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Defining Disability in the EU Non-Discrimination Legislation: Judicial Activism and Legislative Restraints

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To date EU anti-discrimination legislation, particularly the Employment Equality Directive (Directive 2000/78/EC), does not provide any clear definition of disability as a ground of discrimination. In the last few years, the Court of Justice of the European Union (CJEU) has attempted to fill this gap and discussed the concept of disability in several decisions, in the attempt to provide a definition of the ground of disability. The ratification by the European Union of the UN Convention on Rights of Persons with Disabilities (UNCRPD), has led to a clear overruling in the case law: the Court shifted from the medical model to the social model of disability. The UNCRPD now represents a milestone for the CJEU, which recognised that a duty arises to define disability in line with the social model, under the principle of consistent interpretation. Against this background, this article discusses CJEU case law, and compares and contrasts the judicial activism of the Court with the cautious approach adopted by the European Commission in the proposal for a new non-discrimination directive.

1. INTRODUCTION

In western culture[1] disability was traditionally viewed as an individual, medical problem or even a 'personal tragedy'.[2] Until approximately the 1980s, disability was conceived as an individual deficit deriving from 'a disease, trauma or health condition that impairs or disrupts physiological or cognitive functioning'[3]. This 'medical model' focused on the actual health condition of the particular person and on the treatments that could be provided to 'repair' or

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[1] Further to the distinction between the concept of disability in western and developing countries see, among others, Elia Mira Bernabeu, 'The Social Model Analysis of Disability and the Majority World' (2012) 6 *Intersticios. Revista Sociològica de Pensamiento Crìtico* 2, 279.
[2] Among others, Colin Barnes, 'The Social Model of Disability: Valuable or Irrelevant?' in Nick Watson, Alan Roulstone, and Carol Thomas (eds), *The Routledge Handbook of Disability Studies* (Routledge 2012).
[3] Charles E. Drum, 'Models and Approaches to Disability', in Charles E. Drum., Gloria Krahn, Hank Jr. Bersani, *Disability and Public Health* (American Public Health Association/American Association on Intellectual and Developmental Disabilities 2009).

alleviate the impairment. It conceptualized disability as a negative condition, and identified disability with an individual impairment completely independent from any other external or environmental element.

A new sensitivity towards disability issues gradually arose after World War II. As a reaction against this medicalized vision (i.e. the 'medical model of disability'),[4] beginning from the late 1960s, scholars and disability activists[5] elaborated the 'social model of disability', which conceived disability as a societal creation.[6] While the 'medical model' focused on the actual health condition of the particular person and on the treatments that could be provided to 'repair' or alleviate the impairment, in the social model, disability is viewed as the consequence of environmental barriers.[7] Hence, whereas the impairment is the functional limitation within the individual, disability is conceived as 'the loss or limitation of opportunities to take part in the normal life of the community on an equal level with others due to physical and social barriers'.[8] The theoretical reflection on the social model is still evolving. On the one hand, different theorisations of the social model itself have been developed.[9] On the other hand, this model has been the subject of scholarly criticism.[10] Despite a growing criticism, the 'social model' appears to be the dominant paradigm in understanding disability,[11] and has inspired the disability agenda at the international and European levels for the last 30 years. In particular, in the European Union (EU), the development of a wide European disability policy has corresponded to a clear shift from a medical model approach to disability to a holistic social one.[12]

[4] Colin Barnes, 'The Social Model of Disability: Valuable or Irrelevant?' (n 2).

[5] At first, academic interest in disability issues arose during the Seventies in UK and in USA. In particular, the UK's first 'disability' studies course was taught at the Open University (OU) in 1975 as an optional module on the OU's Health and Social Studies Degree. In USA Disability Studies was pioneered by disability advocates and academics in the area of medical sociology. Colin Barnes, 'The Social Model of Disability: Valuable or Irrelevant?' (n 2).

[6] This novel conceptualization of disability was first put forward by the Union of the Physically Impaired Against Segregation (UPIAS) in 1976, but the term 'social model' was initially used by Mike Oliver in his seminal contribution to the volume Jo Campling, *The Handicapped Person: A New Perspective for Social Workers?* (RADAR 1981).

[7] Colin Barnes and Geof Mercer, *Exploring Disability* (2nd edn, Polity Press, 2010); A. Llewellyn and K. Hogan 'The Use and Abuse of Models of Disability', (2000*) Disability & Society*, 15, 157; Peter Siminski, 'Patterns of disability and norms of participation through the life course: empirical support for a social model of disability', (2003) 18 *Disability & Society*, 707. Mike Oliver ad Colin Barnes, 'Disability studies, disabled people and the struggle for inclusion', (2010) 31 *British Journal of Sociology of Education* 5, 547.

[8] Colin Barnes, *Disabled People in Britain and Discrimination* (Hurst and Co. 1991).

[9] There are several 'social models' of disability that are variants of the primary social model: the legal rights model, the minority group model and the affirmation model of disability. There are also a number of models of disability that take elements of the medical and the social models and integrate them: two significant examples are the 'Nagi model' and the 'bio-psycho-social model' of disability. For an analysis of the different approaches mentioned, see, among others, Drum, *supra* note 3. On the affirmation model see John Swain & Sally French 'Towards an Affirmation Model of Disability', (2000) *Disability & Society*, 569. For different theorization of the social models, see also, among many others, Angharad E. Becketta & Tom Campbell, 'The social model of disability as an oppositional device', (2015) 30 *Disability & Society*, 270.

[10] *Inter alia*: Dimitris Anastasiou and James M. Kaufmann, 'The Social Model of Disability: Dichotomy between Impairment and Disability', (2013) 38 *Journal of Medicine and Philosophy*, 441; Guy Dewsbury, Klare Clarke, Dave Randall, Mark Rouncefield and Ian Sommerville, 'The Anti-Social Model of Disability'(2004) 19 *Disability & Society* 2, 145.

[11] Maxime Vanderstraeten, 'Définir, c'est exclure: le cas du handicap' (2015) *Revue interdisciplinaire d'études juridiques*', 91, at 94.

[12] Vlad Perjul, 'Impairment, Discrimination, and the Legal Construction of Disability in the European Union

Despite the embracement of the social model, which is evident in the cornerstone document of EU disability policy, i.e. the European Disability Strategy 2010-2020 (the 'EDS 2010-2020' or simply the 'Strategy'),[13] EU legislation, to date, does not include a unique prescriptive definition of disability. In State aid law, namely in the 2014 General Block Exemption Regulation (GBER),[14] a definition of 'workers with disabilities' has been included. However, while this definition is clearly inspired to the social model, it still refers to national legislation in a vain attempt to respect the diversity of legal cultures and approaches to disability across the Member States.[15] Disability-related provisions in other areas of EU legislation, such as transport,[16] lifts,[17] public procurement,[18] and electronic communications networks and services[19] do not purport to offer a definition of what constitutes a disability. The uneasy task to identify the criteria for determining disability has been deliberately left to national legislation, clearly resulted in a sort of patchwork. A study, released in 2002, reviewed the definitions of disability adopted across the EU juxtaposing different national disability provisions in different areas, such as social security, employment and anti-discrimination. It revealed that there are not only several definitions, which differ from a Member States to another, but often national laws include diverse assessments of disability in different areas of action.[20] Few States, for example Ireland, have adopted a very wide definition of disability.[21] Other Member States, such as Italy,[22] have adopted a more

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and the United States', (2011) 44 *Cornell International Law Journal*, 279.

[13] *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe*, COM(2010) 636 final.

[14] Commission Regulation (EU) 51/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1.

[15] According to Art. 2 of the GBER a worker with disabilities is 'any person who: (a) is recognised as worker with disabilities under national law; or (b) has long-term physical, mental, intellectual or sensory impairment(s) which, in interaction with various barriers, may hinder their full and effective participation in a work environment on an equal basis with other workers'.

[16] See, e.g., 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 L 377/1; 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 L 389/1; 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 airplane [2008] OJ L 10/1; 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) No. 1191/69 and 1107/70 [2007] OJ L 315/1; Regulation (EC) No. 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations [2007] OJ L 315/14; 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 [2006] OJ L 204/1.

[17] Directive 95/16/EC on the approximation of the laws of the Member States relating to lifts [1995] OJ L 213/1.

[18] Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L 134/1; 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 L 134/114.

[19] Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) [2002] OJ L 108/51.

[20] Deborah Mabbett, 'Definitions of Disability in Europe. A Comparative Analysis', *Final Report 13 December 2002, a study prepared by Brunel University*, UK (European Commission).

