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## Discrimination on grounds of disability

### Applying EU anti-discrimination law

*Academy of European Law / Trier*  
*National School of Judiciary and Public Prosecution*

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## Scope of occurrence

- 1. Introductory remarks
- 2. Legal basis for the prohibition of discrimination on grounds of disability in EU law
- 3. The UN Convention on the Rights of Persons with Disabilities in the EU legal system
- 4. Concept and specificity of disability as a criterion for the prohibition of discrimination
- 5. Reasonable accommodation in the workplace
- 6. Summary

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# 1. Introductory remarks

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## Introductory remarks

- Multiple legal sources (European Union law, UN Convention, national law)
- The specific nature of disability as a ground for prohibition of discrimination, including:
  - the comparator issue (Case C-16/19 *Clinical Hospital*)
  - the problem of multiple (intersectional) discrimination
  - the problem of discrimination on the basis of association (discrimination by association)
- Specific regulations on combating discrimination on grounds of disability, including additional obligations on employers regarding reasonable accommodation in the workplace

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## 2. Legal basis for the prohibition of discrimination on grounds of disability in EU law

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### Treaty on the Functioning of the European Union

- Article 9: In defining and implementing its policies and actions, the Union shall take into account, among other things, the fight against social exclusion
- Article 10: In defining and implementing its policies and actions, the Union shall aim to combat discrimination based on, among other things, disability
- Article 19(1): The Union shall have competence to take the necessary measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

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## EU Charter of Fundamental Rights

- Article 21(1) Non-discrimination
- 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.
- Article 26 **Integration of persons with disabilities**
- The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

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## EU Charter of Fundamental Rights

- Judgment of the CJEU of 22 May 2014 C-356/12 *Glatzel*: it is permissible to rely on Article 26 of the Charter of Fundamental Rights before a court for the purposes of interpreting and reviewing the legality of legislative acts of the Union which give effect to the principle expressed in that article, namely the principle of integration of persons with disabilities (paragraph 74).
- Judgment of the CJEU of 26 January 2021, C-16/19, *Clinical Hospital*: Directive 2000/78 gives concrete expression, in the area which it regulates, to the general principle of non-discrimination guaranteed by Article 21 of the Charter of Fundamental Rights of the European Union (paragraph 33).

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### Directive 2000/78 establishing a general framework for equal treatment in employment and occupation (preamble)

- (16) The adoption of measures to accommodate the needs of persons with disabilities in the workplace is the most important factor in combating discrimination against persons with disabilities.
- (17) This Directive does not require that a person who is not competent or capable or available to perform the essential tasks of a given job or to continue a given training programme be recruited, promoted or retained in employment, without prejudice to the obligation to make reasonable accommodation for the needs of persons with disabilities. (...)
- (19) Furthermore, in order to enable Member States to maintain the effectiveness of their armed forces, they may not apply the provisions of this Directive relating to disability and age in all or part of their armed forces (...)

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### Directive 2000/78 establishing a general framework for equal treatment in employment and occupation

- Article 1. The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.
- Article 2(2)(ii) and Article 5: reasonable accommodation (see below, point 5)
- Article 3(4). Member States may provide that this Directive shall not apply to the armed forces in relation to discrimination on grounds of disability or age.

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### Directive 2000/78

- Limited scope (work and employment)
- Prohibition of discrimination: no less favourable treatment on grounds of certain characteristics, including disability
- No definition of disability
- No claim to employment; necessity to meet essential and determining occupational requirements
- Reasonable accommodation: employers must take individual measures to adapt working conditions to the needs of persons with disabilities

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### 3. UN Convention on the Rights of Persons with Disabilities in the EU legal system

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### **Council Decision 2010/48 of 26 November 2009 on the conclusion by the European Community of the United Nations Convention on the Rights of Persons with Disabilities**

- Preamble, recital 6: The approval of the Convention should be accompanied by a reservation by the European Community to Article 27(1) of the Convention [*Work and employment*], stating that the Community is concluding the Convention without prejudice to the law resulting from Community legislation, namely Article 3(4) of Council Directive 2000/78/EC, which allows Member States not to apply the principle of equal treatment on the grounds of disability in the field of employment and occupation
- Article 1. The United Nations Convention on the Rights of Persons with Disabilities is hereby approved on behalf of the Community, subject to the reservation regarding Article 27(1).

