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Daouidi v Bootes Plus SL and the Concept of 'Disability' in EU Anti-Discrimination Law

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Abstract

Daouidi v Bootes Plus SL is one the latest decisions in which the CJEU has been directly confronted with the concept of disability in the realm of EU anti-discrimination legislation. In particular, in this judgment, the Court attempted to identify when the dismissal of a worker due to temporary incapacity of an unknown duration may constitute direct discrimination on the grounds of disability. This decision appears to be significant in that, for the first time, the CJEU discusses the meaning of 'long-term limitation' for the purpose of Directive 2000/78. Although the Court treads carefully, it attempts to further elucidate and bring new elements to the definition of disability in EU anti-discrimination law. In spite of the fact that the Court is potentially widening the notion of disability, it appears, once again, quite reticent in its approach to the role of social, environmental and attitudinal barriers in disabling an individual, and remains somewhat 'trapped' in the medical model of disability. All in all, this analysis endeavors to highlight that the CJEU is struggling to move beyond a rhetorical recognition of the social model of disability and to apply this in practice.

Keywords

Directive 2000/78, disability, social model of disability, medical model of disability, long-term limitation, discriminatory dismissal

Introduction

Daouidi v Bootes Plus SL[1] is one of the latest decisions in which the Court of Justice of the European Union (CJEU) has been directly confronted with the concept of disability in relation

1. Case C-395/15 *Mohamed Daouidi v Bootes Plus SL, Fondo de Garantía Salarial, Ministerio Fiscal*, ECLI: EU: C:2016:917.

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to the scope of application of Directive 2000/78 establishing a general framework for equal treatment in employment and occupation (Directive 2000/78).[2] In this judgment, the Court sought to clarify when the dismissal of a worker due to temporary incapacity of an unknown duration may constitute direct discrimination on the grounds of disability, and, once again, to explain what 'disability' means for the purpose of the Directive.

This ruling appears to be one of the newest episodes in a long 'saga' which commenced, over eleven years ago, with the infamous *Chacón Navas* case.[3] In that case, the Luxembourg judges had adopted a medical model-oriented interpretation of disability,[4] focusing on the health condition of the person.[5] They had held that the concept of disability referred to a 'limitation which results from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life', identifying the cause of the limitation in the individual impairment, irrespective of the role played by environmental barriers. In this heavily criticised decision, the Court had clearly severed the concept of sickness from that of disability, making no distinction between long-term or chronic diseases and short-term illnesses. The definition adopted in *Chacón Navas* remained the sole prescriptive definition of disability until 2013, when the *Ring and Werge*[6] decision was released.[7]

Ring and Werge marks a 'paradigm shift in the Court's case-law'.[8] This shift was prompted by the ratification by the EU of the UN Convention on the Rights of Persons with Disabilities (CRPD),[9] and was grounded in the principle of consistent interpretation governing the relationship between international treaty law and EU law. In observance of this principle, the Court compelled itself to interpret Directive 2000/78 in compliance with the CRPD. It attempted to embrace the social model of disability[10] i.e. the view of disability as stemming from the interaction between impairments and various environmental and societal barriers, which informs the CRPD. The Court made it clear that Directive 2000/78 is not intended to solely cover disabilities that are congenital or result from accidents, to the exclusion of those caused by illnesses. The Luxembourg judges affirmed that '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

2. Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.
3. Case C-13/05, *Sonia Chacón Navas v. Eurest Colectividades SA*, ECLI: EU: C:2006:456.
4. The 'medical model' focused on the health condition of the single person and conceptualised disability as a negative condition. It identified disability with the individual's impairment.
5. L. Waddington, 'Case C-13/05, Chacón Navas v. Eurest Colectividades SA, judgment of the Grand Chamber of 11 July 2006' 44 *CML Rev.* (2007), 487; D. Hosking, 'European Developments. A High Bar for EU Disability Rights. Case C-13/05, Chacón Navas v Eurest Colectividades SA' (2007) *Industrial Law Journal*, 228-237.
6. 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*, EU: C:2013:222.
7. S. Favalli and D. Ferri, 'Defining Disability in the EU Non-Discrimination Legislation: Judicial Activism and Legislative Restraints', (2016) 22 *EPL* 5-35.
8. Opinion of AG Wahl in *Z. v A Government Department and The Board of management of a community school*, (Case C-363/12) at para 88.
9. The UN Convention on the Rights of Persons with Disabilities, adopted in 2006 by the UN General Assembly, was ratified by the EU through Council Decision 2010/48/EC, [2010] OJ L 23/35.
10. On the social model, among many others, see C. Barnes and G. Mercer, *Exploring Disability*, 2nd ed. (Polity Press, 2010).

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'.

Ring and Werge, aside from representing a turning point in the Court's jurisprudence, has opened a sort of 'Pandora's box'. A series of preliminary references from national judges about the meaning of disability have been made since 2013 and these have provoked a great deal of critical academic commentary,[11] because the Court, while openly referring to the social model of disability, disregarded it in practice.[12] This contradictory approach of the CJEU was evident in *Z. v A Government Department*.[13] The case concerned a woman, Mrs Z, who had a rare condition causing infertility and had a baby by means of a surrogate mother in California. Following the birth of her child, Mrs Z was refused a paid leave equivalent to maternity or adoption leave on the grounds that the law did not provide for paid leave in the case of a surrogacy arrangement. Mrs Z brought a complaint before the Irish Equality Tribunal, arguing that she had been subject to discrimination on the grounds of sex, family status and disability. In considering whether a discrimination on the ground of disability had occurred, the CJEU tried to ascertain whether Mrs Z could in fact be considered a person with a disability. The Court found 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', and concluded that Mrs Z did not have a disability within the meaning of the Directive. In doing so, however, the Court relied on the limited scope of the directive *ratione materiae*, to narrow down the definition of disability.[14] Subsequently, in *Kaltoft,*[15] and *Glatzel,*[16] the Court once again made it evident a certain 'reluctance'[17] to focus on the social barriers. These cases demonstrated an uneasiness on the Court's part in dealing with the social model. In particular, in *Kaltoft* the European judges were confronted with the question as to whether or not obesity constituted a disability for the purpose of the Directive. The Court ultimately held that obesity does not in itself constitute a disability within the meaning of Directive 2000/78/EC. However, '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

