

# The unfinished story of EU disability non-discrimination law

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# 19. The unfinished story of EU disability non-discrimination law

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## 1. INTRODUCTION

The adoption of a developed disability policy, including the adoption of disability non-discrimination legislation, is a relatively recent concern for the European Union. For most of the history of the EU,<sup>1</sup> the founding Treaties contained no explicit reference to disability, and therefore no disability-specific competence existed.<sup>2</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 programme 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 inclusion of Article 13 (now Article 19 of the Treaty on the Functioning of the European Union (TFEU)) in the European Communities Treaty in 1999 sparked a flurry of academic speculation on its potential value and implications for EC non-discrimination law on grounds including disability.<sup>3</sup> The rapid adoption of two directives, the Racial Equality Directive<sup>4</sup> and the Employment Equality Directive,<sup>5</sup> based on Article 13 EC, generated a further round of academic discussion.<sup>6</sup> Since then

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<sup>1</sup> And its predecessors, the European Community (EC) and the European Economic Community (EEC).

<sup>2</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>3</sup> Eg L Waddington, 'Article 13 EC: Mere Rhetoric or a Harbinger of Change?' (1998) 1, *CYELS* 175; M Bell, 'Article 13 EC: The European Commission's Anti-discrimination Proposals' (2000) 29 *ILJ* 79; Lisa Waddington, 'Article 13 EC: Setting Priorities in the Proposals for a Horizontal Employment Directive' (2000) 29 *ILJ* 176.

<sup>4</sup> Directive 2000/43/EC implementing the principle of Equal Treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

<sup>5</sup> Directive 2000/78/EC establishing a general framework for Equal Treatment in employment and occupation [2000] OJ L303/16.

<sup>6</sup> See eg S McInerney, 'Equal treatment between persons irrespective of racial or ethnic origin: a comment' (2000) 25 *EL Rev* 317; A Lester, 'New European Equality Measures' [2000] *PL* 562; E Guild, 'The EC Directive on Race Discrimination: Surprises, Possibilities and Limitations' (2000) 29 *ILJ* 416; P Skidmore, 'EC Framework Employment Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy?' (2001) 30 *ILJ* 126; S Fredman, 'Equality: A New Generation?' (2001) 30 *ILJ* 145; U O'Hare, 'Enhancing European Equality Rights: a New Regional Framework' (2001) 8 *MJ* 144; L

the legal situation has evolved significantly: Member States have transposed the directives and a body of related case law has emerged in both the Court of Justice of the EU (CJEU) and within some Member States. Meanwhile the Council has declined to adopt a Commission proposal<sup>7</sup> for a new non-discrimination directive to fill some of the perceived gaps left by the initial two directives.<sup>8</sup> In addition, the EU has become a party to the United Nations Convention on the Rights of Persons with Disabilities (CRPD) which itself contains strong non-discrimination obligations. These developments have led to heightened academic scrutiny, commentary and reflection on EU equality law.

In the context of disability, some of the issues which researchers highlighted as potentially problematic following the adoption of the Employment Equality Directive have indeed gone on to trouble litigators and courts. A particularly prominent example is the meaning of ‘disability’ – a term which is not defined in the Directive.<sup>9</sup> Courts at the national and EU level have struggled to understand what is meant by this concept, and thus to grasp the precise extent of the personal scope of the Directive. Other challenging questions connected with EU disability non-discrimination law, not anticipated in the immediate aftermath of the Directive, have also arisen. Many of these have been generated or influenced by the adoption of the CRPD and its conclusion by the EU.

The goal of this chapter is to identify and explore some of the key current and emerging debates and questions in EU disability non-discrimination law. Accordingly, its coverage of EU disability non-discrimination law will necessarily be incomplete. Of central concern to all the issues selected for discussion here is the EU’s implementation of the CRPD in the equality and non-discrimination context. This thus provides a thread which connects all sections of this chapter.

The chapter will be divided into four main sections – excluding the introduction and conclusion. Section 2 addresses the CRPD and its relationship with EU disability non-discrimination law. Whilst, as already mentioned, this is a theme that will run throughout the whole chapter and surface in our analysis of other selected issues, its importance demands that it is also given specific consideration. Section 3 concerns the personal scope of the Employment Equality Directive. It will explore the meaning of

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Waddington and M Bell, ‘More Equal than Others: Distinguishing European Union Equality Directives’ (2001) 38 CML Rev 587; D Schiek, ‘A New Framework on Equal Treatment of Persons in EC Law?’ (2002) 8 ELJ 290; M Bell and L Waddington, ‘Reflecting on Inequalities in European Equality Law’ (2003) 28 EL Rev 349; C Costello and E Barry (eds), *Equality and Diversity, The New Equality Directive* (Irish Centre for European Law 2003); L Waddington, ‘Implementing the Disability Provisions of the Framework Employment Directive: National Options and Choices’, in Anna Lawson and Caroline Gooding (eds), *Disability Rights in Europe. From Theory to Practice* (Hart Publishing 2005) 107–34.

<sup>7</sup> 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. For further discussion see L Waddington, ‘Future Prospects for EU Equality Law. Lessons to be Learnt from the Proposed Equal Treatment Directive’ (2011) 36 EL Rev, 163.

<sup>8</sup> See further Waddington and Bell, ‘More Equal than Others: Distinguishing European Union Equality Directives’ (2001) 38 CML Rev 587; and Bell and Waddington, ‘Reflecting’ (n 6),

<sup>9</sup> See Waddington, ‘Implementing the Disability Provisions’ (n 6) 107–34, 117–19.

‘disability’ (which is obviously foundational to any claim for disability discrimination) and also the extent to which people who do not themselves have a disability are protected from disability discrimination by the Directive. Section 4 examines the Directive’s reasonable accommodation requirement and the legal challenges to which it has given rise. Finally, Section 5 explores the obligations imposed by the Employment Equality Directive to ensure that disabled people are granted non-discriminatory and effective access to justice when enforcing rights conferred by the Directive.

## 2. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND EU DISABILITY NON-DISCRIMINATION LAW

### 2.1 Background

The CRPD was adopted by the UN General Assembly in December 2006<sup>10</sup> in an attempt to ensure that universal human rights, always intended to be applicable to all members of the human family, are in fact extended to those who have (or are regarded as having) disabilities. It thus details and elaborates long-standing human rights guarantees in the particular context of disability. Such an exercise inevitably contributes to the development and reshaping of human rights law more generally – a phenomenon critiqued by Frederic Mégret,<sup>11</sup> who concludes that the CRPD has produced ‘a fuller concept of the subject of human rights, and a more holistic view of the idea of rights’.<sup>12</sup> Further, the CRPD draws upon elements within pre-existing UN human rights law to present certain types of right, which have particular relevance to disabled people, in ways that are new to human rights law. Thus, specific CRPD Articles are devoted to the right to accessibility,<sup>13</sup> to live independently and be included in the community<sup>14</sup> and to habilitation and rehabilitation.<sup>15</sup> The right to be free from discrimination is defined for the first time in a UN human rights treaty as including a failure to provide a reasonable accommodation.<sup>16</sup> Besides its contributions to the understanding of substantive rights, the CRPD provides a range of procedural innovations concerning the structures for human rights implementation and monitoring.<sup>17</sup> These include requirements that the governments of States Parties establish mechanisms, which include at least one independent body and disabled people’s organisations, to promote, protect and monitor

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<sup>10</sup> Convention on the Rights of Persons with Disabilities and its Optional Protocol (UN Doc A/61/611, 6 Dec 2006).