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### **United Nations Convention on the Rights of Persons with Disabilities**

- **Art. 1.** The purpose of this Convention is to promote and protect all human rights and fundamental freedoms and to ensure their equal enjoyment 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 other persons.

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## UN Convention on the Rights of Persons with Disabilities

- **Article 2** "Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. in all policy areas, including in the political, economic, social, cultural, civil or any other field. This includes all forms of discrimination, including the denial of reasonable accommodation.
- "Reasonable accommodation" (see point 5 below)

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## UN Convention on the Rights of Persons with Disabilities

- **Art. 3. General principles:** including non-discrimination, equality of opportunity, *accessibility*
- **Article 27. Work and employment**
- States Parties recognise the right of persons with disabilities to work on an equal basis with others; this includes the right to the opportunity to earn a living through work freely chosen or accepted in the labour market and in an open, inclusive and accessible working environment. States Parties shall protect and promote the realisation of the right to work, including for those who have lost their full capacity to work during their employment, by taking appropriate steps, including through legislation, inter alia, to:
  - a) prohibiting discrimination on the basis of disability (...)
  - j) ensuring the introduction of reasonable accommodation for persons with disabilities in the workplace (...)

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### UN Convention on the Rights of Persons with Disabilities

- An integral part of the legal order of the Union, e.g. joined cases C-335/11 and 337/11, *HK Danmark*, paragraph 30; Opinion of Advocate General Rantos of 13 March 2025 in case C-38/24 *Bervidi*, paragraph 30, paragraphs 52-53)
- Judgment of the CJEU of 18 March 2014, C-363/12, *Z v A. Government Department*: The Convention is of a programmatic nature (...) the provisions of the Convention are not provisions whose content is unconditional and sufficiently clear. They are therefore devoid of direct effect in Union law. (...) The validity of Directive 2000/78 cannot be assessed in the light of the UN Convention (paragraphs 88-90).
- Judgment of the CJEU of 1 December 2016, C-395/15, *Daouidi*: the UN Convention may be relied upon for the interpretation of Directive 2000/78, which must be interpreted as far as possible in accordance with that convention (paragraph 41).

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## 4. The concept and specificity of disability as a criterion for prohibiting discrimination

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## Possible definitions of disability

- Medical model: a long-term condition involving limitations in the functioning of the human body
- Social model: inability to function fully in society due to existing barriers and limitations
- Human rights model:
  - disability is only one of the characteristics of an individual,
  - recognition of persons with disabilities as subjects of human rights and striving to ensure the widest possible enjoyment of these rights

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## UN Convention

- Recital (e) of the preamble: disability is an evolving concept (...) disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.
- Article 1: 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 other persons.

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### **Judgment of the CJEU of 11 July 2006, C-13/05, *Sonia Chacon Navas***

- The concept of ‘disability’ within the meaning of Directive 2000/78 must be given an autonomous and uniform interpretation.
- The concept of ‘disability’ must be understood as a limitation, resulting specifically from an impairment of physical, mental or psychological functions, which constitutes an obstacle to the participation of a person in professional life.
- The legislator deliberately chose a concept that differs from that of ‘illness’. A simple equation of these two concepts is therefore excluded.
- (...). For a limitation to fall within the concept of ‘disability’, it must therefore be likely to be long-term.
- Directive 2000/78 does not contain any indication that workers are protected against discrimination on grounds of disability in the case of any illness (paragraphs 42–46).

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### **Judgment of the CJEU of 11 April 2013, joined cases C-335/11 and C-337/11 *HK Danmark***

- 38. Disability must be understood as a limitation resulting in particular from impairments of physical, mental or psychological functions which, in interaction with various barriers, may hinder a person from participating fully and effectively in professional life on an equal basis with other workers.
- 39. In addition, it follows from the second paragraph of Article 1 of the UN Convention that physical, mental, intellectual or sensory impairments must be of a ‘long-term’ nature.
- 43. The fact that a person can only work to a limited extent does not prevent that person’s health condition from being covered by the concept of disability. (...) Disability does not necessarily mean total exclusion from work or professional life.