11. L. Waddington & A. Lawson, 'The unfinished story of EU disability non-discrimination law' in Bogg, Costello, & Davies (eds.), *Research Handbook on EU Labour Law* (Edward Elgar, 2016) 474-491; C. O'Brien, 'Union Citizenship and Disability: Restricted Access to Equality Rights and the Attitudinal Model of Disability' in D. Kochenov, *EU Citizenship and Federalism* (CUP, 2017), 509-539. See also L. Waddington, 'Saying all the right things and still getting it wrong: the Court of Justice's definition of disability and non-discrimination law' (2015) *MJ* 576-591; L.Waddington, '"Not Disabled Enough": How European Courts Filter Non-Discrimination Claims Through a Narrow View of Disability, "Pas suffisamment handicap": comment les cours européennes filtrent les actions en discrimination par une apprehension étroite de la notion de handicap' (2015) *European Journal of Human Rights*, 11-35.
12. See O'Brien, supra note 11.
13. Case C-363/12, *Z. v A Government Department and The Board of management of a community school*, EU: C:2013:604.
14. Waddington & Lawson, supra note 11.
15. 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*, EU: C:2014:2463.
16. Case C-356/12 *Wolfgang Glatzel v Freistaat Bayern* EU: C:2014:350. For a comment to this decision see C. O'Brien, 'Driving Down Disability Equality? Case C-356/12 Wolfgang Glatzel v. Freistaat Bayern, Judgment of 22 May 2014' (2014) *MJ*, 723-738.
17. European Disability Forum, Alternative Report to the Committee on the Rights of Persons with Disabilities, available at http://www.edf-feph.org/sites/default/files/2015_03_04_edf_alternative_report_final_accessible.pdf.

limitation is a long-term one, obesity can be covered by the concept of ''disability'' within the meaning of Directive 2000/78'.[18] As noted by Waddington, the CJEU's definition of disability places an emphasis on the physical limitations directly caused by the obesity. [19] In that case, Mr Kaltoft claimed that he was able to perform his job, and that the barriers he faced were most likely determined by negative attitudes and stigma. However, for the CJEU, the sole existence of physical limitations (which in conjunction with external barriers hamper participation in professional life) could make Mr Kaltoft fall within the category of disability. The very same approach can be found in the opinion of AG Sharpston in *Ruiz Conejero*.[20] In this instance, and echoing *Kaltoft,* the AG stated that disability occurs where 'the obesity of the worker concerned hindered his full and effective participation in professional life on an equal basis with other workers on account of reduced mobility or the onset, in that person, of medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity'. The same wording was used by the CJEU in its recent decision on the case.[21]

Along this line of cases, *Daouidi v Bootes Plus SL* demonstrates a renewed effort on the part of the CJEU to embrace the social model, albeit with similarly ambiguous results. *Daouidi v Bootes Plus SL* is, however, of particular interest because, as noted by Waddington in a timely annotation of the case,[22] the Court had the possibility to focus on 'another dimension' of its own definition of disability. In each of the previous decisions, the Court had stipulated that the impairment and the limitation deriving from it, which, in interaction with other barriers, entails a disability, must be 'long-term'. However, it did not enter into any discussion of what 'long-term' means. This very question lies at the centre of *Daouidi.*

Against this background, this commentary, after briefly outlining the judgment itself, critically discusses the approach taken by the Court in *Daouidi* in light of previous decisions adopted by the CJEU. It first focuses on the meaning of 'long-term limitation' given by the CJEU and examines its compliance with the letter and the spirit of the CRPD. It then turns to appraise the absence of any meaningful reference to the role of attitudinal and environmental barriers. Following directly on from this, the article explores some of the possible consequences and drawbacks of the approach adopted by the Court in this judgment. Finally, the concluding section argues that *Daouidi* places itself in continuity with the previous jurisprudence of the Court and shows the difficulty faced by the Court in approaching the definition of disability from the perspective of the social model. However, it also posits that this decision leaves the door open to an increased level of protection against dismissal for employees temporarily unable to work.

18. *Kaltoft*, supra note 15, at para. 59.
19. Waddington, 'Saying all the right things and still getting it wrong: the Court of Justice's definition of disability and non-discrimination law', supra note 11, at 587.
20. Opinion of AG Sharpston in *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA and Ministerio Fiscal* (Case C270/16) ECLI: EU: C:2017:788
21. Case C-270/16, *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA and Ministerio Fisca*l ECLI: EU: C:2017:788, para. 30
22. L. Waddington, 'Non-discriminatie, handicap, definitie van de grond handicap, begrip langdurige beperkingen (Mohamed Daouidi v. Bootes Plus SL e.a.)' (2017) *European Human Rights Cases*.

