



## **EDF draft input to the UN CRPD Committee's General Comment on Equality and Non-discrimination (Article 5 CRPD)**

### **Content**

I. Background .....	2
II. Introduction.....	2
III. Normative Content.....	4
1. Forms of discrimination .....	5
2. Personal scope .....	5
2.1. Concept of disability.....	5
2.2. Discrimination by association .....	6
2.3. Intersectional and multiple discrimination .....	6
3. Grounds of discrimination .....	9
4. Duty to provide reasonable accommodation .....	<a href="#">1140</a>
IV. State Party obligations .....	12
1. Legislative obligations: anti-discrimination laws .....	<a href="#">1342</a>
2. Institutional obligations: equality courts, bodies, ombudspersons .....	13

3 . Enforcement obligations: legal remedies .....	14
---	----

## I. Background

The European Disability Forum (EDF) is the European umbrella organisation representing the interests of 80 million persons with disabilities in Europe. The mission of EDF is to ensure disabled people full access to fundamental and human rights through their active involvement in policy development and implementation in Europe.

EDF very much welcomes the invitation to provide input to the draft General Comment on Article 5 'Equality and non-discrimination' of the UN Convention on the Rights of Persons with Disabilities. We hope that the General Comment will be an excellent basis for developing a strong and ambitious interpretation of Article 5 CRPD.

This submission follows the structure of the outline of the draft General Comment and provides information on the legal character of Article 5 CRPD, its normative character and state party's obligations which it considers important to be included in the draft General Comment.

## II. Introduction

These comments refer to paragraph 1.4. of the outline 'Principle of equality and non-discrimination in international law: Legal character of art. 5'.

EDF considers that Article 5 CRPD is **both a principle and a right**. The principles of equality, non-discrimination and the obligation to provide reasonable accommodation are the cornerstone of the international protection guaranteed by the CRPD. It can be

found in the Convention's preamble and in the general principles underlying the CRPD in Article 3, which underpin all of the Convention's provisions. It is described as a right to be protected against discrimination and to be provided with reasonable accommodation in Article 5 CRPD which is applicable throughout the Convention.

Moreover, the duty of non-discrimination and provision of reasonable accommodation **applies immediately to all rights of the CRPD**. The CRPD encompasses both 'civil and political rights' and 'economic, social and cultural rights'. Civil and political rights are commonly considered as 'immediately realisable'. This means that State Parties have an immediate obligation to promote, protect and fulfil these rights. By contrast, economic, social and cultural rights are subject to the standard of 'progressive realisation'. States Parties are required to prove that they are adopting all the necessary measures to realise the right as quickly and effectively as possible, within the limits of the resources at their disposal.

Non-discrimination represents a cross-cutting obligation of immediate realisation which affects all rights: civil and political and economic, social and cultural rights of the Convention. The introduction of the duty to accommodate into the same provision concerning equality and non-discrimination implies that it would apply across the whole spectrum of civil and political rights, as well as economic, social and cultural rights.<sup>1</sup> The substantive approach to equality adopted by the CRPD requires that States take concrete measures to facilitate the enjoyment of all human rights for persons with disabilities. To this end, reasonable accommodations must be put in place to foster the participation and inclusion of a person with disabilities in

---

<sup>1</sup> Andrea Broderick, The Long and Winding Road to Equality and Inclusion for Persons with Disabilities The United Nations Convention on the Rights of Persons with Disabilities (November 2015, Intersentia).

mainstream society. The CRPD Committee, in its General Comment on Article 24, stated that ‘the denial of reasonable accommodation constitutes discrimination and the duty *to provide reasonable accommodation is immediately applicable and not subject to progressive realization*’. States parties must ensure that independent systems are in place to monitor the appropriateness and effectiveness of accommodations, and provide safe, timely, and accessible mechanisms for redress when students with disabilities, and if relevant, their families, consider that they have not been adequately provided or have experienced discrimination”.<sup>2</sup>

The duty to accommodate clearly stands out as an obligation of immediate realisation and it is part of a broad legal framework to achieve *de facto and substantive* equality. It is worth noting that according to Article 5(4) of the CRPD, “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 present Convention”. Moreover, Article 4(1)(b) of the CRPD requires States to ‘take *all appropriate measures*, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.’

