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# Leveraging EU non-discrimination law to make the cultural and creative sectors more inclusive of professionals with disabilities: socio-legal perspectives

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## ABSTRACT

Working in the cultural and creative sectors is often seen as an atypical exercise, which differs from mainstream practices in the labour market and operates outside the standard regulatory framework. In this context, the situation of cultural and creative professionals with disabilities and the applicable EU legislation can be overlooked, both in research and in practice. Following a socio-legal approach, this article associates desk-based legal research and empirical research, and considers how the participation of cultural and creative professionals with disabilities could be fostered within the current EU regulatory framework. It identifies gaps and potential in EU cultural policy, disability law and labour law, and, supported by the findings from a qualitative study with EU cultural stakeholders, it discusses the challenges that cultural and creative professionals experience, including those with disabilities. Contributing valuable insights into the participation of persons with disabilities in cultural life, the article argues that the Employment Equality Directive, a pillar of EU labour law and non-discrimination law, can play a key role in making those sectors more inclusive.

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## Introduction

The right to take part in cultural life is protected by an array of international instruments (Stamatopoulou 2007), including the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966) and the United Nations Educational Scientific and Cultural Organization (UNESCO) Universal Declaration on Cultural Diversity (2001). Yet, the participation of persons with disabilities in culture is generally ignored, prompting Chow to refer to 'a neglected category of rights of a neglected category of people' (Chow 2022, 426). The entry into force of the United Nations Convention on the Rights of Persons with Disabilities (CRPD or 'the Convention' 2006) in 2008 has cast a new light on the right to participate in cultural life of persons with disabilities. Article 30 CRPD upholds this right without confining its understanding 'to the freedom to enjoy (read: "consume") culture' (Bantekas et al. 2018, 876). It embraces a twofold dimension and distinguishes between the 'passive' enjoyment of culture and the more active and creative contribution of persons with disabilities in culture (Ferri et al. 2022; Pasikowska-Schnass 2017). Article 30(2) CRPD requires States Parties to adopt the necessary

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measures to give persons with disabilities the opportunity to both develop and utilise their creative, artistic and intellectual potential, for their own benefit and the enrichment of society.

The CRPD – being the first human rights treaty the European Union (EU) concluded (Council of the European Union 2009) – has prompted the Union to better address the needs of persons with disabilities in the cultural field (Leahy and Ferri 2022b). Yet, the professional and active dimension to participation in cultural life, as opposed to a more passive one, receives less focus in research and in practice (Leahy and Ferri 2022a, 2024), meaning persons with disabilities are rarely considered as producers of culture (Ferri et al. 2022). In this respect, EU Member States (also States Parties to the CRPD), generally demonstrate ‘a rather limited understanding of people with disabilities as makers and shapers of culture in their own right’ (Leahy and Ferri 2022b, 23). While the importance of accessing and enjoying culture is undeniable, this article addresses this gap and considers persons with disabilities as more active parties of cultural life. In this context, it focuses on the role of EU non-discrimination law and labour law in making the cultural and creative sectors more inclusive and in fostering participation in cultural life of persons with disabilities as professionals. The article considers how the participation of cultural and creative professionals with disabilities could be fostered within the current EU regulatory framework, particularly leveraging on the potential of the Employment Equality Directive (2000).

The article first discusses the methodology followed. It then highlights the overlapping EU regulatory frameworks of relevance for cultural and creative professionals with disabilities, before discussing the challenges experienced by the creative and cultural workforce. Combining legal analysis and qualitative research, it then addresses the role of the Employment Equality Directive, and the duty of reasonable accommodation, in fostering the participation of those professionals with disabilities. Lastly, it provides some concluding remarks.

## Methodology

This article is informed by the human rights model of disability, which recognises persons with disabilities as autonomous beings and human rights holders (Degener 2016, 2017; Lawson and Beckett 2021). As such, it is premised on the idea that the participation and inclusion of persons with disabilities in society and cultural life, including as professionals, is a matter of fulfilling human rights, not charity (Quinn and Degener 2002). This article uses ‘non-discrimination and equality’ as a starting point for analysing the extent to which EU law can make the cultural and creative sectors more inclusive. As well as being one of the key themes identified in the qualitative analysis, this focus builds on the fact that discrimination in the cultural and creative sectors generally surpasses the EU average (Muszyński and Gromada 2023) and is the first hurdle to dismantle in order to make culture more inclusive.

Although there are inconsistencies in definitions used at the EU and Member State levels, the term ‘professionals’ is understood, in this article, to cover different groups of cultural and creative workers (Muszyński and Gromada 2023). Namely, it refers to artists in the common sense, meaning those ‘performing creative work in the art sector’, the ‘broader category of workers’ in the cultural and creative sectors – such as technicians – as well as other creative professionals working beyond the art sector (1).

The article adopts a socio-legal approach in that it focuses on the analysis of law, while considering the social context it applies to, as opposed to considering law on its own terms and in isolation (Graham, Davies, and Godden 2017). As Bhat posits, socio-legal research also ‘invites interdisciplinary study’, and provides opportunities to draw from both theory and method offered by other disciplines (Bhat 2019, 488). This article is therefore based on a blended methodology associating desk-based research and empirical research.

It builds upon legal and non-legal literature on EU cultural policy, disability law and policy, and labour law (see Andersson Cederholm et al. 2024; Ferri and Broderick 2020b; Psychogiopoulou 2015; Vanhegen and Hendrickx 2020), and entails an analysis of a range of legislation, policies and case law.

