the possibility for those EU Member States, which have not yet done so, to make an explicit link between a failure to make a reasonable accommodation and discrimination. In that sense, one could argue that whilst EU law does not require that Member States define a failure to accommodate as discrimination, this would still be an obligation on those Member States which have ratified the Convention. As noted above, this approach would reflect the fact that combating discrimination is an area of shared competence. In such fields, the EU may choose to set only minimum requirements, leaving Member States free to set higher standards as appropriate. The Employment Equality Directive would therefore not hinder compliance with the CRPD by its Member States, even if it did not impose equivalent standards upon them.

<sup>106</sup> Case C-337/11.

<sup>107</sup> Case C-335/11.

### 5.3. THE DEFINITION OF DISABILITY

The CRPD does not contain a definition of disability. Whilst this issue was considered during the negotiation of the Convention, the inclusion and setting of a definition was ultimately regarded as too controversial, and was not supported by all parties.<sup>108</sup> However, the Convention does contain guidance on the concept of disability, providing in Article 1:

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.

The Employment Equality Directive does not define any of the protected grounds, including disability. However, as noted, the difficulties of interpreting this concept were quickly revealed by the first disability-related preliminary reference received by the Court of Justice, *Chacón Navas*. As noted earlier, in that case the Court, showing none of the hesitation or caution of the drafters of the Convention, defined disability as:

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

This definition of disability is very much based on the medical or individual model. In this respect, EU law is, it is submitted, clearly at odds with the Convention. However, one should note that the Court's interpretation – definitive as it is for the time being – is itself not in line with statements and expressions of other EU institutions. Both the Commission and the Council recognized the need to base policy on the social model of disability as early as 1996. In July of that year the Commission adopted a Communication on Equality of Opportunity for People with Disabilities.<sup>109</sup> The Communication notes that the way in which society is organized serves to exclude citizens,<sup>110</sup> and speaks of the evolution towards 'an

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<sup>108</sup> For comments and proposals submitted by the various parties involved in negotiating the Convention on the issue of the definition of disability, see Article 2 – Definitions, Seventh Session, Comments, proposals and amendments submitted electronically, available at: <[www.un.org/esa/socdev/enable/rights/ahcstata2sevscomments.htm](http://www.un.org/esa/socdev/enable/rights/ahcstata2sevscomments.htm)> (accessed 28 June 2012). See also, Stefan Trömel, 'A Personal Perspective on the Drafting of the United Nations Convention on the Rights of Persons with Disabilities', in G. Quinn and L. Waddington (eds.), 1 *European Yearbook of Disability Law*, (Intersentia, 2009) 115 at 121 and 122. Trömel argues that 'Article 1 on the Convention should require the revision of definition of disability/persons with disabilities in those countries that have more limited definitions.' at 122.

<sup>109</sup> Communication of the Commission on Equality of Opportunity for People with Disabilities of 30 July 1996, COM(96) 406 final.

<sup>110</sup> *Ibid.*, para. 2.

equal opportunities model in the field of disability policy' within the Member States of the EU.<sup>111</sup>

In December of the same year, the Council also approved a Resolution on Equality of Opportunity for People with Disabilities.<sup>112</sup> In this document, the Council, like the Commission, reaffirmed its commitment to the principles and values of the United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities<sup>113</sup> and the principles of equality of opportunity and eliminating negative discrimination on the sole ground of disability.

The EU institutions have continued to refer regularly to the philosophical underpinning of disability policy and stress the commitment to the social model of disability. In 2003, for example, the European Commission reiterated its commitment to the model by stating:

The EU's long-standing commitment towards its disabled citizens goes hand in hand with a new approach to disability: from seeing people with disabilities as the passive recipients of compensation, society has come to recognise their legitimate demands for equal rights and to realise that participation relates directly to insertion.<sup>114</sup>

This philosophy is reflected in the 2003 Commission Communication 'Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities', which stressed that the development of such a Convention was fully in line with EC disability policy. The Communication made it clear that the Commission saw non-discrimination and equality as being the core principles to be embraced by any new Convention.<sup>115</sup>

The ongoing commitment of the EU institutions to the social model of disability is also reflected in the revised version of a proposal for a new non-discrimination directive which extends beyond employment and covers disability, amongst a number of other grounds. This proposal is discussed in more detail below. For the time being it suffices to note that the European Parliament proposed inserting text based on Article 1 of the Convention,<sup>116</sup> and this was

<sup>111</sup> Ibid., para. 20.