**EU and Member States should ensure that the obligation not to discriminate and to provide reasonable accommodation is immediately realisable and not subject to progressive realisation.**

### **III. Normative Content**

---

<sup>2</sup> Committee on the Rights of Persons with Disabilities, General comment No. 4 (2016) Article 24: Right to inclusive education, CRPD/C/GC/4 (2016).

These comments refer to Art. 5(2), 7. Discrimination of the outline: forms of discrimination, personal scope and grounds of discrimination', and Article 5(3) 8. Duty to provide reasonable accommodation.

## **1. Forms of discrimination**

Article 2 CRPD states that 'discrimination includes all forms of discrimination, including denial of reasonable accommodation.' Unlike the EU Employment Equality Directive, the CRPD explicitly classifies denial of reasonable accommodation as a form of discrimination.

**EDF calls on the CRPD Committee to reinforce the duty to provide reasonable accommodation under EU and national law by expressly recognising the failure to provide reasonable accommodation as a form of discrimination. It should apply to both public and private employers, whatever be the size of the company or the number of employees.**

## **2. Personal scope**

### **2.1. Concept of disability**

The personal scope of the EU equality legislation is not defined and no reference is made to the concept of disability of the CRPD as the Employment Equality Directive was adopted before the CRPD came into force. EU Member States have applied their national definitions to who is a person with disabilities, thereby limiting the scope of protection under its equality legislation and providing different levels of protection across Europe. The European Court of Justice at first had taken a medical approach to defining disability in the case of *Chacón Navas*, as it focused on the limitation of the person arising from his or her impairment, and not considering the person's interaction with environmental barriers. In more recent cases, the European Court of

Justice stated that the concept of disability needs to be interpreted in the light of article 1 CRPD thereby taking a more human rights based approach to disability.

**EDF recommends the CRPD Committee to clarify that national and EU equality legislation should refer to Article 1 CRPD and its human rights based approach to disability as to define who is entitled to protection against discrimination.**

## **2.2. Discrimination by association**

Mothers of children with disabilities have more difficulties in accessing jobs and it may negatively affect their conditions of employment, for example in many instances where women are involuntary part time workers or are pushed into precarious forms of employment, and all these factors produce pay and pension gaps.

The European Court of Justice has recognized in the case of Coleman v Attridge Law that protection against discrimination under the Employment Equality Directive extends to discrimination by association.

**EDF recommends the CRPD Committee to clarify that the protection against discrimination should extend to persons who experienced discrimination on the basis of their association with a person with a disability.**

## **2.3. Intersectional and multiple discrimination**

Article 6 paragraph 1 of the UN Convention on the Rights of Persons with Disabilities recognises that women with disabilities are subject to multiple discrimination and requires that States parties take measures to ensure the full and equal enjoyment by women with disabilities of all human rights and fundamental freedoms. The CRPD Committee's jurisprudence has also provided specific recommendations to address

multiple and intersectional discrimination.<sup>3</sup> The CRPD Committee has called States Parties in its concluding observations 'to include intersectional and multiple discrimination as a form of discrimination, and definitions of the term, and adopt legal remedies and sanctions to reflect the aggravated nature of violations arising from multiple and intersectional discrimination'.<sup>4</sup> The Committee has been also concerned 'at the absence of action being taken to prevent and combat the multiple discrimination faced by women and children with disabilities, and the lack of data on women and girls with disabilities, which is fundamental to combating the intersectional discrimination they face'.<sup>5</sup> The UN Committee on the Rights of the Child also stressed in the General Comment no. 9 regarding the rights of children with disabilities that 'girls with disabilities are often even more vulnerable to discrimination due to gender discrimination.'

