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# Rights of Workers with Disabilities under EU Law Following Ratification of UN Convention on the Rights of Persons with Disabilities

## Abstract

The objective of this elaboration is to analyze the influence of the UN Convention on the Rights of Persons with Disabilities on EU regulations concerning the status of workers with disabilities. The author presents the EU legal framework on disability, including the EU Charter of Fundamental Rights and Directive 2000/78 on equal treatment in employment, as well as those provisions of the UN Convention that pertain to the prohibition of discrimination, accessibility, and the right to work. In light of the aforementioned considerations, the author proceeds to analyze the influence of the UN Convention on the EU Court of Justice case law with regard to the notion of disability and reasonable accommodations under EU law.

**KEYWORDS:** disability, UN Convention on the Rights of Persons with Disabilities, EU Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, prohibition of discrimination based on disability, reasonable accommodations, accessibility

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# 1 | Preliminary observations

The United Nations Convention on the Rights of Persons with Disabilities (hereinafter referred to as the UN Convention) is the first international human rights treaty to which the European Union itself is a party. The UN Convention is broadly concerned with the labour and employment rights of persons with disabilities, while EU labour law has only limited provisions on the status of workers with disabilities. However, it should be emphasised that in recent decades there has been a significant shift towards the recognition of human social rights by the European Union. The purpose of this paper is to analyse the influence of the UN Convention on EU regulations concerning the status of workers with disabilities.

# 2 | European Union regulations on workers with disabilities

With regard to disability, the material scope of the European Union law is narrow. In accordance with Art. 9 of the Treaty on the Functioning of the European Union<sup>[1]</sup> (hereinafter: TFEU), in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health. It goes without saying that persons with disabilities are particularly vulnerable to social exclusion.

Pursuant Art. 10 TFEU, in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Article 19(1) TFEU expressly provides that, without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age

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<sup>1</sup> Official Journal C 326, 26.10.2012 p. 1.

or sexual orientation. The European Union thus has legislative powers to combat discrimination based on disability<sup>[2]</sup>.

The preamble to the EU Charter of Fundamental Rights states that<sup>[3]</sup> the Union is founded on the indivisible, and universal values of human dignity, freedom, equality and solidarity. It also places the individual at heart of its activities, and intends to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter. The right to human dignity is the basis and source of fundamental social rights, and in particular of rights at work, and labour rights are an essential part of human dignity<sup>[4]</sup>. Human dignity thus provides the theoretical basis for regulating the status of persons with disabilities. From the perspective of labour law, the realisation of human dignity requires that persons with disabilities should be given the opportunity to participate in the labour market as far as possible. In other words, they should enjoy the right to work. Therefore, they should have access to employment opportunities and working conditions appropriate to their state of health. Such a presumption implies far-reaching obligations for national legislators, in particular with regard to incentives for employers to recruit people with disabilities, as well as with regard to reasonable accommodation of the situation of people with disabilities in the workplace (see below).

Under Art. 21(1) EUCFR item 1, any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. Moreover, Art. 26 EUCFR explicitly refers to the integration of persons with disabilities. According to this provision, the Union recognises and respects the right of persons with disabilities to benefit from

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<sup>2</sup> For further analysis see Justyna Maliszewska-Nienartowicz, „Niepełnosprawność”, [in:] *System prawa Unii Europejskiej*, Vol. VI, *Prawo antydyskryminacyjne*, ed. Justyna Maliszewska-Nienartowicz (Warszawa: Wolters Kluwer, 2020), 384 and following, Marcin Wujczyk, „Zasady równego traktowania i zakazu dyskryminacji”, [in:] *System prawa pracy*, Vol. X, *Międzynarodowe publiczne prawo pracy. Standardy europejskie*, ed. Krzysztof W. Baran (Warszawa: Wolters Kluwer, 2020), 458 and following.

<sup>3</sup> OJ C 326, 26.10.2012, p. 391.

<sup>4</sup> Barbara Kresal, „Article 1 - Human Dignity”, [in:] *The Charter of Fundamental Rights of the European Union and the Employment Relation*, ed. Filip Dorssemont, Klaus Lörcher, Stefan Clauwaert, Melanie Schmitt (Oxford, London-New York-New Delhi-Sydney: Hart Publishing, 2019), 206.

measures designed to ensure their independence, social and occupational integration and participation in the life of the community. These two provisions of the EU Charter relating to disability are closely linked<sup>[5]</sup>. The Court of Justice of the European Union (hereinafter: CJEU) considers that Article 26 EUCFR may be relied upon to interpret and review the legality of European Union legislative acts implementing the principle of integration of persons with disabilities set out in that Article. The Court of Justice of the European Union (hereinafter: CJEU) considers that Article 26 EUCFR may be relied upon to interpret and review the legality of European Union legislative acts implementing the principle of integration of persons with disabilities set out in that Article<sup>[6]</sup>.