[21] Article 2(1) Disability Act 2005 available at http://www.irishstatutebook.ie/2005/en/act/pub/0014/ accessed 28 May 2015. See also the definition of disability in the Employment Equality Act 1998 available at http://www.irishstatutebook.ie/1998/en/act/pub/0021/ accessed 28 May 2015.

restrictive definition. In some cases, Member States still keep medical model oriented-definitions of disability, such as Germany.[23] Vanderstraeten recalls that also in Belgium different definitions of disability (handicap) coexist, but most of them are informed to the medical model. [24]

In the non-discrimination field, the absence of a definition of disability as a ground of discrimination has proven particularly problematic. This is so because a uniform definition of disability across the EU is of paramount importance in determining the actual scope *ratione personae* of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereafter 'Employment Equality Directive').[25] While it is arguable that few serious problems arise from the understanding of traditional grounds of discrimination, such as nationality, the absence of a definition of disability creates uncertainty as regards the scope of the protection afforded in the EU legal order. As most recently noted by Lane and Munkholn, disparities in the extent to which anti-discrimination laws implementing the Employment Equality Directive have been applied are due also to differences in understanding 'the very concept of disability'.[26] The Court of Justice of the European Union (CJEU) has been called upon to fill the lacuna in EU anti-discrimination legislation, and has attempted several times to interpret the meaning of 'disability' for the purpose of the Directive. CJEU's case law has been largely boosted by the EU accession to the UN Convention on the Rights of Persons with Disability (UNCRPD or simply 'the Convention'),[27] which has become a clear point of reference in the reasoning of the European judges.

Against this background, this article aims to contribute to the current debate by examining which definition of disability has emerged within EU non-discrimination law, and whether the reference to the social model is sufficient to ensure legal certainty and uniform legal protection against discrimination across the EU. It also aims to discuss whether a legislative definition would be desirable, comparing and contrasting the 'judicial activism' of the Court with a certain 'restraint' of the EU legislature.

This article begins with a succinct analysis of the conceptualization of disability in the

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[22] In Italian legislation, the terms disability and handicap are used as synonymous, creating confusion. From the definition of handicapped person provided by Article 3 of l. 104/1992, we can deduce a definition of disability. This provision defines the handicapped person as a person who has a physical, mental or sensory impairment, which can be stable or progressive and which produces learning difficulties, relationship problems or obstacles in work integration and which could determine social disadvantage or marginalization. This definition is underpinned by the medical model, because focuses only on the individual impairments and does not take into account the environmental barriers.

[23] Theresia Degener, 'The Definition of Disability in German and Foreign Discrimination law' (2006) 26 *Disability Studies Quarterly*, 2. For a general discussion on the definition of disability adopted at the national level see also Lisa Waddington and Anna Lawson, *Disability and non-discrimination law in the European Union: An analysis of disability discrimination law within and beyond the employment field* (European Network of Legal experts in the Non-discrimination Field), Publications Office of the European Union, Luxembourg, 2009, available at: http://www.ec.europa.eu/social/BlobServlet?docId=6154&langId=en.

[24] Maxime Vanderstraeten, 'Définir, c'est exclure: le cas du handicap' (2015) *Revue interdisciplinaire d'études juridiques*', 91, at 98.

[25] [2000] OJ L 303/16.

[26] Jakie Lane & Natalie Videbaek Munkholm, 'Danish and British Protection from Disability Discrimination at Work – Past, Present and Future' (2015) *The International Journal of Comparative Labour Law and Industrial Relations* 91.

[27] Council Decision 2010/48/EC [2010] OJ L 23/35.

most relevant sources of international law, in particular the UNCRPD, since these documents have represented a clear point of reference for CJEU (Section 2). It then briefly sketches out the evolution of EU disability policy in a chronological fashion, in order to give the reader the necessary background to the analysis carried out (Section 3). Sections 4 focuses on the Court's relevant judgments, critically examining the 'judicial activism' of the Court. Section 5 compares and contrast this judicial activism with the timid attitude shown by other EU institutions in the ongoing legislative procedure concerning the proposal for a new non-discrimination directive.[28] Section 6 draws together the discussion in the previous sections.

2. Translating the Social Model into International Law: From the International Classification of Functioning, Disability and Health (ICF) to the UN Convention on the Rights of Persons with Disabilities

The social model of disability has inspired the disability agenda at the international level in the last twenty years. In particular, the influence of the social model theory is visible in both the World Health Organization's and United Nations' documents which have served as point of reference to EU to develop a European disability policy[29] and, most recently, to the CJEU in its case law. The embracement of the social model marked a shift from a mere welfare perspective to a new human rights approach, and led to the abandonment of paternalistic and merely rehabilitative perspectives.[30] It also shaped a definition that focuses on societal barriers rather than on the impairment of the person.

In the early 1980s, the social model timidly influenced the International Classification of Impairments, Disabilities and Handicaps (ICIDH) of 1981, even though, in that document, a subtle ambiguity of language[31] and medical elements remained. The criticism raised against the ICIDH led the World Health Organisation to elaborate a new classification in 2001, the International Classification of Functioning, Disability and Health (ICF).[32] The ICF fully recognizes the role of both environmental factors and health conditions in the conceptualization of disability. It is explicitly based on the 'bio-psycho-social' model of

[28] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426 def.

[29] Gerard Quinn and Eilionoir Flynn, 'Transatlantic Borrowings: The Past and Future of EU Non Discrimination Law and Policy on the Ground of Disability' (2012) 60 *Am. J. Comp. L.* 23.

[30] Vlad Perjul, 'Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States', (n 12).

[31] Jerome E. Bickenbach, Somnath Chatterji, E.M Badley, T.B Üstün, 'Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps' (1999) 48 *Social Science & Medicine*, 1175.

[32] Adopted by the World Health Organisation 54th World Health Assembly, Resolution A54/18 on 9 April 2001. The World Health Organization has elaborated a series of international classifications on health (the so called WHO Family of International Classifications) with the purpose to provide a consensual framework and a common language for governments, providers and consumers in the field. Among these classifications, the International Classification of Functioning, Disability and Health (ICF) establishes a standard language and conceptual basis for the definition and measurement of disability. For further information see World Health Organisation, *ICIDH 2. International Classification of Impairments, Disabilities and Handicaps*, (Final Draft, 2001 WHO). See also T.B Üstün, Somnath Chatterji, Jerome E. Bickenbach, M. Kostanjsek, M. Schneider, 'The International Classification of Functioning, Disability and Health: a New Tool for Understanding Disability and Health' (2003) 25 *Disability and Rehabilitation*, 565.

disability, which attempts to combine some elements of the medical model with the idea of disability as a societal construction. As highlighted by Barnes and Mercer,[33] the ICF 'acknowledges that participation is the outcome of the inter-relationship between the 'features of the person' and 'social and physical environments'. Definitions and categories in the ICF are worded in neutral language: disability and functioning are understood as 'umbrella terms', without any explicit or implicit distinction between different health conditions. In other words, disability is not differentiated by aetiology. As a consequence, by shifting the focus from health condition to functioning, the ICF places all health conditions on an equal footing, allowing them to be compared, in terms of their related functioning, via a common framework. Notably, even though 'the ICF ties in with social model thinking, and it recognises the cultural influences on perceptions of disability, its classification system remains firmly grounded in western scientific concepts'. [34]

At the UN level, the first (non-binding) document which focused on the societal barriers was the 1993 United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993 UN Standard Rules).[35] Being clearly aimed at the 'equalization of opportunities', the 1993 Standard Rules at first sight, reflected the 'rebellion' against 'the medical and diagnostic approach, which ignored the imperfections and deficiencies of the surrounding society'.[36] However, on closer inspection, the terminology used by the rules is still somewhat 'mixed'. On the one hand, the term 'disability' is connected to 'different functional limitations occurring in any population in any country of the world'. According to the rules '[p]eople may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature'. On the other hand, the rules refer to 'handicap' as 'the loss or limitation of opportunities to take part in the life of the community on an equal level with others', i.e. 'the encounter between the person with a disability and the environment', reflecting thus the 'social model'.

The first legally binding instrument fully embracing the 'social model' of disability, i.e. the view that disability stems primarily from the failure of the social environment to meet the needs of people with disabilities, is the UN Convention on the Rights of Persons with Disabilities (UNCRPD), adopted in 2006 by the UN General Assembly and which entered into force in 2008.[37] It is widely recognized that the UNCRPD has been the most rapidly negotiated UN treaty, and one of the most ground-breaking pieces of legislation in the field of human rights. Even though the Convention does not seek to create new rights for disabled

[33] Colin Barnes and Geof Mercer, 'Theorising and Researching Disability from a Social Model Perspective' in Colin Barnes and Geof Mercer (eds), *Implementing the Social Model of Disability: Theory and Research* (The Disability Press 2004).
[34] Ibid.
[35] General Assembly n. 48/96 of 20 December 1993
[36] See at http://www.un.org/esa/socdev/enable/dissre01.htm#concepts accessed 25 May 2015.
[37] The UNCRPD text, along with its drafting history, resolutions, and updated list of signatories and States Parties, is available at http://www.un.org/disabilities/. On the Convention, see Aart Hendricks, 'UN Convention on the Rights of Persons with Disabilities' (2007) 14 *EJHL*, 273; Francesco Seatzu, 'La Convenzione delle Nazioni Unite sui Diritti delle Persone Disabili: i Principi Fondamentali', (2008) 3 *Diritti umani e diritto internazionale*, 535; Sergio Marchisio,Valentina Della Fina, Rachele Cera, *La Convenzione delle Nazioni Unite sui Diritti delle Persone con Disabilita: Commentario* (Aracne 2010) XIII.

persons, it elaborates and clarifies existing human rights within the disability context.[38] In other words, it aims at ensuring the active participation of persons with disabilities in political, economic, social, and cultural life, by accommodating their difference, and 'seeks to recast disability as a social construction and articulates protections in specific application to their human rights enjoyment'.[39] Even though the UNCRPD firmly embraces the social model, it does not include a proper definition of disability.[40]

During the negotiations, there was considerable disagreement on whether or not to include a definition of disability in the text of the Convention. Some negotiators suggested not including a precise definition, but instead prioritizing flexibility, adaptation to change and the inclusiveness of the concept. For instance, the European Commission, negotiating on behalf of the EU, argued that the approach used by the EU in its internal disability discrimination legislation, namely the Employment Equality Directive, which does not contain any definition, was to be preferred. Many suggested that a definition of disability would become outdated and would risk leaving groups outside the Convention's scope. Conversely others, especially disabled people organizations and NGOs, considered it necessary to include a strict definition in order to prevent States from evading real commitments.[41] They argued that, in the absence of a definition, national definitions would prevail, preventing a uniform implementation of the UNCRPD.[42] In the Working Group's draft[43] it was agreed that, if included, a definition of disability should have reflected the social model.