Multiple discrimination is a situation where a person can experience discrimination on two or several grounds, in the sense that discrimination is compounded or aggravated.<sup>6</sup> Intersectional discrimination refers to a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable.<sup>7</sup>

Persons with disabilities are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status. The

---

<sup>3</sup> See CRPD/C/MUS/CO/1, CRPD/C/BRA/CO/1, CRPD/C/CZE/CO/1, CRPD/C/DNK/CO/1, CRPD/C/AUS/CO/1, CRPD/C/SWE/CO/1, CRPD/C/DEU/CO/1, among others.

<sup>4</sup> Slovakia (CRPD/C/SVK/CO/1).

<sup>5</sup> Czech Republic (CRPD/C/CZE/CO/1).

<sup>6</sup> CEDAW General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures para 12.

<sup>7</sup> CEDAW/C/2010/47/GC.2, para. 18

interaction between multiple individual characteristics may indeed increase the possibilities to be discriminated against.

EU equality law embraces a single-ground approach to prohibit discrimination and lacks specific legal instruments to address intersectional and multiple discrimination. The Employment Equality Directive does not enshrine any legal binding provision to tackle multiple and intersectional discrimination against persons with disabilities. The Race Equality Directive does not expressly refer to disability as a ground of multiple discrimination. The Recast Gender Directive does not prohibit discrimination against women with disabilities or any other form of multiple discrimination.

EU case-law also shows that the EU legal framework does not ensure appropriate protection with regard to multiple discrimination. In the case of *Z. v A Government department, The Board of management of a community school*, the European Court of Justice ruled that the refusal to provide paid leave equivalent to maternity leave to a female worker who had a child through surrogacy did not constitute gender or disability discrimination.<sup>8</sup> This case demonstrates the inadequacy of legal instruments which do not take into account the combination of two or more grounds of discrimination. Given that EU legislation does not specifically addresses multiple and intersectional discrimination, individuals cannot claim to be discriminated against on the basis of two or more inseparable grounds.

---

<sup>8</sup> *Z. v A Government department, The Board of management of a community school*, judgment of the court (Grand Chamber).  
18 March 2014



Several European countries have national anti-discrimination legislation which includes provisions concerning multiple discrimination.<sup>9</sup>

Against this framework, **EDF strongly recommends the General Comment to clarify that the protection against discrimination should include multiple and intersectional discrimination on all grounds of discrimination, definitions of the term, and adopt legal remedies and sanctions to reflect the aggravated nature of violations arising from multiple and intersectional discrimination.**

### 3. Grounds of discrimination

EU equality law is characterised by a fragmented and hierarchical legal framework with regard to the protection afforded to disability, race and gender.<sup>10</sup>

The protection of persons with disabilities is weaker compared to race and gender equality law. The Employment Equality Directive 2000/78/EC prohibits discrimination on grounds of disability, age, sexual orientation and religion and establishes a general framework for equal treatment in employment and occupation.<sup>11</sup> The Race Equality Directive 2000/43/EC implements the principle of equal treatment between persons irrespective of racial or ethnic origin.<sup>12</sup>

The material scope of the Employment Equality Directive is confined to employment and occupation. By contrast, the Race Equality Directive has a broader application and applies in a wide range of fields such as employment and occupation, education, housing and goods and services. Gender equality is also guaranteed with regard to

---

<sup>9</sup> Equinet perspective, Innovating at the Intersections, 2016 [http://www.equineteurope.org/IMG/pdf/equinet\\_perspective\\_2016\\_-\\_intersectionality\\_final\\_web.pdf](http://www.equineteurope.org/IMG/pdf/equinet_perspective_2016_-_intersectionality_final_web.pdf)

<sup>10</sup> Dagmar Schiek and Anna Lawson, European Union Non-Discrimination Law and Intersectionality Investigating the Triangle of Racial, Gender and Disability Discrimination), p. 31.