Moreover, principle 17 of the European Pillar of Social Rights<sup>[7]</sup> makes it clear that persons with disabilities have the right to income support that ensures their living in dignity, services that enable them to participate in the labour market and in society and a work environment adapted to their needs.

At the level of EU secondary legislation, we should emphasize the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation<sup>[8]</sup>. Article 1 of the Directive states that its purpose is to establish a general framework for combating discrimination based on religion or belief, disability, age or sexual orientation in employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment. Directive 2000/78 is a specific expression, in the field it covers, of the general principle of non-discrimination now enshrined in Article 21 of the EUCFR<sup>[9]</sup>.

The preamble to Directive 2000/78 emphasises that the provision of measures to accommodate the needs of disabled people in the workplace plays an important role in combating discrimination on the grounds of disability

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<sup>5</sup> Niklas Bruun, „Articles 20 and 21 – Equality and Non-Discrimination”, [in:] *The Charter of Fundamental Rights*, 385.

<sup>6</sup> Judgment of 22.5.2014, C-356/12, *Wolfgang Glatzel v. Freistaat Bayern*, ECLI:EU:C:2014:350, paragraph 74; judgment of 21.10.2021, C-824/19, *TC, UB v. Komisija za zaščita ot diskriminatsia*, ECLI:EU:C:2021:862, paragraph 64.

<sup>7</sup> 2017/C 428/09.

<sup>8</sup> OJ L 303, 2.12.2000, p. 16.

<sup>9</sup> Judgment of 26.01.2021, C-16/19, *VL v. Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, EU:C:2021:64, paragraph 33. See also Leszek Mitrus, „Konceptcja zakazu dyskryminacji w prawie pracy Unii Europejskiej”, [in:] *Różne oblicza dyskryminacji w zatrudnieniu*, ed. Joseph Roger Carby-Hall, Zbigniew Góral, Aneta Tyc (Warszawa: Wolters Kluwer, 2021), 99 and following.

(recital 16). Furthermore, the Directive does not require the recruitment, promotion, retention in employment or training of a person who is not competent, able and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for persons with disabilities (recital 17).

Pursuant Art. 2(2)(ii) of Directive 2000/78 as regards persons with a particular disability, the employer or any person or organisation to whom the Directive applies is obliged, in accordance with national law, to take appropriate measures, in line with the principles contained in Article 5, to eliminate disadvantages resulting from such provision, criterion or practice. According to Art. 3(4) of the Directive, Member States may provide that the Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces.

In accordance with Art. 5 of the Directive, reasonable accommodation shall be provided to ensure compliance with the principle of equal treatment for persons with disabilities. This means that employers shall take appropriate measures, where necessary in a particular case, to enable a person with a disability to have access to, participate in or advance in employment or vocational training, unless such measures would impose a disproportionate burden on the employer. This burden is not disproportionate if it is sufficiently remedied by existing measures under the disability policy of the Member State concerned. In other words, employers are obliged to take measures to adapt working conditions to the needs of people with disabilities<sup>[10]</sup>.

In summary, the prohibition of discrimination requires that comparable situations should not be treated differently and that different situations should not be treated in the same way unless such treatment is objectively justified. Less favourable treatment on the grounds of disability is therefore unlawful. However, disability is a specific prohibited ground of differentiation. In order to ensure equal treatment in employment relations, it is essential to take measures to introduce certain advantages for

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<sup>10</sup> Justyna Maliszewska-Nienartowicz, „Unijna koncepcja racjonalnych usprawnień dla osób z niepełnosprawnościami” *Praca i Zabezpieczenie Społeczne*, 11 (2022): 21 and following; Magdalena Paluszkiewicz, „Racjonalne usprawnienia jako środek wspierania aktywności zawodowej osób z niepełnosprawnościami w świetle orzecznictwa sądowego”, [in:] *Studia z zakresu prawa pracy i polityki społecznej*, ed. Krzysztof. W. Baran, Vol. XXX (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2023), 387 and following

people with disabilities. This is why Directive 2000/78 explicitly requires that workers with disabilities should be provided with reasonable accommodation in the workplace. However, EU law does not refer directly to the concept of accessibility.