As a result of a fierce debate, the final text provides a sort of open-ended conceptualization of disability in the Preamble and in Article 1 UNCRPD, whilst Article 2, devoted to definitions, does not mention disability, nor people with disabilities. Namely, the Preamble, at Paragraph e), affirms that '[d]isability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal

[38] See, among others, Frédéric Mégret, 'The Disabilities Convention: towards a Holistic Concept of Rights' (2008) *The International Journal of Human Rights*, 261; Frédéric Mégret, 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?' (2008) 30 *Human Rights Quarterly* 2, 494.

[39] Michael A. Stein and Janet E. Lord, 'Future Prospects for the United Nations Convention on Disability', in Gerard Quinn and Oddný Mjöll Arnardottir (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Brill 2009).

[40] Further to a detailed analysis of the drafting history of the UNCRPD, see, among others, Rosemary Kayness, Philip French, 'Out of Darkness into Light? Introducing the Convention of Persons with Disabilities' (2008) *Human Rights Law Review*, 1; Stefan Trömel, 'A Personal Perspective on the Drafting History of the United Nations Convention on the Rights of Persons with Disabilities' (2009) *European Yearbook on Disability Law*, 115; Gerard Quinn, 'A Short Guide to the United Nations Convention on the Right of Persons with Disabilities' (2009) 1 *European Yearbook of Disability Law*, 89; Grainne De Burca, 'The EU in the Negotiation of the UN Disability Convention' (2010) 35 *European Law Review* 2, *Fordham Law Legal Studies Research Paper* No. 1525611, http://ssrn.com/abstract=1525611.

[41] All the detailed documentation referred to the discussion on the opportunity to insert a definition of disability in the UNCRPD is available at http://www.un.org/esa/socdev/enable/rights/ahcstata2bkgrnd.htm accessed 28 May 2015.

[42] The discussions on the topic took place in particular during the Third (24 May – 4 June 2004), Fourth (23 August – 3 September 2004) and Seventh (16 January – 3 February 2006) Sessions of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, established by the General Assembly resolution 56/168 of 19 December 2001, available at http://www.un.org/esa/socdev/enable/rights/ahcstata2bkgrnd.htm accessed 28 May 2015.

[43] http://www.un.org/esa/socdev/enable/rights/ahcwgreportax1.htm accessed 28 May 2015.

basis with others'.

Article 1 UNCRPD on the 'purpose' of the Convention states: '[p]ersons 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'. Article 1 is clearly informed by the social model and plays a key role in the protection of persons with disabilities: it is not *strictu sensu* a prescriptive definition, but only provides a minimum ground of protection to be fulfilled by the Parties to the Convention. The UNCRPD does not delineate disability any further, and does not engage in any distinction among different categories or 'diagnostic labelling'.[44]

3. THE DEVELOPMENT OF AN EU 'SOCIAL MODEL ORIENTED' DISABILITY POLICY

3.1. THE EARLY EU DISABILITY LAW AND POLICY

As highlighted above, in the last thirty years the European Union (EU) has developed a significant body of disability law and policy, which has been progressively informed by the social model, under the influence of international law. The earliest actions date back to the 1970s, and were mainly aimed at sustaining Member States in providing specific 'income and services apart from the institutions that serv[ed] the non-disabled majority'.[45] These initiatives were primarily non-binding (soft law), or took the form of action programmes to enhance the exchange of information, and were confined to the areas of employment and vocational training.[46] In the 1980s, under the influence of the United Nations (UN) disability policy[47] the European agenda gradually started to extend beyond its initial narrow scope.[48] In this period, however, as suggested by Kelemen and Vanhala, the EU action was still linked to a medical conception of disability and more focused on stimulating a policy debate, rather

[44] Despite this solution for example US, that are in the process of discussing a future ratification of the Convention, intend to include a declaration: "a definition of disability understanding, which states that UNCRPD does not define 'disability' or 'persons with disabilities', and that the United States understands the definitions of these terms to be consistent with U.S. law. Available at https://www.fas.org/sgp/crs/misc/R42749.pdf.

[45] Lisa Waddington and Matthew Diller, **'**Tensions and Coherence in Disability Policy: The Uneasy Relationship between Social Welfare and Civil Rights Models of Disability in American, European and International Employment Law', in Mary Lou Breslin and Silvia Yee (eds), *Disability Rights Law and Policy* (Transnational Publishers, 2002).

[46] Initial Community Action Programme for the Vocational Rehabilitation of Handicapped Persons (1974-1979), Council Resolution of 24 July 1974 [1974] OJ C 80/30; First Community Action programme on the Social Integration of Handicapped People (1983-1988), 21 December 1981 [1981] OJ C 347/1; HELIOS I Community Action Programme for Disabled People (1988-1991), 23 April 1988 [1988] OJ L 104/38; HELIOS II Community Action Programme to assist Disabled People (1993-1996), Council Decision 93/136/EEC of 25 February 1993 [1993] OJ L 56/30.

[47] *Inter alia* Declaration on the Rights of Disabled Persons n. 3447 of 9 December 1975, and the International Year of Disabled Persons (1981), General Assembly resolution n. 31/123 of 16 December 1976.

[48] The '1986 Recommendation on the Employment of Disabled People' in the European Community (86/379/EEC) was based on the principle of 'fair opportunities' for people with disabilities within the labour market, to be achieved via non-discrimination measures.

than on laying down concrete actions.[49] The UN Standard Rules, which, as mentioned above, contextualize, for the first time, disability within the frame of human rights,[50] boosted the EU action and deeply inspired the '1996 European Community Disability Strategy' (1996 Strategy).[51] The 1996 Strategy laid down the policy foundations for intertwined actions aimed at mainstreaming disability into all policy formation. However, in practice, the EU's role was still confined to support co-operation among Member States, through the identification and exchange of good practices.[52] The 1996 Strategy was clearly inspired by the social model and referred to human diversity and equality of opportunities, yet avoided any explicit definition of disability.

The major quantitative and qualitative change in EU disability policy dates back to 1999 with the entry into force of the Amsterdam Treaty, which conferred on the EU (i.e. to the former European Community) a sound competence to combat disability discrimination.[53] It also included a Declaration stating that Union institutions must take account of the needs of persons with disabilities in drawing up measures under former Article 95 EC (nowArt. 114 TFEU).

Further to the constitutional changes that occurred, Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereafter 'Employment Equality Directive')[54] marked the first legislative intervention to address discrimination on the ground of disability. There is a huge amount of literature on the Employment Equality Directive[55] and several of the CJEU's decisions have shaped the meaning and the scope of its provisions. For the purpose of this analysis, it suffices to point out that this directive bans both direct discrimination (differential treatment based on a specific characteristic) and indirect discrimination (any provision, criterion or practice which is apparently neutral, but is liable to adversely affect one or more specific individuals or incite discrimination). Settled CJEU case law states that the principle of non-discrimination requires that comparable situations must not be treated differently, that dissimilar situations must not be treated in the same way, and a different treatment may be justified if it is based on objective considerations and is proportionate to the legitimate objective being pursued.[56] Harassment, which creates a hostile environment, is also deemed to be a form of discrimination. Notably, the Employment Equality Directive imposes only minimum requirements, and allows Member States to apply provisions which are more favourable to the protection of equal treatment, than those laid down in the Directive.

