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# THE EMPLOYMENT EQUALITY DIRECTIVE AND ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES:

Some Reflections in Light of *Tartu Vangla* and *Komisija za Zashtita ot  
Diskriminatsia*

DELIA FERRI and LÉA URZEL\*

## 1. INTRODUCTION

By concluding the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD or ‘the Convention’) in 2010,<sup>1</sup> the European Union (EU) has undertaken an array of obligations to promote, protect and fulfil disability rights. Prior to the EU’s accession to the CRPD, the EU Treaties and Charter of Fundamental Rights (CFREU) already incorporated references to disability.<sup>2</sup> Further, in 2000, the EU adopted Directive 2000/78 (Employment

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<sup>1</sup> Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ L 23/35.

<sup>2</sup> Article 19 of the Treaty on the Functioning of the European Union (TFEU) allows the Union to take action to combat discrimination on different grounds, including disability. The Charter of Fundamental Rights (CFREU) also prohibits discrimination *inter alia* on the basis of disability (Article 21 CFREU), and provides that ‘[t]he 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’ (Article 26 CFREU).

Equality Directive or ‘the Directive’),<sup>3</sup> which prohibits discrimination on the ground of disability in the workplace, and which increasingly mainstreamed disability rights across various strands of EU legislation and soft law.<sup>4</sup> However, the conclusion of the CRPD ‘gave rise to an immediate and visible shift in the EU’s approach to disability’.<sup>5</sup> The CRPD itself has become ‘an integral part of the [EU] legal order’,<sup>6</sup> and triggered the adoption of a comprehensive policy framework on disability, and new legislative measures. While the EU does not have competence to act in all areas covered by the Convention,<sup>7</sup> as is made evident by the EU’s Declaration of Competence annexed to the Council decision on the conclusion of the CRPD,<sup>8</sup> it has so far used both hard law and soft law to support the realisation of disability rights in several areas of life.

The ratification of the CRPD also prompted the embracement of a social model understanding of disability.<sup>9</sup> In this respect, the Court of Justice of the European Union (CJEU or ‘the Court of Justice’) has played an important role by ensuring the interpretation of EU legislation in light of the Convention.<sup>10</sup> In case law on disability discrimination in relation to the Employment Equality Directive, and since the seminal decision in *HK Danmark*,<sup>11</sup> the CJEU has interpreted disability as stemming from the interaction between an individual’s impairment and external barriers, aligning (at least formally) to Article 1(2) CRPD,<sup>12</sup> and has highlighted the role of reasonable accommodation in dismantling those barriers, in the context of employment and occupation.<sup>13</sup> In 2021, the Court of Justice released two significant

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<sup>3</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303.

<sup>4</sup> L. WADDINGTON, *From Rome to Nice in a Wheelchair: The Development of a European Disability Policy*, Europa Law Publishing, Groningen 2005.

<sup>5</sup> D. FERRI and A. BRODERICK, ‘Introduction’, in D. FERRI and A. BRODERICK (eds.), *Research Handbook on EU Disability Law*, Edward Elgar Publishing, Cheltenham 2020, p. 2.

<sup>6</sup> CJEU (ECJ), *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, Joined Cases C-335/11 and C-337/11, 11.04.2013, ECLI:EU:C:2013:222, paras. 30–32.

<sup>7</sup> A. LAWSON, ‘The European Union and the Convention on the Rights of Persons with Disabilities: Complexities, Challenges and Opportunities’, in V. DELLA FINA, R. CERA and G. PALMISANO (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, Springer, Cham 2017, p. 62; see also L. WADDINGTON, ‘The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences’, (2011) 18(4), *Maastricht Journal of European and Comparative Law*, p. 432.

<sup>8</sup> This Declaration lists a series of legislative instruments that have been adopted by the EU in various areas. It also states that those listed acts ‘illustrate the extent of the area of competence of the [EU]’, and provides that the EU’s competence ‘ensuing from these acts must be assessed by reference to the precise provisions of each measure, and in particular, the extent to which these provisions establish common rules that are affected by the provisions of the Convention’.

<sup>9</sup> D. FERRI and A. BRODERICK (2020), ‘Introduction’, *supra* note 5.

<sup>10</sup> L. WADDINGTON, ‘The European Union’, in L. WADDINGTON and A. LAWSON (eds.), *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts*, 1st ed., OUP, Oxford 2018, p. 133.

<sup>11</sup> CJEU, *HK Danmark*, *supra* note 6.

<sup>12</sup> S. FAVALLI and D. FERRI, ‘Tracing the Boundaries between Disability and Sickness in the European Union: Squaring the Circle?’, (2016) 23(1), *European Journal of Health Law*, p. 5; L. WADDINGTON, ‘Saying All the Right Things and Still Getting it Wrong: The Court of Justice’s Definition of Disability and Non-Discrimination Law’, (2015) 22(4), *Maastricht Journal of European and Comparative Law*, p. 576.

<sup>13</sup> See, *inter alia*, CJEU, *HK Danmark*, *supra* note 6; CJEU (ECJ), *DW v Nobel Plastiques Ibérica SA*, Case C-397/18, 11.09.2019, EU:C:2019:703; CJEU (ECJ), *XXXX v HR Rail SA*, Case C-485/20, 10.02.2022, ECLI:EU:C:2022:85.

decisions in the cases of *Tartu Vangla*<sup>14</sup> and *Komisija za zashtita ot diskriminatsia*.<sup>15</sup> At first glance, those decisions do not depart from previous jurisprudence in that, focusing on discrimination in the workplace, they reaffirm the importance of reasonable accommodation as a gateway to equality for persons with disabilities. However, this contribution argues that, by addressing the right to work in a judicial context, the Court of Justice has indirectly, yet substantially, promoted, alongside non-discrimination in employment, access to justice for persons with disabilities, confirming that, as Xenidis suggested, the Employment Equality Directive is ‘a site of normative complexity that epitomizes the legal versatility of the principle of equality’.<sup>16</sup> While analysing those decisions, this contribution suggests that the interpretation of the Employment Equality Directive in a manner consistent with the CRPD in relation to people working in the administration of justice carves out a significant role for the EU in the implementation of Article 13 CRPD, an area in which, formally, Member States still retain significant competence.

Following these introductory remarks, section 2 below discusses the articulation of the right of access to justice in the CRPD. It first reviews how access to justice is addressed in the broader human rights system. It then considers the normative content of Article 13 CRPD, as well as the relationships and interlinkages with other CRPD provisions. Section 3 moves on to explore the extent of EU competences in the implementation of Article 13 CRPD, and the relevance of EU law in that field. Section 4 focuses on the CJEU’s novel case law, *Tartu Vangla* and *Komisija za zashtita ot diskriminatsia*. After briefly recalling the core provisions of the Employment Equality Directive, it gives an account of these decisions, highlighting the key point of the Court’s reasoning. Section 5 critically discusses how those decisions contribute to promoting access to justice, and does so by contrasting them with the jurisprudence of the UN Committee on the Rights of Persons with Disabilities (CRPD Committee), ultimately emphasising the implications of the CJEU’s recent case law.<sup>17</sup> Section 6 provides some concluding remarks.

## 2. THE CRPD AND THE ARTICULATION OF A STAND-ALONE RIGHT OF ACCESS TO JUSTICE

### 2.1. BACKGROUND AND GENESIS OF THE RIGHT OF ACCESS TO JUSTICE

The right of access to justice is generally conceptualised around the issue of access to the legal system, thus encompassing the right to an effective remedy and the right to a fair hearing. Flynn and Lawson suggest that the concept of ‘access to justice’ can be subject not only to ‘a narrow interpretation which focuses primarily on issues of access’, but also to ‘a wider interpretation

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<sup>14</sup> CJEU (ECJ), *XX v Tartu Vangla*, Case C-795/19, 15.07.2021, ECLI:EU:C:2021:606.

<sup>15</sup> CJEU (ECJ), *TC and UB v Komisija za zashtita ot diskriminatsia and VA*, Case C-824/19, 21.10.2021, ECLI:EU:C:2021:862.

<sup>16</sup> R. XENIDIS, ‘The Polysemy of Anti-discrimination Law: The Interpretation Architecture of the Framework Employment Directive at the Court of Justice’, (2021) 58, *Common Market Law Review*, pp. 1655 and 1656.

<sup>17</sup> The present contribution focuses on case law of the CJEU, and does not engage with case law of the European Court of Human Rights, which remains outside the scope of the analysis proposed.

which entails ensuring (and therefore defining) justice'.<sup>18</sup> Reflecting on Bahdi's work, they point out that a broader understanding of access to justice is more widely followed, as it enables both 'issues of justice as well as issues of access' to be covered.<sup>19</sup> Acknowledged as a groundbreaking treaty, the CRPD is the first human rights instrument to effectively recognise a stand-alone right of access to justice.<sup>20</sup> Although it was not introduced until a later stage of the travaux préparatoires,<sup>21</sup> the drafting of this provision relied on a 'number of comments from States Parties and civil society organisations which are particularly relevant in illustrating the many dimensions of access to justice'.<sup>22</sup> With regard to 'the mandate of the Ad Hoc Committee ... not to create any new rights but merely to restate the application of existing human rights norms to people with disabilities',<sup>23</sup> the drafters drew from well-established human rights principles, such as the right to an effective remedy and the right to a fair hearing, when developing this provision.<sup>24</sup> In this respect, the concept of access to justice enshrined in the CRPD allows for the articulation of a number of rights recognised in core human rights treaties, such as the Universal Declaration of Human Rights (UDHR) of 1948.