### 3 | United Nations Convention on the Right of Persons with Disabilities

The UN Convention on the Rights of Persons with Disabilities was adopted by the UN General Assembly on 13 December 2006 and entered into force on 3 May 2008. Its preamble emphasises, inter alia, the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need to ensure their full enjoyment by persons with disabilities without discrimination. It also recognises that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that impede their full and effective participation in society on an equal basis with others. According to Art. 1, the purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity. 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.

Article 3 indicates the principles of the UN Convention. They are:

- a. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- b. Non-discrimination;
- c. Full and effective participation and inclusion in society;
- d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- e. Equality of opportunity;
- f. Accessibility;
- g. Equality between men and women;

- h.** Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

From the perspective of this paper, we should remember that non-discrimination and accessibility are cornerstones of the UN Convention. In my opinion, from a theoretical point of view, the scope of labour and employment rights of persons with disabilities should be understood broadly. In other words, persons with disabilities who enter into an employment contract should – as far as possible – enjoy the rights that are granted to persons without disabilities, e.g. the right to form and join trade unions, the right to a safe and healthy working environment, protection against unfair dismissal, and so on. Clearly, there is no way to ensure full equality between workers with disabilities and workers without disabilities. Therefore, international, European and national law requires legislators to establish a framework for reasonable accommodation in the workplace for people with disabilities.

Article 5 of the Convention is devoted to equality and non-discrimination. Under this provision, States Parties recognise that all persons are equal before and under the law and are entitled without discrimination to equal protection and equal benefit of the law (item 1). States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds (item 2). In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided (item 3)<sup>[11]</sup>. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the Convention (item 4). Moreover, there should be no doubt that equality of opportunity, as set out in Art. 3e of the Convention, is of particular importance for the status of persons with disabilities in the labour market and their opportunities for employment.

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<sup>11</sup> Article 2 of the Convention provides that „reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

Article 9 of the UN Convention expressly refers to accessibility. The scope of this provision is indeed broad. According to Art. 9(1) states that, in order to enable persons with disabilities to live independently and to participate fully in all aspects of life, States Parties shall take appropriate measures to ensure that persons with disabilities have access, on an equal basis with others, to the physical environment, to transport, to information and communication, including information and communication technologies and systems, and to other facilities and services open or provided to the public, in both urban and rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia: a) buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces; and b) information, communications and other services, including electronic services and emergency services. For the purposes of the present analysis, it should be emphasised that the UN Convention explicitly requires that accessibility includes the identification and removal of barriers to accessibility in the workplace. As a socio-economic norm, it becomes a key element of implementing equality. The duty to make reasonable adjustments and the obligations stipulated in this provision is the means to achieve the goal in a new right to accessibility<sup>[12]</sup>. Consequently, national legislation should impose specific obligations on employers with regard to the conditions of employment of workers with disabilities. It has also been emphasised that reasonable accommodation is an individual mechanism, whereas accessibility is comprehensive and general in nature. Reasonable accommodation should be effectively implemented *ad casum* by both public and private entities. In contrast, accessibility aims at comprehensive actions that should be undertaken by the states in order to safeguard barrier-free environment for persons with disabilities<sup>[13]</sup>.

The right to work is one of the fundamental human rights. Article 27 of the UN Convention expressly regulates work and employment of persons with disabilities<sup>[14]</sup>. According to Art. 27(1), States Parties recognize the right

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<sup>12</sup> Katarzyna Roszewska, „Accessibility – One of the Human Rights or the Means of Their Implementation” *Prawo i Więź*, nr 3(2021): 167; idem, „The Development of the Right to Access as a Part of Human Rights” *Prawo i Więź*, nr 3(2023): 436.

<sup>13</sup> Hanna Markiewicz-Hoyda, „Prawna analiza koncepcji dostępności (accessibility)” *Państwo i Prawo*, 3 (2022): 117.

<sup>14</sup> For further analysis see Magdalena Paluszkiewicz, *Wolność pracy osób z niepełnosprawnościami jako wartość prawnie chroniona* (Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2019), 119 and following.

of persons with disabilities to work on an equal basis with others, including the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall protect and promote the realization of the right to work, including for those who acquire a disability in the course of employment, by taking appropriate measures, including legislation. Pursuant to Art. 27(2), States Parties shall ensure that persons with disabilities are not held in slavery or servitude and are protected, on an equal basis with others, from forced or compulsory labour.