<sup>11</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>

<sup>12</sup> <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32000L0043>

access to and the supply of goods and services according to Directive 2000/113/EC. The European Commission therefore proposed the adoption of the Equal Treatment Directive (the so-called Horizontal Directive) in order to harmonise and extend the equality protection beyond employment.<sup>13</sup> However, as unanimity is required in the Council of the European Union, the draft has remained blocked at that stage since then. As a result, persons with disabilities are protected against discrimination in the EU in the area of employment and vocational training, but not with regards to education, public transport, social protection, health care, access to justice, housing, etc.

At national level, it is worth noting that the prohibition on discrimination on grounds of disability applies in some EU Member States beyond the narrow material scope of EU law. It also covers social protection, social advantages, education, goods and services including housing.<sup>14</sup> For instance, the Federal Disability Equality Act in Austria regulates disability discrimination outside the employment sphere and applies to access to all publicly available goods and services as well as to buildings within the sphere of responsibility of the federal administration.<sup>15</sup>

**EDF calls on the CRPD Committee to clarify that the protection against discrimination covers all fields of life and that states parties, including the EU should adopt comprehensive equality legislation outside employment,**

---

<sup>13</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 {SEC(2008) 2180} {SEC(2008) 2181}

<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52008PC0426>

<sup>14</sup> Aileen McColgan , Jan Niessen and Fiona Palmer, comparative analyses on national measures to combat discrimination outside employment and occupation (December 2006).

<sup>15</sup> Bundes-Behindertengleichstellungsgesetz – BGStG, Änderung (563/A).

including in the fields of social protection, social advantage, education, transport, access to goods and services, and housing.

#### 4. Duty to provide reasonable accommodation

The duty to provide reasonable accommodation in the workplace under EU law is ensured by Article 5 of the Directive 2000/78/EC according to which ‘in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, 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. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.’

The obligation to provide reasonable accommodation is crucial to enable persons with disabilities to have access to, participate in or advance in employment. The European Court of Justice handed down an important decision for employees with disabilities and clarified the legal content of this obligation. The Court, in the case of *Ring and Skouboe Werge*, concluded that “Article 5 of Directive 2000/78 must be interpreted as meaning that a reduction in working hours may constitute one of the accommodation measures referred to in that article”.<sup>16</sup> Moreover, the Directive 2000/78 “must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if

---

<sup>16</sup> Joined Cases C-335/11 and C-337/11, HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab (C-335/11) v HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (C-337/11).

the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of the employer's failure to take the appropriate measures in accordance with the obligation to provide reasonable accommodation laid down in Article 5 of that directive".

Positively, the European Court of Justice found that the adaptation of working hours represents a reasonable accommodation for persons with disabilities who are not capable, or no longer capable, of working full-time. Employers therefore cannot fire persons with disabilities who are absent from work as the consequence of the employer's failure to provide reasonable accommodation and have to re-integrate persons with disabilities in the workplace.

However, the concept of reasonable accommodation still lacks legal certainty, which has created confusion and undermined protection. EU law and case law do not provide much guidance as to the reasonableness and proportionality of the accommodations required by an individual, and leaves these concepts open to wide interpretations by the employers.

In some EU Member States, where the state participates financially in the provision of reasonable accommodation and the employers are aware of this, the employers are found more open to hiring persons with disabilities.

**EDF calls on the CRPD Committee to provide more guidance on the concept of reasonable accommodation and disproportionate burden.**

**Commentaire [OME1]:** N'est-ce pas un peu faible ?

#### **IV. State Party obligations**

These comments refer to IV. State Party obligations: 19. Legislative obligations: anti-discrimination laws, and 20. Institutional obligations: equality courts, bodies, ombudspersons and 21. Enforcement obligations: legal remedies.

### **1. Legislative obligations: anti-discrimination laws**

The CRPD provides a comprehensive legal framework for achieving equality and non-discrimination. According to international human rights law, State Parties have the obligations to protect, to respect and to fulfil the rights embodied in the Convention. As a result, the EU and its Member States are called to adopt equality law that take into account disability in all areas of life.