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**Judgment of the CJEU of 18 March 2014, C-363/12, Z v A.  
Government Department**

- 81. (...) The inability to have children in the traditional way does not, in itself, constitute an obstacle to access to employment, to the exercise of employment or to professional advancement. In the present case, it does not appear from the order for reference that the condition from which Z. suffers in itself makes it impossible for her to perform her work or constitutes an obstacle to her professional activity.
- 82. In those circumstances, it must be held that the condition from which Z. suffers does not constitute a 'disability' within the meaning of Directive 2000/78 and that, consequently, that directive, in particular Article 5 thereof, does not apply in a situation such as that at issue in the main proceedings. The fact that the contracting authority's mother has been caring for the child since its birth, as mentioned in the third question, cannot call that conclusion into question.

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**Judgment of the CJEU of 18 December 2014, C-354/13, Kaltoft**

- 56. The concept of disability within the meaning of Directive 2000/78 does not depend on the extent to which a person may have contributed to the existence of his or her disability.
- 58. Obesity as such does not constitute a disability within the meaning of Directive 2000/78, since, by its nature, it is not always associated with limitations such as those referred to in paragraph 53 of this judgment [*i.e. full and effective participation in professional life*].
- 59 -60. However, if, in specific circumstances, the obesity of a given employee leads to limitations resulting in particular from the impairment of physical, mental or psychological functions which, in combination with various barriers, may hinder his or her full and effective participation in professional life on an equal basis with other employees, and those limitations are of a long-term nature, then such a condition falls within the concept of disability (...) [*For example*] due to limited mobility or the presence of medical conditions that hinder the person's ability to perform their work or constitute an obstacle to the performance of their professional activities.

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### Judgment of the CJEU of 1 December 2016, C-395/15, *Daouidi*

- 44. The Directive covers, in particular, disabilities resulting from accidents.
- 51. In the absence of an express reference to the law of the Member States, the concept of 'long-term' limitation of a person's capacity, within the meaning of the concept of 'disability' referred to in Directive 2000/78, must therefore be given an autonomous and uniform interpretation.
- 56. Indications that a limitation is 'long-term' include, in particular, the fact that (...) the person's incapacity does not indicate a definite prospect of its cessation in the near future, or (...) the fact that that incapacity is likely to continue for a considerable period before the person concerned recovers.
- 57. When examining the 'long-term' nature of the restriction of a person's capacity, the referring court must take into account all objective factors based on the material before it, in particular documents and certificates relating to the person's condition, drawn up on the basis of current knowledge and current medical and scientific data.

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### Judgment of the CJEU of 11 September 2019, C-397/18 *Nobel Plastiques Iberica*

- 42. It does not appear that Directive 2000/78 is intended to cover only congenital disabilities or disabilities resulting from accidents, to the exclusion of disabilities caused by illness. Differentiating the scope of the directive according to the cause of the disability would be contrary to the objective of the directive, which is to achieve equal treatment (see, to that effect, judgment of 11 April 2013, HK Danmark, C-335/11 and C-337/11, EU:C:2013:222, paragraph 40).
- 43. The concept of disability must be understood as referring to an obstacle to the exercise of professional activities, not to the inability to exercise such activities. The state of health of a disabled person allowing them to work, even on a part-time basis, may therefore fall within the concept of disability (see, similarly, the judgment of 11 April 2013, HK Danmark, C-335/11 and C-337/11, EU:C:2013:222, paragraph 44).

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### **Judgment of the CJEU of 26 January 2021, C-16/19, *Clinical Hospital***

- 56. Directive 2000/78 concerns disability in general and, therefore, without distinction or limitation, all types of disability within its meaning (see, to that effect, judgment *in Daouidi*, C-395/15, paragraph 42).
- CJEU: If the referring court finds that the difference in treatment results from an apparently neutral practice, it will still be for it to examine whether that difference in treatment has resulted in a particular disadvantage for persons with a particular disability in relation to persons with other types of disability.

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### **Judgment of the CJEU of 10 February 2022, C-485/20, *HR Rail SA***

- 34. According to settled case law, the concept of ‘disability’ within the meaning of that directive must be understood as referring to a limitation of ability resulting in particular from long-term impairment of physical, mental or psychological functions which, in interaction with various barriers, may hinder a person from participating fully and effectively in professional life on an equal basis with other workers
- 35. In the present case, the applicant in the main proceedings suffers from a health problem requiring the implantation of a pacemaker, a device sensitive to electromagnetic fields occurring in particular on railway tracks, which prevents him from performing the most important tasks of the job to which he has been assigned.
- 36. Consequently, a situation such as that at issue in the main proceedings falls within the scope of Directive 2000/78.