The UN Convention requires that measures taken at the national level should, i.a. prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment; protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, (including equal opportunities and equal remuneration for work of equal value, as well as safe and healthy working conditions); ensure that persons with disabilities are able to exercise their labour and trade union rights; enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training; promote employment opportunities and career advancement for persons with disabilities in the labour market; promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business; employ persons with disabilities in the public sector; promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures; ensure that reasonable accommodation is provided to persons with disabilities in the workplace; promote the acquisition by persons with disabilities of work experience in the open labour market; as well as promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

Thus, the UN Convention refers broadly to the labour and employment rights of persons with disabilities. The material scope of UN Convention concerning workers with disabilities is comprehensive and much broader than the scope of European Union regulations on that category of individuals. It should be noted, however, that the provisions of the UN Convention are not self-executing and that legislative action by the parties to the UN Convention is necessary to ensure their effectiveness<sup>[15]</sup>. The duty to protect

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<sup>15</sup> See also art. 4 of the UN Convention.

and promote the realisation of the right to work of persons with disabilities has been entrusted to both the European Union and its Member States (see next section).

## 4 | The ratification of the UN Convention by the European Union

Pursuant to Art. 1(1) of Council Decision 2010/48 of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, the aforementioned Convention was approved on behalf of the Community subject to a reservation in respect of Article 27(1) thereof. The preamble to the Decision states that the UN Convention constitutes a relevant and effective pillar for the promotion and protection of the rights of persons with disabilities within the European Union, to which both the Community and its Member States attach the greatest importance (recital 4). Both the Community and its Member States have competence in the areas covered by the UN Convention. The Community and the Member States should therefore become Parties to the Convention so that, in situations of mixed competence, they can together fulfil the obligations and exercise the rights conferred by the Convention in a coherent manner (Recital 7)<sup>[16]</sup>.

The reservation submitted by the European Union refers to Art. 27(1) of the Convention „Work and employment”. In accordance with Directive 2000/78, Member States may, where appropriate, enter their own reservations to Article 27(1) of the Convention on the Protection of Persons with Disabilities to the extent that Article 3(4) of the said Directive confers on them the right to exclude from the scope of the Directive non-discrimination on the grounds of disability in relation to employment in the armed forces. Therefore, the Community concluded the Convention without prejudice to the above right, conferred on its Member States by virtue of Community law.

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<sup>16</sup> For further analysis see Tomasz Dubowski, „The European Union and the UN Convention on the Rights of Persons with Disabilities. Selected Institutional Aspects of Implementation” *Białostockie Studia Prawnicze*, No. 4 (2018): 171 and following.

Upon ratification, the UN Convention on the Rights of Persons with Disabilities became part of European Union law. The CJEU clarified that the UN Convention does not create directly enforceable rights. According to the ECJ, the provisions of the Convention are not unconditional and sufficiently precise in terms of their content and therefore do not have direct effect in EU law<sup>[17]</sup>. However, according to settled case-law, the UN Convention must be taken into account when interpreting the provisions of Directive 2000/78 (sections 5 and 6 below).

## 5 | The concept of disability under EU law

We should mention the importance of the UN Convention for the understanding of the concept of „disability”. Recital (e) of the Preamble to the UN Convention emphasises that disability is an evolving concept and results from the interaction between persons with impairments and attitudinal and environmental barriers that prevent their full and effective participation in society on an equal basis with others. According to Art. 1 of the UN Convention, 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. In contrast, the Directive 2000/78 does not define what is meant by „disability”.

In opinion of the CJEU, it follows from the need for uniform application of Community law and the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community, having regard to the context of the provision and the objective pursued by the legislation in question. As is clear from Art. 1, the purpose of Directive 2000/78 is to establish a general framework for combating discrimination based on any of the grounds referred to in that article, which include disability, in the field of employment and occupation. In the light of that objective, the concept of disability within the

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<sup>17</sup> Judgment of 18.03.2014, C-363/12, *Z v. A Government Department*, ECLI:EU:C:2014:159, paragraph 90.

meaning of Directive 2000/78 must be given an autonomous and uniform interpretation. That concept must be understood as referring to a limitation resulting, in particular, from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life<sup>[18]</sup>.

