

# **“To those who have, more shall be given” Disability Discrimination in a changing EU**

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# Point of departure

- Disability discrimination is complex. Gender is a walk in the park!
- Disability discrimination is an established part of the equal treatment discourse in the EU (Treaty and Directives, Charter) and in member state legislation.
- Disability discrimination is included in the Human Rights perspective of equal treatment.
- All (member) states agree to combat discrimination and even inequality based on disability.
- Still: Significant imbalance in relation to labour market participation and efficient work life participation (outcome).
- Still: Differences in work life participation between disabled with reduced working capacity and those without.
  - Furthermore, parts of Europe are in labour market chock. Labour market focus lies elsewhere, currently!



# Problems on the road (labour market)

- Disability might and will stretch the borders of equal treatment much further than other grounds of discrimination – do we accept and communicate this?
- Disability discrimination legislation (in the labour market) is undoubtedly elitist in some aspects.
  - The “competitiveness” entailed in discrimination law does not necessarily embrace all disabled workers or job-applicants.
- The heterogeneity of disability (as such and as a definition by law) provides for uncertainty for public bodies as well as for employers and employees/jobseekers.



- Special features, such as reasonable accommodation, creates uncertainty for public bodies, employers and employees.
- Labour market disability issues are dealt with at numerous and largely uncoordinated levels.
- Disability discrimination as a private law “tool” differs.
- Anti-discrimination bodies could improve as “agents” in relation to other players.
- The focus on other grounds of discrimination keeps the awareness and ambition on disability discrimination to a minimum.
  - This varies between the countries (UK and even Germany on one hand have a stronger disability discrimination focus, and , I would say, Sweden on the other hand lack such focus, however, other grounds, gender, religion, are more profiled).



# Exemplifying the problems

- “Elitist” legislation. Only a portion, (a minority?) of disabled individuals will ever be able to establish an equal situation and truly exercise any right to equal treatment in the labour market. Much stronger effect than other grounds of discrimination.
- Aspects of disadvantages in schools, higher education, access to first work life experiences manifest the picture (even if trends are slowly changing).
- Whereas other grounds of discrimination is hardly ever concluded to be affecting the “market function” and the employers’ prerogative, disability might do exactly this.
  - And result in fair dismissal under employment protection law at least if the disability reduces the working capacity of the employee.



# Active on the Labour Market (16-64 years)

	Male		Female		Total	
Disabled total	69,6	± 1,9	63,0	± 1,9	66,1	± 1,4
- with reduced work. cap.	54,7	± 2,9	55,2	± 2,6	55,0	± 2,0
- without reduced work. cap.	85,9	± 2,4	75,5	± 3,2	80,9	± 2,0
Non-disabled	83,9	± 0,3	78,3	± 0,3	80,8	± 0,3
Total population	81,1	± 0,3	75,8	± 0,3	78,5	± 0,3

Source: Labour Market Situation for Disabled Persons, 4th quarter 2008, Information about Education and Labour Market 2009:3  
 Employed: Reduced Working capacity=50 %, non-disabled=77%.



- **The meaning of disability** is still rather uncertain and not yet subject to any uniform EU concept. Even at national level the very definition is yet to be developed. *Chacon Navas* and the pending CJEU-cases C-335/11 and C-337/11 provide some guidance.
  - AG Kokott (6 Dec 2012) argues:
    - The Definition of Disability under dir. 2000/78/EC should relate to the UN Convention of Disability ratified by EU in 2010!
    - Disability and illness are accepted to be separate, but might coincide or inter-relate.
    - Disability might occur as an effect of an illness
    - Reference to ECtHR (*Glor v. Switzerland* 13444/04 on Diabetes 1)
  - “Long-term” is still not obvious in a number of legislations (6 months in BRD?, 12 months in the UK, 12 months/unclear in Sweden?).



- Reasonable accommodations

- Domestic jurisdictions are still not providing significant guidance on the issue nor does the CJEU (aspects hereof are however addressed in case law).
  - The size of the employer's business, the relevance of the accommodations, the employees ambition to participate in the solution. The accommodation does not have to be physical but covers also organizational accommodations. Employers' prerogative might reduce the impact of the latter.
- In countries with stronger employment protection in relation to illness and health, such accommodations are often considered under employment protection legislation (Sweden, Finland, Norway, to some extent Germany, but not Denmark and not really the UK.)
- AG Kokott (6 Dec 2012) concludes that a part time position would be an accommodation to contemplate if not considered unreasonable or disproportionate (to the employer).





# Addressing the problems

- Clarify the legal situation by encouraging interesting cases before the courts.
  - Reasonableness, Disability-Illness, Indirect discrimination, Positive Action.
  - Acte Clair? Where are all the UK, French or German case submitted for preliminary rulings at the CJEU?
- Raise the awareness and profile (specially in some member states) on disability as a important factor.
- Raise the awareness of the significant imbalances on the labour market which relate to disability.

But also...



- Unreduced working capacity seems not to reduce employability (Sweden, corresponding examples will be presented in Barcelona in June).
- Legislation has shifted towards a equal treatment/non-discrimination paradigm, well suited to alert disabled without reduced working capacity of their individual rights.
- Contemplate the limits of disability anti-discrimination perspective and bring about an understanding of the elitist and not overall inclusive aspects of equal treatment law. There are limits to the merits of the concept. Let us be outspoken about them.
- Support a more integrated perspective o labour market inclusion, where discrimination is one (new and partly promising) part, employment protection and supported and even sheltered employment other.
- **Disability discrimination legislation “is not the end, it is not even the beginning of the end...”**