Daouidi v Bootes Plus SL

Facts and Context

The decision originates from a request for a preliminary ruling under Article 267 TFEU raised by the Social Court of Barcelona (*Juzgado de lo Social No 33 de Barcelona*), in the course of the disability discrimination proceeding between Mohamed Daouidi and Bootes Plus SL, the Wages Guarantee Fund (*Fondo de Garantía Salarial*) and the Spanish Fiscal Public Prosecutor (*Ministerio Fiscal*). Mr Daouidi had been employed by Bootes Plus as a kitchen assistant in a hotel restaurant in Barcelona for over six months, when, in October 2014, he slipped on the kitchen floor. In doing so, he dislocated his left elbow. Following the accident, Mr Daouidi promptly undertook the national procedure to have his temporary incapacity recognised, and informed his employer that he could not return to work immediately. In November 2014, Mr Daouidi received a notice of dismissal from Bootes Plus. Unlike in *Chacón Navas*, where the employer did not state any reason and acknowledged that the dismissal was unlawful, and differently from *Kaltoft*, where the obesity of the worker was somewhat mentioned by the employer before the actual dismissal, in this instance Bootes Plus alleged the worker's poor performance as the basis on which they discharged him from his duties. Even though, just a few months prior to the accident, Bootes had converted his initial three-month contract of part-time occasional employment into a full-time contract and extended it by nine months, the notice of disciplinary dismissal was ostensibly based on the fact that Mr. Daouidi 'did not meet the expectations of the undertaking or perform at the level the undertaking considers appropriate or suitable for the discharge of your duties in the workplace'.[23] In December 2014, Mr Daouidi challenged his dismissal in front of the Social Court and sought a declaration that it was void by virtue of a breach of his fundament right to physical integrity, as well as being discriminatory on the grounds of disability. Mr Daouidi's claim was made on the basis of Spanish Law 36/2011, which distinguishes between unfair dismissal, which gives rise to a right to be reinstated in the job or to be compensated, and discriminatory dismissal or dismissal in breach of the fundamental rights and public freedoms of workers which are null and void. In the latter circumstance, thus when the dismissal is null, Article 113 of Law 36/2011 establishes that 'an order shall be made for the immediate reinstatement of the worker and for payment of the wages outstanding'. The Social Court of Barcelona considered Mr Daouidi's claim well-founded and decided that his dismissal was in fact motivated by his forced absence from work for an indeterminate period of time. However, the Social Court decided to stay the proceeding and refer the matter for preliminary ruling. Being unable to determine whether the worker's dismissal was void on the basis of inconsistent national case law, the *Juzgado* asked five (quite convoluted) questions, which embraced both the Charter of Fundamental Rights of the European Union and (to a limited extent) Directive 2000/78. First, it asked whether, in essence, the decision of an employer to dismiss a worker due to his temporary incapacity (but of an indeterminate duration) constitutes a discrimination for the purpose of Article 21(1) of the Charter. Secondly, it asked whether Article 30 of the Charter, regarding the protection against unjustified dismissal, requires national law on manifestly arbitrary dismissal to be applied when the discharge infringes a fundamental right. In addition, it asked whether a dismissal for temporary incapacity, such as that at stake, would come under the scope of the Charter, and in particular of Articles 3, 15, 31, 34(1) and 35(1), and in such a case, whether those articles could be directly applied by the national court. Lastly, even though

23. *Daouidi v Bootes Plus* SL, supra note 1, para. 27.

Spanish legislation includes a definition of disability, which essentially mirrors the CRPD,[24] the Social Court asked whether a dismissal for temporary incapacity could amount to a direct discrimination on the grounds of disability under Directive 2000/78.

'Lights and Shadows' in the Advocate General Bot's Opinion

In his Opinion delivered on 26 May 2016, Advocate General (AG) Bot focused on the fifth question regarding whether or not the dismissal could have been considered discriminatory on the ground of disability for the purpose of Directive 2000/78. The AG recalled that the application of the Charter is limited to situations that fall within the scope of EU law and only in such cases can provisions of the Charter be relied upon. In establishing 'whether the subject matter of the main proceedings relates to the interpretation or application of a rule of EU law other than those set out in the Charter', the AG therefore focused on the Directive. The apparent emphasis on the Directive notwithstanding, the bulk of his analysis was devoted to the concept of disability itself.[25]

The AG began his Opinion by noting the ratification of the CRPD by the EU, although he did not explicitly invoke the principle of consistent interpretation referred to by the CJEU in all previous decisions since *Ringe and Werge*. He stated that 'the concept of "disability" within the meaning of Directive 2000/78 must be understood as referring 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'.[26] The AG further affirmed that the CJEU has adopted an 'evolving and relatively broad definition of the concept of disability'. This appears to be an implicit reference to Paragraph e) of the CRPD Preamble, which was unequivocally cited in *Ring and Werge*.[27]

The AG preferred not to engage with the two divergent models of disability, and, quite strikingly, never explicitly mentioned the social model, nor societal and environmental barriers. His wording appears more cautious than the one adopted in the *Glatzel* case, where the same AG Bot had been far clearer in referring to the role of external barriers in creating a disability.[28] In the latter Opinion, he had stated that 'disability must not be understood according to the degree of the deficiency at issue, but must be determined having regard to the end result occasioned by that deficiency in a *given social context or environment* (emphasis added)'. He had also mentioned that 'attention must be focused on that consequence and not on the deficiency in itself', and 'all depends upon the environment'.[29] AG Wahl, in his Opinion on the case *Z. v A Government Department and the Board of Management of a Community School*, had been even more explicit in the language used (despite the questionable outcome). He forcefully underlined that the CRPD reflects the social model of disability, and 'offers more robust and expansive protection against

24. Article 2 of Legislative Decree 1/2013 on the rights of persons with disabilities and their social inclusion of 29 November 2013 (BOE No 289 of 3 December 2013, p. 95635) defines disability as the 'situation of persons with long-term impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others'.
25. Opinion of the AG Bot in *Daouidi v Bootes Plus SL* (C 395/15), ECLI: EU: C:2016:371, para 3.
26. Id. para. 41.
27. Id. para. 40.
28. Opinion of Advocate General Bot in *Wolfgang Glatzel* v *Freistaat Bayern* (C-356/12) EU: C:2014:350, para. 35.
29. Id. para. 36.

discrimination than a narrow, individual-centred definition'.[30] The succinct and more nuanced wording of AG Bot's Opinion in the case under discussion can therefore be quite easily contrasted with previous cases. Arguably, he did not want to encounter the same pointed criticism targeted towards the CJEU with regard to how it had thus far applied (or not applied) the social model, nor did he intend to wholly depart from what has been defined a 'cosmetic approach to the social model of disability'.[31]

Using the teleological method of interpretation previously adopted in *Ring and Werge* and in *Kaltof*, the AG recalled that disability encompasses not only the impossibility of exercising a professional activity, but also 'a hindrance to the exercise of such activity', and covers both congenital disabilities and those originated by an accident or caused by illness.[32] The AG was adamant in stating that the existence of a disability can be established without reference to its cause. However, he was quite careful in not calling into question the well-established finding in *Chacón Navas* that sickness cannot as such be regarded as an additional ground for discrimination in relation to Directive 2000/78, and the consistent case law that prohibits the extension of the scope of Directive 2000/78 by analogy beyond the discrimination based on the grounds listed exhaustively in its Article 1.