To better understand the challenges faced by cultural and creative professionals, as well as the importance of EU non-discrimination for those with disabilities, it combines legal analysis with interviews. The desk-based research is therefore supported by empirical findings providing a range of stakeholders' perspectives on the participation of cultural and creative professionals with disabilities. This qualitative study was carried out as part of a broader multi-method research project, 'Protecting the Right to Culture of Persons with Disabilities and Enhancing Cultural Diversity through European Union Law: Exploring New Paths – DANCING'.

Ten interviews were conducted with representatives of EU cultural stakeholders, including umbrella organisations of the sector(s). Participants were recruited in 2023 using a purposeful sampling strategy (Patton 2002). As such, a sample of experts was selected to reflect the perspectives of cultural and creative actors across the EU, thus representing various sectors, industries, professionals, and other stakeholders. The sampling strategy used the cultural domains identified by the European Statistical System Network on Culture (Bína et al. 2012). The interview guide covered, *inter alia*, questions on the sector(s)' functioning and the inclusion of professionals with disabilities. Participants were given information on the research in advance and gave informed consent. All interviews were carried out by videoconference, recorded, translated when necessary, and transcribed verbatim. Each contribution was anonymised and identified as coming from stakeholders of the European cultural and creative sectors (EU CCS). Additionally, so as to preserve further the anonymity of participants, this article does not identify the gender of participants. Instead, it uses the pronoun 'they'. Ethical approval was obtained from Maynooth University Ethics Committee. The analysis of the interviews followed the steps of Braun and Clarke's reflexive thematic analysis approach, involving familiarisation; coding; generating initial themes; reviewing and developing themes; refining, defining and naming themes (Braun and Clarke 2006, 2021a, 2021b, 2022).

## **The overlapping EU regulatory frameworks for cultural and creative professionals with disabilities**

As mentioned above, cultural and creative professionals with disabilities 'often face a unique set of challenges', stemming from the fact that 'arts and culture are often not considered within the context of disability policy, and culture policy often does not consider disabilities' (Snijders et al. 2020, 30). Given the limited competence of the EU in relation to culture, and social matters broadly conceived of, some of these challenges can only be addressed at the Member State level. Nevertheless, the EU deals with culture and disability to varying degrees, and the EU legal and policy framework impacts cultural and creative professionals with disabilities in different ways. The following subsections discuss EU cultural policy, EU disability law and policy, and EU labour law. In doing so, this article highlights the strengths and inadequacies of the current EU regulatory frameworks, which affect the inclusion of professionals with disabilities in the cultural and creative sectors.

### ***EU cultural policy***

The relationship between EU law and culture has been widely discussed (see Brossat 1999; Craufurd Smith 2004a; Denuit 2016; Psychogiopoulou 2008, 2015; Psychogiopoulou and Schoenmaekers 2024b). Challenged by Member States' divergent views over pursuing cultural actions at the EU level, the emergence of EU cultural policy was for a long time a 'sensitive issue' (Staiger 2009, 2). Aside from a few targeted instruments, the EU's action in the cultural field remained seldom until the Treaty of Maastricht, which came into effect in 1993. The newly introduced Article 128 of the Treaty on European Union – now Article 167 of the Treaty on the Functioning of the European Union (TFEU 2024) – established culture as a new area within EU jurisdiction, providing the legal basis for future initiatives. It symbolised a new beginning for EU cultural action (Forrest 1994).

The EU's perimeter of action is now mainly laid out in the TFEU, and Article 167(1) TFEU provides that the EU must 'contribute to the flowering of the cultures of the Member States, while respecting

their national and regional diversity'. According to Article 167(2) TFEU, the EU's cultural competence is limited to encouraging cooperation between Member States and, if necessary, carrying out actions to support and supplement their actions in some specific areas, including that of 'artistic and literary creation'. Under Articles 2(5) and 6(c) TFEU, the EU is assigned to a supporting role and may not supersede Member States' competence in the area of culture. It can only adopt recommendations and incentive measures, and any harmonisation between the Member States is explicitly excluded as per Article 167(5) TFEU. Article 167(4) TFEU also requires the EU to take cultural aspects into account in its action under other provisions of the EU treaties. This 'cultural mainstreaming clause' (Psychogiopoulou 2006) therefore enables initiatives which exploit EU competences and interactions between culture and other policy domains (Psychogiopoulou 2018).

Moreover, culture often has 'a commercial value, is the subject of trade, or can act as a catalyst for the sale of other goods and services' (Craufurd Smith 2004b, 2). The establishment of the single market and the free movement of goods, services, and people, indicates that the regulation of culture in EU law is broader and 'more long-standing' than the limited wording of the EU treaties would suggest (2). In addition, EU cultural policy has evolved with the adoption of several legal instruments, some aimed at favouring cultural creation. This includes the expanding EU copyright legislation (see Stamatoudi and Torremans 2021), the Audiovisual Media Services Directive (2018) and the two consecutive Creative Europe Regulations (2013, 2021). Notably, the New Creative Europe Regulation explicitly mentions its alignment to the CRPD and recognises persons with disabilities as creators (2021, rec. 61 and art. 3).

Overall, the EU treaties outline a 'circumvented policy space in the field of culture' (Psychogiopoulou and Schoenmaekers 2024a, 2), one that certainly affects the EU's approach to the situation of cultural and creative professionals, including those with disabilities.

### ***EU disability law and policy***

The development of an EU framework for disability has been progressive. When the European Community began to address the topic of disability, persons with disabilities were initially considered from the perspective of participation in the labour market – as workers with disabilities, or at least as 'those who should be or who no longer are: the potential worker, the unemployed' (Blanc 2016). Gradually, however, the focus started to shift away from 'the distorting prism of unemployment or even work' (Blanc 2016), and the rather 'medical [...] understanding of disability' (Lawson 2005, 273). Increasing attention was devoted to promoting integration in society (Council of the European Communities 1988) and tackling 'the societal forces which operate to marginalise disabled people' (Lawson 2009, 85). In doing so, the European Community endeavoured to support the activities of Member States (Ferri and Broderick 2020a), and 'mainstrea[m] disability issues into general areas of Community policy' (Waddington 2006, 31).