The ratification of the UN Convention on the Rights of Persons with Disabilities has had a direct impact on the interpretation of the concept of disability. In subsequent case law, the CJEU has held that the concept of disability must be understood as referring to a limitation resulting in particular from physical, mental or psychological impairments which, in combination with various barriers, may hinder the full and effective participation of the person concerned in working life on an equal footing with other workers. It also follows from Article 1(2) of the UN Convention that the physical, mental or psychological impairments must be „longterm”<sup>[19]</sup>. In slightly different wording this approach has been reiterated by the CJEU in subsequent rulings<sup>[20]</sup>.

It has been suggested in the literature that a „medical” model assumes that disability results from individual impairment. In contrast, a „social” model sees disability as caused by barriers that arise from the interaction between the individual impairment and the environment (which includes physical infrastructure, work organisation and social attitudes). This shifts the focus away from the medical circumstances of the individual and towards the social barriers that have created a disadvantage<sup>[21]</sup>. We should conclude that the ratification of the UN Convention has contributed

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<sup>18</sup> Judgment of 11.07.2006, C-13/05, *Sonia Chacon Navas v. Eurest Colectividades SA*, ECLI:EU:C:2006:456, paragraphs 40-43.

<sup>19</sup> Judgment of 11.04.2013, *Joined Cases C335/11 and C337/11 HK Danmark v. Dansk almennyttigt Boligselskab and HK Danmark v. Dansk Arbejdsgiverforening*, ECLI:EU:C:2013:222, paragraphs 38-39. Moreover, the CJEU has held that a disability does not necessarily imply complete exclusion from work or professional life (paragraph 43).

<sup>20</sup> E.g. judgment of 11 September 2019, *C397/18, DW v. Nobel Plásticos Ibérica*, EU:C:2019:703, paragraph 42; judgment of 10.02.2022, *C-485/20, XX v. H.R. Rail*, ECLI:EU:C:2022:85, paragraph 34: according to settled case-law, the concept of „disability” must be understood as referring to a limitation of capacity 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.

<sup>21</sup> Marc Bell, Anne Numhauser-Henning, „Equal Treatment”, [in:] *European Labour Law*, ed. Jaspers Teun, Pennings Frans, Peters Saskia (Cambridge: Intersentia, 2019), 147.

significantly to the acceptance of the social model of disability under Directive 2000/78<sup>[22]</sup>.

## 6 | Reasonable accommodations under EU law

Furthermore, we should emphasise the issue of reasonable accommodation, as provided for in Art. 5 of Directive 2000/78, as well as art. 2 and art. 5 of the UN Convention.

The CJEU has ruled that the concept of „reasonable accommodation” in Directive 2000/78 must be interpreted broadly as referring to the removal of the various barriers which prevent the full and effective participation of persons with disabilities in working life on an equal basis with other workers. Furthermore, recital 20 provides a non-exhaustive list of reasonable accommodation measures of a physical, organisational or educational nature. Such an obligation is also enshrined in the United Nations Convention, the provisions of which may be invoked for the purposes of interpreting the provisions of Directive 2000/78, so that the latter must be interpreted as far as possible in a manner consistent with the said Convention<sup>[23]</sup>.

One of the recent requests for a preliminary ruling concerned the compatibility of excluding a blind person from performing duties as a juror in criminal proceedings, with regard to the provisions of the Directive 2000/78, the UN Convention and the EU Charter of Fundamental Rights. The Court held that Art. 5 of Directive 2000/78, read in the light of recitals 20 and 21 of its preamble, employers must take appropriate measures, where necessary in a particular case, to enable a person with a disability to have access to, participate in or advance in employment, unless such measures would impose a disproportionate burden on the employer<sup>[24]</sup>. This obligation must be read in the light of Art. 26 of the Charter, which

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<sup>22</sup> For further analysis see Maliszewska-Nienartowicz, „Niepełnosprawność”, 395 and following; Michał Skóra, „Ewolucja pojęcia niepełnosprawności w unijnym i polskim prawie pracy” *Białostockie Studia Prawnicze*, No. 2 (2021): 190 and following.

<sup>23</sup> Judgment of 15.07.2021, C795/19 XX v. Tartu Vangla, ECLI:EU:C:2021:606, paras. 48-49.