[49] R. Daniel Kelemen and Lisa Vanhala, 'The Shift to the Rights Model of Disability in the EU and Canada' (2010) *Regional & Federal Studies* 1, 1.
[50] See *supra* Section 2.
[51] Gerard Quinn and Eilionoir Flynn, 'Transatlantic Borrowings: The Past and Future of EU Non Discrimination Law and Policy on the Ground of Disability' (2012) 60 *Am. J. Comp. L.* 23.
[52] Mark Priestley, 'In search of European Disability Policy: Between National and Global' (2007) 1 *ALTER – Revue Européenne de recherche sur l'handicap*, 61: Lisa Waddington, *From Rome to Nice in a Wheelchair. The Development of a European Disability Policy* (Europa Law Publishing 2006).
[53] Article 13 EC Treaty now Art. 19 TFEU.
[54] [2000] OJ L 303/16.
[55] Among many others see Erica Howard, 'EU Equality Law: Three Recent Developments', (2011) 17 *European Law Journal* 785; Evelyn Ellis and Philippa Watson, *EU Anti-Discrimination Law*, Oxford University Press, 2012. Erica Howard (2011) 17, 'ECJ Advances Equality in Europe by Giving Horizontal Direct Effect to Directives', *European Public Law*, 4, 729.
[56] Case C-148/02 *Carlos Garcia Avello* v *Etat Belge* [2003] ECR I-11613.

The EU Charter of Fundamental Rights of the European Union (EU CFR), solemnly proclaimed in 2000, helped shed a new light on the rights of people with disabilities. In fact, the Charter contains different provisions directly or indirectly related to disability. Article 20 of the Charter provides for equality before the law, Article 21(1) provides for an all-embracing prohibition on discrimination, and Article 26 of the Charter states that '[t]he Union recognises and respects the right 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'.[57]

In 2003 the EU Disability Action Plan 2003-2010 (hereinafter EU DAP) was adopted to carry forward the 1996 Strategy.[58] The ultimate objective of the EU DAP was to 'boost equal opportunities for people with disabilities' so as to create a 'sustainable dynamic for the full inclusion of people with disabilities into society'. The EU DAP was clearly informed by the social model and was aimed at mainstreaming disability issues across all EU policies, legislation and programmes from design and implementation through to monitoring and evaluation.[59]

3.2. CURRENT EU DISABILITY LAW AND POLICY IN A NUTSHELL

After the entry into force of the Treaty of Lisbon, Article 19 TFEU (former Art. 13 EC) remains the main relevant provision which confers legislative competence on the EU in relation to combating discrimination on disability (and other) grounds. In addition, Article 10 TFEU requires that, 'in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on … disability …'. Other provisions of the TFEU conferring legislative competence on the EU in relation to other matters, do not explicitly mention disability discrimination. It is well known that, even though the EU CFR has been given the same legal value as the Treaties (Article 6 TEU), the Charter does not expand existing EU competencies.

To date, the Employment Equality Directive remains the main piece of legislation that protects and promotes the rights of people with disabilities, even though the EU legal framework currently includes disability-related provisions in various areas, such as transport,

[57] Valentina Bongiovanni, 'La Tutela dei Disabili tra Carta di Nizza e Convenzione delle Nazioni Unite' (2011) 3 *Famiglia e Diritto*, 310, also available online at http://www.iusme.it/contributi/04%20-%20Veronica%20Bongiovanni.pdf; Marco Olivetti, 'Uguaglianza. Art. 26 Inserimento dei disabili', in Raffaele Bifulco, Marta Cartabia, Alfonso Celotto, *L'Europa dei Diritti. Commentario alla Carta dei Diritti Fondamentali dell'Unione Europea* (Il Mulino, 2001); Carlo Hanau, 'Handicap', *Dig. Disc. Pubbl.* VIII (Utet, 2003) 67.

[58] Commission Communication COM(2003) 650 of 30.10.2003 'Equal opportunities for people with disabilities: A European Action Plan'.

[59] See also CSES, *Mid-term Evaluation of the European Action Plan 2003-2010 on Equal Opportunities for People with Disabilities*, Final Report, June 2009, at file:///C:/Users/sfavalli/Downloads/Final%20report%20-%20MTE%20of%20EU%20DAP%20PDF.pdf
accessed 28 May 2015. The Mid-term Evaluation of the European Disability Action Plan 2003-2010 was carried out by the Centre for Strategy and Evaluation Services (CSES) on behalf of the Unit for the Integration of People with Disabilities (Unit G3) of the Directorate-General Employment, Social Affairs and Equal Opportunities (DG EMPL) during the period January 2008 to June 2009. The evaluation covered the two first phases of the Action Plan's implementation 2004-2005 and 2006-2007.

lifts, public procurement, and electronic communications networks and services.[60] A proposal for a new non-discrimination directive to tackle discrimination outside the labour market is also under discussion, but its approval and entry into force should not be expected too soon.[61] As mentioned in the introduction, none of these legislative instruments contain a definition of disability.

The European Disability Strategy 2010-2020 (the 'EDS 2010-2020' or simply the 'Strategy'),[62] which proposes comprehensive and mainstream policy action, complements the legal framework in force. While the previous policy programmes had (mainly, whilst not exclusively) a strong focus on employment and accessibility in relation to transportation and the built environment, the Strategy adopts a wider approach and is articulated in eight interconnected key areas of action: accessibility, participation, equality, employment, education and training, social protection, health and external action. The strategy firmly embraces the social model and explicitly refers to the (non)definition of the UNCRPD Convention, according to which 'people 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 fact, the whole content and structure of the Strategy have been deeply influenced by the UNCRPD, which the EU signed in 2007 and ratified in 2010.[63]

The UNCRPD is currently an 'integral part of EU Law' and enjoys a quasi-constitutional status in the EU legal system, beneath the Treaties but above secondary law.[64] As a consequence, EU secondary law must be interpreted in light of the UNCRPD: if the wording of secondary EU legislation is open to more than one interpretation, preference should be given, as far as possible, to the interpretation which renders the European provision consistent with the Convention. The Court recognises the existence of this duty of consistent interpretation, by virtue of the 'sub-constitutional' rank of international agreements in the EU legal framework. More generally, the UNCRPD has become the benchmark against which EU disability initiatives must be measured. Put roughly, the EU must implement the Convention and put its provisions into effect within the sphere of its own competence.[65]

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[60] See *supra* Introduction.

[61] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426 def.

[62] *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe*, COM(2010) 636 final. On the Strategy see *inter alia* David L. Hosking, 'Staying the Course: The European Disability Strategy 2010–2020' (2013) 4 *European Yearbook of Disability Law*, 73; Delia Ferri, 'Is there a 'Cultural Dimension' of EU Disability Policy? New Perspectives after the Accession to the UN Convention on the Rights of Persons with Disabilities' in Lauso Zagato, Dino Costantini, Fabio Perocco (eds), *Trasformazioni e Crisi della Cittadinanza Sociale* (Venice University Press 2014).

[63] In March 2007, the Council authorized the Commission to sign the Convention and issued a declaration on the Optional Protocol and concluded it through Council Decision 2010/48/EC [2010] OJ L 23/35. This concluding decision was formally adopted on 26 November 2009, under the EC Treaty. The procedure of ratification was completed when the EU officially deposited the instrument of ratification on December 23, 2010. Grainne De Burca, 'The EU in the Negotiation of the UN Disability Convention' (n 40).

[64] *Ex multis, Etang de Berre*, Case C-239/03, [2004] E.C.R. I-07357 [25]

[65] Amongst others, Lisa Waddington, 'Breaking New Ground: The Implications of the UN Convention on the Rights of Persons with Disabilities for the European Community" in Oddný Mjöll Arnardottir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, (Brill 2009); Lisa 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 *Maastricht Journal of*

4. In Search for a Definition of Disability as a Ground of Discrimination: The Role of the CJEU

4.1. The Case Law before the Ratification of the UNCRPD…

Until the ratification of the UNCRPD, the development of a social model oriented EU disability policy did not provide great clarity on how disability should be defined in EU level. The European Commission itself, ambiguously, admitted that 'the social model of disability does not give straightforward insights into how definitions in social policy should be formulated'.[66] The quest for a definition of disability emerged visibly in the non-discrimination field, in particular in relation to 'Employment Equality Directive',[67] in order to determine its actual scope *ratione personae*. The Court of Justice itself has clearly stated that the concept of 'disability' must be 'given an autonomous and uniform interpretation' and that is not possible to refer to the laws of the Member States for the definition of that concept.[68]

The European judges were called on for the first time to define disability in 2005, in *Chacón Navas.*[69] The facts referred to a Spanish employee who, after being off work sick for eight months, was dismissed. While the employer acknowledged that the dismissal was 'unlawful' under Spanish law and offered her compensation, the employee argued that the dismissal was 'void' due to the unequal treatment and discrimination she suffered, and claimed that she should be reinstated in her post. The Spanish court decided to stay the proceeding and requested a preliminary ruling from the CJEU. The core question was to establish if the claimant's health condition fell within the scope of disability according to the Employment Equality Directive. According to the national court, even though disability and sickness are two different concepts under EU law, there is a causal link between sickness and disability. The referring court suggested 'that sickness constitutes an identifying attribute that is not specifically cited which should be added to the ones in relation to which Directive 2000/78 prohibits discrimination'.[70] The Spanish court arrived at that conclusion by referring to the International Classification of Functioning, Disability and Health (ICF), according to which 'disability' is a generic term which includes defects, limitation of activity and restriction of participation in social life', and concluded that 'sickness is capable of causing defects which disable individuals'.[71]