<sup>112</sup> Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council of 20 December 1996 on equality of opportunity for people with disabilities, [1997] OJ C/I.

<sup>113</sup> United Nations General Assembly Resolution 48/46 of 20 December 1993.

<sup>114</sup> EU Disability Action Plan (Equal opportunities for people with disabilities: a European Action Plan, COM(2003) 650 final), 4.

<sup>115</sup> Communication from the Commission to the Council and the European Parliament of 24 January 2003, 'Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities', COM(2003) 16 final.

<sup>116</sup> European Parliament legislative resolution of 2 April 2009 on 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 (COM(2008) 0426 – C6-0291/2008 – 2008/0140(CNS)), amendment 17. Amendment 3 of the resolution proposed that the following text be included in the preamble: 'This Directive is one means by which the Community is complying with its obligations

taken over and included in the current (amended) proposal for the Directive. The inserted Recital reads:<sup>117</sup>

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.

Lastly, it is worth noting that the European Community's original negotiation position on the Convention was that no definition of disability was needed.<sup>118</sup> However, following the Court's judgment in *Chacón Navas*, the Commission, at the eighth and last negotiating session in New York in August 2006, withdrew its opposition to the inclusion of guidance on the meaning of the concept of disability and disabled persons in the Convention.<sup>119</sup> It is submitted that the judgment, which generated much criticism from Disabled People's Organizations (DPOs) and academics within Europe, led the Commission to quietly revise its opinion of the desirability of including guidance on the concept of disability in the Convention.

What then are the implications of the CRPD, and Art. 1 in particular, for interpreting the concept of disability in the Employment Equality Directive and the *Chacón Navas* judgment? In its judgment, the Court described its definition of disability as 'autonomous and uniform'.<sup>120</sup> The autonomous nature of the judgment and related definition is not at issue. However, it is difficult to understand how the Court's definition of disability could be 'uniform', if that means that it should be common to all Member States.<sup>121</sup> Given that the Directive only sets

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under the UN Convention on the Rights of Persons with Disabilities, and should be interpreted in that light'. Whilst the latest version of the full proposal that has been made public via the Council's homepage (3 August 2011, 12447/11) retains a reference to CRPD in preamble Recital 2, the aforementioned Parliamentary amendment has not been maintained.

<sup>117</sup> In Recital 19a. Version of 3 August 2011, (12447/11). At least one (unknown) Member State has inserted a reservation with regard to this recital.

<sup>118</sup> See e.g. Contribution by Governments, European Union, Article 2 Definitions, EU Position 30 January 2006, available at: <[www.un.org/esa/socdev/enable/rights/ahc7eu.htm](http://www.un.org/esa/socdev/enable/rights/ahc7eu.htm)> (accessed 28 June 2012).

<sup>119</sup> Information received from participants to the Ad Hoc Committee which negotiated the Convention.

<sup>120</sup> Paras. 40 and 42.

<sup>121</sup> An alternative interpretation is that the definition of disability given in the judgment is 'uniform' in the sense that it should be applied by the Court across all elements of the directive, meaning that, for example, the same definition of disability should be used with regard to the prohibition of direct and indirect discrimination, and the obligation to provide a reasonable accommodation. This interpretation would imply that Member States would remain free to adopt and apply different definitions of disability in their national legislation, as long as at least the group of people covered by the definition developed by the Court were covered. However, the Court gave no indication that this was what it intended, so this element of the judgment is ambiguous and unclear at the very least.

minimum requirements, Member States remain free to extend the protection from discrimination beyond the (personal) scope provided for in the Directive.<sup>122</sup> Moreover, some Member States, such as the UK and Ireland,<sup>123</sup> had, prior to Court's judgment, developed a definition of disability for the purposes of non-discrimination law which was (and continues to be) broader than that recognized by the Court of Justice. Should the Court's judgment be interpreted as requiring, on occasions, a more restrictive definition of disability in such jurisdictions, this would seem to clash with the 'non-regression' clause in the Directive,<sup>124</sup> as well as the minimum requirements dimension. In short, the Court's claim in *Chacón Navas* that its definition of disability is 'uniform'<sup>125</sup> does not seem to be compatible with the Directive, meaning that Member States remain free to set higher standards or, in this case, develop a broader definition of disability, for the purposes of non-discrimination law.