<sup>11</sup> F Mégret, ‘The Disabilities Convention: Towards a Holistic Conception of Rights’ (2008) 12 *IJHR* 261.

<sup>12</sup> *ibid* 261.

<sup>13</sup> CRPD Art 9.

<sup>14</sup> CRPD Art 19.

<sup>15</sup> CRPD Art 26.

<sup>16</sup> CRPD Art 2. See also Art 5.

<sup>17</sup> See further G Quinn, ‘The United Nations Convention on the Rights of Persons with Disabilities: Toward a New International Politics of Disability’ (2009) 15 *Texas Journal on Civil Liberties and Civil Rights* 33.

national CRPD implementation;<sup>18</sup> designate governmental focal points and co-ordination mechanisms for CRPD implementation;<sup>19</sup> collect and disseminate appropriately disaggregated statistical and other research data to inform law and policies implementing the CRPD;<sup>20</sup> and closely consult and actively involve disabled people's organisations in all efforts to implement the CRPD.<sup>21</sup>

Unsurprisingly, the EU's conclusion of the CRPD has given rise to many questions and discussions about the impact of the CRPD on EU law and policy – questions which have considerable practical, as well as academic, significance. No less interesting, although perhaps of less pressing practical importance, are questions about the EU's impact on the drafting and development of the CRPD. Both types of question will be explored here, with particular reference to the topic of disability non-discrimination law.

## 2.2 Impact of EU Disability Non-Discrimination Law on the CRPD

The CRPD was adopted after a four-year period of negotiation within the Ad Hoc Committee,<sup>22</sup> in which the EU<sup>23</sup> (represented by the Commission and with co-ordination between the then-27 Member States) played an active role. This was the first time the EU had formally engaged in the drafting of a UN human rights treaty. In light of this, Gráinne de Búrca<sup>24</sup> carried out a probing inquiry into the question of whether various innovations in the CRPD could be attributed to the EU's unprecedented involvement in its drafting. She concluded that, despite the EU's generally active and positive contribution to the drafting of relevant provisions, the innovations in question owed more to the contributions made by NGOs and other non-state actors – civil society (particularly disabled people's organisations) also having played an unprecedented role in this drafting process.<sup>25</sup> Nevertheless, de Búrca identifies two respects in which the EU was particularly influential – both of which involved arguments that aspects of EU disability non-discrimination law should be included within the CRPD. The first of these, on which de Búrca describes the EU as being the 'main advocate',<sup>26</sup> concerned the addition of reasonable accommodation to the CRPD's

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<sup>18</sup> CRPD Art 33(2) and (3).

<sup>19</sup> CRPD Art 33(1).

<sup>20</sup> CRPD Art 31.

<sup>21</sup> CRPD Art 4(3).

<sup>22</sup> General Assembly Resolution 58/168 (UN Doc A/RES/56/168, 26 February 2002).

<sup>23</sup> This terminology is used for convenience, although it was actually the EC at that time and not the EU.

<sup>24</sup> G de Búrca, 'The European Union in the negotiation of the UN Disability Convention' (2010) 35 *EL Rev* 174.

<sup>25</sup> For a first-hand account of the involvement of disabled people's organisations in this process, see S Trömel, 'A Personal Perspective on the Drafting History of the United Nations Convention on the Rights of Persons with Disabilities' in G Quinn and L Waddington (eds), *European Yearbook of Disability Law* (Intersentia 2009) vol 1, 115.

<sup>26</sup> *ibid* 192.

non-discrimination provisions. Indeed, the EU strongly advocated for explicit recognition that failure to provide reasonable accommodation constitutes disability discrimination despite the fact that no such explicit recognition is to be found in the Employment Equality Directive.<sup>27</sup> The second was resistance to incorporating a categorical definition of ‘disability’ in the CRPD – although, after the decision in *Chacón Navas*,<sup>28</sup> the Commission did not oppose the inclusion of the open-textured guidance on the meaning of ‘disability’ which now appears in Article 1 of the CRPD. Finally, it should be noted that the EU also played a particularly influential role in the drafting of Article 44, which deals (for the first time in a UN human rights treaty) with the accession or ‘formal confirmation’ of the treaty by regional integration organisations (such as the EU).

Thus, it seems that aspects of EU disability non-discrimination law have helped to shape important aspects of the way in which the CRPD is drafted. While the significance of treaty drafting should not be understated, the way in which that treaty is subsequently interpreted and applied is also crucial to its long-term effectiveness and impact. UN treaty monitoring bodies, such as the UN Committee on the Rights of Persons with Disabilities, have a key role in this process. However, they do not operate in isolation from developments at regional and national level.<sup>29</sup> It is the task of future research to assess the impact, if any, of EU disability non-discrimination law, including through its national manifestations, on the interpretation and guidance provided by members of the Committee on the Rights of Persons with Disabilities on the CRPD.

### 2.3 Impact of the CRPD on EU Disability Non-discrimination Law

Questions about how the CRPD affects EU disability law and policy<sup>30</sup> are rooted in the soil of the EU’s conclusion (or ratification) of the CRPD.<sup>31</sup> The fertility of this soil for the germination of such questions is enriched by the fact that the CRPD is the first

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<sup>27</sup> For further discussion of this discrepancy between the CRPD and the Employment Equality Directive, see L Waddington, ‘Equal to the Task? Re-Examining EU Equality Law in Light of the United Nations Convention on the Rights of Persons with Disabilities’ in L Waddington, G Quinn and E Flynn (eds), *European Yearbook of Disability Law* (Intersentia 2013) vol 4, 169.

<sup>28</sup> Case C-13/05 *Chacón Navas v Eurest Colectividades SA* [2006] ECR I-6467. For analysis of this case, see below, Section 3.2.

<sup>29</sup> For further discussion see, eg, Anthea Roberts, ‘Comparative international law? The role of national courts in creating and enforcing international law’ (2011) 60 ICLQ 57–92.

<sup>30</sup> See, for more detailed discussions of the implications of the CRPD for EU law, European Foundation Centre Study on Challenges and Good Practice in the Implementation of the UN Convention on the Rights of Persons with Disabilities (European Commission 2008); L Waddington, ‘Breaking new ground: the implications of ratification of the United Nations convention on the rights of persons with disabilities for the European Community’ in O Arnardóttir and G Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff 2009) 111; L Waddington, ‘Equal to the Task?’ (n 27) 169.