The UDHR is regarded as the first instrument encapsulating formal manifestations of a right of access to justice, with Article 7 UDHR addressing equality before the law; and Article 8 UDHR, on the right to an effective remedy, providing that '[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'; and Article 10 UDHR focusing on the right to a fair trial in civil and criminal proceedings. Furthermore, Flynn highlights that 'access to justice is arguably one of the most fundamental civil and political rights which stems from the concept of equal citizenship'.<sup>25</sup> Although not explicit, some aspects of the right of access to justice are indeed found in the International Covenant on Civil and Political Rights (ICCPR), especially within Article 14, which 'encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law'.<sup>26</sup> In that regard, the UN Human Rights Committee, in its General Comment No. 32, stated that '[a]ccess to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived,

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<sup>18</sup> E. FLYNN and A. LAWSON, 'Disability and Access to Justice in the European Union: Implication of the United Nations Convention on the Rights of Persons with Disabilities', (2013) 4, *European Yearbook of Disability Law*, p. 12, referring to D. RHODE, 'Access to Justice', (2001) 69(5), *Fordham Law Review*, p. 1785.

<sup>19</sup> E. FLYNN and A. LAWSON, (2013), 'Disability and Access to Justice in the EU' *supra* note 18, referring to R. BAHDI, 'Background Paper on Women's Access to Justice in the MENA Region', Report of the International Development Research Centre (IDRC), 31.10.2007, available at [https://www.uwindsor.ca/law/rbahdi/sites/uwindsor.ca.law.rbahdi/files/womens\\_access\\_to\\_justice\\_in\\_mena-bahdi\\_en.pdf](https://www.uwindsor.ca/law/rbahdi/sites/uwindsor.ca.law.rbahdi/files/womens_access_to_justice_in_mena-bahdi_en.pdf), last accessed 04.04.2022.

<sup>20</sup> A. BRODERICK and D. FERRI, *International and European Disability Law and Policy: Text, Cases, and Materials*, CUP, Cambridge 2019, p. 187.

<sup>21</sup> See E. FLYNN, 'Art. 13 Access to Justice', in I. BANTEKAS, M.A. STEIN and D. ANASTASIOU (eds.), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, OUP, Oxford 2018, pp. 384–390.

<sup>22</sup> E. FLYNN, 'Making Human Rights Meaningful for People with Disabilities: Advocacy, Access to Justice and Equality before the Law', (2013) 17(4), *The International Journal of Human Rights*, p. 500.

<sup>23</sup> E. FLYNN (2018), 'Art. 13 Access to Justice', *supra* note 21, p. 387, referring to UNITED NATIONS, 'Chairman says draft convention sets out detailed code of implementation and spells out how individual rights should be put into practice', Press Release, 12.08.2005, SOC/4680, available at <https://www.un.org/press/en/2005/soc4680.doc.htm>, last accessed 04.04.2022.

<sup>24</sup> E. FLYNN and A. LAWSON (2013), 'Disability and Access to Justice in the EU', *supra* note 18, p. 42.

<sup>25</sup> E. FLYNN (2013), 'Making Human Rights Meaningful', *supra* note 22, p. 499, referring to T.H. MARSHALL, *Citizenship and Social Class, and Other Essays*, CUP, New York 1950.

<sup>26</sup> CCPR, General Comment No. 32, UN Doc. CCPR/C/GC/32, 23.08.2007, para. 9.

in procedural terms, of his/her right to claim justice'.<sup>27</sup> Further, Article 14(3)(f) requires that, in the course of determining criminal charges against an individual, that person must be provided with the free assistance of an interpreter.

On the whole, Article 13 CRPD articulates, in a single provision, an innovative obligation that incorporates 'less familiar elements', thus reflecting the multifaceted nature of the concept of 'access to justice', and 'acknowledg[ing] that accessing justice concerns more than participating in a tribunal or court as claimant or defendant'.<sup>28</sup> Article 13 CRPD goes beyond the previous human rights treaties and effectively 'provides a unique legal tool that can be used to counter discrimination, stigma and the exclusion faced by persons with disabilities'.<sup>29</sup>

## 2.2. ARTICLE 13 CRPD: GUARANTEEING EFFECTIVE ACCESS TO JUSTICE OF PERSONS WITH DISABILITIES

People with disabilities face multiple obstacles, not only when seeking redress and 'equal treatment before courts, tribunals, law enforcement officials, prison systems, and other bodies' as claimants or victims, but also when trying to participate and contribute to the justice system's functioning, as witnesses, jurors, lawyers, judges or other officials.<sup>30</sup> The CRPD Committee has observed several times that persons with disabilities are prevented not only from resorting to the justice system, but also from contributing to its operation.<sup>31</sup> Moreover, varying greatly depending on one's impairment and potential intersecting identities, the barriers faced by people with disabilities can take many forms,<sup>32</sup> including 'laws which deny legal standing to people with disabilities; inadequate legal information and advice; insufficient resources; inaccessible architectural design; inaccessible information or communication methods in court; [or] an inadequate protection from subsequent victimization'.<sup>33</sup> Attitudinal barriers are also common. In fact, preconceived notions and 'hostile or paternalistic attitudes' contribute to hindering, or even preventing, the participation of persons with disabilities in legal proceedings, and to challenging, for example, their reliability as witnesses, or their competence as jurors.<sup>34</sup> External barriers may occur in the education system, which prevents people with disabilities from following legal education and training, accessing legal professions and, ultimately, participating in the administration of justice as professionals.<sup>35</sup>

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<sup>27</sup> Ibid.

<sup>28</sup> E. FLYNN and A. LAWSON (2013), 'Disability and Access to Justice in the EU', *supra* note 18, pp. 9 and 42.

<sup>29</sup> A. BRODERICK and D. FERRI (2019), *International and European Disability Law*, *supra* note 20, p. 186, referring to E. FLYNN, *Disabled Justice? Access to Justice and UN Convention on the Rights of Persons with Disabilities*, Routledge, London/New York 2016, p. 17.

<sup>30</sup> S. ORTOLEVA, 'Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System', (2011) 17(2), *ILSA Journal of International & Comparative Law*, pp. 284 and 300–312.

<sup>31</sup> *Inter alia*, CRPD, 'Concluding Observations on the Report of France', UN Doc CRPD/C/FRA/CO/1, 04.10.2021, para. 27.

<sup>32</sup> E. FLYNN and A. LAWSON (2013), 'Disability and Access to Justice in the EU', *supra* note 18, p. 11. On barriers mentioned during the CRPD negotiations, see also E. FLYNN (2018), 'Art. 13 Access to Justice', *supra* note 21, pp. 385–386.

<sup>33</sup> E. FLYNN (2013), 'Making Human Rights Meaningful', *supra* note 22, p. 496.

<sup>34</sup> E. FLYNN and A. LAWSON (2013), 'Disability and Access to Justice in the EU', *supra* note 18, p. 10.

<sup>35</sup> A. BRODERICK and D. FERRI (2019), *International and European Disability Law*, *supra* note 20, pp. 192–193. On barriers, see also D.A. LARSON, 'Access to Justice for Persons with Disabilities: An Emerging Strategy', (2014) 3(2), *Laws*, pp. 220–238.

With a view to ensuring that States Parties address those barriers faced by persons with disabilities, Article 13 CRPD articulates the right of access to justice in a comprehensive and novel manner. As mentioned above, while encapsulating, notably, the right to a fair hearing and the right to an effective remedy, access to justice, as enshrined in the CRPD, refers to ‘a broad concept, encompassing peoples’ effective access to the systems, procedures, information, and locations used in the administration of justice’.<sup>36</sup> As such, it enables persons with disabilities to assert the full range of rights recognised in the Convention in the context of the justice system, and contributes towards their full inclusion in society.

Article 13(1) requires States Parties to ensure effective access to justice for persons with disabilities on an equal basis with others, whereby ‘effective’ can be interpreted as referring to the right to an effective remedy, and ‘on an equal basis with others’ further indicates an ‘obligation to prohibit discrimination’, although not explicitly referred to in these terms.<sup>37</sup> Where Article 13 CRPD does not contain an exhaustive list of measures to ensure the effective access to justice of persons with disabilities, the CRPD Committee proceeded, in General Comment No. 6 on equality and non-discrimination,<sup>38</sup> to ‘identif[y] the main obligations that must be fulfilled in order to ensure effective access to justice and processes for people with disabilities’.<sup>39</sup> Indeed, the CRPD Committee states that, in order to enable the participation of persons with disabilities, States Parties must commit to the:

- (a) Delivery of information in an understandable and accessible manner;
- (b) Recognition and accommodation of diverse forms of communication;
- (c) Physical accessibility throughout all stages of the process;
- (d) Financial assistance in the case of legal aid, where applicable, and subject to statutory tests of means and merits.<sup>40</sup>

In this respect, Article 13(1) CRPD indicates that States Parties should provide ‘procedural and age-appropriate accommodations’. It is quite striking that the Article does not refer explicitly to reasonable accommodation, as a number of other CRPD provisions do.<sup>41</sup> Rather, it mentions explicitly procedural and age-appropriate accommodations, without expanding further on the nature of these adjustments.<sup>42</sup> Subsequent scholarship has suggested that those accommodations add to reasonable accommodations, and ‘may be more generic and less individualized in approach’.<sup>43</sup> In that regard, the obligation to provide procedural and age-related accommodations to persons with disabilities could not be ‘mitigated by arguments about reasonableness and the extent of the burden they would place on the duty-bearer’.<sup>44</sup> The CRPD

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<sup>36</sup> J.E. LORD, K.N. GUERNSEY, J.M. BALFE et al., *Human Rights. Yes! Action and Advocacy on the Rights of Persons with Disabilities*, 2nd ed., Human Rights Center, Minneapolis 2012, p. 137.