In that context, the entry into force of the Treaty of Amsterdam in 1999 marked a point of no return. Being the first Treaty to refer to disability, it represented a significant legal breakthrough in developing EU disability law and policy (Waddington 2006). Under what is now Article 19 TFEU, the European Community became competent to address and take appropriate action to combat disability-based discrimination – amongst other grounds. The adoption of the Treaty of Amsterdam led to 'a qualitative and quantitative shift in the EU action' on disability, and prompted the development of a growing body of EU secondary legislation, including the Employment Equality Directive (Ferri and Broderick 2020a, 2). Following the Treaty of Lisbon of 2009, which solidified EU disability law, Article 19 TFEU remains of particular interest as it continues to be 'the legal basis for the adoption of EU non-discrimination and equality legislation' (3).

Almost concomitantly, the EU also concluded the CRPD (Council of the European Union 2009), committing to a range of obligations aimed at promoting, protecting, and fulfilling the rights of persons with disabilities (Ferri and Urzel 2022). It fostered 'an immediate and visible shift in the EU's approach to disability' (Ferri and Broderick 2020a, 2). The Court of Justice of the European Union

(CJEU or 'the Court') recognised the Convention as 'an integral part of the European Union legal order' (*Joined Cases HK Danmark* 2013, para. 30). As such, the CRPD is hierarchically inferior to the EU treaties and superior to EU secondary legislation (Broderick and Ferri 2019), meaning that the latter must, 'as far as possible, be interpreted in a manner consistent with that convention' (*Joined Cases HK Danmark* 2013, para. 32). It also considers the Convention's provisions devoid of direct effect (*Z. v A Government Department* 2014, para. 90), which 'constrains the capacity of the Convention to generate any "free-standing" rights that go beyond the current state of EU law' (Bell 2020, 12). Additionally, the EU action on disability is circumscribed to the 'complex internal division' of exclusive, shared, and supporting competences (Chamon 2020, 52). Although this makes the implementation of the CRPD delicate (Ferri and Urzel 2022), the EU has now become a key player in realising the rights of persons with disabilities, including Article 30 CRPD.

Shortly after, the European Commission adopted the European Disability Strategy 2010–2020 (2010), a policy instrument designed to implement the Convention at the EU level. Elaborating 'an ambitious 10-year agenda' (Lawson 2017, 70), this strategy pinpointed key areas of action, including legislative developments, and competences to be mobilised (Ferri 2022). It particularly stressed how EU-level actions were designed to complement and support those of the Member States (Lawson 2017). Although 'formally devoid of binding force' (Ferri 2022, 146), this strategy has led to tangible change, as it paved the way for the adoption of some initiatives such as the European Accessibility Act (2019) and the Web Accessibility Directive (2016; O'Mahony and Quinlivan 2020). Together with the Employment Equality Directive, these currently constitute the core of EU disability law (Ferri 2022). This comprehensive work was carried on in a new strategy for the period 2021–2030 (European Commission 2021). Notably, this new strategy recognises that accessible and inclusive art and culture are crucial to enabling 'full participation in society' (20) and enjoins the Commission and Member States to 'promote and raise the visibility of the art works by persons with disabilities' (21). It also addresses the need to promote 'access to quality and sustainable jobs', and stresses how participation in employment leads to better social inclusion (13). Although it highlights the contribution of the Employment Equality Directive to realising equal rights, including through reasonable accommodation, it also emphasises that 'more needs to be done to ensure better labour market outcomes for persons with disabilities' (14).

The recent adoption of the Directive establishing the European Disability Card and European Parking Card (2024) has also concretised one of the Commission's strategic initiatives. This should facilitate equal access to special conditions or preferential treatment – as residents of the countries visited – including in using transport and participating in cultural activities (Recs. 26, 27 and art. 2). Tagged as a major advance for the freedom of movement of persons with disabilities (Felix 2024), some gaps remain as it specifically excludes the consideration of social assistance or social security – a significant omission since many barriers to the freedom of movement of persons with disabilities relate to social protection (Ferri 2023). It is all the more relevant for cultural and creative professionals with disabilities, as they are part of a highly mobile category of professionals already facing challenges in accessing social protection (European Parliament 2023; Muszyński and Gromada 2023).

## **EU labour law**

Whilst culture remains somewhat at the periphery of EU action, EU legislation and soft law continue to solidify the framework for the cultural and creative sectors (Borén and Power 2021). Although much of the responsibilities lie with the Member States, the situation of professionals with disabilities is impacted by a complex framework of EU law and policy, one that may not address them as cultural and creative professionals but is more broadly concerned with employment.

To be understood as a labour law matter, the situation of professionals with disabilities must also be placed in the broader context of social policy, whereby both the Union and the Member States must aim to promote employment, improve living and working conditions, ensure proper social protection and combat exclusion as laid down in Article 151 TFEU. Although the main responsibility rests with Member States, the scope of EU labour law remains vast, encompassing

an array of EU secondary legislation (Vanhegen and Hendrickx 2020). For example, over the years, the EU has legislated to favour both labour and social rights and addressed a range of issues with the Occupational Health and Safety Framework Directive (1989), and the Working Time Directive (2003). Furthermore, to facilitate freedom of movement within the EU – a topic of great interest to cultural and creative professionals – the EU has enacted the Posted Workers Directive (1996) and the Regulation on the Coordination of Social Security Systems (2004). More recently, the EU legislator has sought to modernise the existing legal framework and improve living and working conditions (Directive on Transparent and Predictable Working Conditions 2019), the work–life balance of parents and carers (Work–life Balance Directive 2019) and the adequacy of minimum wages in the EU (Adequate Minimum Wages Directive 2022). As non-discrimination is a pillar of the EU’s action in the field of labour law, a number of directives have been enacted to combat discrimination on grounds of gender (Directive on Equal Treatment between Self-employed Men and Women 2010; Recast Gender Equality Directive 2006), race and ethnicity (Racial Equality Directive 2000), as well as religion or belief, disability, age and sexual orientation (Employment Equality Directive 2000).