In order to reply to the question referred, the Court adopted a narrow interpretation of disability, based on the medical model,[72] and consequently clearly distinguished the concept

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European and Comparative Law 4, 431.
[66] Deborah Mabbett, 'Definitions of Disability in Europe', (n 20).
[67] [2000] OJ L 303/16.
[68] Para. 40
[69] Case C-13/05, *Sonia Chacón Navas* v *Eurest Colectividades* SA [2006] ECR I-6467.
[70] Para. 24.
[71] Para. 22.
[72] Lisa Waddington, 'Equal to the Task? Re-Examining EU Equality Law in Light of the United Nations Convention on the Rights of Persons with Disabilities' (2013) 4 *European Yearbook of Disability Law*, 169.

of sickness from that of disability:[73] 'the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'.[74] As noted by Waddington, according to the CJEU, the cause of the disadvantage is the individual 'impairment', irrespective of the role played by environmental barriers. Furthermore, differentiating the facts of the case from *Mangold,*[75] the Court gave a very narrow interpretation of the scope of the Directive.[76] It clarified that, although fundamental rights form an integral part of the general principles of EU law, and include a general principle of non-discrimination, 'it does not follow from this that the scope of Directive 2000/78 should be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof'.[77]

Following the Opinion of Advocate General (AG) Geelhoeld,[78] the CJEU affirmed that the wording of both the Treaty and the directive demonstrated that the EU legislators, by selecting the word 'disability', must be taken to have intended that 'sickness' has a different meaning.[79] Ultimately, the Court argued that there is nothing in the Employment Equality Directive to suggest that workers who develop any type of sickness will fall within the purview of the protections granted to those discriminated against based on a personal disability.[80]

According to Flynn and Quinn, the formal legal arguments employed by the Court obscure other objectives that it has pursued in its judgment. These authors suggest that the Court opted for a definition of disability that inflicts the lowest financial burden on Member States in effecting that same definition. It seems quite likely that 'the issue of costs (and the need not to unduly intrude on the prerogatives of Member States) played a role in determining the boundaries of the definition of disability'.[81]

A second relevant case is *Coleman.*[82] In this decision, the Court did not expressly

[73] Lisa 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* 2, 487.
[74] Para. 43.
[75] Case C-144/04, *Werner Mangold* v *Rüdiger Helm*, SA [2005] ECR I—9981.
[76] See also E. Adobati, ' La Corte di giustizia precisa la nozione di handicap ai sensi della direttiva n. 2000/78/CE', (2006) *Diritto comunitario e degli scambi internazionali*, 531; Francesca Evangelista, 'Malattia e Handicap, Distinte le Tutele Ue' (2006) 34 *Diritto e giustizia*, 100; Gaia Giappichelli, 'La Corte di Giustizia si Pronuncia sulla Nozione di Handicap: un Freno alla Vis espansiva del Diritto Antidiscriminatorio?' (2007) 4 *Riv. it. dir. lav*., 758.
[77] Para. 56, Case C-13/05, *Sonia Chacón Navas* v *Eurest Colectividades* SA [2006] ECR. I-6467.
[78] The Opinion of Advocate General (AG) Geelhoeld provided a lengthy and detailed interpretation of former Article 13 EC (i.e. Article 19 TFEU) in connection with the Employment Equality Directive. The AG, referring to the evolution and wording of former Article 13 EC, mentioned that the list of prohibited grounds for discrimination is exhaustive and the scope of the directive need to be interpreted strictly. According to the AG, the Court is bound to respect the choices made by the EU legislature 'with regard to the definition of the prohibition of discrimination and the substantive and personal delineation of that prohibition and must not stretch them'.
[79] Para. 44, Case C-13/05, *Sonia Chacón Navas* v *Eurest Colectividades* SA [2006] ECR. I-6467.
[80] Further to the intersection between the concepts of disability and sickness in the CJEU case law from the EU Employment Law perspective, see Mark Bell, Sickness Absence and the Court of Justice: Examining the Role of Fundamental Rights in EU Employment Law. (2015) *European Law Journal*. doi: 10.1111/eulj.12143
[81] Gerard Quinn and Eilionoir Flynn, 'Transatlantic Borrowings: The Past and Future of EU Non Discrimination Law and Policy on the Ground of Disability' (n 51).
[82] Case C- 303/06, *S. Coleman* v *Attridge Law and Steve Law* [2008] ECR I-5603.

discuss the precedent established in *Chacon Navas*, nor addressed explicitly the normative definition of disability. It instead substantially broadened the scope *ratione personae* of the Directive,[83] by admitting discrimination by association. However, in rendering its decision, the Court again recalled the *Chacon Navas* strict definition of disability.[84]

The reference to the CJEU was made in the course of proceedings between Ms Coleman and Attridge Law, a firm of solicitors. Ms Coleman claimed she had been dismissed from her employment and treated less favourably than her fellow employees due to her ancillary role as a primary care-giver for her disabled son. The referring court asked, in essence, whether the Employment Equality Directive must be interpreted as prohibiting discrimination on grounds of disability only in respect of an employee who is himself disabled, or whether the Directive protect also employees who, though they are not themselves disabled, are treated less favourably or harassed on the ground of their association with a person who is disabled. In answering the questions raised by the referring court, the CJEU first recalled that the concept of 'disability' was discussed in *Chacón Navas* (and implicitly stated that there was no need to return on the point). There, the CJEU affirmed that although 'the scope of Directive 2000/78 cannot be extended beyond the discrimination based on the grounds listed exhaustively in Article 1 of the directive, with the result that a person who has been dismissed by his employer solely on account of sickness cannot fall within the scope of the general framework established by Directive 2000/78, it nevertheless did not hold that the principle of equal treatment and the scope *ratione personae* of that directive must be interpreted strictly with regard to those grounds'. Consequently, the Court, in *Coleman*, affirmed that the objectives of the Directive and its effectiveness would be undermined if an employee in the situation of Ms Coleman could not rely on the prohibition of direct discrimination laid down in the Directive where it is proven that she has been treated less favourably than another employee in a comparable situation on the grounds of her child's disability.

4.2. …AND AFTER THE RATIFICATION OF THE UNCRPD.

Chacón Navas was heavily criticized by legal scholarship,[85] because of the outdated medical model approach adopted by the Court, in stark contrast with the orientation taken by the EU in its policy documents since the 1996.

Despite the criticism, the narrow, medical model-oriented concept of disability elaborated in *Chacón Navas* remained the sole prescriptive definition of disability until 2013,

[83] Lisa 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' (2009) 46 *Common Market Law Review* 2, 665. With reference to the implications of *Coleman* on the topic of discrimination of association in EU, see Costantina Karagiorgi, 'The Concept of Discrimination by Association and its Application in the EU Member States' (2014) 18 *European Anti-Discrimination Law Review*; Davide Venturi, 'Effettività della Tutela Comunitaria contro la Discriminazione Diretta Fondata sull'Handicap ed Estensione dell'Ambito Soggettivo della Tutela: il Caso Coleman' (2008) 3 *Dir. relaz. ind*., 849.

[84] Para. 45 and 46.

[85] Lisa 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* 2, 487.

when the Court released its decision in the *Ring and Werge* case.[86] For the first time, the CJEU openly embraced the social model of disability.[87] This overruling occurred, mainly, as a consequence of the ratification of the UNCRPD: as the Court itself later acknowledged, the judgment in *Ring and Werge* 'arguably marks a paradigm shift in the Court's case-law. In that case, the EU concept of disability was explicitly aligned with that of the UN Convention'.[88]

The facts of the joined cases referred to Ms Jette Ring and Ms Lone Skouboe Werge, who were both dismissed after several absences from work caused by their health conditions. The trade union HK, acting on behalf of the two applicants, submitted that both employees were suffering from a disability and that their employers were required to offer them reduced working hours, by virtue of the obligation to provide accommodation pursuant to Article 5 of Employment Equality Directive. In both main proceedings the employers disputed that the applicants' state of health was covered by the concept of 'disability' within the meaning of the directive. The referring courts thus asked the CJEU if and when a condition caused by a medically diagnosed illness could be covered by the ground of disability. In its preliminary observations,[89] the Court articulated that the Employment Equality Directive must, as far as practicable, be interpreted in a manner consistent with the UNCRPD, which, like all international treaties concluded by the EU, becomes an integral part of EU law and enjoys, as recalled above in Section 3, a sub constitutional status. The Court considered in particular the wording of recital (e) and article 1, paragraph 2 of the Convention, subsequently outlining a definition of disability based on the social model and consistent with the Convention. It finally recognised that 'sickness can, in some circumstances, constitute a disability' for the purpose of the directive: 'if a curable or incurable 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, such an illness can be covered by the concept of 'disability' within the meaning of Directive 2000/78.'[90]

The CJEU affirmed that the scope of the Directive is not limited to disabilities that are congenital or resulting from accidents. In this respect, the Court distinguished between short-term illnesses, which are not to be regarded as a disability, and long-term impairments which can be caused by sickness and which, when subject to various barriers and exogenous factors, can be regarded as disabilities.[91]

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[86] Joined cases C- 335/11 and C- 337/11, *HK Danmark, acting on behalf of Jette Ring* v *Dansk almennyttigt Boligselskab* (C-335/11) and *HK Danmark, acting on behalf of Lone Skouboe Werge* v *Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, in liquidation (C-337/11) 11 April 2013, not yet published.