<sup>31</sup> Council Decision 2010/48/EC 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 L23/35–61.



international human rights treaty to which the EU has become a party. Notwithstanding this, there is clear authority to the effect that the EU is bound, within the limits of its competence, to implement international treaties which it has concluded and that such obligations also bind Member States in their implementation of EU law.<sup>32</sup> Member States which have ratified the CRPD will thus be bound to implement it both by way of their obligations under UN law and also, within the scope of EU competence, by way of their obligations under EU law.<sup>33</sup> Challenging questions concerning the identification of the exact scope of the EU's competence in matters covered by the CRPD therefore arise,<sup>34</sup> adding an additional layer of complexity to the task of the UN Committee on the Rights of Persons with Disabilities when examining the EU's initial and periodic reports.<sup>35</sup>

Like other international agreements made by the EU, the CRPD cannot take precedence over primary EU treaty law. It should, however, be used as a guide to interpreting secondary EU legislation.<sup>36</sup> The CJEU has already used the CRPD as a guide to the interpretation of disability-related elements of the Employment Equality Directive, as will be discussed more fully in the sections on the definition of disability and reasonable accommodation below. In addition, the obligation to interpret EU secondary law consistently with the CRPD's non-discrimination requirements adds leverage to the analogous obligation in Article 21 of the EU Charter of Fundamental Rights. The significance of this is demonstrated by recent challenges to the use of EU structural funds to perpetuate systems of institutional (rather than community-based) living for people with disabilities<sup>37</sup> – arguments based on the discrimination entailed in such approaches featuring prominently in the debates.<sup>38</sup>

<sup>32</sup> TFEU Art 216(2). See also Case 181/73 *Haegeman v Belgium* [1974] ECR 449, para 5.

<sup>33</sup> Case 104/81 *Hauptzollamt Mainz v Kupferberg* [1982] ECR 3641, para 13.

<sup>34</sup> See further L Waddington, 'The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences' (2011) 18 MJ 411.

<sup>35</sup> Submitted in accordance with Art 35 of the CRPD. The CRPD Committee published its Concluding observations on the initial report of the European Union (CRPD/C/EU/CO/1) on 2 October 2015.

<sup>36</sup> Case C-61/94 *Commission v Germany* [1996] ECR I-3989; more generally, M Cremona, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law*, EUI Law Working Paper 22/2006 <<http://hdl.handle.net/1814/6249>> accessed 8 August 2015; C-122/95 *Germany v Council* [1998] ECR I-973.

<sup>37</sup> See eg European Coalition for Community Living, 'Wasted Time, Wasted Money, Wasted Lives ... A Wasted Opportunity? – A Focus Report on how the current use of Structural Funds perpetuates the social exclusion of disabled people in Central and Eastern Europe by failing to support the transition from institutional care to community-based services' (March 2010); G Quinn and S Doyle, *Getting a Life – Living Independently and Being Included in the Community: A Legal Study of the Current Use and Future Potential of the European Structural Funds to Contribute to the Achievement of Article 19 of the United Nations Convention on the Rights of Persons with Disabilities* (Office of the High Commission for Human Rights European Region 2012).

<sup>38</sup> See, in particular, Quinn and Doyle (n 37) ch 4, which draws on the US Supreme Court discrimination case of *Olmstead v LC* 527 US 581 (1999).

Besides its role in guiding interpretation of EU secondary law, questions have arisen about whether the CRPD can be used as a basis for annulling such laws. International agreements concluded by the EU, such as the CRPD, ‘form an integral part of the Community [now Union] legal system’<sup>39</sup> and the Court of Justice has the competence to hold that EU secondary law is invalid on the grounds that it conflicts with such an international agreement. However, for the Court to take this rather radical step, it must first find that the relevant provision on the international agreement has direct effect. In order for a provision of international agreement to have direct effect, the Court has held that it must ‘be capable of conferring rights on citizens of the Community [now Union] which they can invoke before courts’.<sup>40</sup>

The question of whether the CRPD was capable of having direct effect arose in *Z v a Government Department and the Board of Management of a Community School*,<sup>41</sup> where it was argued that the Employment Equality Directive fell short of CRPD standards and should therefore be annulled. This argument was rejected by the CJEU, which followed the advice offered in the Advocate General’s opinion that the CRPD was insufficiently precise and unconditional to have this type of direct effect.<sup>42</sup> In the words of Advocate General Wahl:

With regard to the issue of compatibility between Directive 2000/78/EC [the Employment Equality Directive] and the UN Convention, I would observe that the obligations laid down in the latter international instrument seem to be addressed to Contracting Parties. They are to take appropriate measures – if necessary, by adopting legislation – to give effect to the rights of disabled persons as laid down in the UN Convention. Drafted in a programmatic form, I cannot read that Convention as containing any provisions which would fulfil the condition that the provision must be unconditional and sufficiently precise, as stated above. Consequently, I do not consider that the UN Convention may be relied on to challenge the validity of Directive 2000/78/EC.<sup>43</sup>

Because the material scope of EU disability non-discrimination law falls short of that of the CRPD, and because it would be possible to extend it within the limits of EU competences, questions about the expansion of the scope of EU disability non-discrimination legislation inevitably arise. Although the CRPD would not appear to oblige the EU to adopt new legislation to this effect, it may make such an extension more appealing in that it would facilitate the harmonisation of diverse national efforts to bring domestic disability non-discrimination legislation into line with CRPD requirements.<sup>44</sup> As has already been mentioned, however, the Council has thus far failed to adopt the Commission’s 2008 proposal for new legislation extending the material scope of EU disability (and other) non-discrimination law beyond employment

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<sup>39</sup> Case 181/73 *Haegeman v Belgium* [1974] ECR 449, para. 5.

<sup>40</sup> Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* [1972] ECR 1219.

<sup>41</sup> Case C-363/12, *Z v a Government Department and the Board of Management of a Community School* [2014] (ECJ 18 March 2014) Opinion of AG Wahl.

<sup>42</sup> *ibid* paras 85–90.

<sup>43</sup> *ibid* para 114.

<sup>44</sup> A point explored further in L Waddington, ‘Equal to the Task?’ (n 27) 169, 197–98.



and vocational training.<sup>45</sup> It now seems unlikely that agreement on the proposal will be reached.<sup>46</sup> However, explicit requirements not to discriminate against disabled people are contained in various pieces of EU secondary legislation – in connection with transport,<sup>47</sup> for example, and the structural funds.<sup>48</sup> This trend is bolstered by Article 10 of the TFEU and Article 21 of the Charter, as well as by the CRPD. It is therefore impossible to attribute this creeping mainstreaming of disability non-discrimination requirements entirely to the CRPD, but it seems probable that it has played (and will continue to play) a part in it.

Later sections of this chapter will consider the influence of the CRPD on specific elements of EU disability non-discrimination law. At a more general level, however, it is clear from the above discussion that attempting to quantify this impact in exact terms is likely to be a fruitless exercise. Despite this, it seems safe to say that the CRPD is helping to cement the human rights foundations of this body of law as well as to shape its content. The headline position given to the CRPD in the European Disability Strategy 2010–2020<sup>49</sup> demonstrates its significance in the shaping of current and future EU disability policy – and it is within this broad context that EU disability non-discrimination law sits.