<sup>37</sup> E. FLYNN (2018), ‘Art. 13 Access to Justice’, *supra* note 21, pp. 390–391.

<sup>38</sup> CRPD, General Comment No. 6, UN Doc. CRPD/C/GC/6, 26.04.2018, paras. 51–55.

<sup>39</sup> A. BRODERICK and D. FERRI (2019), *International and European Disability Law*, *supra* note 20, p. 195.

<sup>40</sup> CRPD, General Comment No. 6, *supra* note 38, para. 52.

<sup>41</sup> A. BRODERICK and D. FERRI (2019), *International and European Disability Law*, *supra* note 20, p. 196.

<sup>42</sup> On the concept of procedural and age-appropriate accommodations, see E. FLYNN, ‘Article 13 [Access to Justice]’, in V. DELLA FINA, R. CERA and G. PALMISANO (eds.) (2017), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, *supra* note 7, p. 285.

<sup>43</sup> E. FLYNN and A. LAWSON (2013), ‘Disability and Access to Justice in the EU’, *supra* note 18, p. 25.

<sup>44</sup> *Ibid.*

Committee confirmed this interpretation in its General Comment No. 6, distinguishing reasonable accommodation from procedural accommodations, and pointing out that the latter ‘are not limited by disproportionality’.<sup>45</sup> Although it is not mentioned overtly, the concept of ‘reasonable accommodation’ remains fully applicable in the context of access to justice. Given that reasonable accommodation falls within the remit of the general principle of equality and non-discrimination, it is of cross-cutting application.<sup>46</sup>

As Flynn and Lawson point out, Article 13(1) CRPD is innovative in that it explicitly refers to direct and indirect participants, ‘including as witnesses, in all legal proceedings, including at investigative and other preliminary stages’, which ‘goes beyond the conventional focus of access to justice instruments on the rights of parties to a dispute’.<sup>47</sup> Flynn further elaborates on the personal scope of Article 13(1) CRPD, positing that:

One interpretation is that the term ‘direct participant’ refers to those directly involved in, or affected by, the outcome of a legal proceeding – including the parties to the case, legal representatives, and adjudicators such as the judge and jury. Indirect participants could then include court staff, court reporters, members of the public who attend the hearing, and even other potential claimants who could be affected by the outcome of the hearing.<sup>48</sup>

With reference to the concept of ‘access to justice’ as defined by Lord et al.,<sup>49</sup> the scope *ratione personae* of Article 13(1) CRPD can be further interpreted as encompassing ‘all persons with disabilities who are to some extent involved in a particular legal proceeding or have been in contact with the judicial system in some manner’.<sup>50</sup> Article 13(1) CRPD thus entails that persons with disabilities shall be recognised as professionals and active contributors to the administration of justice, reflecting the importance of their full inclusion and participation in the community.<sup>51</sup> Moreover, the CRPD Committee indicates that good governance relies on a democratic system which facilitates persons with disabilities assuming roles of ‘claimants, victims, defendants, judges, jurors and lawyers’.<sup>52</sup> In this respect, the CRPD Committee also insists, in its dialogue with States Parties, on the necessity to address ‘the underrepresentation of persons with disabilities in the legal profession’ and the barriers they encounter.<sup>53</sup> Additionally, it recommends that States Parties ‘[t]ake measures to empower persons with disabilities to work in the justice system as judges, prosecutors or in other positions, with the provision of all necessary support’.<sup>54</sup> Further, the 2020 International Principles and Guidelines

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<sup>45</sup> CRPD, General Comment No. 6, *supra* note 38, para. 51.

<sup>46</sup> E. FLYNN (2018), ‘Art. 13 Access to Justice’, *supra* note 21, p. 393.

<sup>47</sup> E. FLYNN and A. LAWSON (2013), ‘Disability and Access to Justice in the EU’, *supra* note 18, p. 42.

<sup>48</sup> E. FLYNN (2018), ‘Art. 13 Access to Justice’, *supra* note 21, p. 397.

<sup>49</sup> J. E. LORD et al. (2012), *Human Rights. Yes!*, *supra* note 36, p. 137.

<sup>50</sup> A. BRODERICK and D. FERRI (2019), *International and European Disability Law*, *supra* note 20, p. 195.

<sup>51</sup> E. FLYNN and A. LAWSON (2013), ‘Disability and Access to Justice in the EU’, *supra* note 18, p. 42.

<sup>52</sup> CRPD, General Comment No. 7, UN Doc. CRPD/C/GC/7, 09.11.2018, para. 81.

<sup>53</sup> CRPD, ‘Concluding Observations on the Initial Report of Luxembourg’, UN Doc. CRPD/C/LUX/CO/1, 10.10.2017, para. 27; CRPD, ‘Concluding Observations on the Report of France’, *supra* note 31, para. 27; CRPD, ‘Concluding Observations on the Initial Report of Jamaica’, UN Doc. CRPD/C/JAM/CO/1, 25.03.2022, para. 26.

<sup>54</sup> CRPD, ‘Concluding Observations on the Initial Report of the United Kingdom of Great Britain and Northern Ireland’, UN Doc. CRPD/C/GBR/CO/1, 03.10.2017, para. 33.



on Access to Justice for Persons with Disabilities, drafted by the Special Rapporteur on the Rights of Persons with Disabilities,<sup>55</sup> indicate in Principle 2 that '[f]acilities and services must be universally accessible to ensure equal access to justice without discrimination of persons with disabilities'. Principle 7 of this document states that '[p]ersons with disabilities have the right to participate in the administration of justice on an equal basis with others'.

Article 13(2) CRPD incorporates an obligation to provide 'training to those working in the field of administration of justice, including police and prison staff'. As such, the CRPD aims to tackle the low level of awareness, among the judiciary and the police, of the human rights of persons with disabilities,<sup>56</sup> which ultimately affects their capacity to enjoy the right of access to justice. In doing so, it also further reinforces the broad interpretation of the principle of access to justice in the CRPD.<sup>57</sup> Indeed, the CRPD Committee indicates, in General Comments No. 1 and No. 6, that Article 13(2) CRPD involves the promotion of training with respect to those involved in the administration of justice, such as 'lawyers, magistrates, judges, prison staff, sign-language interpreters and the police and penitentiary system',<sup>58</sup> as well as social workers and other first responders.<sup>59</sup> In this respect, the CRPD Committee regularly recommends that States Parties take measures to ensure the provision of appropriate training to relevant actors in the administration of justice.<sup>60</sup>

### 2.3. PLACING ARTICLE 13 CRPD IN CONTEXT

The CRPD reaffirms 'the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination'.<sup>61</sup> It is hence evident that the realisation of Article 13 CRPD is closely intertwined with the implementation of the other provisions of the CRPD and, as such, cannot be read in isolation from them. Further, Article 13 CRPD itself is key for the full enjoyment of all rights provided for in the CRPD.

Article 13 CRPD must be interpreted in light of Articles 3 and 4 CRPD, which position the principles of equality and non-discrimination within the remit of general principles and obligations of the Convention. It must be conceived of as encapsulating an implicit obligation to prohibit discrimination in the administration of justice, with the phrase 'on an equal basis with others'.<sup>62</sup> It also entertains relevant connections with CRPD provisions targeting aspects

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<sup>55</sup> UN SPECIAL RAPPORTEUR ON THE RIGHTS OF PERSONS WITH DISABILITIES, 'International Principles and Guidelines on Access to Justice for Persons with Disabilities', 2020, available at [https://www.ohchr.org/sites/default/files/Documents/Issues/Disability/SR\\_Disability/GoodPractices/Access-to-Justice-EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Disability/SR_Disability/GoodPractices/Access-to-Justice-EN.pdf), last accessed 04.04.2022.

<sup>56</sup> CRPD, 'Concluding Observations UK', *supra* note 54, para. 32.

<sup>57</sup> E. FLYNN (2017), 'Article 13 [Access to Justice]', *supra* note 42, p. 285; E. FLYNN (2018), 'Art. 13 Access to Justice', *supra* note 21, p. 400.

<sup>58</sup> CRPD, General Comment No. 6, *supra* note 38, para. 55.

<sup>59</sup> CRPD, General Comment No. 1, UN Doc. CRPD/C/GC/1, 19.05.2014, para. 39.

<sup>60</sup> See CRPD, 'Concluding Observations on the Initial Report of Germany', UN Doc. CRPD/C/DEU/CO/1, 13.05.2015, para. 28; CRPD, 'Concluding Observations UK', *supra* note 54, para. 33; CRPD, 'Concluding Observations Luxembourg', *supra* note 53, para. 27.

<sup>61</sup> UN Convention on the Rights of Persons with Disabilities, UN Doc. A/RES/61/106, 13.12.2006, Preamble para. (c).