The AG then concluded that Mr Daouidi's limitation, in interaction with various external barriers, hinders his full and effective participation in professional life. However, he also affirmed the need for the national court to establish the long-term nature of that limitation, which seems in fact to coincide with the long-term impairment requirement. In this respect, the AG took a rather 'medical turn', and held that the referring court has to establish the long-term limitation by relying 'on documents and medical certificates assessing the likely duration of the disability in question'.[33] Should it appear from this medical evidence that Mr Daouidi's limitation 'as a result of possible *sequelae*, it is likely to last longer than the average time needed for an injury such as the one that he suffered to heal, and is likely to last for a significant period, then that limitation may come within the definition of ''disability'' within the meaning of Directive 2000/78'.[34]

Finally, the AG concluded that 'disability is an objective concept and it is therefore irrelevant to take account of the subjective views of the employer as to whether the inability to work of the applicant in the main proceedings was sufficiently long-term or not'.[35] The AG also rejected the French government's plea that the period of time between the occurrence of an accident at work and dismissal must be taken into consideration when assessing the long-term nature of the limitation. The AG stated that '[s]uch a limitation could unquestionably be regarded as long-term, even if a worker was dismissed immediately following the accident at work. To adopt the contrary position would manifestly run counter to the protection of disabled workers, in that it would encourage employers to dismiss, as quickly as possible, sick or injured workers whose incapacity for work might become long-term'. It seems clear that the AG is quite conscious of the need to avoid the potential for employers, concerned about the development of a sickness into a disability

30. Opinion of Advocate General Wahl in *Z. v A Government Department and the Board of Management of a Community Schoo*l, (C 363/12) para. 85.
31. The expression has been used by C. O'Brien, 'Union Citizenship and Disability: Restricted Access to Equality Rights and the Attitudinal Model of Disability', supra note 11, at 519.
32. Opinion of the AG Bot in *Daouidi v Bootes Plus SL* (C 395/15), paras 40-42.
33. Id. para. 47.
34. Id. para. 47.
35. Id para. 48.

and the need to avoid the accusation of discriminatory dismissal, to dismiss a worker as soon as he is temporarily unable to work.

The Court of Justice's Decision

The judgment of the Court, released on 1 December 2016, followed the exact same pattern and arrived at the same conclusions as those of the AG Bot. The Court went straight to the fifth question with the intention of allowing the referring court to determine whether the condition of Mr Daouidi, i.e. a temporary incapacity of uncertain duration caused by an accident, falls within the notion of disability within the meaning of Directive 2000/78.

Similar to the AG's Opinion, and in line with each of the preceding cases, the judgment of the Court began by recalling the conclusion of the CRPD by the EU, and the fact that Directive 2000/78 'is one of the EU acts relating to matters governed by that Convention'.[36] The Court alluded to the obligation undertaken by the EU to implement and act in compliance with the Convention in areas falling within the scope of its competences.[37] The Court went on to state the need to interpret the Directive in a manner consistent with the Convention, and referred to the *Ring and Werge* definition of disability, modelled on Art. 1 CRPD.[38]

The Court focused on whether a condition such as that of Mr Daouidi, which is in principle reversible, could fall within the scope of disability for the purpose of the Directive. Since, according to the Court, 'a limitation resulting 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, and if that limitation is long-term, it may come within the concept of ''disability''', the assessment revolved essentially on what constitutes a 'long-term' limitation.

The reasoning of the Court can be summarised within three main points. First, the Court noted that the CRPD does not specify what 'long-term' means, nor can such a definition be found in EU law. The Court went on to affirm that no reference to Member States' law can be made as 'the concept of a ''long-term'' limitation of a person's capacity, within the meaning of the concept of ''disability'' referred to by Directive 2000/78, must . . . be given an autonomous and uniform interpretation'. The Court is clearly aware that the national legislation of the Members States differ greatly in this respect, and that any deviation from the concept of disability adopted at the Union level would result in a disparate application of the Directive. The fact that Mr Daouidi qualifies under Spanish law as 'temporarily unable to work' is, therefore, immaterial for the purpose of establishing whether his limitation is long-term within the meaning of the Directive.[39] Secondly, in a similar vein to the Advocate General's opinion, the Court stressed that an assessment of whether a limitation in one's capacity is long-term is objective and 'factual in nature'. It is based on different sources of evidence 'established on the basis of current medical and scientific knowledge and data'.[40] Thirdly, in the attempt to provide the national court, which ultimately will be responsible for conducting this assessment, some guidance, the CJEU affirmed that a limitation

36. *Daouidi v Bootes Plus SL*, supra note 1, para. 40.
37. On the CRPD in the EU legal order see D. Ferri, 'The conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: a constitutional perspective', (2010) *European Yearbook Of Disability Law* 47-71.
38. *Daouidi v Bootes Plus SL*, supra note 1, paras 40-45.
39. Id. paras 48-53.
40. Id. paras 57.

can be considered long-term if 'the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress' or is likely to be significantly lengthy.

The Court then turned to the other four questions, but concluded that it had no jurisdiction in relation to these remaining issues. Since the application of Directive 2000/78 to the case is linked to the assessment by the referring court on the long-term nature of the limitation, the Luxembourg judges held that it was not possible for them to argue that the situation comes within the scope of EU law. Consequently, the Charter of Fundamental Rights remains outside of the scope of the decision.

Critical Analysis of the Decision

Before delving into the likely consequences that the decision of the Court might have, this section addresses two main points. First, it examines the meaning of 'long-term limitation' given by the CJEU and its potential compliance with the letter and the spirit of the CRPD. Second, it discusses the somewhat contradictory nature of decision, which still appears to be embedded within the medical model, and compares it with the approach adopted by the CRPD Committee.