<sup>24</sup> Judgment of 21.10.2021, C-824/19, TC, UB v. Komisia za zashtita ot diskriminatsia, ECLI:EU:C:2021:862, paragraph 54.

lays down the principle of the integration of persons with disabilities so that they may benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community. Such an obligation is also enshrined in the United Nations Convention, the provisions of which may be used to interpret the provisions of Directive 2000/78, so that the latter must be interpreted, as far as possible, in a manner consistent with that Convention. However, Art. 5(3) of the UN Convention provides that, in order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided. Moreover, Art. 5(3) of the UN Convention has the overarching purpose of promoting the equality of persons with disabilities and eliminating discrimination, as reflected in Art. 27 of the Convention, which recognises their right to work on an equal basis with others, in particular the opportunity to gain a living by performing work freely chosen or accepted in a labour market and in a work environment that is open, inclusive and accessible to persons with disabilities. In the present case, the applicant has been excluded from any participation in criminal proceedings, regardless of the issues involved, and without any investigation into whether reasonable accommodation, such as material, personal or organisational assistance, could be offered to her. Moreover, subject to the finding of the referring court, that measure appears to go beyond what is necessary, since it is clear from the reference for a preliminary ruling that, following the introduction of the electronic assignment of jurors in August 2016, the applicant participated in that capacity in the assessment of numerous criminal cases. Therefore, Art. 2(2)(a) and Art. 4(1) of Directive 2000/78, read in the light of Articles 21 and 26 of the Charter and the United Nations Convention, must be interpreted as precluding the total deprivation of a blind person of any possibility of performing the duties of juror in criminal proceedings<sup>[25]</sup>.

The CJEU has also confirmed that Directive 2000/78 must, as far as possible, be interpreted in a manner that is consistent with the UN Convention Article 2(3) of the UN Convention. This provides that discrimination on the grounds of disability includes all forms of discrimination, including denial of reasonable accommodation. According to Art. 5 of Directive 2000/78, reasonable accommodation must be provided to ensure compliance with the principle of equal treatment for persons with disabilities. Therefore, the

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<sup>25</sup> Judgment of 21.10.2021, C-824/19, TC, UB v. Komisia za zashtita ot diskriminatsia, ECLI:EU:C:2021:862, paragraphs 58-64.

employer must take appropriate measures, where necessary in a particular case, to enable a person with a disability to have access to, participate in or advance in employment or vocational training, unless such measures would impose a disproportionate burden on the employer. Article 5 of the Directive, read in the light of Article 2(4) of the UN Convention, provides a broad definition of reasonable accommodation. The adaptation of the ‘workplace’ (recital 20 of the preamble to Directive 2000/78) should be understood as meaning that this adaptation should be made as a matter of priority, taking into account other measures which make it possible to adapt the working environment for the disabled person in order to enable him or her to participate fully and effectively in working life on an equal basis with other workers. These measures may include the implementation by the employer of measures to enable the person to remain in employment, such as redeployment to another job<sup>[26]</sup>.

Therefore, where a worker becomes permanently incapable of remaining in his or her job as a result of the onset of a disability, reassignment to another job may constitute an appropriate measure in the context of reasonable accommodation within the meaning of Art. 5 of Directive 2000/78. This interpretation is consistent with the concept of reasonable accommodation, which must be understood as referring to the removal of the various barriers that prevent persons with disabilities from participating fully and effectively in working life on an equal footing with other workers. It should be noted that Art. 5 of Directive 2000/78 does not oblige an employer to take measures that would impose a ‘disproportionate burden’ on him. In any event, the possibility of reassigning a disabled person to another job is only available if there is at least one vacancy that the worker concerned is capable of performing<sup>[27]</sup>.

In other words, the reassignment to another position can be considered a reasonable accommodation for a disabled worker if such a job is available in the company and the worker has the relevant skills and qualifications. The analysis of the recent CJEU decisions leads to the conclusion that the ratification of the UN Convention has contributed to a broad and flexible understanding of „reasonable accommodation” under EU law. In any case, the refusal of such accommodation by the employer requires a thorough

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<sup>26</sup> Judgment of 10.02.2022, C-485/20, XX v. H.R. Rail, ECLI:EU:C:2022:85, paragraphs 38-41.

<sup>27</sup> Judgment of 10.02.2022, C-485/20, XX v. H.R. Rail, ECLI:EU:C:2022:85, paragraphs 43-48.

analysis and Art. 5 of Directive 2000/78 should be interpreted in accordance with the UN Convention and the EU Charter of Fundamental Rights<sup>[28]</sup>.