<sup>62</sup> E. FLYNN (2017), 'Article 13 [Access to Justice]', *supra* note 42, p. 292.

of the justice system more directly.<sup>63</sup> As such, this Article can be read in conjunction with the following provisions of the CRPD: Articles 12 on Equal Recognition before the Law, 14 on Liberty and Security of Person, 15 on Freedom from Torture or Cruel, Inhuman or Degrading Treatment or Punishment, 16 on Freedom from Exploitation, Violence and Abuse, and 17 on Protecting the Integrity of Persons with Disabilities.<sup>64</sup> Furthermore, the realisation of Article 12 CRPD, which provides for the legal recognition and enjoyment of the legal capacity of persons with disabilities, is deemed as particularly relevant for the implementation of the right of access to justice. The relationship between Articles 12 and 13 CRPD is addressed in General Comment No. 1, where the CRPD Committee stresses the need to recognise the right to legal capacity of persons with disabilities, in order to enable them to access justice on an equal basis with others.<sup>65</sup> The CRPD Committee also mentions, in its concluding observations, how the denial of legal capacity corresponds to denying access to justice to persons with disabilities.<sup>66</sup>

Additionally, the realisation of Article 13 CRPD is closely connected with that of Article 9 CRPD, which requires States Parties to ensure the accessibility of the physical environment, transportation, and information and communication.<sup>67</sup> In this regard, General Comment No. 2 on Article 9 stresses the need to ensure the physical accessibility of the judiciary and law enforcement agencies, as well as to ensure that the relevant services provide accessible information and communications, in order to guarantee effective access to justice for persons with disabilities.<sup>68</sup> The principle of access to justice is further complemented by Article 21 CRPD on Freedom of Expression and Opinion, and Access to Information, which obliges States Parties to facilitate accessible communication and the provision of information to persons with disabilities, in the means, modes and format of their choice.<sup>69</sup> Broderick and Ferri note that ‘the general accessibility obligations laid down in Article 9 and the requirements of Article 21 to make information and communications accessible intersect and reinforce the obligations provided for in Article 13’.<sup>70</sup>

Flynn and Lawson also highlight the relationship between Article 13 CRPD and Article 8 CRPD on Awareness-raising, recognising that people with disabilities, and society as a whole, must be aware of their human rights in order to be able to exercise and assert them in the justice system.<sup>71</sup> Finally, Article 29 on Participation in Political and Public Life must also be read in conjunction with the right to access justice, as the participation of persons with disabilities in the administration of justice, as professionals, effectively contributes to their inclusion in the functioning of public affairs.<sup>72</sup>

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<sup>63</sup> A. BRODERICK and D. FERRI (2019), *International and European Disability Law*, *supra* note 20, p. 200.

<sup>64</sup> *Ibid.*, pp. 200–202.

<sup>65</sup> CRPD, General Comment No. 1, *supra* note 59, para. 38.

<sup>66</sup> CRPD, ‘Concluding Observations on the Initial Report of Estonia’, UN Doc. CRPD/C/EST/CO/1, 05.05.2021, para. 25.

<sup>67</sup> See S. ORTOLEVA (2011), ‘Inaccessible Justice’, *supra* note 30, p. 286.

<sup>68</sup> CRPD, General Comment No. 2, UN Doc. CRPD/C/GC/2, 22.05.2014, para. 37.

<sup>69</sup> E. FLYNN and A. LAWSON (2013), ‘Disability and Access to Justice in the EU’, *supra* note 18, pp. 25–26.

<sup>70</sup> A. BRODERICK and D. FERRI (2019), *International and European Disability Law*, *supra* note 20, p. 194.

<sup>71</sup> E. FLYNN and A. LAWSON (2013), ‘Disability and Access to Justice in the EU’, *supra* note 18, p. 27.

<sup>72</sup> *Ibid.*, p. 28.

### 3. THE ROLE OF THE EUROPEAN UNION IN IMPLEMENTING ARTICLE 13 CRPD: A PRELIMINARY APPRAISAL

The CRPD is the first human rights treaty that the EU has concluded. It has been heralded as a milestone in the history of the EU, and a success when it comes to the Union's role in the protection of human rights.<sup>73</sup> As mentioned in the introduction to this contribution, the CRPD has also been a driver for the development of the EU action on disability,<sup>74</sup> and a normative standard within CJEU case law. Notwithstanding the importance of the CRPD and its sub-constitutional status (below the EU Treaties, but above secondary legislation) in the EU legal order,<sup>75</sup> its implementation is fraught with difficulty, '[g]iven the EU's complex internal division of competences'.<sup>76</sup> However, the EU has a rather significant role to play, and can use its overall portfolio of exclusive, shared and supporting competences to implement the Convention. This is evident when it comes to Article 13 CRPD, which is identified in the EU Initial Report to the CRPD Committee as covering a field in which the EU shares competences with the Member States.<sup>77</sup>

The EU, in fact, possesses shared competence in the Area of Freedom, Security and Justice (ASFJ), as provided for in Article 4 TFEU. The ASFJ, governed by Articles 67 to 89 TFEU, entails cooperation among the Member States in the fields of migration, as well as judicial cooperation in civil and criminal matters, and police cooperation. Article 67 TFEU states that '[t]he Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member State', and provides that the EU 'shall *facilitate access to justice*, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters' (emphasis added). The right to access to justice is also embedded in the CFREU, as Article 47 CFREU recognises the right to an effective remedy and to a fair trial, while Article 48 CFREU touches upon the presumption of innocence and right of defence. Those provisions, however, are applicable to Member States only when 'they are implementing Union law'.<sup>78</sup> In compliance with the Treaty, and in line with the CFREU,<sup>79</sup> the EU has enacted a series of legislative instruments regarding criminal proceedings and the protection of victims, and an array of regulations covering civil matters. Most of those instruments relate to the recognition and enforcement of judgments and

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<sup>73</sup> D. FERRI, 'The UN Convention on the Rights of Persons with Disabilities in the EU Legal Framework and the Development of EU Disability Policies after 2020. What is Coming is Better than what is Gone?', in M. GANNER, E. RIEDER, C. VOITHOFER and F. WELTI (eds.), *The Implementation of the UN Convention on the Rights of Persons with Disabilities in Austria and Germany*, Innsbruck University Press, Innsbruck 2021, pp. 209–212.

<sup>74</sup> In this sense, see D. FERRI and A. BRODERICK (2020), 'Introduction', *supra* note 5; see also A. LAWSON (2017), 'The European Union and the CRPD', *supra* note 7, pp. 61–66.

<sup>75</sup> A. BRODERICK and D. FERRI (2019), *International and European Disability Law*, *supra* note 20, pp. 318–321.

<sup>76</sup> M. CHAMON, 'Negotiation, Ratification and Implementation of the CRPD and its Status in the EU Legal Order', in D. FERRI and A. BRODERICK (eds.), *Research Handbook on EU Disability Law*, Edward Elgar Publishing, Cheltenham 2020, p. 52.

<sup>77</sup> CRPD, Consideration of Reports Submitted by States Parties under Article 35 of the Convention. Initial Report of States Parties due in 2012. European Union, UN Doc. CRPD/C/EU/1, 03.12.2014, para. 71.

<sup>78</sup> Article 51 CFREU. See also E. FLYNN and A. LAWSON (2013), 'Disability and Access to Justice in the EU', *supra* note 18, p. 33.

<sup>79</sup> On situating the concept of access to justice in the EU, see European Union Agency for Fundamental Rights (FRA), 'Access to Justice in Europe: An Overview of Challenges and Opportunities', 2011, pp. 13–22, available at [https://fra.europa.eu/sites/default/files/fra\\_uploads/1520-report-access-to-justice\\_EN.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/1520-report-access-to-justice_EN.pdf), last accessed 18.05.2022.

court settlements issued in another Member State, as well as procedural and substantive issues in cross-border relationships between private persons in areas such as family law, property law and contract law.<sup>80</sup> While EU law has progressively engaged in a (limited) harmonisation of some aspects of criminal and civil justice, legislative instruments are mostly underpinned by the principle of mutual recognition, and are based on mutual trust.<sup>81</sup> Regulatory aspects of administration of justice remain in the hands of the Member States. However, the CJEU has consistently held that, although the organisation of national justice systems falls within the national competence, Member States are nonetheless required, when exercising that competence, to comply with their obligations deriving from EU law,<sup>82</sup> including general principles of EU law such as the principle of equality.<sup>83</sup> In that regard, the EU's shared competence in relation to non-discrimination and related legislation comes into play. Indeed, there is currently no legislation prohibiting disability discrimination in the provision of legal services or access to justice. The proposal for a horizontal non-discrimination Directive focusing on combating discrimination, on the basis *inter alia* of disability, outside the labour market,<sup>84</sup> still under discussion after 14 years, would not extend its scope of application to this field.<sup>85</sup> However, when it comes to those employed in the justice system, and the implementation of Article 13(1) CRPD, in relation to what Flynn terms 'indirect participants', most recent case law (discussed below) indicates that the Employment Equality Directive is, in fact, relevant.

#### 4. APPLYING THE EMPLOYMENT EQUALITY DIRECTIVE IN THE JUDICIAL CONTEXT: *TARTU VANGLA* AND *KOMISIA*

After having examined the normative content of Article 13 CRPD, and having located this provision within the remit of the EU's shared competence, we now move on to examine the

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<sup>80</sup> EUROPEAN COMMISSION, *Compendium of European Union legislation on judicial cooperation in civil and commercial matters: 2018 Edition*, Publications Office, Luxembourg 2019. For a historical approach on procedural issues, see E. STORSKRUBB, *Civil Procedure and EU Law: A Policy Area Uncovered*, OUP, Oxford 2008.

<sup>81</sup> E. STORSKRUBB, 'Mutual Trust and the Dark Horse of Civil Justice', (2018) 20, *Cambridge Yearbook of European Legal Studies*, pp. 179–201.

<sup>82</sup> See, *inter alia*, CJEU (ECJ), *Commission v Poland*, Case C-619/18, 24.06.2019, EU:C:2019:531, para. 52; CJEU (ECJ), *A.B. and Others v Krajowa Rada Sądownictwa and Others*, Case C-824/18, ECLI:EU:C:2021:153, para. 68.