In short, once again, the issue of shared competence may be relevant, with the Member States being free to go beyond the provisions of the Employment Equality Directive where this is necessary in order to ensure full compliance with the Convention. However, one should also note that the Court itself may choose to revise its definition of disability. The preliminary reference in the cases of *Skouboe Werge* and *Ring* referred to above also offers it this opportunity. The Danish courts have asked a number of main and sub-questions related to understanding the concept of disability, and referring back to the *Chacón Navas* judgment. In its response, the Court may refer to the CRPD and also pick up on the implications of the decision of the Commission, Parliament and Council, to accept the Parliament's amendment to the 2008 Equal Treatment Directive, and thereby effectively incorporate the CRPD's guidance on the concept of disability in the proposed Directive.

#### 5.4. PROTECTION FROM DISCRIMINATION ON THE GROUNDS OF DISABILITY FOR PEOPLE WHO ASSOCIATE WITH A PERSON WITH A DISABILITY

As noted, the Convention addresses 'all forms of discrimination' 'on the basis of disability'. It can be argued that the latter phrase emphasizes that discrimination that is based on disability is prohibited, and not just discrimination against individuals who actually have a disability.<sup>126</sup> In that sense, individuals who experience discrimination because they associate with a person with a disability

<sup>122</sup> Recital 28 provides: 'This Directive lays down minimum requirements, thus giving the Member States the option of introducing more favourable provisions. ...'.

<sup>123</sup> See L. Waddington, 'Case C-13/05, *Chacón Navas v. Eurest Colectividades SA*, judgment of the Grand Chamber of 11 July 2006', 44 *Common Market Law Review* 2 (2007), 487.

<sup>124</sup> Also found in Recital 28.

<sup>125</sup> If 'uniform' is interpreted to mean a common definition across all Member States. However, for a suggestion for a possible alternative interpretation of the phrase see footnote 121.

<sup>126</sup> Where the discrimination is on the grounds of disability.

could also claim protection.<sup>127</sup> Nevertheless, the States Parties declined to specifically include a reference to ‘associates’ of persons with disability in the definition of discrimination.<sup>128</sup>

The Convention seems to adopt a similar approach to the protected ground as that found in the Employment Equality Directive, as interpreted by the Court of Justice in the *Coleman* case. However, the Convention prohibits all forms of discrimination on the basis of disability, and this includes both indirect discrimination and failure to provide a reasonable accommodation. In contrast, the Employment Equality Directive only prohibits direct discrimination and harassment on the ground of disability. Article 5 only confers an entitlement to a reasonable accommodation on persons with a disability, and this was reiterated by the Court in *Coleman*. Whilst the Court did not consider the situation with regard to indirect discrimination and associates of people with disabilities in *Coleman*, a reading of the Directive suggests that it does not protect people who are associated with someone with a disability from indirect discrimination on the basis of their association. The Directive defines indirect discrimination as occurring where ‘an apparently neutral provision, criterion or practice would put persons having ... a particular disability ... at a particular disadvantage compared with other persons ...’. The definition therefore seems to provide protection from indirect discrimination only for ‘persons having ... a particular disability ...’ who are disadvantaged. As a consequence, it seems difficult to argue that an individual who is disadvantaged not because they have a disability, but because someone they associate with has a disability, is protected from indirect discrimination as a result of this association under EU law. Such protection would only be possible if, ‘persons having ... a particular disability’ could be interpreted as including ‘persons who associate with persons having a particular disability’.

This might reflect a mismatch between the Convention and EU law, with the latter providing a lower level of protection. However, one should realize that this argument is highly speculative, since neither the prohibition of indirect discrimination in the Employment Equality Directive nor the CRPD have been the subject of authoritative interpretation in this respect. In any case, as was argued above in the context of reasonable accommodation, the Directive only sets minimum requirements, and this means that Member States remain free to set higher standards, and to extend protection from indirect discrimination, and the duty to provide a reasonable accommodation, to individuals who associate with a person with a disability. Both forms of discrimination could arise, for example, in the context of a shift worker who also has caring responsibilities for a disabled family member or friend.<sup>129</sup> That worker may need to provide assistance to a

<sup>127</sup> See G. Quinn, ‘A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities’, in G. Quinn and L. Waddington (eds.), 1 *European Yearbook of Disability Law*, (Intersentia, 2009), 89 at 102.