### 3. PERSONAL SCOPE

#### 3.1 The Two Elements

The question of who is protected from discrimination on the grounds of disability under the Directive includes two distinct elements. First, whilst it is clear that persons who have a disability are protected, the Directive provides no definition of the concept of disability and therefore no definition of who is a person with a disability. This is an issue with which national courts have been left to grapple, and it has been the dominant issue in the disability-related judgments of the CJEU to date. Second, the Directive is also silent as to whether people who do not have a disability (at present), but who experience discrimination on the grounds of disability, fall within its personal scope. This section discusses the personal scope of the Directive, addressing both of these dimensions.

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<sup>45</sup> Commission (n 7).

<sup>46</sup> L Waddington, 'Future Prospects' (n 7).

<sup>47</sup> See eg Regulation (EU) No 1177/2010 of the European Parliament and of the Council concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 [2010] OJ L334/7 Art 9(1); Regulation (EU) No 181/2011 of the European Parliament and of the Council concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 [2011] OJ L55/6 Art 11(1).

<sup>48</sup> See eg General Regulation on the Structural Funds (2007–2013) [2006] OJ L210 Art 16.

<sup>49</sup> Commission, 'European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe' COM/2010/0636 final. See, for recent analysis of this Strategy, D L Hosking, 'Staying the Course: The European Disability Strategy 2010–2020' in Waddington, Quinn and Flynn (n 27) 73–98.

### 3.2 The Concept of Disability

The first disability-related case on the Employment Equality Directive to reach the Court of Justice was *Chacón Navas*.<sup>50</sup> At its heart this case concerned the relationship between sickness and disability, and whether the two could be equated for the purposes of the Directive in any circumstances. The case concerned an individual who was sick and had not been able to work for some time. She was dismissed after a period of absence and challenged this decision on the grounds that it was incompatible with the Directive. The Court was therefore called upon to consider whether someone in this situation was protected under the Directive and, in order to address this issue, it developed a definition of disability. It ruled that ‘disability’, in this context, means ‘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>51</sup> It went on to explain that, for any limitation to be regarded as a ‘disability’, ‘it must be probable that it will last for a long time’.<sup>52</sup> The Court also held that ‘disability’ is different from ‘sickness’,<sup>53</sup> and that 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>54</sup> It added that its definition of disability was ‘autonomous and uniform’.<sup>55</sup>

The definition of disability developed in *Chacón Navas* was based on the medical or individual model of disability.<sup>56</sup> According to the Court’s definition 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. The *Chacón Navas* judgment thus locates barriers to employment in the individual, and not in the attitudes or structures of potential employers. This individual-focused model can be contrasted with a social model of disability, based on a socio-political approach, which focuses attention on the barriers to employment (and other aspects of life) which result from the failure of social structures and environment to adjust to the needs and aspirations of people with impairments. Many such barriers can and should fall within the ambit of prohibitions of disability discrimination (such as that contained in the Employment Equality Directive).

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<sup>50</sup> *Chacón Navas* (n 28). For further commentary on this case see L Waddington, ‘Case C-13/05, *Chacón Navas v Eurest Colectividades SA*, Judgment of the Grand Chamber of 11 July 2006’ (2007) 44 *Common Market Law Review* 487–499. The information in this section draws on material in this case note, as well as the paper by L Waddington, ‘“Not Disabled Enough”: How European Courts Filter Non-Discrimination Claims Through a Narrow View of Disability’ “‘Pas suffisamment handicapé”: comment les cours européennes filtrent les actions en discrimination p rune apprehension étroite de la notion de handicap’, (2015) 15 *European Journal of Human Rights* 1, 11.

<sup>51</sup> *Chacón Navas* (n 28) para 43.

<sup>52</sup> *ibid* para 45.

<sup>53</sup> *ibid* para 44.

<sup>54</sup> *ibid* para 46.

<sup>55</sup> *ibid* paras 40 and 42.

<sup>56</sup> See, for examples of literature on theoretical models of disability, M Oliver, *Understanding Disability: from theory to practice* (Macmillan Press Ltd 1996); M Priestley, ‘Constructions and creations: idealism, materialism and disability theory’ (1998) 13 *Disability and Society* 1, 75–94.

*Chacón Navas* also left unresolved important questions concerning the relationship between sickness and disability. For instance, it remained unclear whether, for purposes of the Directive, sickness should ever be treated as a disability and, if so, in what circumstances. Thus, it was unclear whether long-term and chronic sickness, however defined, could be included within the concept of disability for purposes of EU disability non-discrimination law.

In spite of the uncertainty caused by the *Chacón Navas* judgment, the Court did not have an opportunity to revisit its case law on this topic until some seven years later in the case of *HK Danmark (Skouboe Werge and Ring)* in 2013.<sup>57</sup> This delay proved to be significant because, as noted above, in the intervening period the EU had become a party to the CRPD and was thereby bound by it within the limits of its competences. Whilst (as noted in Section 2.2 above) the Ad Hoc Committee that negotiated the CRPD decided not to define the concept of disability, it did include open-textured guidance on the point. Article 1 thus provides that:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

In *HK Danmark* the CJEU demonstrated that it was cognisant of its obligation to interpret the Employment Equality Directive consistently with the CRPD,<sup>58</sup> and this led it to refine and develop its definition of disability. ‘Disability’, it held, must be understood as:

a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.<sup>59</sup>

In recognising that disability results from an interaction between an impairment and barriers in the environment, the Court seemed to reject the individual model of disability which had underpinned the *Chacón Navas* judgment, and embraced the social model approach which lies at the heart of the CRPD. The Court also held that a curable or incurable illness, which leads to the required degree of limitation on a long-term basis, falls within the concept of ‘disability’ within the meaning of the Directive.<sup>60</sup> Its guidance as to the required degree of limitation was situated within the context of employment and working life. Thus it stressed that a disability does ‘not necessarily imply complete exclusion from work or professional life’<sup>61</sup> and noted that a ‘disability’

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<sup>57</sup> Joined Cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (Ring and Skouboe Werge)*, (ECJ, 11 April 2013).

<sup>58</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), *European Yearbook of Disability Law* (Intersentia 2010) vol 2, 47, 66–68 in particular.

<sup>59</sup> *HK Danmark* (n 57) para 38.

<sup>60</sup> *ibid* para 41.