<sup>83</sup> See L.S. ROSSI and F. CASOLARI, *The Principle of Equality in EU Law*, Springer, Cham 2017; see also M. BELL, 'Walking in the Same Direction? The Contribution of the European Social Charter and the European Union to Combating Discrimination', in G. DE BÚRCA, B. DE WITTE and L. OGERTSCHNIG (eds.), *Social Rights in Europe*, OUP, Oxford 2005, pp. 261–278.

<sup>84</sup> EUROPEAN COMMISSION, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM/2008/0426 final, 02.07.2008. On the proposal, see E. HOWARD, 'EU Equality Law: Three Recent Developments', (2011) 17(6), *European Law Journal*, pp. 785–803. For a disability perspective, see L. WADDINGTON, 'Future Prospects for EU Equality Law: Lessons to be Learnt from the Proposed Equal Treatment Directive', (2011) 36(2), *European Law Review*, p. 163.

<sup>85</sup> See A. BRODERICK and P. WATSON, 'Disability in EU Non-Discrimination Law', in D. FERRI and A. BRODERICK (eds.), *Research Handbook on EU Disability Law*, Edward Elgar Publishing, Cheltenham 2020, pp. 138–139.

relevance of the Employment Equality Directive in the judicial context, by looking at the CJEU decisions in *Tartu Vangla* and *Komisia za zashtita ot diskriminatsia*.

#### 4.1. SETTING THE SCENE: THE EMPLOYMENT EQUALITY DIRECTIVE AND DISABILITY

The Employment Equality Directive bans direct and indirect discrimination, as well as harassment, on a number of grounds, including disability. The core tenets and the reach of this Directive (and those of its sister Racial Equality Directive)<sup>86</sup> have been progressively clarified by the CJEU in an extensive body of case law, and discussed by an ever-growing body of scholarship.<sup>87</sup> When it comes to discrimination on the ground of disability, a significant number of decisions have been adopted after the entry into force of the CRPD, illuminating the boundaries of the protection afforded by the Directive. As highlighted by O’Cinneide,<sup>88</sup> the CJEU has consistently adopted a purposive approach to the interpretation of this Directive, underlining its purpose and objectives.<sup>89</sup> Further, Xenidis notes that the teleological interpretation of the Court has contributed to making anti-discrimination rules ‘an important component of the Union’s social policy ... guaranteeing that virtually every individual is able to reap the material and symbolic benefits arising from economic participation’.<sup>90</sup>

The Employment Equality Directive does not define any of the protected grounds. However, after the ratification of the CRPD, as mentioned above in the introduction, the CJEU has proffered a definition of the ground of disability that aligns with the letter of Article 1(2) CRPD. It held that:

the concept of ‘disability’ must be understood as referring to a limitation which results in particular from 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>91</sup>

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<sup>86</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180.

<sup>87</sup> The literature is vast. See, generally, E. MUIR, *EU Equality Law: The First Fundamental Rights Policy of the EU*, OUP, Oxford 2018; M. BELL, ‘The Principle of Equal Treatment: Widening and Deepening’, in P. CRAIG and G. DE BURCA (eds.), *The Evolution of EU Law*, OUP, Oxford 2011, pp. 611–639; M. BELL and L. WADDINGTON, ‘Equality and Diversity: Challenges for EU Anti-Discrimination Law’, (2006) 13(3), *Maastricht Journal of European and Comparative Law*, pp. 277–278; L. WADDINGTON and M. BELL, ‘Reflecting on Inequalities in European Equality Law’, (2003) 28, *European Law Review*, p. 349; M. BELL, *Anti-Discrimination Law and the European Union*, OUP, Oxford, 2002.

<sup>88</sup> C. O’CINNEIDE and K. LIU, *The Ongoing Evolution of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC: A Legal Analysis of the Situation in EU Member States*, Publications Office, Luxembourg 2019.

<sup>89</sup> See, e.g. CJEU (ECJ), *Surjit Singh Bedi v Bundesrepublik Deutschland and Bundesrepublik Deutschland in Prozesstandschaft für das Vereinigte Königreich von Großbritannien und Nordirland*, Case C-312/17, 19.09.2018, EU:C:2018:734, para. 28.

<sup>90</sup> R. XENIDIS (2021), ‘The Polysemy of Anti-discrimination Law’, *supra* note 16, pp.1655-1656.

<sup>91</sup> CJEU, *HK Danmark*, *supra* note 6, para. 38.

The Court also ruled that the Employment Equality Directive covers not only disability deriving from congenital impairments or resulting from accidents, but also that arising from an illness.<sup>92</sup> In *Daouidi*, the CJEU stated that the limitation which results, in particular, from physical, mental or psychological impairments must be long-term, but this long-term requirement is fulfilled when the recovery prognosis of the worker is either unclear or likely to be significantly prolonged.<sup>93</sup>

When it comes to discrimination on the ground of disability, in the recent case of *VL*,<sup>94</sup> the Court of Justice confirmed that the prohibition of discrimination on the ground of disability also applies in relation to differential treatment of two groups of disabled people. The CJEU, referring to the *ratio* of the Directive, suggested that the protection granted by it:

would be diminished if it were to be considered that a situation where such discrimination occurs within a group of persons, all of whom have disabilities, is, by definition, not covered by the prohibition of discrimination laid down thereby solely on the ground that the difference in treatment at issue takes place as between persons with disabilities.<sup>95</sup>

Article 2(2)(a) of the Directive defines direct discrimination as occurring ‘where one person is treated less favourably than another is, has been or would be treated in a comparable situation’ on any of the non-discrimination grounds. Indirect discrimination occurs when an apparently neutral provision, criterion or practice would put persons who possess a protected ground at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.<sup>96</sup> In that regard, the CJEU has consistently held that, in order to be objectively justified, the provision at issue must pursue a legally permitted objective, and be proportionate to the achievement of that objective.<sup>97</sup>

Notably, the Directive establishes that a difference in treatment which is based on a characteristic related to any of the grounds covered by the Directive, such as disability, does not constitute discrimination where that characteristic is a ‘genuine and determining occupational requirement provided that the objective is legitimate and the requirement is

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<sup>92</sup> Ibid. See also L. LOURENÇO and P. POHJANKOSKI, ‘Breaking Down Barriers? The Judicial Interpretation of “Disability” and “Reasonable Accommodation” in EU Anti-Discrimination Law’, in U. BELAVUSAU and K. HENRARD (eds.), *EU Anti-Discrimination Law Beyond Gender: Achievements, Flaws, and Prospects*, Hart Publishing, Oxford 2019, pp. 321–338.

<sup>93</sup> CJEU (ECJ), *Mohamed Daouidi v Bootes Plus SL, Fondo de Garantía Salarial, Ministerio Fiscal*, Case C-395/15, 01.12.2016, EU:C:2016:917, para. 40. For a critical discussion, see D. FERRI, ‘*Daouidi v Bootes Plus SL* and the Concept of “Disability” in EU Anti-Discrimination Law’, (2019) 10(1), *European Labour Law Journal*, p. 69.

<sup>94</sup> CJEU (ECJ), *VL v Szpital Kliniczny im. Dra J. Babinskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, Case C-16/19, 26.01.2021, ECLI: C:2021:64. For a comment, see J. DAMAMME, ‘Arrêt Szpital Kliniczny: la discrimination entre personnes en situation de handicap à la lumière de la directive 2000/78/CE (CJUE, 26 janvier 2021, aff. C-16/19)’, (2021) 8, *Journal de droit européen*, p. 384.

<sup>95</sup> CJEU, *VL*, *supra* note 94, para. 35.

<sup>96</sup> Article 2(2)(b) Employment Equality Directive.

<sup>97</sup> CJEU (ECJ), *Carlos Enrique Ruiz Conejero v Ferroservicios Auxiliares SA and Ministerio Fiscal*, Case C-270/16, 18.01.2018, ECLI:EU:C:2018:17.

proportionate’.<sup>98</sup> Without engaging in a discussion of this particular exception to the principle of non-discrimination, it suffices to note that the CJEU has consistently held that it must be interpreted strictly, having regard to the specific nature of the job in question.<sup>99</sup> In *Mario Vital Pérez*, the CJEU was confronted with an age limit in relation to the recruitment of a local police officer.<sup>100</sup> The Court of Justice did accept that, in principle, ‘the possession of particular physical capacities is one characteristic relating to age’, and thus it constitutes a genuine and determining occupational requirement.<sup>101</sup> They also held that the maintaining of operational capacity and proper functioning of the police service is a legitimate aim, but ultimately rejected the argument that an age limit was necessary and proportionate to achieve that aim.

The Directive applies to all persons, as regards both the public and private sectors, including public bodies, in relation to conditions for access to employment, self-employment, or occupation; access to all types, and to all levels, of vocational training; employment and working conditions; and membership of, and involvement in, an organisation of workers or employers.<sup>102</sup> In general, the CJEU has adopted a broad interpretation of the material scope of the Directive.<sup>103</sup>

For the purpose of this analysis, it is useful to recall that Article 5 of the Employment Equality Directive places on employers the obligation to adopt reasonable accommodations ‘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’. In *Commission v Italy*, the Court clarified that this obligation to adopt reasonable accommodation measures applies to all employers, and national legislation cannot create exceptions to exempt certain categories of employers.<sup>104</sup> The CJEU has also established that accommodation measures are the ‘consequence, not the constituent element, of the concept of disability’.<sup>105</sup> Recital 20 of the Preamble to the Directive gives some guidance as to what might entail a reasonable accommodation, and indicates that this encompasses effective and practical measures to adapt the workplace to the disability, such as adapting premises and equipment, patterns of working time or the distribution of tasks.<sup>106</sup> In that connection, Broderick suggests that the Directive ‘links the notion of “appropriateness” to the effectiveness of measures taken

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<sup>98</sup> Article 4(1) Employment Equality Directive. See also Recital (23) of the Preamble which reads as follows: ‘In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.’