The European Parliament (EP) has also recently put forward a resolution, advocating for an EU framework to improve social and professional conditions in the cultural and creative sectors (2023). Interestingly, it calls for easier access to social protection and decent working conditions, the promotion of fair remuneration, practices, and funding. Moreover, this Resolution emphasises the importance of ensuring access to education, training opportunities, and career development, and discusses the need to adopt measures against workplace harassment and discrimination. In this context, the EP recognises that professionals with disabilities may face worse working conditions, career progression, or sustainability in the cultural and creative sectors, as well as barriers to accessing higher education in the arts and culture. While the Resolution broadly acknowledges relevant EU acts on equal treatment and specifically mentions those concerning equality between men and women, it makes no mention of the Employment Equality Directive (2023, Preamble).

Since the EU’s competence in the area of culture is limited and cultural work can somewhat be regarded as atypical (Alacovska 2022; Banks 2007), one can easily assume that the regulatory framework is inadequate and that it fails cultural and creative professionals, including persons with disabilities. In contrast, this article argues that the EU’s shared competence in relation to non-discrimination can be employed to address some of the challenges faced by professionals with disabilities.

## **Participation of professionals with disabilities in the cultural and creative sectors: challenges and socio-legal perspectives**

### ***Social and professional situation: between precarity and atypicality***

Indeed, since the seventies, the proliferation of non-standard forms of work and the trend towards ‘flexploitation’ have not spared the cultural and creative sectors (de Peuter 2011, 419). Owing to various work arrangements or characteristics – from freelance work, self-employment, short-term contracts, temporary and part-time work, and other types of flexible work – pursuing an activity in the cultural and creative sectors continues to be seen as ‘atypical’ (Ellmeier 2003). ‘[R]eflecting the independent and specialised nature of many occupations in the cultural sector’, cultural employment is defined by a relatively high proportion of self-employment (33%), more than twice as high as the 14% average in the whole economy (Eurostat 2019, 70). Although a genuine desire for autonomy may lead to choosing self-employment, more often than not, it may be driven by the lack of permanent and stable opportunities to provide for oneself (van Andel and Loots 2022). The project-based and temporary nature of work was echoed by participants in the study who reflected on the lack of stability and working from one production to the next. One participant indicated in that

respect how they had ‘the impression it is still [...] not into a kind of permanent employment yet, especially for people on stage’ (EU CCS 2).

Furthermore, fewer people are working on a full-time basis, pointing in part to ‘the number of cultural jobs being characterised by self-employment/freelancing and job flexibility, which may result in job insecurity and considerable variations in income over time’ (Eurostat 2019, 71). Overall, working in the cultural and creative sectors requires a certain flexibility from individuals to adapt to the intermittent nature of opportunities and entails a higher degree of risk-taking (Menger 2017). That becomes especially challenging when the regulatory framework fails to consider the atypical way in which professionals work, leading to precarious living and working conditions (European Parliament 2023; Snijders et al. 2020).

Precarity further manifests itself in the lack of income security and earning capacity of cultural and creative professionals (Hesmondhalgh and Baker 2010; van Andel and Loots 2022). On top of the challenging working conditions mentioned by participants, pursuing such a career requires ‘the ability to survive a period on low income’, which presents a distinct challenge to professionals with disabilities (Randle and Hardy 2017, 456). One participant mentioned the need to ‘be aware of the working conditions that theatres, for instance, are under. Where the money is so scarce that people work many, many hours a week. Many more hours than they ever get paid for’ (EU CCS 5). The current context and its impact on the sector(s) were particularly highlighted, and the same participant emphasised that they thought ‘everyone will try to do what they can but there are pressures from all sides. There was the lockdowns where people were just focusing on surviving. Now people are fighting with inflation’ (EU CCS 5).

In parallel, self-employment is recognised in Article 27 CRPD as a way to realise the right to work of persons with disabilities on an equal basis with others. Additionally, the latest EU Strategy for the Rights of Persons with Disabilities explicitly calls on Member States to facilitate self-employment and entrepreneurship for persons with disabilities, as a means to foster ‘access to quality and sustainable jobs’ (European Commission 2021, 15). However, while potentially drawn to the flexibility or autonomy that self-employment affords, persons with disabilities also encounter distinct social and economic barriers that impact on their inclusion in the labour market as self-employed individuals, potentially leading to heightened precarity (Norstedt and Germundsson 2022). Further, generally facing a ‘higher risk of poverty’ (Grammenos 2023, 134), persons with disabilities are, among other groups, more likely to face a ‘financial inability to sustain a cultural economy career’ as workers with disabilities (Eikhof 2020, 239). In that vein, one participant recognised how individuals with disabilities may already experience socio-economic disadvantages compared to their peers without disabilities (EU CCS 4). This person further suggested that this could impact the jobs, as well as training opportunities that could be pursued (EU CCS 4).