<sup>61</sup> *ibid* para 43.

must be understood as a ‘hindrance’ to the exercise of professional life, and a person with a disability who was only able to work part-time was capable of being covered by the concept.<sup>62</sup> It also held that there was no requirement that a person should need accommodation measures (such as adapted or additional equipment) in order to be regarded as disabled.<sup>63</sup> Accommodation measures, it noted, are ‘the consequence, not the constituent element, of the concept of disability’.<sup>64</sup>

Despite the Court’s attempt to follow the guidance in the CRPD when developing its definition of disability in *HK Danmark*, the judgment did not put an end to preliminary references relating to the concept of disability. In 2014 the Court ruled in *Z v A Government Department and the Board of Management of a Community School*<sup>65</sup> which concerned a woman who, as a result of a physical impairment, was unable to bear a child naturally. She arranged for a surrogate mother to carry her child using her own genetic material. Following the birth of her child, she was refused paid leave of absence by her employer (equivalent to maternity or adoption leave) on the grounds that she had neither given birth nor adopted a child and, as a result, had no legal entitlement to leave. One of the questions that arose in the case was whether this amounted to disability discrimination as prohibited under the Employment Equality Directive.<sup>66</sup>

In responding to this question, both the CJEU and the Advocate General noted that the concept of disability had to be interpreted in line with the CRPD and the Court’s earlier judgment in *HK Danmark*.<sup>67</sup> The Court went on to imply that Z’s condition might well amount to a disability within the meaning of the CRPD, stating that:

Having regard to the concept of ‘disability’ ... it is not disputed that such a condition constitutes a limitation which results in particular from physical, mental or psychological impairments, or that it is of a long-term nature. In particular, it cannot be disputed that a woman’s inability to bear her own children may be a source of great suffering for her.<sup>68</sup>

This paragraph resonates with many of the elements which determine whether a person has a disability, as established by Article 1 UN CRPD. However, the Court concluded that for a person to be covered by the Directive their disability needed to impact on their ability to participate in professional life. The Court stated:

... the concept of ‘disability’ within the meaning of Directive 2000/78 presupposes that the limitation from which the person suffers, in interaction with various barriers, may hinder that person’s full and effective participation in professional life on an equal basis with other workers.<sup>69</sup>

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<sup>62</sup> *ibid* para 44.

<sup>63</sup> *ibid* para 45.

<sup>64</sup> *ibid* para 46.

<sup>65</sup> *Z v A Government Department* (n 41).

<sup>66</sup> *ibid* para 28 (Question 3).

<sup>67</sup> *ibid* paras 75–76, and paras 79–81 Opinion of AG Wahl.

<sup>68</sup> *Z v A Government Department* (n 41) para 79 of Judgment. This is similar in tone to the views of the Opinion of AG Wahl para 93.

<sup>69</sup> *Z v A Government Department* (n 41) para 80.

It then went on to rule, following the advice of the Advocate General, that ‘the inability to have a child by conventional means’ did not prevent Z from ‘having access to, participating in or advancing in employment’ and that there was no evidence that Z’s condition ‘made it impossible for her to carry out her work or constituted a hindrance to the exercise of her professional activity’.<sup>70</sup> It therefore concluded that Z’s condition did ‘not constitute a “disability” within the meaning of Directive 2000/78’.<sup>71</sup>

Thus, the Court accepted that Z may have had a disability within the meaning of the CRPD. It was also clear that she had been denied access to an employment-related benefit falling within the material scope of the Directive. Nevertheless, according to the Court, Z was not entitled to claim protection from employment-related discrimination on the grounds that her impairment did not impact in any way on her ability to work. She may have been disabled, but not ‘in the right way’, and so was therefore excluded from claiming protection from disability discrimination at the hands of her employer. It therefore seems that, because EU non-discrimination law is confined to the field of employment, the Court takes the view that protection from discrimination law should only be provided to individuals who are regarded as having an impairment which impacts on employment-related skills, and not to individuals who have impairments which (in combination with social barriers) impact on other areas of life.<sup>72</sup>

The judgment in *Z* focuses very much on the impact of the impairment, rather than reflecting on environmental factors and the social model of disability more generally. This is ironic given that the Advocate General began his considerations on this point by noting that disability is ‘as much a social construct as a medical fact’<sup>73</sup> and the UN Convention moves away from a ‘narrow, individual centred definition’ of disability.<sup>74</sup> It is highly doubtful whether the approach adopted in *Z* is compatible with the EU’s obligations under the CRPD. Nor, as will be discussed in Section 3.3 below, does it seem compatible with the Court’s earlier approach in *Coleman v Attridge Law*.<sup>75</sup>

Interesting questions about the meaning of ‘disability’ in the Directive were again raised in *Kaltoft*.<sup>76</sup> This case concerned the alleged dismissal of a child-minder on grounds of obesity and the Court was asked to decide whether obesity could amount to a disability. The Court found that obesity did not in itself constitute a ‘disability’ since it does not necessarily involve a limitation which results from an impairment and which, in interaction with various barriers, hinders participation in professional life.<sup>77</sup> However, where obesity does lead to such a limitation, it should be regarded as a

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<sup>70</sup> *ibid* para 81.

<sup>71</sup> *ibid* para 82.

<sup>72</sup> Such a view was also expressed by the AG Jääskinen in Case C-354/13 *FOA v Kommunernes Landsforening (KL) (Kaltoft)* (ECJ, 17 July 2014) Opinion of AG Jääskinen, paras 38–39 – although he was at pains to stress that the impairment in question need not hinder the claimant’s participation in the particular employment they held, provided that it hindered their participation in employment more generally.

<sup>73</sup> Quoting RD Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press 2011) 202 in *FOA* (n 72) para 85.

<sup>74</sup> *FOA* (n 72) para 85.

<sup>75</sup> Case C-303/06 *Coleman v Attridge Law* [2008] ECR I-5603.

<sup>76</sup> *FOA* (n 72) para 85.

<sup>77</sup> *ibid* para 58.

disability. The Court said this would be the case, for example, if an obese worker was affected by reduced mobility or medical conditions related to his obesity which prevented him from carrying out his work or caused him discomfort when working.<sup>78</sup> The Court concluded by repeating its definition in *HK Danmark* and holding that obesity constitutes a ‘disability’ within the context of the Employment Equality Directive, where ‘it entails a limitation resulting in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers’.<sup>79</sup>

To sum up, the body of case law analysed in this section has constructed a definition of disability for purposes of the Directive. A person has a disability if they have an impairment which results in the required degree of hindrance to participation in professional life. Insignificant illnesses or impairments are thus unlikely to meet this threshold. Impairments which the Court does not regard as impacting on ability to work will also not be regarded as disabilities, even if they have a significant impact on other aspects of life. In addition, any condition must be long-term (but not necessarily permanent) to be regarded as a disability.

What emerges from these complex rules is an approach which risks focusing on the disability status of individual claimants instead of on the (alleged) act of discrimination.<sup>80</sup> The problems with such an approach were recognised by Harlan Hahn almost 20 years ago, when he wrote: ‘[a] firm adherence to medical concepts of disability may tend to focus undue emphasis on diagnosed conditions instead of acts of discrimination’.<sup>81</sup> More recently Anna Lawson has noted ‘the disability definition requirement risks distracting judicial and other attention from the behaviour of the alleged discriminator and focusing it instead on the functional limitations of the victim’.<sup>82</sup> The Court’s focus on the definition of the disability, albeit one which the Court attempts to align with the CRPD, runs this risk. The consequences of such an approach under EU law, and the scope for an alternative approach focusing on discrimination, are an appropriate subject for further research.<sup>83</sup>

### 3.3 Extending Protection to People who have no Impairment

As indicated in Section 3.1 above, people who have no ‘physical, mental, intellectual or sensory impairments’<sup>84</sup> may also be victims of disability-based direct discrimination

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<sup>78</sup> *ibid* para 60.