<sup>99</sup> CJEU (ECJ), *Reinhard Prigge and Others v Deutsche Lufthansa AG*, Case C-447/09, 13.09.2011, EU:C:2011:573, para. 72. See also CJEU (ECJ), *Mario Vital Pérez v Ayuntamiento de Oviedo*, Case C-416/13, 13.11.2014, ECLI:EU:C:2014:2371; CJEU (ECJ), *Gorka Salaberria Sorondo v Academia Vasca de Policía y Emergencias*, Case C-258/15, 15.11.2016, ECLI:EU:C:2016:873.

<sup>100</sup> CJEU, *Mario Vital Pérez*, *supra* note 99.

<sup>101</sup> *Ibid.*, para. 37.

<sup>102</sup> Article 3 Employment Equality Directive.

<sup>103</sup> C. O’CINNEIDE and K. LIU (2019), *The Ongoing Evolution*, *supra* note 88, pp. 45–48.

<sup>104</sup> CJEU (ECJ), *European Commission v Italian Republic*, Case C-312/11, 04.07.2013, ECLI:EU:C:2013:446, para. 61.

<sup>105</sup> CJEU, *HK Danmark*, *supra* note 6, para. 46.

<sup>106</sup> *Ibid.*, para. 49.

in increasing participation and inclusion in employment'.<sup>107</sup> The duty to adopt reasonable accommodation is limited by the 'disproportionate burden defence'. However, an employer cannot claim that the burden is disproportionate 'when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned'.<sup>108</sup> In order to ascertain whether an accommodation gives rise to a disproportionate burden, Recital 21 of the Preamble requires the consideration of financial and other costs of the accommodation, the scale and financial resources of the organisation, and the possibility of obtaining public funding or any other assistance. Recital 17 of the Preamble provides that the Directive does not require an employer to recruit, promote or maintain in employment or training an individual 'who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training'. However, this is 'without prejudice to the obligation to provide reasonable accommodation for people with disabilities'.

#### 4.2. XX v TARTU VANGLA

The CJEU's decision in *Tartu Vangla*, released on 15 July 2021, arises from a request for a preliminary ruling raised by the Estonian Supreme Court (Riigikohus) in the proceedings between XX, a prison officer with a hearing impairment, and the Tartu Prison in Estonia.<sup>109</sup>

XX is a prison officer who worked at the Tartu Prison for almost 15 years before being dismissed in June 2017. His dismissal relied on a medical certificate from the same year which showed that his auditory acuity did not meet the requirements of sound perception fixed by the Estonian Regulation in place, namely Regulation No. 12 concerning the health requirements and medical examination for prison officers, as well as the requirements relating to the content and format of medical certificates. XX shared that his hearing impairment had existed since his childhood. Following this, he brought an action before the Administrative Court of Tartu, claiming that his dismissal was unlawful and constituted discrimination on the ground of disability, thus violating the Estonian Constitution, and national legislation on equal treatment. His action was dismissed in December 2017, and the Administrative Court held that the minimum standards of sound perception prescribed by Regulation No. 12 were a necessary and justified measure which contributed to ensuring that prison officers were able to carry out their duties. In April 2019, the Court of Appeal of Tartu upheld the appeal of XX, considering his dismissal unlawful and entitling him to compensation. The Court of Appeal argued that the provisions of Regulation No. 12 on auditory acuity were contrary to the principles of equality and legitimate expectation. In doing so, it also sought a constitutional review of the provisions in question. The Estonian Supreme Court decided to stay the proceedings and raised a preliminary reference to the CJEU asking whether the interpretation of Article 2(2), read in conjunction with Article 4(1), of the Employment Equality Directive precludes national

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<sup>107</sup> A. 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*, Intersentia, Cambridge/Antwerp 2015, p. 160.

<sup>108</sup> Article 5 Employment Equality Directive.

<sup>109</sup> For an analysis of this decision, see S. BALDIN, 'Lavoratori con disabilità e accomodamenti ragionevoli nella giurisprudenza della Corte di giustizia dell'UE. Riflessioni a margine di *XX c. Tartu Vangla*', (2022) 49(4), *DPCE Online*, available at <http://www.dpceonline.it/index.php/dpceonline/article/view/1467>, last accessed 04.03.2022.



legislation which imposes an outright ban on the pursuit of the occupation of prison officer where auditory acuity requirements are not met, and which prohibits the use of hearing aids to assess compliance with said requirements.<sup>110</sup>

After emphasising that the conditions of recruitment and dismissal of prison officers fell within the scope of the Employment Equality Directive as foreseen in Article 3(1)(a) and (c) of that Directive,<sup>111</sup> the Court highlighted that derogations from the principle of non-discrimination could only be justified in very limited circumstances, following a strict interpretation of Article 4(1) of the Directive, read in conjunction with Recital 23.<sup>112</sup> It noted that the Directive ‘does not require prison services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services’.<sup>113</sup> In that connection, it recalled, in line with *Mario Vital Pérez*, that the concern to ensure the operational capacity and proper functioning of those services constitutes a legitimate objective within the meaning of Article 4(1), and conceded that:

the objective pursued by the national legislation at issue in the main proceedings ... for minimum standards of sound perception, non-compliance with which constitutes an absolute medical impediment to the exercise of the duties of a prison officer, seeks to preserve the safety of persons and public order by ensuring that prison officers are physically capable of performing all the tasks required of them.<sup>114</sup>

Hence, requirements relating to minimum standards of sound perception to perform the activities of a prison officer could be regarded as ‘genuine and determining occupational requirement[s]’ in view of the ‘nature of a prison officer’s duties and of the context in which they are carried out’, referring for example to the necessity to react to a sound alarm or an attack.<sup>115</sup> However, the Court then pointed out that, under Article 5 of the Employment Equality Directive, read in light of Recitals 20 and 21, and Recital 16, employers have the duty to take appropriate measures to enable persons with disabilities to work, including through the provision of reasonable accommodation.<sup>116</sup> It also recalled that the Directive:

precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post.<sup>117</sup>

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<sup>110</sup> CJEU, *Tartu Vangla*, *supra* note 14, para. 24.

<sup>111</sup> *Ibid.*, para. 27.

<sup>112</sup> *Ibid.*, para. 33.

<sup>113</sup> *Ibid.*, para. 34.

<sup>114</sup> *Ibid.*, para. 37.

<sup>115</sup> *Ibid.*, paras. 41–43.

<sup>116</sup> *Ibid.*, para. 48.

<sup>117</sup> *Ibid.*, para. 50.

In doing so, the Court also reiterated that the provisions of the Employment Equality Directive must be interpreted, as far as possible, in a manner consistent with the CRPD provisions.<sup>118</sup> Ultimately, the Court ruled that Articles 2(2)(a), 4(1) and 5 of this Directive oppose the absolute restriction of the activities of prison officer to persons whose auditory acuity does not meet minimum sound perception requirements, without having ascertained whether the individual is capable of fulfilling his duties after having been provided with a reasonable accommodation.<sup>119</sup>

#### 4.3. *TC AND UB v KOMISIA ZA ZASHTITA OT DISKRIMINATSIA AND VA*

The decision in the case of *Komisia za zashtita ot diskriminatsia* was delivered by the CJEU in October 2021.<sup>120</sup> It followed a request for a preliminary ruling from the Bulgarian Supreme Administrative Court (Varhoven administrativen sad) in a case opposing two judges, TC and UB, against the Commission for Protection against Discrimination (Komisia za zashtita ot diskriminatsia) and VA, a person with a visual impairment.

In 2014, VA, who had been qualified to practice law since 1977, was appointed as a juror with the Sofia District Court (Sofiyski gradski sad) and assigned to the chamber of Judge UB. However, following her assignment to the Court, VA was not invited to participate in any oral procedures in criminal proceedings between March 2015 and August 2016. For that reason, in May 2015, she asked the President of the Sofia District Court, Judge TC, to assign her to another judge. As her request did not receive an answer, she lodged a complaint in September 2015 with the Commission for Protection against Discrimination (hereinafter ‘Komisia’), claiming that she had been discriminated against on the ground of disability. In response, both TC and UB argued that they had acted lawfully, claiming that the differential treatment of VA was justifiable. They alleged that the duties of jurors cannot be carried out by persons with disabilities when this would result in an infringement of the principles enshrined in the Code of Criminal Procedure. The Komisia rejected the claims put forward by UB and TC, and held that VA had in fact been discriminated against on the ground of disability. TC and UB first challenged the decision of the Komisia before the Administrative Court of the City of Sofia, but their actions were dismissed, and the Administrative Court noted that, since August 2016, VA had been participating in criminal proceedings effectively. TC and UB then appealed the Administrative Court’s decisions before the Bulgarian Supreme Administrative Court. This court decided to stay the proceedings, and put forward two questions for the CJEU. It asked whether the interpretation of Article 5(2) CRPD, and of Article 2(1), (2) and (3), and Article

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<sup>118</sup> Ibid., para. 49, referring to CJEU, *Nobel Plastiques Ibérica*, *supra* note 13, para. 40.

<sup>119</sup> CJEU, *Tartu Vangla*, *supra* note 14, para. 54.