Long-term Impairments or Long-Term Limitations or Both?

In approaching the fifth and final question of the referring court, the CJEU has focused on whether the condition of Mr Daouidi, who was dismissed while temporarily unable to work, for an indeterminate period of time, is covered by the notion of disability within the meaning of that Directive. Since, according to the definition given by the CJEU itself, disability entails a 'limitation resulting in particular from *long-term* physical, mental or psychological impairments which, in interaction with various barriers, may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers' and that limitation must be long-term, the CJEU distilled the questions provided by the referring court to what 'long-term' means.

While, since *Ring and Werge,* a long-term limitation deriving from a similarly long-term impairment (in interaction with other barriers) has been considered the *conditio sine qua non* that a disability may exist, in *Daouidi* the CJEU seems to look at the long-term nature of the limitation, rather than on the duration of the impairment itself.

It is indeed unclear from the wording of the Court whether the limitation even coincides with the impairment itself. The CJEU affirms that the 'UN Convention does not define ''long-term'' as regards a physical, mental, intellectual or sensory impairment. Directive 2000/78 does not define ''disability'', nor does it clarify the concept of a ''long-term'' limitation of a person's capacity for the purposes of that concept'.[41] It could be said from this paragraph that the Court uses limitation and impairment as interchangeable and synonymous. However, in the remainder of its own analysis, the Court largely refers to the assessment of the 'limitation to [the workers'] capacity' and to the fact that 'the ''long-term'' nature of the limitation must be assessed *in relation to the condition of incapacity*, as such, of the person concerned at the time of the alleged discriminatory act adopted against him' (emphasis added).[42] In the text of the decision in Spanish, but also in the French text, the word 'limitation' represents the pivot within the discussion of the Court.[43] Therefore, the

41. Id. para. 49.
42. Id. para. 53.
43. The very same wording is also in the Italian text.

limitation is arguably the consequence of the impairment, and could be considered a 'functional deficit' using the International Classification of Functioning, Disability and Health (ICF).

It remains unclear whether the CJEU is focused on how long the impairment has existed or on how long it is likely to have a limiting effect, or even both. However, the wording of the decision seems to lead to the conclusion that the focus must be on how long the impairment has given rise to a limitation. The CJEU affirms, then, that 'the evidence which makes it possible to find that such a limitation is ''long-term'' includes the fact that . . . the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress or the fact that that incapacity is likely to be significantly prolonged before that person has recovered'.[44] In the case of Mr Daouidi, six months after the accident his elbow was still in plaster, and the impairment persisted. However, should the plaster be removed and were Mr Daouidi to recover from the injury, an assessment of whether limiting effects were still in place would need to be conducted.

On the one hand, the CJEU affirms that a situation of incapacity of uncertain duration does not automatically lead to a person's incapacity being classified as 'long-term'. On the other hand, the focus on the limitation may imply that short-term injuries or impairments of uncertain duration can potentially have long-term effects. This may be most evident in cases relating to mental health issues. A person may experience an episode of depression that lasts for three or four months from its commencement and diagnosis to full recovery. In this case, the impairment is temporary or 'short-term' in itself. However, its consequences may be long term. For example, in order to maintain appropriate level of mental health, the person might have to ensure that their workload remains manageable, that they avoid stressful situations, or that they reduce their working time (e.g. avoid working in the evenings and weekends). This 'limitation' would endure for a longer period of time, if not indefinitely. If the worker can demonstrate, based on medical evidence, that their condition entails a long-term limitation, their dismissal could be deemed to be discriminatory on the grounds of disability, and they would be entitled to have reasonable accommodations made on their behalf. In *Ring and Werge*, as noted by Bell, the Court acknowledged the complex relationship between sickness and disability.[45] This complex relationship is also somewhat evident in *Daouidi*. The CJEU appears aware that a 'distinction needs to be drawn between situations where sickness absence is connected to disability and those where it is not'.[46] Nonetheless, by focusing on the limitation of capacity (instead of merely focusing on the impairment that causes it), it appears to have reached a higher benchmark within its disability jurisprudence and (at least potentially) expanded the scope of application of the grounds of disability in EU anti-discrimination law.

Interestingly, it seems that this approach could capture the spirit of Article 1 of the Convention, which does not explicitly refer to the concept of limitation. Rather, it emphasises impairments. Article 1 CRPD states that '[p]ersons with disabilities *include* (emphasis added) those who have *long-term physical, mental, intellectual or sensory impairments* which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'. The letter of this provision, the fact that it is stipulated outside the framework of the definitions (Art. 2 of the CRPD) should make it clear that this is not a strict characterisation, but an open-

44. Id. para. 56.
45. M. Bell, 'Sickness Absence and the Court of Justice: Examining the Role of Fundamental Rights in EU Employment Law' (2015) 21 *European Law Journal*, 641–656, at 654.
46. Id., at 654.

ended conceptualisation of disability. It provides minimum grounds for protection to be fulfilled, not an overall target to be met. Thus, short-term conditions might potentially be included in the definition of disability in so far as, in conjunction with other barriers, they hamper the full participation of the person in social and professional life. The CJEU decision seems to open the door to a somewhat flexible approach regarding the duration of the impairment itself by focusing on its effects, i.e. on the limitation of capacity deriving from the impairment.

The Role of Social Barriers in the CJEU's Decision: The 'Elephant in the Room'

In *Daouidi* the CJEU focused only on the meaning of '"long-term' limitation of a person's capacity for the purposes of that concept [of disability]'. In its attempt to provide the national court with guidance, the CJEU argues that in order to ascertain the long-term nature of the limitation it is necessary to rely on 'current medical and scientific knowledge and data'.[47] In its effort to clarify the meaning of 'long-term limitation', the CJEU ends up anchoring its reasoning to a very medicalised view of disability, and never mentions the role of social and attitudinal barriers. The CJEU, probably unwittingly, ends up once again in somewhat conflating impairment (or the limitation deriving from it) and disability: as far as the limitation is long-term, it is disabling.