Moreover, whether employed or self-employed, social protection can represent additional challenges for the population of cultural and creative professionals who tend to be highly mobile in the EU (Voices of Culture 2021). These challenges relate to their limited contributory capacity and effective access to social protection, weak to non-existent social security coverage, or difficult coordination across the EU (European Parliament 2023). Meanwhile, access to social protection for people with disabilities is also fraught with obstacles (Baptista and Marlier 2022).

While increased attention is paid to the status and working conditions of cultural and creative professionals in the EU (Culture Action Europe and Dâmaso 2021; European Commission 2023; Kammerhofer-Schlegel et al. 2023; Muszyński and Gromada 2023; Snijders et al. 2020; Voices of Culture 2021), one participant noted how little attention is paid to:

how things work within the sector [...] be it in terms of employment, be it in terms of working conditions, be it in terms of [...] what is the power asymmetry in terms of relationship between the people within the sector. (EU CCS 7)

The same participant suggested addressing the participation of professionals with disabilities within the broader discussion on working conditions in the cultural and creative sectors (EU CCS 7).



The difficulties experienced by sectoral professionals in terms of mobility, status, or working conditions are key to understand the participation of those with disabilities. However, they must also be understood in light of the ‘unique set of challenges’ they present for cultural and creative professionals with disabilities (Snijders et al. 2020, 30).

### ***Discrimination and the lack of equal opportunities***

Indeed, while the abovementioned challenges concern most cultural and creative professionals, persons with disabilities are disproportionately affected, and find it ‘more challenging to establish and maintain a career’ (Eikhof 2020, 234). When around 50% of persons with disabilities in the EU are employed, compared to 75% of persons without disabilities (Grammenos 2023, 74), the cultural workplace may be an environment where ‘positions are not usually held by people with disabilities’ (Basas 2009, 664). In that regard, one participant observed ‘that the place of persons with disabilities in our institutions is probably not in proportion to the number of persons with disabilities in society’ (EU CCS 9).

Discrimination in the cultural and creative sectors surpasses the EU average (Muszyński and Gromada 2023). In 2021, the arts, entertainment, and recreation sectors recorded the third highest proportion of people who had felt discriminated against at work (6,1%) (Eurostat 2022). In a context of growing inequality, injustice and lack of equal opportunities, ‘the cultural workplace [appears] foundationally unequal’ (Banks 2017, 109) – and ‘inequality dynamics’ disproportionately affect those members of disadvantaged groups, including persons with disabilities (Tatli and Özbilgin 2012, 259–260).

Notwithstanding initiatives to improve labour market outcomes (European Commission 2021), persons with disabilities continue to face barriers in accessing and sustaining work (Leahy and Ferri 2022a). A participant acknowledged the lack of equal opportunities for persons with disabilities who find themselves in a ‘marginalised position’, questioning the fair and equivalent chances of being part of an industry and of receiving ‘the equal amount of support and also, just, equal amount of acknowledgement’ (EU CCS 4). Another participant also recognised that some persons with disabilities might experience more discrimination depending on their disabilities (EU CCS 9).

Additionally, persons with disabilities are often kept away from opportunities seen as ‘too competitive, elite, selective, or “impractical”’ (Basas 2009, 664). Such a tendency was also highlighted by various participants who emphasised the elitism and intense competition prevalent in certain sectors or practices, and how this could affect the inclusion of individuals with disabilities. As one participant noted, this ‘might also be a barrier, that some people think that elitism and inclusion do not really work well together’ (EU CCS 8). Some participants further highlighted the difficulties of pursuing artistic and cultural activities from a young age, and how access to the mainstream education system was essential:

This is getting better, and that makes the further path easier as well, I think, than if they are in a special school only with people with disabilities where maybe [...] dreams are not allowed to develop the same way. (EU CCS 6)

Noting financial constraints, as well as the lack of adapted programmes, adequate equipment or facilities, some participants discussed the barriers that hinder the access of persons with disabilities to education and training, particularly higher education in the arts and culture. Echoing the point that discrimination ‘pervades all aspects of education and employment’ (Basas 2009, 615), one of the participants described these institutions as one of ‘the main gatekeepers of the industry’ (EU CCS 4). That is all the more striking as research shows that people in cultural employment have a significantly higher ‘level of educational attainment’ than the average (Eurostat 2019, 69). Although some had a more positive outlook on the subject, one participant commented: ‘I think there are, of course, always obstacles, and usually, you need one person with disabilities [...] to fight to get the entrance, to open the door, and then it gets easier for the next ones’ (EU CCS 6).

Particularly marked by inequalities and discrimination ‘rooted in this notion of people with disabilities as recipients of the “therapeutic benefits” of the arts, rather than as valuable producers of them’ (Basas 2009, 615), the cultural workplace therefore persists as an arena where individuals with disabilities face enduring barriers.

### ***Lack of knowledge and awareness***

Another point to highlight is the lack of knowledge and awareness of disability in the cultural and creative sectors (Floch and Baltà Portolés 2021). In several instances, participants discussed this issue – either admitting to their lack of knowledge or the sector(s). The awareness of the rights of persons with disabilities is closely intertwined with the prevention and elimination of discrimination, especially since discrimination can partly be attributed to employers often ‘harbor[ing] pessimistic views about the work-related abilities’ of persons with disabilities (Bonaccio et al. 2020, 135). One participant emphasised the potential in the cultural and creative sectors to transcend stigma, mentioning the ‘richness of culture or the power of culture’ to embrace all individuals, and how, for example, they can come together for a performance, beyond stigmatisation or differentiating individuals (EU CCS 2).