<sup>120</sup> For an analysis of this decision, see D. FERRI, ‘Op-Ed: “A Step Forward in Ensuring Equality for Persons with Disabilities – *TC, UB v Komisia za zashtita ot diskriminatsia, VA*”’, *EU Law Live*, 02.11.2021, available at <https://eulawlive.com/op-ed-a-step-forward-in-ensuring-equality-for-persons-with-disabilities-tc-ub-v-komisia-za-zashtita-ot-diskriminatsia-va-by-delia-ferri/>, last accessed 04.04.2021; L. WADDINGTON, ‘*Komisia za zashtita ot diskriminatsia (HvJ EU, C-824/19) – No Blanket Exclusion of Blind Person from Being Employed as a Juror*’, (2022) 2 *European Human Rights Cases Updates*, available at [https://www.ehrc-updates.nl/commentaar/211849?skip\\_boomportal\\_auth=1](https://www.ehrc-updates.nl/commentaar/211849?skip_boomportal_auth=1), last accessed 23.08.2022; P. ADDIS, ‘Una persona con disabilità può far parte di una giuria? Note a partire dal caso *Komisia za zashtita ot diskriminatsia* della Corte di giustizia’, (2022) 51(1), *DPCE Online*, available at <http://www.dpceonline.it/index.php/dpceonline/article/view/1584>, last accessed 18.05.2022.

4(1) of the Employment Equality Directive entails that it is permissible for a person who is blind or visually impaired to work as a juror and participate in criminal proceedings, or whether sight constitutes a genuine requirement of the activity of a juror.<sup>121</sup>

The Court of Justice first rephrased and combined the questions posed by the referring court, and focused on the compatibility of excluding a blind person, such as VA, from performing duties as a juror in criminal proceedings with Article 2(2) and 4(1) of the Directive, interpreted in light of the CRPD and of Articles 21 and 26 CFREU.<sup>122</sup> The CJEU considered whether the Employment Equality Directive was applicable in the circumstances of the case. In this respect, it highlighted that the activities of a juror constitute paid, professional activity, and hence fall within the scope of the Employment Equality Directive. In this regard, Waddington notes that if the status of juror in Bulgaria amounts to being employed, it is unclear whether this is also the case in other EU Member States, suggesting that if being a juror was considered to be a civic duty, ‘any discrimination against such jurors would automatically fall outside the scope of the Employment Equality Directive’.<sup>123</sup> The Court then observed that VA is a person with a disability, referring specifically and exclusively to the permanent loss of sight experienced by VA, to her impairment.<sup>124</sup> While the CJEU relied on the definition of disability adopted in the *HK Danmark* decision,<sup>125</sup> once again it discloses an underlying medicalised approach to disability.

The CJEU moved on to consider whether the total exclusion of VA from juror duties in criminal proceedings could be justified on the basis of Article 4(1) of the Employment Equality Directive. In this respect, it carried out a proportionality test to ascertain whether such an exclusion was appropriate for achieving the objective pursued, or whether it went beyond what was necessary to achieve it.<sup>126</sup> In line with *Tartu Vangla* and prior case law, the Court confirmed that the genuine and determining occupational requirement defence should be interpreted narrowly.<sup>127</sup> In relation to the proportionality test, the Court once again noted that:

regard must be had to the fact that, under Article 5 of Directive 2000/78, read in the light of recitals 20 and 21 thereof, employers are to 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 unless such measures would impose a disproportionate burden on the employer.<sup>128</sup>

Taking into account this duty to reasonably accommodate a person with a disability, the CJEU held that, while certain restrictions on the performance of jury duties may be appropriate to

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<sup>121</sup> CJEU, *Komisija za zashtita ot diskriminatsia*, *supra* note 15, para. 30.

<sup>122</sup> *Ibid.*, para. 34. Interestingly, the CJEU also quickly complemented the sources considered by the referring Court, and mentioned the necessity to refer to Articles 21 and 26 CFREU to interpret the directive in question: D. FERRI (2021), ‘Op-Ed: *Komisija za zashtita ot diskriminatsia*’, *supra* note 120.

<sup>123</sup> L. WADDINGTON (2022), ‘*Komisija za zashtita ot diskriminatsia*’, *supra* note 120, para. 10.

<sup>124</sup> CJEU, *Komisija za zashtita ot diskriminatsia*, *supra* note 15, para. 39.

<sup>125</sup> CJEU, *HK Danmark*, *supra* note 6, para. 38; CJEU, *Komisija za zashtita ot diskriminatsia*, *supra* note 15, para. 39.

<sup>126</sup> CJEU, *Komisija za zashtita ot diskriminatsia*, *supra* note 15, para. 54.

<sup>127</sup> *Ibid.*, para. 45. See also L. WADDINGTON (2022), ‘*Komisija za zashtita ot diskriminatsia*’, *supra* note 120, para. 13 and the case law cited therein.

<sup>128</sup> *Ibid.*, para. 54.

fulfil the principle of immediacy and the direct assessment of evidence, Articles 2(2)(a) and Article 4(1) of the Employment Equality Directive, read in the light of Articles 21 and 26 of the Charter, and in light of the CRPD, preclude the total exclusion of a blind juror from criminal proceedings, without having assessed whether the individual is capable of fulfilling her duties as a juror after having been provided with reasonable accommodation.<sup>129</sup>

## 5. READING *TARTU VANGLA* AND *KOMISIA* THROUGH THE LENS OF ARTICLE 13 CRPD

### 5.1. THE COURT'S APPROACH TO THE CRPD IN *TARTU VANGLA* AND *KOMISIA*

In the two cases outlined above, the CJEU focused on the interpretation of the Employment Equality Directive, and considered the situations faced by two individuals with disabilities, a prison officer and a juror, having regard to their rights to work and not to be discriminated against in the workplace. The Court did not refer extensively to the CRPD in *Tartu Vangla*, following the succinct approach adopted by Advocate General (AG) Saugmandsgaard Øe. The CJEU, in fact, limited itself to mentioning that the obligation to reasonably accommodate a person with a disability:

is also enshrined in the [CRPD], which was approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009 ..., the provisions of which may be relied on for the purposes of interpreting the provisions of Directive 2000/78, so that the latter must, as far as possible, be interpreted in a manner consistent with the Convention.<sup>130</sup>

In *Komisija za zashtita ot diskriminatsia*, the Court, while recalling the principle of consistent interpretation – as in *Tartu Vangla* – explicitly mentioned Article 5(3) CRPD, which ‘stipulates that, in order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided’.<sup>131</sup> In this respect, the assessment of VA’s ‘ability to work ... in light of the provision of reasonable accommodations is fully in line with both Directive 2000/78 and the CRPD, as [is] the requirement for an individualised analysis’.<sup>132</sup> The CJEU tried to elucidate the *ratio* of this provision, connecting it to Article 27 CRPD, and noting that:

Article 5(3) of the UN Convention has an inclusive purpose promoting equality for disabled persons and eliminating discrimination, as also shown by Article 27 [CRPD], recognising their right to work, on an equal basis with others, particularly the opportunity to earn a living by accomplishing work freely chosen or accepted

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<sup>129</sup> Ibid., para. 64.

<sup>130</sup> CJEU, *Tartu Vangla*, *supra* note 14, para. 49.

<sup>131</sup> CJEU, *Komisija za zashtita ot diskriminatsia*, *supra* note 15, para. 60.

<sup>132</sup> L. WADDINGTON (2022), ‘*Komisija za zashtita ot diskriminatsia*’, *supra* note 120, para. 8.

in a labour market and in a work environment that is open, inclusive and accessible to persons with disabilities.<sup>133</sup>

In neither of these decisions did the CJEU mention Article 13 CRPD. Interestingly, Article 13 CRPD was recalled by AG Saugmandsgaard Øe in his opinion on *Komisija za zashtita ot diskriminatsia*,<sup>134</sup> alongside Articles 5 and 27 CRPD. The AG made reference to procedural accommodations and argued:

Reference should be made to Article 13 of that UN Convention, which deals with ‘access to justice’ for persons with disabilities. That provision stipulates that States Parties to that convention are to ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings.

In this regard, the AG also recalled the above-mentioned International Principles and Guidelines on Access to Justice for Persons with Disabilities,<sup>135</sup> stating that:

the right of equal access to justice requires that persons with disabilities have the opportunity to participate directly in the adjudicative process, including as jurors. To that end, States are called upon to remove all disability-related barriers, including laws, that prevent persons with disabilities from being judges or jurors, and to ensure the equal participation of those persons in the jury system by providing them with all necessary support, reasonable accommodations and procedural accommodations. Those accommodation measures include the provision of independent intermediaries or facilitators trained to provide communication assistance to parties, such as oral interpreters, who must perform their functions effectively, accurately and impartially. They also include technical support in the form of voice telecommunications products.<sup>136</sup>

As noted by Waddington, AGs, in their opinions, have been more likely to engage with the CRPD and its interpretation.<sup>137</sup> The Court has so far been much more reluctant to do so, and has also tended to rely on or cite a limited number of CRPD provisions. The silence of the Court in those cases is hence unsurprising. However, both decisions, as will be discussed below, do fall under the scope of Article 13 CRPD and the right of access to justice, and can be seen to contribute to its realisation.

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<sup>133</sup> *Ibid.*, para. 61.

<sup>134</sup> CJEU, ‘Opinion of Advocate General Saugmandsgaard Øe *TC and UB v Komisija za zashtita ot diskriminatsia and VA*’, Case C-824/19, 22.04.21, ECLI:EU:C:2021:324, para. 81, referring to UN SPECIAL RAPPORTEUR ON THE RIGHTS OF PERSONS WITH DISABILITIES (2020), ‘International Principles and Guidelines’, *supra* note 55, para. 7.2.