This approach places the CJEU reasoning in stark contrast with the perspective adopted by the UN Committee on the Rights of Persons with Disabilities (CRPD Committee). While acknowledging that the Committee has a very different role and mandate than that of the CJEU, and despite the difficulties encountered by the same Committee in translating Article 1 of the CRPD and the social model into a viable definition of disability, the CJEU approach to temporary incapacity to work in *Daouidi* differs dramatically in that it identifies disability with the long-term limitation. The Court, in line with AG Bot, abandons any attempt to embrace a social construction of disability and, aside from mentioning the barriers, never refers to the role they play in disabling an individual. *S.C. v Brazil*[48] is, thus far, the primary (and sole) case[49] in which the CRPD Committee, while ultimately declaring the complaint inadmissible on the grounds that the author had not exhausted domestic remedies, had the opportunity to elaborate on the concept of disability. Interestingly, in this case the nature of a long-term impairment was at stake. While the facts that originated the case are quite different from those of the *Daouidi* decision, the main legal issue is quite similar. It concerns the possibility for a temporary incapacity to work to be considered a disability. The complaint was raised by a Brazilian worker of *Banco do Brasil*, who was first demoted from her job of bank teller, after being on medical leave for three months following various motorcycle accidents, and then refused a transfer to a different branch to work closer to home, despite being

47. *Daouidi v Bootes Plus SL*, supra note 1, para. 57.
48. *S.C. v. Brazil,* CRPD/C/12/D/10/2013, Decision adopted by the Committee at its twelfth session (15 September–3 October 2014).
49. Interestingly, so far, the CRPD Committee has avoided the discussion of what constitutes a disability. In a decision adopted in August 2017 in relation to a person with albinism, the Committee once again limits itself to recall Art. 1 CRPD, and, after having recalled what albinism is, affirms that '[a] human rights-based model of disability requires the diversity of persons with disabilities to be taken into account (preamble, para.(i)) together with the interaction between individuals with impairments and attitudinal and environmental barriers (preamble, para. (e)).27 In view thereof, and while noting that the State party does not question the competence *ratione materiae* of the Committee to address the author's complaint, the Committee considers necessary to clarify that albinism falls within the definition of disability as enshrined by article 1 of the Convention. See *Mr. X v Tanzania* CRPD/C/18/D/22/2014, Views adopted by the Committee at its eighteenth session (14 August - 1 September 2017).

declared chronically ill by her doctor. After an unsuccessful application to the domestic courts, Ms S.C. raised a complaint before the Committee asking for Brazil to be declared in breach of the CRPD for having endorsed *Banco do Brasil*'s discriminatory policy. The State of Brazil, in its defensive claims, affirmed that S.C.'s communication was inadmissible *ratione materiae* because the author was not a person with a disability for the purpose of the Convention. In particular, the State party claimed that '[w]hereas Article 1 of the Convention defines disability *as consisting of a long-term impairment*, the author was diagnosed by professionals of the National Institute of Social Security (INSS) with a *temporary incapacity to work* (emphasis added)'.[50] The wording used by the State party is clearly informed by the medical model: it conflates disability with the long-term impairment, as the individual impairment is the disability itself, and focuses on the circumstance that S.C. had not provided qualifying evidence of a long-term impairment.[51] The Committee rejected the arguments of the State Party and considered that it was not precluded from examining the communication, implicitly affirming that Ms S.C. could in fact be considered a person with a disability for the purposes of the CRPD. When considering the issue, the Committee tried to move away from the medical model. It stated that the Convention makes it clear that 'persons with disabilities *include, but are not limited to,* 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'.[52] Then, the Committee ventured into uncharted territory by going on to consider that 'the difference between illness and disability is a difference of degree and not a difference of kind', and that a 'health impairment which initially is conceived of as illness can develop into an impairment in the context of disability as a consequence of its *duration* or its chronicity'.[53] This statement clearly endeavored to distinguish the concepts of illness and disability, and, in this context, duration (arguably long-term) is of crucial importance. However, the Committee clearly avoided mentioning medical evidence. It did not engage in any discussion on the duration of the impairment. Rather, the Committee focused on the social context, and highlighted the need to consider the author's physical impairment in interaction with external barriers. It instead underlined the 'human rights-based model of disability', and, in particular, the need for the diversity of persons with disabilities to be taken into account, in combination with attitudinal and environmental barriers. This statement makes it immediately evident that the CJEU's approach is different from that which was adopted (at least in this decision) by the Committee. Both the AG's Opinion and the judgment of the CJEU focus exclusively on the limitation, and, while formally adhering to the CRPD, they return to a medicalised conception of disability in which the role of external and environmental barriers is substantially irrelevant. In this respect, the *Daouidi* case heightens the dissonance which was already in existence, and that had previously been noted by scholars in relation to prior case law,[54] between the continuous reference to the CRPD and the substance of the CJEU reasoning.

50. *S.C. v. Brazil*, para 4.1 (emphasis added).
51. However, the Author herself focused on her impairment and in counteracting the arguments raised by the State claims to be a person with a disability because she has '*permanent impairment* to her left knee and *permanent* incapacity to perform specific tasks'. *S.C. v. Brazil*, para 5.1 (emphasis added).
52. *S.C. v. Brazil*, para 6.3 (emphasis added).
53. *S.C. v. Brazil*, para 6.3 (emphasis added).
54. Among others, L. Waddington, 'Saying all the right things and still getting it wrong: the Court of Justice's definition of disability and non-discrimination law' (2015) *MJ* 576-591.