[87] Angelo Venchiarutti, 'Sistemi Multilivello delle Fonti e Divieto di Discriminazione per Disabilità in Ambito Europeo' (2014) 9 *La nuova giurisprudenza civile commentata*, 409.

[88] Para 88, Case C-363/12 *Z.* v *A Government Department and The Board of management of a community school*, not yet published.

[89] Para. 33 Joined cases C- 335/11 and C- 337/11.

[90] Para. 41, Joined cases C- 335/11 and C- 337/11.

[91] Lisa Waddington, 'HK Danmark (Ring and Skouboe Werge): Interpreting EU Equality Law of the UN Convention on the Rights of Persons with Disabilities' (2013) 21 *European Anti-Discrimination Law Review*, 11; Nathalie Betsch, 'The Ring and Skouboe Werge Case: a Reluctant Acceptance of the Social Approach of

After *Ring and Werge*, in *Commission* v *Italy*,[92] the CJEU confirmed that, while it is true that the concept of a 'disability' is not directly defined in the Employment Equality Directive, it should be interpreted on the basis of the UNCRPD.[93] That case originated from action for failure to fulfil EU obligations brought by the Commission against Italy. The Commission affirmed that Italy did not correctly transpose the Employment Equality Directive into its national law, and, in particular, it did not ensure, in breach of Article 5 of the Directive, that reasonable accommodation in the workplace is to apply to all persons with disabilities, all employers, and all aspects of the employment relationship. The Court stated that the definition of disability adopted by Italian legislation[94] was too narrow, and had failed to include all persons with disabilities.[95] Italy based its defence on the *Chacón Navas* case's outdated concept of disability,[96] and argued that neither the Commission nor the Employment Equality Directive specified a uniform concept of disability, to which all Member States should conform. Italy attempted to claim also that the CJEU had not provided a concrete and specific definition of disability. According to the Italian government, the generic definition of disability adopted in *Chacón Navas* afforded to Member States a broad discretion in transposing the concept at national level. The CJEU however rejected Italian arguments, recalled *Ring and Werge*'s definition and finally condemned Italy.

Similarly, in *Z.* v *A Government Department and the Board of management of a community school*,[97] the Court [98] referred to the UNCRPD's (non)definition of disability [99] and again firmly embraced the social model of disability. However, the definition that the court adopted was somewhat narrower than that embraced in the previous cases. In this case, Ms Z., employed as a post primary school teacher in a school managed by the Board of Management, opted for surrogacy due to a rare health condition affecting her and causing her infertility. During the surrogate's pregnancy, Ms Z made an application for adoption leave. After having been refused paid leave of absence, Ms Z brought a complaint before the Irish Equality Tribunal. She argued that she had been subject to discrimination on grounds of sex, family status and disability. The Equality Tribunal decided to stay the proceedings and to refer for preliminary ruling to the CJEU. *Inter alia* the Tribunal asked whether Articles 3(1) and 5 of the Employment Equality Directive are 'to be interpreted as meaning that there is

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Disability' (2013) 4 *European Labour Law Journal* 2, 2013,135.

[92] *Commission* v *Italy*, Case C-312/11, 4 July 2013, not yet published.

[93] Paragraph 56, Case C-312/11, Commission v Italy, 4 July 2013, not yet published.

[94] The Court referred to l. 104/1992, l. 381/1991, l. 68/1999 and d.lgs. 81/2008.

[95] Among others, Angelo Venchiarutti, 'Sistemi Multilivello delle Fonti e Divieto di Discriminazione per Disabilità in Ambito Europeo', (n 87); Adriana Topo, 'Il Licenziamento del Lavoratore Malato e del Lavoratore Disabile' (2014) Giur. It., 2; Maurizio Cinelli, 'Insufficiente per la Corte di Giustizia la Tutela che l'Italia Assicura ai Lavoratori Disabili: una Condanna Realmente Meritata?' (2013) 4 *Rivista Italiana di Diritto del Lavoro*, 935; Giulia Milizia, 'L'UE Condanna l'Italia per la Disparità di Trattamento dei Disabili sul Lavoro', *Diritto & Giustizia*, 1001; Carmelo Danisi, 'Disabilità, Lavoro e «Soluzioni Ragionevoli»: l'Inadempimento dell'Italia alla Corte di Giustizia' (2014) *Quaderni Costituzionali*, 1005.

[96] Paras. 38-39.

[97] Case C-363/12 *Z.* v *A Government Department and The Board of management of a community school*, not yet published

[98] Cristina Campiglio, 'Il diritto dell'Unione Europea si Confronta con la Maternità su Commissione' (2014) *Giurisprudenza Civile Commentata*, 763; Ivan Libero Nocera, 'Niente Congedo di Maternità per la Madre che ha Avuto un Figlio mediante un Contratto di Maternità Surrogata' (2014) *Diritto & Giustizia*, 372.

[99] Para. 75, Case C-363/12 *Z.* v *A Government Department and The Board of management of a community school*, not yet published.

discrimination on the ground of disability where a woman – who suffers from a disability which prevents her from giving birth, whose genetic child has been born through a surrogacy arrangement, and who is responsible for the care of her genetic child from birth – is refused paid leave from employment equivalent to maternity leave and/or adoption leave'. In order to reply the question referred, the Court recalled *Ring and Werge* and the UNCRPD, confirming that the concept of disability refers to a limitation which results 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.[100] However, in this case, the Court made a clearer and sharper distinction between the (non)definition of the UNCRPD and the one adopted in the EU legal framework: '[w]hereas the UN Convention refers broadly to participation in society, the Court's definition covers only participation in professional life'. The Court relied on the limited scope of the directive *ratione materiae*, as the directive only targets disabilities that make a worker's involvement in professional life more burdensome. In doing so, it also explicitly narrowed down the definition of disability. The Court concluded that 'the inability to have a child by conventional means does not in itself, in principle, prevent the commissioning mother from having access to, participating in or advancing in employment'.[101] In other words, although the claimant's infertility would be categorized as a disability under the UNCRPD, it was not under the Employment Equality Directive, because of the Directive's limited scope. This decision makes plain a sort of imperfect fit between the UNCRPD broad definition of disability and the scope of the Employment Equality Directive, which only applies to employment-related issues.[102] However, the Court clarified that the emerging difference in results between the Employment Equality Directive's and the UNCRPD's notions of disability did not affect the validity of that directive in the light of the UN Convention[103].

In *Kaltoft* [104] the Court was asked to investigate the relationship between disability and obesity.[105] The facts referred to the dismissal of Mr Karsten Kaltoft, who worked for 15 years

[100] Para. 77.

[101] Para. 81, Case C-363/12 *Z.* v *A Government Department and The Board of management of a community school*, not yet published.

[102] Mel Cousins, 'Surrogacy Leave and EU law: Case C 167/12, C.D. v S.T. and Case C 363/12, Z. v A Government Department, Judgements (Grand Chamber) of 18 March 2014' (2014) 21 *Maastricht Journal of European and Comparative Law* 3, 10.

[103] The Court pointed out that in so far as the obligations imposed by that Convention are addressed to Contracting Parties, that international agreement is 'programmatic'. Consequently, since the provisions of the UNCRPD are subject, in their implementation or effects, to the adoption of subsequent measures which are the responsibility of the Contracting Parties, they therefore do not have direct effect in European Union law. It follows that the validity of Directive 2000/78 cannot be assessed in the light of the UN Convention, but that directive must, as far as possible, be interpreted in a manner that is consistent with that Convention.

[104] Case C-354/13, *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft*, v *Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund*, 18 December 2014, not yet published.