This resonates with Daly and Whelan’s argument about the potential for awareness initiatives in eradicating disability-related stigma, rather than imposing ‘a hard law prohibition’ (2021, 750). Participants highlighted a range of initiatives meant to raise awareness, or to build knowledge on disability, and the inclusion of persons with disabilities at the level of their organisations, members, or the sector(s). They recognised that fostering the participation of persons with disabilities is ‘the right thing to do’ (EU CCS 7) and that it is ‘important for cultural organisations to show society that you are inclusive’ (EU CCS 2).

Several participants linked the efforts needed to achieve disability-inclusion with the ongoing efforts to tackle climate change. They highlighted that, while climate action could serve as a model to spur change in the sector(s), it could be a competing issue to address. Indeed, cultural stakeholders must consider other pressing issues like decolonisation, freedom of expression, or sustainability, and participants emphasised the limited resources and the regional disparities the sector(s) must navigate to address matters of inclusion.

Participants further deplored the lack of comprehensive change, noting the tokenistic nature of some dedicated projects, the few productions offering representation, and the lack of lasting change or genuine inclusion of persons with disabilities, both ‘on stage’ and behind the scenes. One participant also hinted at the relatively small circles which discuss diversity and inclusion, noting that such conversations sometimes feel ‘like preaching to the converted’ (EU CCS 5). Overall, knowledge and awareness of the need to include professionals with disabilities is not uniform throughout the cultural and creative sectors. Consequently, their capacity to pursue lasting change appears undermined, particularly in light of the other pressing issues they face.

In this context, although an in-depth review of the different ways the EU can address the challenges faced by cultural and creative professionals is beyond this article’s scope, it posits that the Employment Equality Directive has a role to play in fostering the participation of cultural and creative professionals with disabilities.

## **Leveraging EU non-discrimination law in the cultural and creative sectors**

### ***A role for the Employment Equality Directive***

Many of the barriers encountered by cultural and creative professionals, with or without disabilities, pertain to discrimination and a lack of equal opportunities. The Employment Equality Directive, and EU labour law more broadly, ‘is only one piece in a much larger jigsaw’, but it is key to ‘tackling the barriers that can arise’ (Bell 2020, 17). More than twenty years following its adoption, the

Employment Equality Directive embodies a ‘major legislative achievement in respect of EU disability policy [which] had a significant impact upon the domestic legislation of the Member States’ (O’Mahony and Quinlivan 2020, 27). It remains to this day the most important piece of secondary legislation on non-discrimination of direct interest for persons with disabilities (Arsenjeva 2024; Broderick and Watson 2020). In fact, participants referred to non-sectoral labour law, including the ‘condition of non-discrimination’ (EU CCS 2). They further stressed the need to make inclusion ‘a normal concept’ in the functioning of their sector (EU CCS 1), or an obligation rather than something ‘on top’ (EU CCS 8). Thus, the Employment Equality Directive appears as an influential resource to leverage for the benefit of cultural and creative professionals with disabilities.

### **Conceptualising disability-based discrimination**

The Employment Equality Directive aims to protect against discrimination on a number of grounds, including disability (art. 1). Article 2 characterises the prohibition of discrimination based on disability as covering direct discrimination, including ‘between persons with [different] disabilities’ (VL 2021, para. 35). It also encompasses indirect discrimination – namely, an apparent ‘neutral provision, criterion or practice [...] applied to all but [imposing] a particular disadvantage on disabled people which cannot be justified’ (Lawson 2005, 274) – as well as harassment and instructions to discriminate. As such, the prohibition of discrimination in all its forms – or at least, the ones covered under the Directive – represents a key avenue for promoting equal treatment and combating barriers faced by (aspiring) cultural and creative professionals with disabilities, and not just those in more administrative roles.

However, the Employment Equality Directive does not define disability. The CJEU has taken on this role and regularly elaborates on the ‘core tenets and reach of this Directive’ through an expanding body of case law, several of which have arisen after the EU’s conclusion of the CRPD (Ferri and Urzel 2022, 90). In this context, the CJEU has stated that:

the concept of ‘disability’ must be understood as referring to 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. (*Joined Cases HK Danmark 2013*, para. 38)

In referring to the CRPD, which denounces the medical model of disability, the Court seems to assert an ‘apparent endorsement of the social model of disability’ (Bell 2020, 18–19). However, it has since drawn criticism for its approach (Waddington 2015), most notably because the Court’s attempts to defining disability (see *Kaltoft 2014* paras. 59–60 and *Daouidi v Bootes Plus SL 2016*, para. 57) have continued to rely on ‘medical evidence of the degree of impairment (and its prognosis) as a significant element in establishing disability’ (Bell 2020, 19). It shows that the CJEU has not fully grasped the CRPD’s paradigm shift in the conceptualisation of disability. This impacts professionals with disabilities, and possibly those in the cultural and creative sectors.

### **Scope of application and outstanding gaps in the EU non-discrimination framework**

The prohibition of discrimination covers both the public and private sectors, and requires Member States to combat discrimination ‘in a broad sway of employment and training related areas, including university education’ (Waddington 2006, 21). According to Article 3, the Directive covers conditions for access to employment, self-employment, or occupation, vocational guidance and training, employment and working conditions, as well as membership in employers and workers organisations. In this respect, it ‘applies to all persons who exercise an economic activity either in an employed or self-employed capacity’ (Broderick and Watson 2020, 125), which makes it particularly relevant for cultural and creative professionals, many of whom are self-employed.