Looking Ahead: The Challenges Posed by the Daouidi Decision

As demonstrated in the previous section, the CJEU's renewed attempt to rely on the social model coupled with a lack of clear indication on the role barriers play in disabling the individual, might be quite problematic in itself. However, this may also be very difficult to incorporate within the daily practice of domestic courts. It has already been argued that 'the real difficulty with the social model is that it lacks the legal certainty of the medical model, particularly when it comes to evidentiary matters', because it 'blurs the boundaries between the existence or possession of the protected characteristic and the discriminatory consequences'.[55] Hervey and Rostant, reflecting on discrimination on the grounds of disability in cases of people with obesity (or non-ideal weights), show that 'the social model, relying upon attitudinal barriers, posits the existence of a protected characteristic established only if and when it can be shown that attitudes, in the form, say, of stereotypical thinking, have erected a barrier to full participation, for example a decision not to recruit'. The physical impairment is not in itself a disability. The latter stems from the interaction between the impairment and the barriers, including attitudinal barriers, which might be difficult to prove in practice. The CJEU is certainly aware of this difficulty, and argues that 'in the context of the verification of that ''long-term'' nature, the referring court must base its decision on all the objective evidence in its possession, in particular on documents and certificates relating to that person's condition, established on the basis of current medical and scientific knowledge and data'.[56] Seemingly, the CJEU relies on medical data in the attempt to ensure a firm point of reference, and to provide some legal certainty to domestic courts that need to decide whether or not the condition at stake might entail a disability, and to fade away from the difficulty well explained by Hervey and Rostant in relation to 'non-ideal weight' discrimination.[57] In the case of Mr Daouidi, however, the AG clearly states that 'Disability is an objective concept and it is therefore irrelevant to take account of the subjective views of the employer as to whether the inability to work of the applicant in the main proceedings was sufficiently long-term or not'. Would, however, the views of the employer be otherwise relevant if attitudinal barriers should be established, for example in stereotyping a future lack of productivity? This is an uneasy question, which the CJEU has yet to answer, and it is likely to emerge in subsequent cases.

However, the CJEU's decision in *Daouidi* presents specific challenges for a national court that cannot be underestimated.

First, the distinction between the impairment and the limitation remains blurred. Although this analysis seems to show that the Court considers them being separate concepts, the 'language of limitation' is not unambiguous and one might still argue, contrary to what is posited here, that they are synonymous with one another. Consequently, it might prove difficult for national courts (and especially for those members of the judiciary who are not familiar with the conceptualisation of disability), to navigate the liminal space that appears to exist between 'sickness' on the one hand, and 'disability' on the other. This opens up another question, already raised by Hendrickx,[58] as to

55. T. Hervey, and P. Rostant, '"All About That Bass"? Is non-ideal-weight discrimination unlawful in the UK?' (2016) *Modern Law Review*, 79: 248–282, at 275.
56. *Daouidi v Bootes Plus SL* (C-395/15), [59].
57. Hervey, and Rostant, supra note 55.
58. F. Hendrickx, 'Disability and reintegration in work: interplay between EU non-discrimination law and labour law', in F. Hendrickx (ed.) *Reasonable Accommodation in the Modern Workplace. Potential and Limits of the Integrative Logics of Labour Law*; Bulletin of Comparative Labour Relations, 2016; Vol. 93; pp. 61 – 72, at 68.

what extent the evolving concept of disability can be widened in order to expand the scope of protection offered by disability discrimination law, and whether the dichotomy illness/disability is really valid.

Secondly, if the national court distinguishes between limitation and impairment, it should then establish what a 'long-term' limitation is. The CJEU anchors this evaluation upon medical data. However, aside from departing from a social conception of disability, this posits that medical data will provide 'objective evidence' and will be consistent.[59] In reality, medical prognoses may differ greatly, in particular (but not exclusively) in relation to mental health issues.[60] Scientific knowledge may not ultimately offer the objective point of reference envisaged by the Luxembourg judges. This would leave the domestic court in the position of having to decide which medical report is most reliable based on those provided to it. This conclusion, coupled with the consideration that the burden of proof will end up being inevitably on the person with disability, who will have to produce extensive medical evidence in order to assuage this same burden,[61] might undermine the realisation of the objective pursued by the Directive. Even if one is to assume that a consistent medical prognosis can be obtained, the domestic court will be left with the task of deciding whether, for example, a seven-month limitation is sufficiently long to fall within the specific meaning of 'long-term'. It is arguable that the national court would then quite likely refer to national law and practice in its evaluation of the long-term limitation, and draw from the parameters included in national law, if there are any. On the one hand, the CJEU has consistently held that the fact that a person is qualified as a person with a disability under national law, 'does not necessarily indicate that he has a disability within the meaning of Directive 2000/78'.[62] On the other hand, the decision as to whether the person has a long-term limitation for the purpose of the Directive might lead the national court to turn again to how disability is defined within their national legal system. This is paradoxical in itself, as it contradicts the rhetoric of uniformity utilised by the CJEU. The CJEU, in the *Daouidi* decision, while it does not give a definition of 'long-term', and circuitously refers to vague concepts such as hindrance over a 'long period of time' or 'prolonged' incapacity, seems to make different national approaches inevitable. As noted by Waddington and Lawson in 2009,[63] and, most recently by Ferri and Lawson,[64] national definitions of disability differ greatly across the EU. Most of them remain within the medically oriented model, and focus on the impairment itself and its duration, which can vary greatly. For example, the UK Equality Act refers to the fact that the condition must last for 12 months (or might be likely to last for a total of 12 months) in order to be considered long-term. In this vein, it might seem unlikely that a UK court will consider as long-term an impairment given a seven-month prognosis. Contrastingly, in Ireland, the legislation does not include any explicit time reference,

59. Waddington, 'Non-discriminatie, handicap, definitie van de grond handicap, begrip langdurige beperkingen (Mohamed Daouidi v. Bootes Plus SL e.a.)' supra note 11, at 29.
60. Id.
61. In this sense also Waddington, 'Non-discriminatie, handicap, definitie van de grond handicap, begrip langdurige beperkingen (Mohamed Daouidi v. Bootes Plus SL e.a.)' (2017) *European Human Rights Cases*, 29.
62. This was reiterated in *Ruiz Conejero*, supra note 22, para. 31.
63. L. Waddington and A. 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?%20docId=6154&langId=en.
64. D. Ferri and A. Lawson, *Reasonable accommodation for disabled people in employment contexts. Publications Office of the European Union*, Luxembourg, 2016.