<sup>79</sup> The AG in this case opined that only the most severe form of obesity (WHO class III obesity, or severe, extreme or morbid obesity) would always meet the definition of disability developed by the Court (*ibid* para 56). The Court was not so prescriptive or precise in its judgment.

<sup>80</sup> However a different approach can be identified in *Coleman* (n 75) as discussed below.

<sup>81</sup> H Hahn, ‘Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective’ (1996) 14 *Behavioral Sciences and the Law* 41, 56.

<sup>82</sup> A Lawson, ‘Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated’ (2011) 40 *ILJ* 359, 362.

<sup>83</sup> See further L Waddington, ‘Not Disabled Enough’ (n 50).

<sup>84</sup> CRPD, Art 1.



and harassment.<sup>85</sup> The Court of Justice was faced with such a case in *Coleman v Attridge Law*.<sup>86</sup> There a mother claimed to have been the victim of direct discrimination and harassment at the hands of her employer because her son was disabled. In assessing whether Ms Coleman fell within the protective scope of the Directive, the Court had regard to the Directive's objectives and intended effect.<sup>87</sup> It endorsed the Opinion of the Advocate General that the Directive excludes disability 'from the range of permissible reasons an employer may legitimately rely upon in order to treat one employee less favourably than another.'<sup>88</sup> Accordingly, the treatment Ms Coleman had allegedly received was 'on the ground' of disability – albeit that it was her son, and not herself, who had 'impairments'. Thus, what mattered was not whether the claimant fell into a 'particular category of person' but whether she had been treated less favourably 'by reference to the grounds ... [of disability]'.<sup>89</sup>

This *Coleman* reasoning sits uncomfortably with the emphasis, now being placed by the CJEU, on the need for an impairment to hinder a person's participation in professional life.<sup>90</sup> It would have been nonsensical to require Ms Coleman to demonstrate that her young son had impairments which, in due course, would hinder his professional life. Consistency with *Coleman*, as well as with the CRPD, seems to require the abandonment of the recent emphasis on hindrance to professional life in assessments of whether or not a person is disabled for the purposes of the Directive. Questions relating to the employment experiences of a claimant should be relevant only to the question of whether or not the discrimination is of a type falling within the Directive's material scope – not its personal scope. Questions about personal scope in the disability context, we suggest, should be determined simply by reference to whether the discrimination was on grounds of 'physical, mental, intellectual or sensory impairments', even if those impairments were not actually possessed by the alleged victim of the discrimination.

On the basis of the *Coleman* reasoning, it might be expected that a person who is harassed or treated less favourably than others because she is wrongly perceived to have a 'physical, mental, intellectual or sensory impairment'<sup>91</sup> would also fall comfortably within the protective scope of the Directive. Such an approach to discrimination on the basis of perceived disability is supported by the interpretation of disability-based discrimination given to the CRPD by the UN Committee on the Rights of Persons with Disabilities.<sup>92</sup> The question indeed seems unproblematic. It is therefore somewhat

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<sup>85</sup> Conceivably, this situation might also arise in connection with indirect discrimination, but it is difficult to envisage an apparently 'neutral' provision, criterion or practice for these purposes. Neither the CRPD nor the Employment Equality Directive appear, on their wording, to grant reasonable accommodation entitlements to people who are not themselves disabled.

<sup>86</sup> *Coleman* (n 75).

<sup>87</sup> *ibid* paras 48–51.

<sup>88</sup> *ibid* para 18.

<sup>89</sup> *ibid* para 38.

<sup>90</sup> This tension was acknowledged by Advocate General, who described it as a 'slight contradiction', *FOA* (n 72) para 36.

<sup>91</sup> CRPD, Art 1.

<sup>92</sup> See eg UN Committee on the Rights of Persons with Disabilities, Concluding Observations on Spain (6th Session, 19–23 September 2011) paras 19–20.

surprising that it was described, by the Advocate General in *Kaltoft*, as a ‘difficult legal question’.<sup>93</sup> Once discrimination on the ground of perceived disability is acknowledged to fall within the scope of the Directive, however, difficult legal and factual questions about its application are likely to arise. These were nicely summed up by a UK judge (in the context of English law<sup>94</sup>) as follows:

What the putative discriminator perceives will not always be clearly identifiable as ‘disability’. If the perceived disability is, say, blindness, there may be no problem: a blind person is necessarily disabled. But many physical or mental conditions which may attract adverse treatment do not necessarily amount to disabilities, either because they are not necessarily sufficiently serious or because they are not necessarily long-term. If a manager discriminates against an employee because he believes her to have a broken leg, or because he believes her to be ‘depressed’, the question whether the effects of the perceived injury, or of the perceived depression, are likely to [be long term] may never enter his thinking, consciously or unconsciously (nor indeed, in the case of perceived ‘depression’, may it be clear what he understands by the term). In such a case, on what basis can he be said to be discriminating ‘on the ground of’ the employee’s – perceived – disability?<sup>95</sup>

It would be very surprising if questions about discrimination on the basis of perceived disability did not reach the CJEU in the near future. As has been suggested elsewhere,<sup>96</sup> arguments focusing on the perception of the employer have the potential to avoid intrusive examinations into the degree and likely duration of claimants’ functional limitations. They therefore hold considerable appeal for victims of direct disability discrimination or harassment and their legal representatives.

It is a pity that questions relating to discrimination on the grounds of perceived disability were not explicitly raised in the *Kaltoft* request for a preliminary ruling. It seems likely that many dismissals for obesity will be on the ground of a perception (perhaps false) that the person concerned currently has a physical impairment which will limit their work performance. Also relevant would have been questions about discrimination based on a belief that a person will acquire a disability in the future, because such a view also seems likely to underpin many decisions to treat people who are obese less favourably than others. The *Coleman* reasoning would suggest that less favourable treatment, based on either a belief that a person is currently disabled or will become so in the future, constitutes direct discrimination on grounds of disability contrary to the Employment Equality Directive.

To sum up, the reasoning of the ECJ (now CJEU) in *Coleman* merits careful consideration. It marks a high point in the reasoning of the ECJ on the personal scope of the Directive in relation to disability matters because it focuses attention on the aims of the Directive (which would coincide with the aims of the CRPD) rather than on

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<sup>93</sup> *FOA* (n 72) para 49.

<sup>94</sup> The Disability Discrimination Act 1995, now the Equality Act 2010, which adopts a similar approach to defining ‘disability’ to that adopted in *Chacón Navas* (n 28) and discussed above. See, for fuller discussion, T Hervey and P Rostant, ‘All about that Bass’? Is Non-Ideal-Weight Discrimination Unlawful in the UK?’ (2016) 79 (2) *MLR* 248.

<sup>95</sup> *J v DLA Piper* [2010] ICR 1052 (EAT) [62] (Underhill J).