<sup>128</sup> See Article 2 – Definitions, Seventh Session, Comments, proposals and amendments submitted electronically, page 23, available at: <[www.un.org/esa/socdev/enable/rights/ahcstata2sevscomments.htm](http://www.un.org/esa/socdev/enable/rights/ahcstata2sevscomments.htm)> (accessed 28 June 2012).

<sup>129</sup> On reasonable accommodation and carers see also: R. Horton, ‘Care-giving and reasonable adjustment in the UK’, in N. Busby and G. James (eds.), *Families, Care-giving and Paid Work, Challenging Labour Law in the 21<sup>st</sup> Century*, (Edward Elgar, 2011), 137.

person with a disability at certain times – typically in the early morning, evening and night – thereby rendering them unavailable for shift work at these times. A requirement that such an individual work at these times could be regarded as a form of indirect discrimination on the grounds of disability, and a duty to provide a reasonable accommodation to the individual, by allowing them to work on the day shift whilst their relative or friend receives support from another source, such as a day centre, could resolve the problem. While the obligation to provide such protection may not flow from the EU law, one can argue that it is imposed on those Member States which have ratified the CRPD under international law.

### 5.5. MATERIAL SCOPE OF THE PROTECTION FROM DISCRIMINATION

The Convention has a very broad scope, and the duty to prohibit disability discrimination extends across all fields. In contrast, to date EU disability non-discrimination law only covers employment and vocational training. The 2008 proposal by the Commission for a new non-discrimination directive addresses discrimination in areas beyond employment, such as access to goods and services, healthcare, education, social security, and also covers a number of grounds, including disability. The proposal also seeks to establish a duty to provide for a reasonable accommodation in favour of disabled individuals beyond the field of employment.<sup>130</sup> However, to date this proposal has not been adopted and, given the strength of the opposition from some Member States to further EU equality law, this is unlikely to occur in the foreseeable future.<sup>131</sup>

Consequently, there once again exists a (significant) mismatch between the scope of the Convention and EU law in the field of non-discrimination and equality. Nevertheless, in light of the fact that combating discrimination is an area of shared competences, it does not seem possible to argue that there is a legal obligation on the EU under the Convention to adopt a new directive addressing discrimination on the ground of disability, and going beyond employment. As noted, in a field in which competences are shared, strictly speaking it is the Member States that have the responsibility to comply with the Convention, as long as the EU has not acted. Any EU action that is taken must be in compliance with the Convention, but there does not seem to be a legal obligation under international law to act in fields of shared competence. Therefore, those Member States which have ratified the Convention now find themselves under an obligation to extend the material scope of disability non-discrimination law to cover the full range of fields falling under the CRPD, but this obligation does not extend to the EU itself.

However, I have argued elsewhere<sup>132</sup> that it can nevertheless be highly desirable for the EU to act in such areas of shared competence. Indeed, this is recognized by the Commission in the case of the proposed Equal Treatment Directive. In its

<sup>130</sup> For a discussion of the impact which the CRPD has had on this proposal, see L. Waddington, 'Future Prospects for EU Equality Law. Lessons to be Learnt from the Proposed Equal Treatment Directive', *European Law Review* 2 (2011), 163.

<sup>131</sup> *Ibid.*

<sup>132</sup> L. Waddington, '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* (2011), 431.

staff working paper<sup>133</sup> accompanying the proposed Directive, the Commission wrote:

It should also be recalled that the UN Convention on the Rights of Persons with Disabilities will need in any event to be concluded and implemented by the EC and the Member States. 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.

Whilst not explicitly stated, the last sentence, referring to (unspecified) risks of divergent national CRPD implementation measures in the field of non-discrimination, clearly hints at the subsidiarity principle. According to this principle the Union should only take action if the objectives of the action could not be sufficiently achieved by the Member States and the Union can better achieve the action, because of its scale or effects.<sup>134</sup> In line with the subsidiarity principle, EU-level action in some CRPD fields in which the EU and the Member States share competences may be appropriate, both politically and from the perspective of efficiency – but it is doubtful that there is any obligation on the EU under international law to act in a field in which it shares competence with the Member States.<sup>135</sup>

## 6. CONCLUSION

Whilst EU equality law, to the extent that it exists, is generally in line with the provisions of the CRPD, it cannot be regarded as a full and complete implementation of the Convention with regard to non-discrimination and equality. Nevertheless, one should be cautious in concluding that this means that the EU is in breach of its obligations under the Convention, or that it is obliged to adopt further legislation in this field. The EU concluded the Convention to the extent of its competences and, in the field of non-discrimination and equality, those competences are shared with the Member States. This implies that, as long as EU legislation only sets minimum requirements with regard to non-discrimination, and as long as those

<sup>133</sup> 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.