### **2. Institutional obligations: equality courts, bodies, ombudspersons**

In accordance with Article 33 of the CRPD, in order to effectively monitor the implementation of the rights enshrined in the Convention, States Parties shall maintain, strengthen, designate or establish a framework, including one or more independent mechanism, by taking into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.

To this end, it is crucial to strengthen the role and mandates of equality bodies, National Human Right Institutions (NHRIs), Ombudspersons and civil society organisations that participate in those national mechanisms established to monitor the implementation of the CRPD. States Parties need to equally guarantee that these monitoring bodies have sufficient independence, human and financial resources and are part of an appropriate institutional architecture.

As a party to the CRPD, the EU has created a monitoring Framework composed of: the European Parliament, the European Ombudsman, the EU Agency for Fundamental Rights (FRA) and the European Disability Forum (EDF). The 2015

concluding observations of the UN CRPD Committee to the EU recommend ensuring that the Framework has adequate financial and human resources to perform its tasks. The lack of adequate resource indeed jeopardises the effective functioning of the EU monitoring framework which would need stronger capacity and tools to assess the CRPD's implementation at EU level.

Article 33, 3 CRPD stresses that 'civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process'.

**EDF recommends the CRPD Committee to recognise the diversity of monitoring bodies, and to stress that all these bodies should involve persons with disabilities and their representative organisations in their monitoring role. States parties, both at national and EU level should ensure that the monitoring bodies have a strong mandate, receive adequate resourcing and are independent according to the Paris Principles.**

### **3 . Enforcement obligations: legal remedies**

State Parties under the CRPD are obliged to promote the access to justice for persons with disabilities who still encounter several barriers, including physical and procedural barriers, and those relating to the denial of legal capacity. Access to justice is a fundamental right and a crucial prerequisite for the protection of all other human rights. However, access to justice for persons with disabilities is not adequately ensured under national law. Persons with disabilities therefore do not have available remedies for alleging violations of their rights or participating in legal proceedings. The CRPD Committee has already highlighted the necessity of providing persons with disabilities with the support they may require to take decisions

and have access to justice.<sup>17</sup> In its Concluding Observations, it has urged states to replace substituted decision making with supported decision making. The CRPD Committee also recommends that State Parties “provide training, in consultation and cooperation with persons with disabilities and their representative organizations, at the national, regional and local levels for all actors, including civil servants, judges, and social workers, on the recognition of the legal capacity of persons with disabilities and on mechanisms of supported decision-making”.<sup>18</sup>

Persons with disabilities still have negative experiences with law enforcement and available legal remedies. They fear that judicial authorities, police and other law-enforcement authorities will not seriously take into account the crime reported. Moreover, persons with disabilities are not fully aware of their own rights, of what constitutes a crime and when reporting it. They cannot seek any redress if they do not know what their legal rights are, or how to exercise them under law. In many countries, lack of information provided in accessible format on how to have access to legal services obstacles the ability of persons with disabilities to report crimes and their effective participation in legal proceedings.<sup>19</sup>

To remedy these issues, it would be essential to adopt specific legal remedies and sanctions to uphold the prohibition of disability-based discrimination in a cross-cutting way in all rights and areas of life. A dedicated mechanism should be established to

---

<sup>17</sup> European Union Agency for Fundamental Rights, Legal capacity of persons with intellectual disabilities and persons with mental health problems (2013).

<sup>18</sup> CRPD Committee, Report of the Committee on the Rights of Persons with Disabilities, General Assembly Official Records, Sixty-eighth session, Supplement No. 55 (A/68/55).

<sup>19</sup> United Nations, DSPD Division for Social Policy and Development and Development of Economic Social Affairs DESA, Access to justice for persons with disabilities, Toolkit on Disability for Africa.

address cases of discrimination and foster the use of available legal remedies by persons with disabilities facing discrimination and inequality.

**EDF calls on the Committee to highlight and clarify the legal content of the obligation to provide effective and accessible legal remedies for all persons with disabilities, regardless of their legal capacity status.**

DRAFT