<sup>96</sup> See A Lawson, ‘Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated’ (2011) 40 *ILJ* 359, 373–75.

medical details or hindrances to professional life. It also contains untapped potential for the development of interesting and helpful case law on discrimination on the ground of perceived disability.

#### 4. REASONABLE ACCOMMODATION

The Employment Equality Directive requires employers to make a reasonable accommodation to meet the needs of a disabled person unless this would amount to a disproportionate burden.<sup>97</sup> The CJEU addressed both the question of what amounts to an accommodation, and the issue of disproportionate burden, in *HK Danmark*.<sup>98</sup>

Recital 20 of the Directive provides some guidance on what amounts to an accommodation. It states '[a]ppropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example, adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training and integration resources'. In *HK Danmark* the Court was called upon to decide if a reduction in working time could amount to a reasonable accommodation. Since the Directive did not explicitly mention a reduction in working hours as a form of accommodation, the Court found that it had to interpret the concept of 'patterns of working time' to determine whether this could include reduced working hours.<sup>99</sup> The employers in this case argued that the concept only referred to issues such as the patterns and rhythms of work and timing of breaks.

Referring once again to the CRPD, and particularly Article 2 which includes a definition of reasonable accommodation,<sup>100</sup> the Court found that the concept of reasonable accommodation 'must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers'.<sup>101</sup> In light of this, and noting that the list of accommodation measures in Recital 20 of the Directive was not exhaustive,<sup>102</sup> the Court found that both the Directive and CRPD 'envisage not only

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<sup>97</sup> Art 5 of the Directive.

<sup>98</sup> This section draws on L Waddington, '*HK Danmark (Ring and Skouboe Werge)*, Interpreting EU Equality Law in Light of the UN Convention on the Rights of Persons with Disabilities' [2013] EADLR 11. For recent analysis of relevant developments within Member States, see D Ferri and A Lawson, 'Reasonable Accommodation for Disabled People in Employment: Contexts: A Legal Analysis of the EU Member States, Iceland, Liechtenstein and Norway' (European Network of Legal Experts in Gender Equality and Non-Discrimination and European Commission, 2016) <http://www.equalitylaw.eu/downloads/3724-reasonable-accommodation-for-disabled-people-in-employment-contexts>.

<sup>99</sup> *HK Danmark* (n 57) para 50.

<sup>100</sup> The Article provides that "reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.

<sup>101</sup> *HK Danmark* (n 57) para 54.

<sup>102</sup> *ibid* para 56.

material but also organisational measures'<sup>103</sup> and held that 'a reduction in working hours may constitute one of the accommodation measures' covered by the Directive.<sup>104</sup> This indicates that the concept of an 'accommodation' in the Directive should be interpreted broadly.

However, a broad interpretation of the concept of an 'accommodation' does not mean that employers are obliged to make all suitable accommodations. Employers are not under a duty to accommodate when doing so would cause a 'disproportionate burden'. Recital 21 of the Directive refers to some factors which should be taken into account to determine whether a measure amounts to a disproportionate burden. These are 'the financial and other costs entailed, the scale and financial resources of the organization or undertaking and the possibility of obtaining public funding or any other assistance'. In *HK Danmark* the Court stated that the existence of a disproportionate burden was a matter for the national court to assess, in light of the guidance given in Recital 21 of the Directive.<sup>105</sup> However, the Court proceeded to give its own reflections on this matter. It noted that, immediately after dismissing one of the litigants (Ms Ring), her former employer advertised a part-time position at the location where she had worked. The Court noted '[t]here is nothing in the documents before the Court to show that Ms Ring was not capable of occupying that part-time post or to explain why it was not offered to her'.<sup>106</sup> It further recalled that Ms Ring had found employment as a part-time receptionist with another company shortly after her dismissal. The Court also noted that Danish law provides for public assistance to employers to facilitate the employment of persons with disabilities.<sup>107</sup> This seems like a relatively straightforward case in which the accommodation at issue did not amount to a disproportionate burden, especially since no additional costs seemed to be involved. However, there is likely to be further litigation and academic discussion on the limits of the defence of disproportionate burden, and how far EU law expects employers to go to accommodate disabled people. The relevance of public support and subsidies to cover the cost of accommodation is also potentially relevant, and is an area which provides ample scope for comparative research.

The Court has also addressed reasonable accommodation under the Directive in an infringement procedure against Italy.<sup>108</sup> The Commission submitted that Italy, whilst having adopted a range of measures to promote the employment of disabled people, including a quota law and providing for reimbursement of costs related to employing a disabled person, did not fully transpose Article 5 of the Directive in that it failed to impose a duty on all employers to provide reasonable accommodations to all persons with disabilities (subject to the limitations set out in the Directive). Italy defended its

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<sup>103</sup> *ibid* para 55.

<sup>104</sup> *ibid* para 64.

<sup>105</sup> *ibid* para 60.

<sup>106</sup> *ibid* para 62.

<sup>107</sup> *ibid* para 63.

<sup>108</sup> Case C-312/11 *Commission v Italy* (ECJ, 4 July 2013) (only available in Italian and French).

failure to extend the reasonable accommodation duty to employers with fewer than 15 employees on the grounds of proportionality.<sup>109</sup> It also criticised the Commission:

for drawing an excessively literal interpretation of Article 5 of Directive 2000/78, which significantly differs from the interpretation appearing in the initial application of that institution and which is more radical and more extensive than could result from a mere reading of the terms of that article as well as from a reasonable and proportionate approach.<sup>110</sup>

The Court, relying once again on the CRPD, and quoting the definition of reasonable accommodation found in Article 2 of the Convention,<sup>111</sup> found that Italy had not imposed a duty to accommodate on all employers, in favour of all disabled people, and with regard to all the different aspects of employment and vocational training, as required by the Directive.<sup>112</sup> Italy was therefore found to have breached its duty to transpose the Directive in this respect. The Court therefore demonstrated its commitment to a broad interpretation of the material scope of this provision in the context of employment and vocational training, and once again drew inspiration from the CRPD.

## 5. ENFORCEMENT OF RIGHTS UNDER THE DIRECTIVE AND ACCESS TO JUSTICE

According to Article 9(1) of the Employment Equality Directive:

Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, [...].

This requirement thus concerns structures for accessing justice in relation to the rights conferred by the Directive to be free from disability (and other) discrimination in employment and occupation. Like other provisions of EU secondary law, it must be interpreted consistently with Article 21 of the Charter of Fundamental Rights, which prohibits disability (and other) discrimination, and also with the CRPD. Thus, although the material scope of the Directive is confined to employment and vocational training, Article 9 of the Directive operates in combination with other elements of EU law to require that there is no disability discrimination in the operation of the justice machinery through which people can bring claims for employment discrimination. Although this point has been made before,<sup>113</sup> it is an important one which remains relatively neglected. Initial analysis of its implications is provided here.

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<sup>109</sup> *ibid* para 44.