## 7 | Assessment of compatibility of EU regulations on workers with disabilities with the UN Convention

The European Union is obliged to inform periodically the UN Committee on the Rights of Persons with Disabilities about the measures taken to implement the said UN Convention. In 2022, the UN Committee made public the list of issues prior to the submission of the second and third periodic reports of the European Union<sup>[29]</sup>. The UN Committee required information *i.a.* on measures taken to conduct a cross-cutting, comprehensive review of EU legislation to ensure full harmonization with UN Convention, and also on measures in place to ensure effective implementation and enforcement of EU legislation relevant to persons with disabilities by Member States, including in areas such as victims' rights or employment. With regard to equality and non-discrimination (Article 5 of the Convention), the UN Committee requested, *inter alia*, information on measures taken to adopt the proposed horizontal directive on equal treatment<sup>[30]</sup>, including information on the current status of the adoption process, the main obstacles and the prospects and envisaged timeframe for its adoption. The UN Committee required also information on measures taken by the European Union to recognize multiply and intersectional forms of discrimination faced by persons with disabilities and to provide access to remedies in case of discrimination.

With regard to work and employment rights (Art. 25 of the Convention), the information provided by the European Union should refer, *inter alia*, to

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<sup>28</sup> Maliszewska-Nienartowicz, „Unijna koncepcja”, 27; Magdalena Paluszkiwicz, „Reasonable Accommodation as Means of Ensuring Access to Work for Persons with Disabilities in the Polish Legal System” *Prawo i Więź*, No. (2023): 451 and following.

<sup>29</sup> CRPD/C/EU/QPR/2-3, 20 April 2022.

<sup>30</sup> Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Brussels, 26 June 2019, 2008/0140(COD).

measures taken to address inequalities affecting women with disabilities in employment, including efforts to promote their access to the open labour market and to ensure that education and vocational training are accessible to them; measures to protect the rights of persons with disabilities under the Adequate Minimum Wage Directive, including persons in sheltered workshops; and also measures to protect persons with disabilities from discrimination by the use of artificial intelligence in recruitment, selection, promotion and termination of employment decisions.

In this context, it should be emphasised that the conformity of EU legislation on persons with disabilities with the UN Convention is regularly assessed. The European Union and its Member States are obliged to ensure full harmonisation of their legislation with the provisions of the UN Convention. This obligation should trigger further efforts and legislative measures to introduce higher standards of protection for workers with disabilities. Union of Equality. Strategy for the Rights of Persons with Disabilities 2021-2030<sup>[31]</sup> provides a framework for such activities. It aims to improve the lives of people with disabilities over the next decade. Section 4.2. „Developing new skills for new jobs” underlines that having the right skills and qualifications is a prerequisite for accessing and succeeding in the labour market. Member States are responsible to adapt education and training policies to the needs of persons with disabilities in a manner consistent with the UN Convention. Section 4.3. „Fostering access to quality and sustainable jobs” says that participation in employment is the best way to ensure economic autonomy and social inclusion. Section 4.4. „Consolidating social protection systems” emphasizes that alongside fair employment, adequate social protection, including retirement schemes, is an essential prerequisite to ensure an adequate income for a decent standard of living of persons with disabilities and their families. In general terms, section 9.1. „Strengthening the EU Framework under UNCPRD” provides that as party to UN Convention the EU had to set up a framework in order to promote, protect and monitor implementation of the Convention.

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<sup>31</sup> Brussels, 3.3.2021 – COM(2021) 101 final.

## 8 | Concluding remarks

Pursuant to the UN Convention, persons with disabilities have the same rights as everyone else. This instrument of international law also marked a breakthrough in setting minimum standards for the rights of persons with disabilities. The Convention introduced a new paradigm of disability, a new concept of equality, a new definition of non-discrimination and new protection tools, but it did not create new or unique rights for persons with disabilities. Lack of accessibility can constitute discrimination against persons with disabilities. The European Union has an obligation to protect the rights of persons with disabilities in matters within its competence. There is therefore scope for the UN Convention to have a significant future impact in promoting the right to work of persons with disabilities within the European Union and in adapting employment conditions to their needs. The UN Convention provides an appropriate legal framework for improving the situation of persons with disabilities, while Member States are required to implement and enforce international and European standards for the protection of persons with disabilities at work (the latter is outside the scope of this paper).

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