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## Disability under Directive 2000/78 in the light of CJEU case law

- A finding of disability *in a particular case* is a prerequisite for the application of Directive 2000/78
- Autonomous concept of EU law
- Extensive interpretation taking into account the UN Convention
- Emphasis on the limitations experienced by persons with disabilities in the field of employment and work (moving away from a medical definition of disability)

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## Discrimination by association

### Judgment of the CJEU of 17 July 2008, C-303/06 Coleman

- 56. (...) The prohibition of direct discrimination (...) is not limited to persons who are themselves disabled. If an employer treats an employee who is not himself disabled less favourably than he treats, has treated or would treat another employee in a comparable situation and it is established that the less favourable treatment of that employee is related to the disability of his child, for whom he provides essential care appropriate to his needs, such treatment is contrary to the prohibition of direct discrimination referred to in Article 2(2)(a) of Directive 2000/78
- 63. The prohibition of harassment is not limited to persons who are themselves disabled. If it is established that is related to the disability of the child for whom the employee provides essential care in accordance with the child's needs, such conduct is contrary to the prohibition of harassment referred to in Article 2(3) of the Directive.

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**Discrimination within the same protected group**  
**Judgment of the CJEU of 26 January 2021, C-16/19, *Clinical Hospital***

- 31. The objective pursued by Directive 2000/78 supports an interpretation of Article 2(1) and (2) of that directive as not limiting the group of persons with whom a comparison may be made in order to establish discrimination on grounds of disability within the meaning of that directive to persons who are not affected by a disability.
- 35. (...) The protection afforded by that directive would be weakened if it were to be held that a situation in which such discrimination occurs within a group of persons who are all disabled is, by definition, outside the scope of the prohibition of discrimination laid down in the directive solely because the difference in treatment occurs between persons with disabilities.

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**Judgment of the CJEU of 26 January 2021, C-16/19, *Clinical Hospital***

- 36. (...) The principle of equal treatment laid down in Directive 2000/78 aims to protect disabled workers within the meaning of that directive against any discrimination on grounds of their disability, not only in comparison with workers who are not disabled, but also in comparison with other workers affected by disability.
- 44. On the other hand, it cannot be assumed that a provision or practice introduces a difference in treatment directly on the grounds of disability within the meaning of Articles 1 and 2(2)(a) of that directive if it is based on a criterion which is not inextricably linked to disability.

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### **Judgment of the CJEU of 26 January 2021, C-16/19 *Clinical Hospital***

- Rejection of the assumption that it is necessary to compare the situation of disabled and non-disabled workers
- Discrimination may occur within a group of persons with disabilities
- Discrimination occurs when less favourable treatment is inextricably linked to disability
- CJEU: extension of the scope of the EU principle of equal treatment
  - the issue of identifying the comparator
  - application of protective mechanisms provided for by EU law
- Is discrimination possible within other protected groups?
- CJEU: yes, in the context of the prohibition of discrimination on grounds of religion:
  - CJEU judgment of 15 July 2021, joined cases C-804/18 and C-341/19, *WABE* (paragraphs 49-50)
  - CJEU judgment of 13 October 2022, C-344/20, *LF* (paragraphs 59-61)

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## **5. Rational improvements in the working environment**

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### Preamble to Directive 2000/78

- (20) Appropriate, i.e. effective and practical, measures should be taken to adapt the workplace to take account of disabilities, for example by adapting premises or equipment, working hours, the distribution of tasks or training or integration programmes.
- (21) In order to determine whether the adoption of the measures in question would impose a disproportionate burden, account should be taken, in particular, of the financial and other costs involved, the size of the organisation or the financial resources available to the undertakings and the possibility of obtaining public funding or any other assistance.

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### Article 5 of Directive 2000/78

- In order to ensure compliance with the principle of equal treatment of persons with disabilities, reasonable accommodation shall be provided. This means that the employer shall take appropriate measures, taking into account the needs of the particular situation, to enable a person with a disability to have access to employment, to pursue or develop his or her employment or training, unless these measures impose a disproportionate burden on the employer. Such a burden is not disproportionate if it is sufficiently compensated by existing measures in the policy of the Member State concerned for the disabled.

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## UN Convention on the Rights of Persons with Disabilities

- Article 2 "Reasonable accommodation" means necessary and appropriate modification and adjustments not entailing disproportionate or undue hardship, 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.