<sup>110</sup> *ibid* para 54 of judgment. We are grateful to our colleague, Dr Elise Muir of Maastricht University, who assisted in the translation of this phrase from French to English.

<sup>111</sup> *ibid* para 58 of judgment.

<sup>112</sup> *ibid* para 62 of judgment.

<sup>113</sup> E Flynn and A Lawson, 'Disability and Access to Justice in the European Union: Implications of the United Nations Convention on the Rights of Persons with Disabilities' in

An obvious first question relates to the nature of this duty on the justice system not to discriminate on grounds of disability and, in particular, whether it includes a duty to provide reasonable accommodation. Article 21 of the Charter does not refer explicitly to the duty to provide reasonable accommodation. Nevertheless, we suggest that this duty will be incorporated into the duty not to discriminate in the operation of the justice system. This is because (as explained above) a failure to provide reasonable accommodation is unequivocally treated as a form of disability discrimination by the CRPD.<sup>114</sup> Consequently, the judicial and administrative procedures established by Member States for the enforcement of disability non-discrimination claims, must themselves operate in a non-discriminatory manner, including by ensuring that reasonable accommodations are provided to disabled litigants.

Another important point to note about the content of the obligation created by Article 9(1) of the Directive is that reference should be had to provisions of the CRPD other than those dealing specifically with discrimination. Of most obvious relevance is Article 13 of the CRPD, which provides that:

- (1) States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
- (2) In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice [...].

This goes to the very core of how enforcement mechanisms, and people working within them, operate in practice. It requires ‘accommodations’ which are appropriate without specifying that they are subject to some sort of ‘reasonableness’ limitation. It also explicitly requires the provision of appropriate training to justice officials.

Other CRPD provisions are also relevant to the interpretation of Article 9(1) of the Directive. An obligation to ensure that relevant enforcement structures and systems are made accessible, consistently with Article 9 of the CRPD,<sup>115</sup> is thus included, as is an obligation to ensure that those enforcement mechanisms are available to people under guardianship or analogous restrictions.<sup>116</sup>

Finally, enforcement mechanisms will clearly not be ‘available’ (as is required by Article 9(1)) to those who believe their rights to have been breached if those people cannot afford them. This is not a disability-specific issue. Nevertheless, disabled people make up a heavy proportion of Europe’s poor<sup>117</sup> and it is therefore an issue of

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Waddington, Quinn, and Flynn (n 27) 7–44; D Ferri and A Lawson, ‘Reasonable Accommodation for Disabled People in Employment Contexts’ (n 98) 84–89, 105, 106 and 110.

<sup>114</sup> See in particular CRPD Art 2.

<sup>115</sup> See further General Comment No 2 of the UN Committee on the Rights of Persons with Disabilities, Article 9: Accessibility (11 April 2014).

<sup>116</sup> See further General Comment No 1 of the UN Convention on the Rights of Persons with Disabilities, Article 12: Equal recognition before the law (11 April 2014).

<sup>117</sup> Data from the 2011 EU Survey on Income and Living Conditions (EU-SILC UDB 2011) indicates that across Europe 19 per cent of people with disabilities aged 16 and over, compared



considerable relevance in the disability context, and goes to the heart of the effectiveness of rights conferred by the Directive.

The effective and equal access of disabled claimants to the Article 9(1) enforcement mechanisms raises many interesting issues which, to date, have not been systematically researched. More information about the existence and nature of barriers that prevent such access is needed. Studies identifying trends over time and the impact, if any, of public spending cuts (eg to legal aid budgets or to other support for providers of legal advice), would help to throw light on whether current developments are progressive or retrogressive. The fact that access to justice was a focus of the 2014 Work Forum on Disability of the European Commission will, it is to be hoped, heighten the profile of these important but still neglected questions.

## 6. CONCLUSION

This chapter demonstrates that EU disability non-discrimination law remains a vibrant and evolving topic meriting on-going research and analysis. The decade and a half which has passed since the adoption of the Employment Equality Directive has witnessed important legal and political developments. Most significant of these has been the EU's conclusion of the CRPD and the role which that treaty now plays in the interpretation of the Directive.

In relation to the definition of disability the above discussion reveals that there is still considerable legal uncertainty and confusion. Reference to the CRPD has done little to resolve the problem. This is perhaps due, at least in part, to the inconsistency in the use of social model terminology in the CRPD.<sup>118</sup> Thus, despite acknowledging that 'disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others',<sup>119</sup> the substantive articles of the CRPD refer throughout to people as having 'disabilities' and not (as might have been expected) as having 'impairments'. The term 'disability' is thus used in two different senses in the CRPD – to refer to the exclusion which results from the interaction between an impairment and social barriers, on the one hand; and to refer to a person's functional limitation or impairment, on the other. The potential for confusion resulting from this inconsistency could be reduced by clear guidance from the UN Committee on the Rights of Persons with Disabilities. In the absence of that, however, we suggest that many of the difficulties in which the Court of Justice currently finds itself could have been avoided had it retained a clear focus on the purpose of disability non-discrimination law – ie to reduce the exclusion and prejudice experienced by people with impairments and thereby reduce the extent to which they are disabled by social barriers. The interaction between impairment and social barriers is thus what the

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with 15 per cent of people without disabilities, lived in households at risk of poverty even after income support.

<sup>118</sup> See, for more detailed discussion of the CRPD and the social model, R Kayess and P French, 'Out of Darkness into Light' [2008] 8 HRLR 1.

<sup>119</sup> CRPD, preamble para (e).

Directive aims to influence – by making certain types of social barrier unlawful. Requiring individuals with impairments to demonstrate that they are generally disadvantaged because of that interaction before they can bring a specific discrimination claim (as the Court of Justice appears to be doing) is akin to requiring a woman to show that she is routinely the victim of sexual harassment before she can bring a specific claim for pregnancy discrimination against her employer.

If progress is to be made in understanding what ‘disability’ means, for the purposes of EU (and other) non-discrimination law, clarity is needed about the mechanisms for identifying what is meant by the concept of ‘impairment’.<sup>120</sup> This is not a medical question which can be handed over to doctors. It is a socio-political question that goes to the heart of the identity of the disability movement. Disabled people’s organisations, amongst others, clearly have a role to play in the development of guidelines to inform judges and legislators as to how ‘impairment’ should be understood for these purposes – eg whether it should include (perceived) deviations from ‘normal’ or desirable weight, height or appearance. More clarity about the concept of ‘impairment’ for these purposes is therefore urgently needed.

On the issue of reasonable accommodation, the above analysis reveals a degree of clarity and resolution in relation to the legal questions which have to date emerged before the Court of Justice. This, of course, does not mean that its application in practice is straight-forward. Indeed, evidence suggests this is far from the case.

Finally, in relation to procedures for enforcing rights conferred by the Employment Equality Directive, the above discussion highlights a range of questions that have not yet been examined by the Court of Justice or (it seems) the Commission. Nevertheless, they concern important issues that have a significant impact on the effectiveness of EU disability non-discrimination law in practice.

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<sup>120</sup> As used in the CRPD preamble para (e) and Art 1.