In *J.K. v TP S.A.* (2023), the CJEU clarified for the first time the application of the Employment Equality Directive to self-employment, easing the ‘strict binary distinction between employment and self-employment status’ (Muszyński and Gromada 2023, 9) that can affect the protection of

professionals at the EU level (Risak and Dullinger 2018). This case considered the situation of a self-employed individual in the audiovisual sector who, following the refusal of the Public Television company to renew his contract, claimed he had been discriminated on the ground of his sexual orientation. The Court established that the principle of equal treatment covers not only access to self-employment but also “employment and working conditions” [...] applicable to any form of employment or self-employment, whatever the legal form in which it is pursued’ (*J.K. v TP S.A.* 2023, paras. 56–58). Ultimately, the CJEU delivered a far-reaching interpretation of the Employment Equality Directive and extended the scope of anti-discrimination protection to the entire professional relationship of self-employed individuals, ‘during and after the exercise of that activity’ (Jaroszyński and Łacny 2023, 555), including conditions of conclusion, renewal, or termination of contracts. Although it creates some uncertainties, this judgment greatly contributes to making non-discrimination law ‘react to the digital transformation of the economy, and related changes in society and work relations’ (Křičková and Fellerová Palkovská 2023). It also accommodates ‘peculiar work-related arrangements’ common in the cultural and creative sectors (Aloisi 2023, 993). In this respect, it becomes even more pertinent to utilise the Employment Equality Directive to enhance the participation of cultural and creative professionals with disabilities, and to ‘guarant[ee] that virtually every individual is able to reap the material and symbolic benefits arising from economic participation’ (Xenidis 2021, 1656).

However, although significant and influential for professionals with disabilities, the ‘practical impact’ of the Employment Equality Directive remains ‘severely constrained by the narrow confines of its material scope’ (Lawson 2009, 105). It overlooks the fact that employment, occupation or self-employment are not matters which operate in a vacuum and that achieving equal treatment in the workplace also entails tackling discrimination outside of it (Lawson 2009; Prets and Weber 2005). Improving the inclusion of cultural and creative professionals with disabilities requires a more comprehensive approach; one that addresses ‘discriminatory education systems’ – which participants also highlighted – and difficulties in accessing transport or housing, which impact directly on employment (Lawson 2009, 105). One participant particularly insisted on the fact that cultural stakeholders are ‘not the sole solution’ to inclusion, but only one piece of a more global system which relies on different factors – transport policies, cities, associations and the education system (EU CCS 9).

The Commission explicitly underlined the limits of the EU’s efforts to tackle disability-based discrimination by advancing a proposal for a Horizontal Non-discrimination Directive (2008), which would apply outside the labour market. The unsuccessful trajectory of the proposal, which has yet to be adopted, makes it evident that the protection afforded to people based on race, ethnic origin or gender is far more important than that based on disability and other grounds (Lawson 2009). This echoes one participant’s remarks, who noted:

The issue of inclusion, of diversity, it is on everyone’s mind. But probably today we are in any case [...] in Europe, maybe more focused on the question of non-discrimination between people of different ethnic backgrounds, between men and women. (EU CCS 9)

Overall, this long-standing proposal pursues greater protection against discrimination, beyond employment and occupation, in areas such as social protection, education, or access to and supply of goods and services (Commission of the European Communities 2008, art. 3). In this respect, its adoption would further benefit cultural and creative professionals with disabilities and would represent a visible step towards the realisation of the CRPD at EU level, particularly in ‘end[ing] discrimination by all appropriate measures’ (Quinn 2022, para. 35).

### ***Reasonable accommodation as a driver of change***

Further to the prohibition of discrimination, the Employment Equality Directive encompasses a duty to reasonably accommodate persons with disabilities. This obligation is also ‘firmly embedded in the

CRPD’ and underpins almost all substantive provisions, beyond employment (Lawson 2009, 103). In the context of the Directive, Article 5 places on employers, providers of goods and services, and public authorities an obligation to provide reasonable accommodation ‘to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer’. As a stand-out ‘provision like no other in that Directive’, it also acknowledges in some way the limits of a formal understanding of equal treatment (Daly and Whelan 2021, 746).

Although not yet in the context of the cultural and creative sectors, the CJEU has regularly emphasised the role of reasonable accommodation in dismantling barriers that hinder persons with disabilities’ full and effective participation in professional life (see *Ca Na Negreta* 2024; *Komisia* 2021; *Tartu Vangla* 2021). This duty can undoubtedly play a key role in the participation of cultural and creative professionals with disabilities, and one participant recalled in that sense: ‘we have had people with very mild disabilities enquiring if we would be able to accommodate them, and of course, we also say [...] that we will accommodate’ (EU CCS 5).

Overall, however, participants showed limited familiarity with the concept of reasonable accommodation. As the topic was explicitly broached, most participants either seemed to miss the point and started discussing a different issue, or readily admitted that they lacked knowledge, had not worked on the subject, or simply did not know this term. On the other hand, the analysis shows that participants remained familiar with this question, albeit in a more implicit or practical way. For instance, one participant shared that:

[i]t is still the question of persons with disabilities, their integration in the workforce, the specificities they have, and how it is taken into account or not. And I suspect the ‘or not’ is probably the current situation. (EU CCS 7)

Without referring explicitly to ‘reasonable accommodation’, several participants shared concrete examples of accommodation they knew of, and one recalled:

I remember seeing quite a few places where you had sort of arrangements for [...] people with, say, wheelchairs, and then you would have of course access ramps and all these kinds of things. But then you would also have adapted desks etc., or adapted facilities. (EU CCS 7)

Participants further reflected on the capacity of their organisations to accommodate potential employees, or of their sector to accommodate persons with disabilities. For example, one mentioned a request to use a video format instead of a written one as part of an application, which the organisation had accommodated (EU CCS 10). Overall, the duty of reasonable accommodation seemed, in principle, fairly well accepted by most participants. However, the European legislator does not provide much information on what ‘the individualized duty of reasonable accommodation may be taken to mean’ (Broderick and Watson 2020, 128). The preamble to the Directive, which is non-binding and therefore only indicative, merely refers to effective and practical measures to adapt the workplace, including the physical adaptation of the workplace, as well as the adjustment of working time patterns, the distribution of tasks, and the provision of training (Employment Equality Directive 2000, rec. 20). The CJEU has clarified that this list is not exhaustive and that the reasonable accommodation duty could cover any other adaptations including organisational ones, such as reduced working hours if it could ‘make it possible for the worker to continue employment’ (*Joined Cases HK Danmark* 2013, para. 56). Thus, providing reasonable accommodation requires ‘an individualised analysis’, which takes into account the abilities of professionals with disabilities in receipt of the accommodation as well as ‘the work-related skills and activities that are required’ (Waddington 2020, 111).