<sup>134</sup> Article 5(3), TFEU.

<sup>135</sup> In fact, for reasons which are not related to disability or the CRPD, it is highly unlikely that the EU will adopt this Directive, and negotiations are now stalled. See L. Waddington, 'Future Prospects for EU Equality Law. Lessons to be Learnt from the Proposed Equal Treatment Directive', *European Law Review* 2 (2011), 163.



requirements do not actively breach the Convention, Member States remain free to adopt further instruments at the national level where this is necessary to comply with the obligations they have undertaken under the CRPD. In addition, in line with Case C-540/03 *Parliament v. Council* considered above, EU law should not give the Member States the impression that compliance will automatically lead to full compliance with, and implementation of, the CRPD, when EU law sets lower standards than those found in the Convention. Consequently, the actions of the EU and the Member States should be considered in combination when reflecting on compliance with the Convention.

However, one should also not conclude that the CRPD is irrelevant for EU non-discrimination and equality law. One can already see that the Convention has influenced the content of the proposal for a new Equal Treatment Directive. Whilst that Directive is unlikely to be adopted in the short term, it is clear that the EU's conclusion of the CRPD has impacted on the proposal, and the amendments which have subsequently been made to it. The CRPD has also already been referred to in a number of EU instruments, including the new EU Disability Strategy 2010–2020.<sup>136</sup> Moreover, the Convention is likely to influence other EU (legislative) initiatives relating (indirectly) to non-discrimination and equality.<sup>137</sup> Therefore, whilst non-discrimination and equality remain an area of shared competence, this does not mean the Convention is of no significance for the EU. Indeed, existing practice has already demonstrated that the Commission, Council and Parliament are taking the Convention into account when preparing and adopting various initiatives.

Furthermore, the Convention may reinforce the existing obligation on the EU, found in Article 10 TFEU, to 'combat discrimination based on ... disability' when defining and implementing its policies and activities. The Convention can provide a framework within which to interpret this obligation. This framework can be inspired both by the general obligations of the Convention (Article 4 CRPD) and by the specific substantive provisions of the Convention. Consequently, the Convention is of importance for many dimensions of EU policy on non-discrimination and equality.

<sup>136</sup> European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe, COM(2010) 636 final, Brussels, 15.11.2010. One goal of the Strategy is to identify actions 'needed to implement the UN Convention at EU level' (p. 4).

<sup>137</sup> See, for example, Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No. 1083/2006, Brussels, 6.10.2011 COM(2011) 615 final 2011/0276 (COD), p. 152, which provides, as one of the conditions for receiving Structural Funds (ex-ante conditionalities), that Member States demonstrate: 'The existence of a mechanism which ensures effective implementation and application of the UN Convention on the rights of persons with disabilities'.

Postscript:

Following the completion of this article, the Court of Justice of the European Union handed down its ruling in 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 (Skouboe Werge and Ring)* on 11 April 2013. The Court referred explicitly to the CRPD, and noted that the EU is now a party to the Convention and that such international agreements are binding on EU institutions and prevail over acts of the EU.

The Court went on to hold that the Employment Equality Directive precluded national legislation under which an employer could terminate an employment contract with a reduced period of notice following the absence of a disabled work from work, 'where those absences are the consequence of the employer's failure to take appropriate measures in accordance with the obligation to provide reasonable accommodation' as provide for in Article 5 of the directive.

With regard to the definition of disability, the Court drew inspiration from Article 1 CRPD, and held that, for the purposes of the Employment Equality Directive, the concept of disability must be interpreted as:

including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails 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, and the limitation is a long-term one.

This new definition is in line with the guidance on the concept of disability given in the CRPD.

## **PART II**

### **ANNUAL REVIEW OF EUROPEAN LAW AND POLICY**