[105] During the last few years, the EU demonstrated a specific sensitivity on obesity issues. On 30 May 2007, the EU Commission established a coherent and comprehensive Community Strategy to address the issues of overweight and obesity, by adopting the White Paper on 'A Strategy on Nutrition, Overweight, and Obesity-related Health Issues', focusing on action that can be taken at local, regional, national and European levels to reduce the risks associated with poor nutrition and limited physical exercise. On the topic see among others Benedikt Buchner, 'Nutrition, Obesity and EU Health Policy' (2011) 18 *European Health Law Journal* 1, 1; Andrea Faeh, 'Obesity in Europe: The Strategy of the European Union from a Public Health Law Perspective'

for the Municipality of Billund (Denmark) as a childminder. During his employment, consequent to his recognised obesity, Kaltoft was provided financial assistance to fund fitness and physical training sessions as part of the local authority's health policy, but without successful results. Although the employer rejected the contention that Mr Kaltoft's obesity formed part of the reasons behind his dismissal, the *Fag og Arbejde*, a workers' union acting on behalf of Mr Kaltoft, brought proceedings founded upon unlawful discrimination on grounds of disability. The claimant argued in his written observations that the WHO considers obesity to be a chronic and durable illness.[106] Furthermore, he pointed out that obesity has been considered to be a disability under US law. Obesity can, in fact, entail physical limitations that create obstacles to the full and effective participation in professional life, either because of reduced mobility or because of pathologies or symptoms that result from it, and it can equally entail limitations on the employment market by reason of prejudice on the basis of physical appearance.[107] In these circumstances, the referring court asked the CJEU if obesity could be deemed to be a disability within the meaning of the Employment Equality Directive.[108] Both the Opinion of the AG and the judgment of the Court recognized that, even if obesity does not in itself constitute a disability within the meaning of Directive 2000/78/EC 'in the event that, under given circumstances, the obesity of the worker concerned entails a limitation which results in particular from physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one, obesity can be covered by the concept of 'disability' within the meaning of Directive 2000/78'.[109]

However, the CJEU took a cautious approach and left it to the national court to decide whether in the pending case obesity constituted a disability.[110] The Court demonstrated a particular reticence in addressing such a topical issue, acknowledging that the implications of recognising obesity as a disability could have a large impact on the labour market and, recalling Flynn and Quinn's arguments, on the costs to be borne by the Member States,

(2012) 19 *European Journal of Health Law* 1, 69; Caoimhin MacMaoláin, 'Food Information Regulation: Failing to address ongoing concerns about obesity'(2014) 17 *Irish Journal of European Law* 1, 77.

[106] The WHO ranks obesity into three classes by reference to the BMI. Persons with a BMI of 30.00 to 34.99 are Obese class I, persons with a BMI of 35.00 to 39.99 are Obese class II, and persons with a BMI in excess of 40.00 are Obese class III, which is sometimes referred to as severe, extreme or morbid obesity.

[107] Para. 52, *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft,* v *Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund*.

[108] Although it is not relevant for the purpose of this article, it is to highlight that by its first question, the referring court essentially asked whether EU law must be interpreted as laying down a general principle of non-discrimination on grounds of obesity as such as regards employment and occupation. After a brief analysis of the EU law and case law (with reference in particular to *Chacon Navas*) on the topic (paras. 31-40), the Court finally opted out for a negative solution.

[109] Para. 59, Case C-354/13, *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft, v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund*, 18 december 2014, not yet published.

[110] For a critical comment on the possible consequences of *Kaltoft* in EU disability discrimination law see Iyiola Solanke, 'Kaltoft - a step (in the wrong direction?) towards protection from weight discrimination under EU law' (Eutopia law, 22 December 2015) http://eutopialaw.com/2014/12/22/kaltoft-a-step-in-the-wrong-direction-towards-protection-from-weight-discrimination-under-eu-law/ accessed 28 May 2015; Delia Ferri and Silvia Favalli, 'Tracing the Boundaries between Disability and Sickness in the European Union: Squaring the Circle?', *EJHL* forthcoming.

especially those where obesity is an increasing phenomenon.[111]

All in all, it appears that the ratification of the UNCRPD has led to a clear departure in the jurisprudence of the Court of Justice: the (non)definition provided by the UNCRPD represents a landmark for the CJEU. However, the CJEU has taken a somewhat ambiguous path. On the one hand, as it appears in *Ring and Werge* and in *Kaltoft*, disability is used as an 'umbrella-term', encompassing a large variety of different health situations. This has inevitably had the result of implicitly enlarging the scope of the Employment Equality Directive *ratione personae*. On the other hand, the restricted scope *ratione materiae* of the directive falls short of the wide social-model oriented notion of disability purported by the UNCRPD. Thus, the Court inevitably narrows down the definition of disability to make it fit within the scope of the directive, as it appears in *Z.* v *A Government Department.*

4.3. *GLAZEL* AND THE DEFINITION OF DISABILITY OUTSIDE THE EMPLOYMENT EQUALITY DIRECTIVE: SHADING AWAY FROM THE SOCIAL MODEL?

In *Glatzel*,[112] the Court examined the definition of disability in relation to Article 21 EU CFR, outside the employment context. However, again, interestingly enough it chooses a very ambiguous path.

Mr Glatzel lost his driving licence in April 2010, on the ground that he had driven under the influence of alcohol. He then applied for a new driving licence. While he was granted a licence to drive certain 'light' motor vehicle heavy, he was refused the authorization to conduct heavy good vehicles on the ground that an ophthalmological examination had revealed that Mr Glatzel suffered from unilateral amblyopia, involving a substantial functional loss of vision in only one eye. However, the visual acuity in Mr Glatzel's right eye did not satisfy the requirements laid down in Annex III to Directive 2006/126/EC, according to which drivers of these types of vehicles must have visual acuity of at least 0,1. This provision is not based on the idea of addressing the lack of spatial vision of the person concerned but to enable the driver of a motor vehicle in one of those categories to react to a sudden loss of vision in the better eye during a journey and to stop the vehicle on the side of the road using his residual vision.

Following an unsuccessful challenge to that decision, Mr Glatzel brought an action before the Administrative Court of Regensburg. Since that court dismissed his action, Mr Glatzel brought an appeal against that judgment before the *Bayerischer Verwaltungsgerichtshof*. The latter court stated that Mr Glatzel, who had a normal field of vision and whose visual impairments affected, in particular, his central visual acuity, would be capable of seeing objects appearing in his field of peripheral vision in essentially the same way as a person with normal vision and would, therefore, be able to stop the power-driven

[111] For instance, with reference to the possible impact of *Kaltoft* in UK see Mark Butler, 'Obesity As A Disability: The Implications or Non-Implications of *Kaltoft*', (2014) 20 *Web JCLI* http://webjcli.org/article/view/358/466 accessed 28 May 2015; Katy Ferris and James Marson, 'Does Disability Begin at 40? Karsten Kaltoft v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund (Advocate General's Opinion) [2014]', (2014) 20 *Web JCLI* http://webjcli.org/article/view/373 accessed 28 May 2015.

[112] Case C-356/12, *Wolfgang Glatzel* v *Freistaat Bayern* of 22 May 2014, not yet published.

vehicle he was driving even by using only his residual vision. The court, thus, decided to stay the proceedings and to refer the CJEU for a preliminary ruling and asked whether the strict requirements laid down in Annex III to Directive 2006/126/EC constituted an interference with the fundamental rights guaranteed by Articles 20, 21(1) and 26 of the EU CFR, which concern equality before the law, non-discrimination on grounds of disability and the integration of persons with disabilities.

The Court, in answering the question, first highlighted that the notion of 'disability' is not defined by the Charter itself. Then, it referred to its case-law on equal treatment in the area of employment and occupation, namely *Ring and Werge* and *Commission* v *Italy*, and stated that: 'Article 21(1) of the Charter requires the EU legislature, in particular, not to apply any difference in treatment on the basis of 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 persons, unless such a difference in treatment is objectively justified'.[113]

On the one hand, the European judges recalled the previous case law. On the other hand, the Court stated that it did not have sufficient information to ascertain whether Mr Glatzel's impairment constituted a 'disability' within the meaning of the Charter, thus substantially refusing to 'apply' the definition. In addition, the Court added that it was not really necessary for the purpose of determining the validity of Directive 2006/126/EC, in the light of Article 21(1) of the Charter, to determine definitively whether, in the case in the main proceedings, Mr Glatzel was disabled. Even if the state of a person like Mr Glatzel could be considered as falling within the definition of 'disability' within the meaning of the Charter, the difference in treatment consisting in not issuing him with a driving licence for certain vehicles may be objectively justified in the light of overriding considerations of road safety.

The Court went on to refer to the requirements laid down in Annex II to the Directive 2006/126/EC and the determination of minimum value relating to visual acuity required to certain vehicles. The Court plainly referred to medical data, and recalled that the EU legislature has a broad discretion in relation to complex medical questions, such as those relating to the visual acuity necessary to drive power-driven vehicles. In such a context, the Court claimed that it could not carry out an assessment of scientific and technical facts, which is a task for the legislature. Without discussing the findings of the Court in detail, it is notable that, as highlighted by O'Brien,[114] the Court clearly 'adopted the language of the social model of disability, but has so far failed to apply it'. As this Author suggests, the Court considers that disability is to be found nowhere other than in the impairment itself, and actually focused on the nature of the impairment. This is probably a bold statement, but it is certain that the Court has not yet taken a clear approach to disability, and undoubtedly cases like *Glatzel* and *Z* offer very little (and confused) guidance.

[113] Para. 46.

[114] Charlotte O'Brien, 'Driving Down Disability Equality? Case C-356/12 Wolfgang Glatzel v. Freistaat Bayern, Judgment of 2 May 2014' (2014) 21 MJ 4, 723.

