

Combating Disability Discrimination and Realising Equality: A Comparison of the UN CRPD and EU Equality and Non-Discrimination Law

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Introduction and Structure of the Presentation

- The report compares EU law and the CRPD, to determine how they address disability equality and non-discrimination
- Methodology and structure of the report
- Key findings of the report
- Concluding remarks and recommendations

METHODOLOGY & STRUCTURE OF THE REPORT

Methodology

➤ EU Law

- ❖ The report analyses the Employment Equality Directive and related case law

➤ The CRPD

- ❖ The report draws on the CRPD, the CRPD Committee's General Comments, Concluding Observations and individual communications as well as documents issued by other UN human rights committees

Methodology

- Comparison of EU law – the Employment Equality Directive and the CJEU's case law – with the CRPD
- Assessment of the extent to which EU law is compatible with the CRPD
- Identification of the **key elements of disability equality and non-discrimination law** and comparison of the relevant EU law provisions/requirements with CRPD obligations

Key Elements of EU Equality/Non-Discrimination Law

- i. The definition of disability
- ii. The definition of discrimination
- iii. Reasonable accommodation
- iv. Discrimination by association & discrimination based on future & perceived disability

Key Elements of EU Equality/Non-Discrimination Law

- v. Positive action
- vi. Material scope
- vii. The partial reversal of the burden of proof
- viii. Compliance and sanctions

Structure of the Report

➤ Part I

General overview of CRPD obligations - touches on the 8 key areas identified

➤ Part II

Sets out EU law requirements in the 8 key areas

➤ Part III:

In-depth comparison of EU law with the CRPD obligations in the 8 areas identified

Nature of the CRPD and EU Competences

- The CRPD is a **mixed agreement** - this means that the EU and its Member States are jointly responsible for implementing the CRPD
- A few areas covered by the CRPD fall under the **exclusive competence** of the EU
- However, **equality and non-discrimination law and policy** are a **shared competence** of the EU and the Member States

Categories of Compliance

EU law breaches the CRPD

EU law fails to implement the CRPD in full (gaps in the Directive)

EU law fails to implement the CRPD in full (Member State responsibility)

EU law is in full compliance with the CRPD

EU law goes beyond the requirements of the CRPD

Areas of uncertainty

KEY FINDINGS OF THE REPORT

EU Law breaches the CRPD: Definition of Disability

EU Law

- 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

CRPD

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

EU Law breaches the CRPD: Definition of Disability

- **Firstly**, under the CJEU's definition, a person is only regarded as disabled if they are potentially hindered in exercising professional life
- In contrast, the CRPD adopts a broader perspective and recognises as disabled, people whose participation is hindered with regard to “society”

EU Law breaches the CRPD: Definition of Disability

- **Secondly**, EU law requires not only that an individual has an impairment, but also experiences limitations directly related to that impairment
- The CJEU **appears** to exclude from the definition of disability individuals who are disabled simply on account of socially created barriers, such as false assumptions and prejudices, in contrast to the CRPD

EU Law breaches the CRPD: The Reasonableness of Accommodations

- The **CRPD Committee** has stated that the reasonableness of an accommodation should be assessed with regard to the **suitability and effectiveness of the measure**
- In contrast, the **CJEU in *HK Danmark*** has said that an accommodation must be reasonable, meaning that it must not constitute a disproportionate burden for the employer

Gaps in the Directive: Multiple and Intersectional Discrimination

- EU equality and non-discrimination law pays **little attention to multiple and intersectional discrimination**
- The CRPD explicitly addresses multiple discrimination against women and girls with disabilities, and the CRPD Committee reads a very wide prohibition of intersectional discrimination into the Convention

Gaps in the Directive: Failure to Define a Denial of Reasonable Accommodation as Discrimination

- The **Employment Equality Directive** establishes an obligation to provide a reasonable accommodation, but **does not explicitly define** an unjustified denial of an accommodation as a form of discrimination
- The **CRPD** **does define** an unjustified denial of an accommodation as a specific form of discrimination