However, this obligation is not absolute, and the Employment Equality Directive stipulates in Article 5 that it is conditioned to whether it imposes a disproportionate or undue burden on the employer. This is dependent on factors such as the employer’s size and financial resources (Lawson 2005). Recital 21 of the Employment Equality Directive specifies that consideration should be given to the financial and other costs entailed by the

accommodation, the scale and financial resources of the organisation, and the possibility of obtaining public funding or other assistance. Although duty-bearers are directed to seek State funding and other assistance, the Directive, however, ‘does not require states to provide any such funding’ (Daly and Whelan 2021, 747). The concept of reasonable accommodation outlined in the Employment Equality Directive and interpreted by the Court addresses primarily ‘the reasonableness of an accommodation measure in terms of cost’ (Waddington and Broderick 2018, 72). For instance, the CJEU discusses reasonable accommodation in *Joined Cases HK Danmark* (2013, para. 60) ‘in exactly the terms which the CRPD Committee seeks to avoid’ (Waddington and Broderick 2018, 72), namely, with regard to costs. This differs considerably from the CRPD Committee’s interpretation, whereby ‘the reasonableness of an accommodation is a reference to its relevance, appropriateness and effectiveness for the person with a disability’ (CRPD Committee 2018, para. 25(a)).

This reasoning also underlines an ‘uncertainty for employers and employees where the measures required may be beyond a firm’s resources’ (Daly and Whelan 2021, 755). This was pointed out by one participant who wondered ‘whether in fact we would have the budget for it’ (EU CCS 5). In this context, given the fragile financial health of the cultural and creative sectors, particularly in the aftermath of COVID-19, cultural and creative stakeholders are facing challenging economic circumstances (EY Consulting 2021), which participants alluded to. This raises the question of how that could affect cultural organisations’ ability to fulfil their reasonable accommodation duty. This was raised by one participant:

[B]ecause probably many cultural operators are restricted by the lack of funding as well, so if there is any sort of special adjustment, adjustments to make, it can be tricky for them to do it because they are already struggling. (EU CCS 7)

However, participants also noted the goodwill and resourcefulness of their sector(s) on several occasions:

[W]hen people want to adapt they just do it. (EU CSS 10)

[I]n the cultural sector, there is a lot of solidarity and [...] we manage to find solutions even without any sort of funding or any sort of things [...]. We don’t know how, we don’t know with which funding but we will find a way to make it happen. (EU CCS 7)

What the CJEU’s case law also illustrates is that by affirming the need to provide reasonable accommodation to persons with disabilities, potentially cultural and creative professionals, the Employment Equality Directive enables the EU to contribute significantly to the implementation of the CRPD (Ferri and Urzel 2022), including Article 30. As such, the Employment Equality Directive can be leveraged to make the cultural and creative sectors more inclusive of professionals with disabilities, when culture is an area where Member States still retain significant competence.

## Concluding remarks

The inclusion of cultural and creative professionals with disabilities is still to be realised, in spite of the clear obligations stemming from Article 30(2) CRPD. This article’s socio-legal approach contributes valuable insights into the participation of persons with disabilities in cultural life and the challenges they face as professionals. Through an analysis of scholarship, legislation, and interviews, it has shown the strengths and inadequacies of the current EU framework on a topic that, in contrast to the participation of audiences with disabilities, is generally less researched and implemented (Leahy and Ferri 2022a, 2024).

This article primarily recast the participation of cultural and creative professionals with disabilities as a non-discrimination issue. It has explored how EU law affects the professional lives of creators, despite a limited cultural competence, and argued that the EU has a significant role to play in advancing the inclusion of cultural and creative professionals with disabilities and in implementing

Article 30 CRPD. Notably, it has focused on the Employment Equality Directive, and by drawing on contributions from participants, it has demonstrated how the Directive could be leveraged to benefit professionals with disabilities in the cultural and creative sectors, particularly through reasonable accommodation.

However, a significant gap remains in EU non-discrimination law, as it currently fails to protect persons with disabilities beyond employment settings. The long-awaited Horizontal Non-discrimination Directive holds considerable potential for cultural and creative professionals with disabilities in that it would ‘significantly broaden and strengthen the protection available to disabled Europeans from discrimination and marginalisation’ (Lawson 2009, 106). The onus remains on EU institutions and Member States to address a pivotal question; namely, whether there is any sense in guaranteeing equal treatment in the labour market if equality is not ensured in all other areas of life (Prets and Weber 2005).

As recently evidenced in the EP resolution (2023), professionals encounter a range of specific challenges that affect their education and career pathways, including in terms of working conditions, mobility, social protection or freedom of expression. In addressing those, this article also emphasises the need to consider the overlap between the general challenges experienced by cultural and creative professionals and those faced by persons with disabilities, which creates a unique range of barriers for professionals with disabilities to overcome. Non-discrimination represents only one dimension of the EU’s potential to make the cultural and creative sectors more inclusive of professionals with disabilities, but it is a key one.

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