5. IS THERE A ROOM FOR A LEGISLATIVE DEFINITION IN THE PROPOSAL FOR A NON-DISCRIMINATION DIRECTIVE?

Almost 7 years ago, in 2008, the Commission proposed a new Directive extending the material scope of the provisions against discrimination on the ground of religion and belief, disability, age and sexual orientation beyond the area of employment, in the fields of social protection, including social security and healthcare; social advantages; education; access to and supply of goods and other services which are available to the public, including housing.[115] The proposed Directive replicates those parts of the material scope of the Race Equality Directive[116] that were not included in the Employment Equality Directive. In other words, the proposal, which is built upon the legal basis of Article 19 TFEU, purports to implement the principle of equal treatment even in sectors other than employment, supplementing the existing legal framework. However, as noted by Howard, the scope is still narrower than that of the Race Directive, as Article 3 of the Proposal contains more exceptions.[117] Waddington, in her analysis of the proposal, underlines that many Member States are still querying the extent of the EU's power to legislate in areas such as health and social protection, thus undermining the prospects of broad and progressive reform in this area.[118]

Without addressing the proposal in detail, for the purposes of this article it suffices to point out that the proposed Directive shows a more ambitious approach with regard to the prohibition of disability discrimination, and includes a number of additional provisions to strengthen disability discrimination law. However, there is a very evident restraint with regards to defining disability.

Notably, the original text of the proposal, though containing reference to the UNCRPD, did not include an explicit definition of disability. In this respect, as noted by Bell,[119] 'the proposed Directive could be regarded as a missed opportunity'. However, in its 'Legislative Resolution to the Proposal',[120] the European Parliament proposed inserting a definition of disability drawn from the UNCRPD, but in the Preamble rather than in a specific article. In particular, in an amendment to Recital 12(a) of the Directive, Article 1 UNCRPD was included in the non-binding preamble: 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, whether environmental or attitudinal, may hinder their full and effective participation in society on an equal basis with others.'

The inclusion of this preambular paragraph in the proposed Directive, if adopted,

[115] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426 def.

[116] Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.

[117] Erica Howard, 'EU Equality Law: Three Recent Developments' (2011) 17 *European Law Journal* 785.

[118] Lisa Waddington,'Future Prospects for EU Equality Law. Lessons to Be Learnt from the Proposed Equal Treatment Directive', *European Law Review, 2* (2011), 163.

[119] Mark Bell, 'Advancing EU Anti-Discrimination Law: the European Commission's 2008 Proposal for a New Directive' (2009) 3 *The Equal Rights Review*, 7.

[120] P6_TA(2009)0211 European Parliament Legislative Resolution of 2 April 2009 on the Proposal for a Council Directive Implementing the Principle of Equal Treatment between Person Irrespective of Religion or Belief, Disability, Age or Sexual Orientation (COM (2008)0426-C6-291/2008-2008/0140(CNS)).

should provide some further guidance on the concept of disability to both Member States and the CJEU. However, it is far from constituting a real innovation. It will perpetuate a situation in which there is no prescriptive definition in the European legal framework. In addition, this amendment would have been significant at the time of its release, i.e. before the adoption of the UNCRPD, as a means of adapting EU law to the Convention's text. However, now, that the UNCRPD is an integral part of EU law and is constantly referred to by the CJEU, the abovementioned recital will not have an actual impact. Probably, *rebus sic stantibus*, the addition of such a text in the preamble of the proposed Directive would possibly even be useless and redundant.

The Parliament, however, suggested another interesting amendment to article 4 of the proposed directive including, beside persons with disabilities, 'persons with chronic diseases'. This amendment suggests that persons with chronic diseases are not (necessarily) to be considered persons with disabilities, but they must be protected against discrimination. This amendment, if agreed, would add petrol to the fire of the already discussed distinction between sickness and disability. The Parliament also suggested adding an alinea in the same article stating that the concept of disability is to be understood in the light of the UNCRPD (Article 4(1)). Again this reference to the Convention and to the need for consistent interpretation is arguably redundant, since the principle is well established and already applied by the CJEU in a regular manner (at least formally).

At present, this proposed Directive is still subject to an ongoing discussion and negotiation in Council. As yet, it has not been possible to achieve the unanimous agreement of all Member States that is required for the adoption of directives based on Article 19 TFEU.[121] It appears that the EU legislature is not ready to engage with a legislative definition, and prefers either no definition or an indirect (and blurred) definition by mere reference to the Convention.

6. IS IT TIME TO TAKE STOCK?

Recalling Degener's words,[122] 'legal definitions of disability have been [and continue to be] an issue of much debate in Europe and around the globe'. In the EU, the quest for a definition of disability has emerged prominently and has not yet found a solution, in particular with regards to the non-discrimination field.

Absent an explicit definition, the CJEU has been called to fill the gap. The Court did not shrink from this task but first adopted a conservative medical model-oriented attitude, and then, even when overruling its case law, it still 'walked on the edge'. It formally and firmly embraced the social model, but, in particular in *Z* and *Glatzel*, substantially distanced itself

[121] For a detailed report of Proposal's procedure see http://eur-lex.europa.eu/legal-content/en/HIS/?uri=CELEX:52008PC0426 . See also 'Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation (2008)', The European Union, Annual Review of European Law and Policy (2015) 5 *European Yearbook of Disability Law*, 173 and Mark Bell, 'Advancing EU Anti-Discrimination Law: the European Commission's 2008 Proposal for a New Directive', (n 119).

[122] Theresia Degener, *Definition of Disability* (2004). Study produced under the European Community Action Programme to combat discrimination (2001-2006) available at http://www.pedz.uni-mannheim.de/daten/edz-ath/gdem/04/disabdef.pdf accessed 28 May 2015.

from the social model-oriented conceptualization, narrowing down the concept of disability and still focusing on the impairment.

The absence of a definition in the EU non-discrimination legislation has given to the Court great flexibility, and the possibility of adaptation. Disability is an evolving concept, as stated in the UNCRPD's Preamble.[123] However, the undeniable judicial activism of the Court, so far, has not brought great clarity. In addition, the constant reference to Article 1 UNCRPD and to the social model has offered little legal certainty in respect of what constitutes a disability for the purpose of EU non-discrimination law. It is probably true to say that a clear-cut legislative definition could impact negatively on the protection of persons of disability, limiting the scope of the legislation provided. However, it would probably be desirable to develop consistent public policies and to combat discrimination consistently across the EU. As several scholars contend,[124] the way in which disability is conceived has a decisive impact on the enforcement of legislation protecting and promoting the rights of persons with disabilities.[125] As Mabbett [126] argues, 'it may not be possible to promote sufficient substantive equality without treating some people differently on grounds of disability. If so, it is necessary to have an idea of what constitutes a fair basis for 'differential treatment'. Even those such as Woodhams and Corby,[127] who advocate for a radical approach that bypasses the requirement for a definition, seem to implicitly recognise that the understanding of disability directly affects the way in which people with disabilities are regarded and treated by administrations and other societal organisations. Whittle and Venchiarutti[128] observe that variations amongst the Member States in terms of the definition of disability would result in a disparate application of the Employment Equality Directive throughout the EU, and this, in turn, will have a negative impact on the fundamental principle of the free-movement of persons.

In several circumstances the EU institutions (in particular the Commission) expressed their negative view in respect to a prescriptive definition of disability in legislation.[129] The text of the 2008 Proposal for a New Equal Treatment Directive is the most recent (and probably not the last) evidence of this negative attitude. Even though the proposal is not likely to be approved soon, and the current text will be probably subject to modifications and

[123] See *supra* paragraph 2.

[124] *Ex pluribus* Philippe Auvergnon, 'Approche Juridique du Handicap Psychique: les Enjeux d'une Définition en Droit Social' [A legal Approach to Psychic Disability: Issues Surrounding a Definition in Social Law] (2012) 6 *ALTER, European Journal of Disability Research*, 255; Deborah Mabbett, 'Some are More Equal Than Others: Definitions of Disability in Social Policy and Discrimination Law in Europe' (2005) 34 *Journal of Social Policy*, 215; Sandra Fredman, 'Does Disability Equality Challenge the Existing Anti-Discrimination Paradigm?', in Anna M. Lawson and Caroline Gooding (eds), *Disability Rights in Europe* (Hart, 2005).

[125] Michael Oliver and Colin Barnes, *The New Politics of Disablement* (Palgrave Macmillan, 2012).

[126] Deborah Mabbett, 'Some are More Equal Than Others: Definitions of Disability in Social Policy and Discrimination Law in Europe', (2005) Journal of Social Policy, 34(2), 215

[127] Carol Woodhams and Susan Corby, 'Defining Disability in Theory and Practice: a Critique of the British Disability Discrimination Act 1995' (2003) 32 *Journal of Social Policy* 2, 159.

[128] Richard Whittle, 'The Framework Directive for Equal Treatment in Employment and Occupation: an Analysis from a Disability Rights Perspective' (2002) 27 *European Law Review* 3, 303; Angelo Venchiarutti, 'Sistemi Multilivello delle Fonti e Divieto di Discriminazione per Disabilità in Ambito Europeo', (n 87).

[129] In the 2002 European Commission research project on 'Definitions of Disability' mentioned above, (Deborah Mabbett, 'Definitions of Disability in Europe', n20) the Commission specifically mentioned that 'its goal in commissioning the research was not to move towards a single standard definition, but rather to develop a framework in which different definitions could be located and compared'.

amendments, the legislative 'restraint' shown up to now is not likely to change.