Gaps in the Directive: Reversal of Burden of Proof

- The **Employment Equality Directive** requires a partial reversal of the burden of proof in cases of direct and indirect discrimination, but **not with regard to harassment or failure to make a reasonable accommodation**
- The **CRPD Committee** requires that the partial reversal of the burden of proof applies to **all alleged cases of discrimination**, including harassment and reasonable accommodation cases

EU Law fails to implement the CRPD in Full: Gaps in the Directive

- In all three cases, the Directive has not addressed the full scope of the CRPD obligations - this risks misleading the Member States into regarding EU law as being fully in line with the CRPD
- In addition, if individual Member States were required to address issues of multiple and intersectional discrimination under the CRPD, this could result in divergent approaches to multiple and intersectional discrimination

Member States to fill Gaps: Material Scope of the Prohibition of Disability Discrimination

- The Employment Equality Directive only prohibits disability discrimination concerning employment and vocational training
- In contrast, the CRPD prohibits discrimination with regard to all human rights
- We argue that EU Member States are obliged to extend the material scope of their equality and non-discrimination law to cover the full scope of the CRPD, to the extent that they have not done so already

Member States to fill Gaps: Positive Action

- EU law allows Member States to adopt positive action, but does not require them to do so
- The CRPD regards positive action as mandatory in certain situations of persistent and structural discrimination
- Again, we argue that Member States are obliged to adopt positive action measures to the extent that this is required by the CRPD

EU Law implements the CRPD in Full

- EU law and the CRPD recognise that an **illness**, which is sufficiently severe and long-lasting, **can be regarded as a form of disability**
- EU law and the CRPD prohibit **direct and indirect discrimination and harassment**

EU Law implements the CRPD in Full

- EU law and the CRPD/General Comment No. 6 prohibit **disability discrimination by association**
- EU law requires “**effective, proportionate and persuasive**” **sanctions**, in line with the CRPD and General Comment No. 6

EU law goes beyond the Requirements of the CRPD

- EU law defines an **instruction to discriminate** as a freestanding form of discrimination
- This form of discrimination is not referred to in the CRPD or by the CRPD Committee

Areas where there is Uncertainty: EU law

- The CRPD Committee has included **discrimination on the basis of future disability** under the CRPD's wide prohibition of disability discrimination
- The Employment Equality Directive does not explicitly prohibit discrimination on the ground of future disability or genetic make up, and it is unclear whether such a prohibition can be implied from the case law of the CJEU

Areas where there is Uncertainty: EU law

- The CRPD Committee has **included discrimination on the basis of perceived disability** under the CRPD's prohibition of disability discrimination
- The Directive does not explicitly prohibit such discrimination, and it is unclear whether the prohibition can be implied from case law

Areas where there is Uncertainty: CRPD

- EU law provides for a justification for cases of what would otherwise be indirect discrimination
- The CRPD, General Comment No. 6 and the CRPD Committee do not refer to a justification test for indirect discrimination

CONCLUDING REMARKS

Concluding Remarks & Recommendations

Revision or
clarification of
CJEU case law
in some areas

EU initiatives
to close the gap
between the
Employment
Equality
Directive & the
CRPD

Member States
should take
some action to
close the gaps
left by EU law

Questions for Discussion

I

- Has your Member State taken action to implement the CRPD with regard to disability equality and non-discrimination? If so, what action has been taken?

2

- Does the action relate to any areas where we identified gaps between EU law & the CRPD or does the action cover other areas?

Questions for Discussion

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- If no action has been taken, is this because your Member State fully complies with all CRPD requirements regarding equality and non-discrimination? Or has this issue not been considered?

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- Our report concludes that EU law (the case law of the CJEU) breaches the CRPD with regard to the definition of disability and the interpretation of the “reasonableness” requirement of the reasonable accommodation duty. Is this the case in your Member State as well?

THANK YOU FOR YOUR ATTENTION

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