

## Chronic Disease: Ground of discrimination?

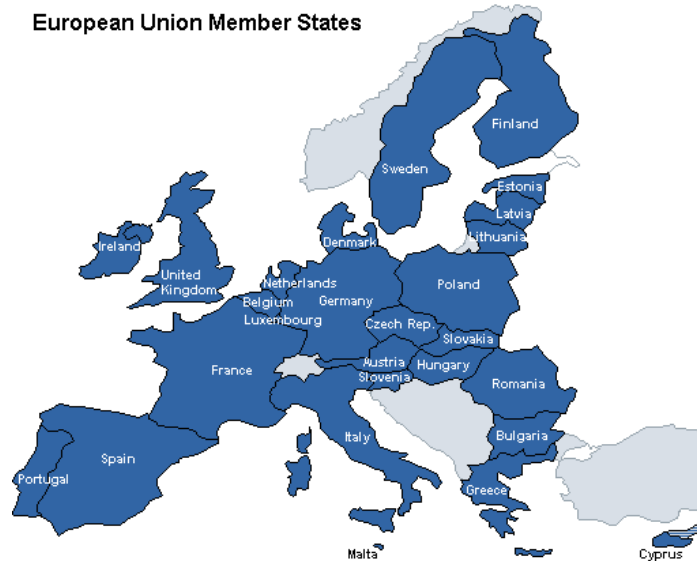


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Building Competence. Crossing Borders.

# My background in relation to non-discrimination



- Person: Expertise in counseling, strategic litigation, publication, networking and prevention
- Center for Social Law: Non-Discrimination as one thematic focus [www.non-discrimination.ch](http://www.non-discrimination.ch) (f.e. expertise for de FADA)
- Switzerland: Current dynamic political developments (such as popular initiative to strengthen protection against discrimination)

# The objectives of the workshop



1. Comments on the challenges concerning «discrimination on grounds of chronic disease»
  - The absence of «CD» as an explicit category
  - The question of «CD» as implicit part of «disability»
  - Statistical discrimination
2. Open exchange of experience
  - What is the legal situation in your country?
  - Is there any interesting jurisprudence?
  - What are the challenges in litigation?

## Problem: Illustration based on a German case

### Facts (ArG Berlin, 17 Ca 1102/11)

The plaintiff is affected with HIV without symptoms. He worked as chemical-technical assistant in a pharmaceutical company. During his probationary period he was dismissed. The justification by the employer was: The HIV-infection could affect drug manufacturing.



## Problem: Illustration based on a German case

### Merits (ArG Berlin, 17 Ca 1102/11)

(freely translated): «Disability» does require a biological or psychological deviation from a healthy person. Furthermore it requires functional impairment affecting participation in life. In this case the requirements are not met, because the plaintiff was not prevented from participation in social life because of its asymptomatic HIV infection, but due to the behavior of the employer.



## Conclusion of the problem

Persons who are discriminated against on the grounds of a chronic disease do not fall within the scope of protection of antidiscrimination-law, if

- «CD» or similar grounds are not explicitly mentioned in laws, and
- the functional impairment does not lead «objectively» («quasi-naturally») – in interaction with structural barriers – to an impairment of social participation



## Solution of the problem?

- Explicit regulation as ground of discrimination
- Implicit protection on the basis of a (broad) interpretation of a given ground (such as «disability»)



## Chronic disease as an explicit ground of discrimination

- „Disease“/“Illness“ or „chronic disease“
- „Health“ or „Status of Health“
- „Disease“/“Illness“ or „chronic disease“ as explicit part of „Disability“
  - By general clarification
  - By naming individual diseases (such as diabetes, HIV-Aids, multiple scleroses, chronic bowl diseas etc.)





# Chronic disease implicitly protected by the law

- „Chronic disease“ as an unwritten ground of discrimination within a non-exhaustive list of grounds of discrimination
  - Stigma
  - Systematic exclusion occurrence in social reality
- Discrimination on the ground of „Chronic disease“ as a violation of personality
- „Chronic Disease“ as part of „Disability“

# „Chronic Disease“ as „Disability“

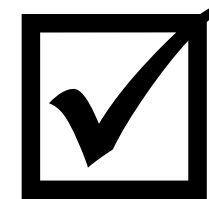
## Art. 1 ICRPD

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

# „Chronic Disease“ as „Disability“

## Art. 1 ICPRD

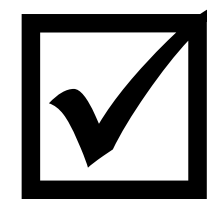
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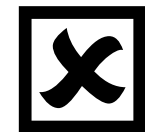
Art. 1 ICPRD

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Severe chronic disease



Mild chronic disease



and in between



# „Chronic Disease“ as „Disability“

## Art. 1 ICPRD

Persons with disabilities include those who have long-term<sup>2</sup> 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.

Structural barriers (communication, architectur)



Attitudinal barriers (prejudice, stereotypes)



# Statistical Discrimination: The challenge

## System of fair risk selection

- „Disease/Illness“ as a factor in Risk Selection in the insurance industry (such as private life insurance, health insurance, occupational disability insurance)
- Fair distribution of risks within the insurance collective

## Negative effects

### Material level

- Unequal treatment between carrier of a disease and those who do not carry the disease
- Violation of personality
- Limitation in life management

### Procedural level

- Intransparent risk assessment



## Solution? Human Rights based approach

- Negative effect on the personality and equality concerning a sensitive aspect of the personality („CD“ as a suspect ground)
- Strict scrutiny of justification (statistical data)
- Transparent procedure of risk assessment, duty of justification





## Impetus for the discussion

- What is the legal situation in your country?
- Is there any interesting jurisprudence?
- What are the challenges in litigation?