but in some documents an example of a long-term condition is that of an impairment which persists or is likely to persist for at least six months,[65] and a similar approach is incorporated within Austrian law.[66] The existence of these often wholly divergent definitions is likely to affect the way in which domestic courts apply the Directive. Ultimately, while the Court is clearly aware that the definitions of disability contained within the national legislation of the Members States can differ quite markedly, and any deviation from the search for an EU dimension of the concept of disability would result in a disparate application of the Directive, the approach adopted in *Daouidi* is likely to fall short in terms of allowing for uniform interpretation of the concept of disability throughout the EU. Such an approach might also lead us to question whether we can realistically expect an entirely harmonized definition across the EU, or whether the role of the CJEU in this respect is to provide general legal criteria for identifying a disability, whilst leaving to national courts some discretion in relation to how they apply these criteria to specific factual situations before them.

Concluding Remarks

When, in 2013, the Court of Justice, relying on the obligation to interpret EU secondary law in compliance with the CRPD, attempted to embrace the social model of disability, it likely hoped that this would resolve the matter.[67] However, *Z. v A Government Department and the Board of management of a community school*, *Kaltoft* and *Glatzel* have all demonstrated that the concept of disability for the purpose of EU anti-discrimination law is far from clear. Despite being relatively succinct, *Daouidi v Bootes Plus SL* has attracted immediate attention from disability scholars,[68] as it is the latest attempt of the Court to shed light on what disability means in the context of the implementation of Directive 2000/78. This decision is significant in that the CJEU for the first time discusses the meaning of 'long-term limitation'. The Court treads carefully but attempts to further elucidate and add new elements to the definition of disability in EU anti-discrimination law established in *Ring and Werge*. It is quite evident that the lack of a clear definition within EU legislation has left the CJEU with the uneasy task of constructing a Union-wide definition of disability for the purposes of EU law. One must be cognisant of the significant attempts made thus far by CJEU to align EU law with the CRPD in this respect. However, not only has the Court yet to establish any significant degree of clarity, it has also fallen short of the objective of incorporating the social model embedded in the CRPD into EU law, in particular when applying

65. See e.g. the *HSE – Employers Agency Strategy and Action Plan for the Employment of People with Disabilities* in the Health Service at <http://www.hse.ie/eng/staff/Resources/hrstrategiesreports/Disability%20Strategy%20and%20Action%20Plan.doc> (last visited 30 May 2017).

66. Federal Disability Equality Act (BGBl. I No. 82/2005).

67. In *Commission v Italy* – a case which stemmed from an infringement proceeding initiated against Italy for failure to properly implement Directive 2000/78 in relation to the duty of the employer to provide reasonable accommodation - the Court simply recalled *Ring and Werge* and gave the impression that it had reached a point of clarity on the definition of disability. See Pastore, 'Disabilità e lavoro: prospettive recenti della Corte di giustizia dell'Unione europea' (2016) *RDSS*, 199-224.

68. L. Waddington, 'Non-discriminatie, handicap, definitie van de grond handicap, begrip langdurige beperkingen (Mohamed Daouidi v. Bootes Plus SL e.a.)' (2017) *European Human Rights Cases*, 29; Paolo Addis, 'La Corte di Giustizia dell'Unione europea alle prese con una domanda ricorrente: che cos'è la disabilità? Nota alla sentenza Daouidi, 1° dicembre 2016, causa C-395/2015', (2017) Diritto Pubblico Comparato ed Europeo.

the Directive. The distinction between sickness, on the one hand, and disability, on the other remains blurred, and arguably this distinction seems hard to maintain.[69]

The decision in *Daouidi* has a twofold contradictory outcome. On the one hand, looking at the text of the decision, the Court seems to draw a distinction between limitation and impairment. Although one might argue that such a distinction is rather haphazard, it seems that the Court has established a higher benchmark within its disability jurisprudence and expanded the scope of application of the grounds of disability by admitting that short-term injuries or impairments of uncertain duration can potentially have long-term effects. However, on the other hand, upon engaging in a deeper contextual reading of the judgment, the CJEU remains quite reticent in its approach to the role of social, environmental and attitudinal barriers in disabling an individual, as well as being somewhat 'trapped' within the medical model of disability. In a similar manner to *Z. v A Government Department and the Board of management of a community school*, *Kaltoft* and *Glatzel*, the Luxembourg judges, within their judgment, distanced themselves from the social model-oriented conceptualisation, and failed to consider the role of social barriers, such as the perception of a future lack of productivity. The ruling commented on here, thus, continues a now well-established approach of 'name-checking' the CRPD.[70] The excessive emphasis on providing multiple sources of medical evidence in order to define a long-term impairment appears contradictory to the social model of disability, and distant from the approach taken by the Committee on the Rights of Persons with Disabilities (despite it not having, so far, offered any extensive or definitive guidance) in *S.C. v Brazil*.

Finally, the CJEU's approach to the assessment of a 'long-term' impairment is quite likely to increase the degree of divergence within the interpretation of disability as well as 'long term' across the EU, undermining the uniform interpretation of the Directive. *Daouidi* seems to make more evident the distance between the 'rhetoric' of uniformity and the difficulty in overcoming different national definitions of and approaches to disability.

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69. F. Hendrickx, 'Disability and reintegration in work: interplay between EU non-discrimination law and labour law', in F. Hendrickx (ed.) *Reasonable Accommodation in the Modern Workplace. Potential and Limits of the Integrative Logics of Labour Law*; Bulletin of Comparative Labour Relations, 2016; Vol. 93; pp. 61 – 72, at 72.
70. C. O'Brien, 'More back-slapping than soul-searching: The European Commission's reflections on the UN Convention on the Rights of Persons with Disabilities', at http://eulawanalysis.blogspot.ie/2014/06/more-back-slapping-than-soul-searching.html.