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### Judgment of the CJEU of 11 April 2013, joined cases C-335/11 and C-337/11 *HK Danmark*

- 53 According to the fourth paragraph of Article 2 of the UN Convention 'reasonable accommodation' means 'necessary and appropriate modification and adjustments not imposing a disproportionate or excessive burden, where needed in a particular case, to ensure to persons with disabilities the exercise or enjoyment on an equal basis with others of all human rights and fundamental freedoms'. It follows from the above that the aforementioned provision recommends a broad interpretation of the concept of reasonable accommodation.
- 54 However, in the context of Directive 2000/78, that concept must be understood as meaning the removal of all barriers which may hinder persons with disabilities from participating fully and effectively in professional life on an equal basis with other workers.
- 56 It should also be noted that the list of appropriate measures for adapting the workplace to disabilities contained in recital 20 of Directive 2000/78 is not exhaustive (...)

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### Examples of reasonable adjustments

- Reduction of working time (joined cases C-335/11 and C-337/11 *HK Danmark*, paragraph 56)
- Assignment of other tasks (Case C-397/18 *Nobel Plastiques Iberica*, Case C-824/19 *TC and UB v Komisja za zashita ot diskriminatia*)
- Allowing a prison officer to use a hearing aid (Case C-759/19 *Tartu Vangla*, paragraph 51)
- Transfer to another position for which the employee has the required skills, abilities and availability (Case C-485/20 *HR Rail*, paragraph 49)
- In general: material, organisational and personal measures (e.g. special work equipment, additional breaks, remote working, support from a third party)

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### Judgment of the CJEU of 18 January 2024, C-631/22, *Ca Na Negreta*

#### (reasonable accommodation and protection against dismissal)

- Article 5 of Directive 2000/78 must be interpreted, in the light of Articles 21 and 26 of the Charter of Fundamental Rights and Articles 2 and 27 of the UN Convention, as precluding national legislation which provides that an employer may terminate an employment contract on the ground that that, due to a disability which arose during the employment relationship, the employee is permanently unable to perform the tasks required of him under the employment contract, without making the possibility of termination of the contract conditional on the prior introduction and application of reasonable accommodation to enable that employee to remain in employment or on the demonstration, where appropriate, that the introduction of such accommodation would impose a disproportionate burden (paragraph 53).

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**Opinion of Advocate General Rantos of 13 March 2025  
in Case C-38/24 *Bervidi***

- Problem of indirect discrimination by association and reasonable accommodation
- Refusal to grant an employee's request for permanent transfer to a position with fixed working hours before noon in order to perform her duties, which would enable her to provide assistance and basic care appropriate to the needs of her severely disabled child, while continuing to perform her professional activities on an equal footing with other employees
- Alternatively: transfer to a lower position with the employee's consent
- Advocate General: inflexible working hours may be discriminatory towards carers of disabled children (paragraph 46 of the opinion)

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**Opinion of Advocate General Rantos of 13 March 2025  
in Case C-38/24 *Bervidi***

- Article 5 of Directive 2000/78 must be interpreted as meaning that, where a worker who is not himself disabled is the carer of his disabled child, the employer of that carer is required to take appropriate measures, by way of the 'reasonable accommodation' provided for in that article, in particular those relating to the adjustment of working hours and the modification of the tasks performed, in order to enable that worker, taking into account the needs of the specific situation, to provide the support and essential care appropriate to the needs of his child, provided that those measures do not impose a disproportionate burden on that employer (paragraph 60 of the opinion).
- Another argument: Article 9(1) of Directive 2019/1158 on work-life balance for parents and carers: the right of parents and carers to request flexible working arrangements

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## Reasonable adjustments

- Employers' obligation to take individualised measures
- Unjustified refusal to introduce reasonable accommodation constitutes discrimination on the grounds of disability
- Adaptation of working conditions to the needs of disabled employees
- Open catalogue of reasonable accommodation
- Requirement of proportionality between the employer's capabilities and the employee's needs
- Strengthening the stability of employment for disabled employees (determining whether the employee could continue working after the introduction of reasonable accommodation)

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## 6. Summary

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## Summary

- The UN Convention on the Rights of Persons with Disabilities has a significant impact on the interpretation of Directive 2000/78
- A broad and dynamic interpretation of 'disability' and 'reasonable accommodation'
- The EU Court of Justice's efforts to ensure the widest possible protection for persons with disabilities

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Thank you for your attention

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