<sup>135</sup> *Ibid.*

<sup>136</sup> CJEU (2021), ‘Opinion of Advocate General Saugmandsgaard Øe’, *supra* note 134, para. 83.

<sup>137</sup> L. WADDINGTON (2018), ‘The European Union’, *supra* note 10, p. 151.

## 5.2. ARTICLE 13 CRPD: A HIDDEN NORMATIVE FRAMEWORK?

*Tartu Vangla* and *Komisija za zashtita ot diskriminatsia* both concerned individuals working within the administration of justice, one as a prison officer and the other as a juror.

First, one may question whether, in fact, their situations could fall under Article 13 CRPD. As recalled in section 2 above, Article 13(1) CRPD lays down States Parties' obligation to provide effective access to justice for persons with disabilities, on an equal basis with others, and both scholarship and the CRPD Committee have argued for a broad personal scope of this provision. The scope *ratione personae* of Article 13(1) CRPD is said to encompass direct and indirect participants with disabilities, meaning individuals who are to some extent participating in legal proceedings, including at investigative and other preliminary stages.<sup>138</sup> The obligation laid out in Article 13(1) CRPD can be understood to apply to those involved in the judicial system in some way, including as professionals, seeking 'the opportunity to perform their duties as parties, witnesses, jurors, lawyers, prosecutors, judges, arbitrators, and other participants in the administration of justice' on an equal basis with others.<sup>139</sup> The CRPD Committee examined the violation of Article 13 CRPD in the context of jury duty in 2016, in individual communications brought under the Optional Protocol to the CRPD.<sup>140</sup> In particular, in both *Gemma Beasley v Australia*<sup>141</sup> and *Michael Lockrey v Australia*,<sup>142</sup> the CRPD Committee considered the situation of deaf individuals summoned to serve as jurors in Australia, and prevented from doing so due to a lack of accommodation. In both decisions, it confirmed that exercising the activities of a juror fell within the scope of Article 13 CRPD, as 'the performance of jury duty is an integral part of the Australian judicial system and, as such, it constitutes "participation" in legal proceedings'.<sup>143</sup> The relevance of Article 13 CRPD in *Tartu Vangla* may be perceived as more limited. The CRPD Committee has not addressed in its jurisprudence whether prison personnel are included under Article 13(1) CRPD, nor has it adopted a General Comment on Article 13 CRPD, which could potentially clarify this issue. However, it ensues from Article 13(1) CRPD that access to justice refers to the participation, be it direct or indirect, in legal proceedings, 'including at investigative and other preliminary stages'. As such, Article 13(1) CRPD does indeed seem relevant when it comes to participation in all phases of legal proceedings, including the conviction that follows at a posterior stage. Further, the administration of justice includes the penal system. In that regard, a prison officer, such as XX in *Tartu Vangla*, falls within the scope of Article 13 CRPD.

Second, one may question whether the reference made by the CJEU to reasonable accommodation falls within the normative content of Article 13 CRPD. The answer to this question is in the affirmative. In both *Gemma Beasley v Australia* and *Michael Lockrey v Australia*, the CRPD Committee discussed the lack of accommodation that the applicant

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<sup>138</sup> See *supra* section 2.

<sup>139</sup> S. ORTOLEVA (2011), 'Inaccessible Justice', *supra* note 30, p. 285.

<sup>140</sup> Under the Optional Protocol, States Parties recognise the competence of the CRPD Committee 'to receive and consider communications from and on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention' (Article 1 Optional Protocol).

<sup>141</sup> CRPD, *Gemma Beasley v Australia*, UN Doc. CRPD/C/15/D/11/2013, 25.05.2016.

<sup>142</sup> CRPD, *Michael Lockrey v Australia*, UN Doc. CRPD/C/15/D/13/2016, 30.05.2016.

<sup>143</sup> CRPD, *Gemma Beasley v Australia*, *supra* note 141, para. 8.9.

experienced. In *Gemma Beasley*, it argued that the failure to provide Auslan (Australian Sign Language) amounted to a failure to fulfil its obligations under Article 13(1) CRPD, read alone and in conjunction with Articles 3, 5(1) and 29(b) of the Convention.<sup>144</sup> In *Michael Lockrey*, the CRPD Committee reached a similar conclusion, finding that Australia had failed to provide reasonable accommodation in the form of steno-captioning.<sup>145</sup> A similar approach to the role of reasonable accommodation in judicial settings can be found in *Makarov v Lithuania*. In that individual communication, the CRPD Committee found the State Party to be in violation of the rights of Ms Makarova (deceased wife of the applicant) under Article 12(3) CRPD and Article 13(1) CRPD, as it failed to provide any form of reasonable accommodation for her to participate in the court proceedings and subsequent appeal procedure.<sup>146</sup> While the CRPD Committee does not seem to be fully consistent in the way in which it deals with reasonable and procedural accommodations,<sup>147</sup> the relevance of reasonable accommodation in judicial contexts is settled, and has been constantly highlighted by scholars.<sup>148</sup> In this respect, the focus maintained by the CJEU on reasonable accommodation is relevant within the context of Article 13 CRPD.<sup>149</sup>

Hence, not only the situations giving rise to the *Tartu Vangla* and *Komisija za zashtita ot diskriminatsia* cases fall within the scope of Article 13(1) CRPD, but the interpretation of the Employment Equality Directive given by the CJEU de facto supports access to justice for people with disabilities. In particular, the CJEU does advance the right of access to justice by affirming the need to provide reasonable accommodation to persons with disabilities who are ‘indirect participants’ in the justice system and to ensure their equal enjoyment of justice-related positions. The CJEU had already been confronted with differences in treatment involving persons working within the administration of justice, particularly on the ground of age.<sup>150</sup> With *Tartu Vangla* and *Komisija za zashtita ot diskriminatsia*, the Court confirmed that issues of access to justice, insofar as they relate to personnel in the administration of justice, remain within the scope of the Directive. Further, those decisions confirm the propensity of the CJEU to rely on ‘the principle of non-discrimination in employment underpinning the Directive [to fulfil] various socio-regulatory functions’, expanding the reach of the Directive.<sup>151</sup> They once again make it evident that ‘employment, occupation and vocational training ... are entry points for multi-dimensional demands that extend beyond the scope of material and distributive disadvantage, and include grievances relating to participation in social life and recognition of

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<sup>144</sup> Ibid., para. 9.

<sup>145</sup> CRPD, *Michael Lockrey v Australia*, *supra* note 142, para. 9.

<sup>146</sup> CRPD, *Makarov v Lithuania*, UN Doc. CRPD/C/18/D/30/2015, 05.10.2017, para. 7.6.

<sup>147</sup> A. BRODERICK and D. FERRI (2019), *International and European Disability Law*, *supra* note 20, p. 198, referring, among others, to CRPD, ‘Concluding Observations on the Initial Report of Latvia’, UN Doc. CRPD/C/LVA/CO/1, 10.10.2017, para. 23. In its most recent jurisprudence on Article 13(1), the CRPD Committee recalls more clearly the distinction between procedural accommodations and the concept of ‘reasonable accommodation’. In *Al Adam v Saudi Arabia*, the Committee had to consider the situation of a man with a hearing impairment who alleged, in particular, a violation of his rights under Article 13(1) CRPD: *Al Adam v Saudi Arabia*, UN Doc. CRPD/C/20/D/38/2016, 20.09.2018, para. 11.5. See also CRPD, General Comment No. 6, *supra* note 38, para. 51.

<sup>148</sup> E. FLYNN (2018), ‘Art. 13 Access to Justice’, *supra* note 21, p. 393.

<sup>149</sup> D. FERRI (2021), ‘Op-Ed: *Komisija za zashtita ot diskriminatsia*’, *supra* note 120.

<sup>150</sup> CJEU (ECJ), *Commission v Hungary*, Case C-286/12, 06.11.2012, ECLI:EU:C:2012:687, para. 81. The CJEU held that requiring compulsory retirement of judges, prosecutors and notaries when they reached 62 years of age constituted a ‘difference in treatment on grounds of age which [was] not proportionate as regards the objectives pursued’.

<sup>151</sup> R. XENIDIS (2021), ‘The Polysemy of Anti-discrimination Law’, *supra* note 16, p. 1653.

diversity and difference'.<sup>152</sup> The CJEU has been reluctant to overtly refer to Article 13 CRPD, probably mindful of the fact that the administration of justice remains a sensitive area for Member States. However, having regard to the AG's reference to the International Principles and Guidelines on Access to Justice for Persons with Disabilities, and to procedural accommodations, the CJEU has probably lost an opportunity to capitalise on the synergies between Articles 5(3), 13(1) and 27 CRPD, and to highlight the important role of the EU in the implementation of Article 13 CRPD. The latter provision remains a hidden normative framework in *Tartu Vangla* and *Komisija za zashtita ot diskriminatsia*, but one that may emerge in future cases.

## 6. CONCLUDING REMARKS

Article 13 CRPD recasts the right of access to justice as a stand-alone, broad right, advancing on previous narrower formulations set out in international human rights instruments. It imposes a range of far-reaching obligations on its parties, including the EU Member States and the EU, in order to ensure the effective access to justice of persons with disabilities as parties to legal proceedings, and as professionals within the justice system, broadly conceived of. On the whole, it requires States Parties to remove disability-related barriers in the justice system, and provide age-appropriate and procedural accommodations to ensure the equal participation of people with disabilities in roles related to the administration of justice.

In *Tartu Vangla* and *Komisija za zashtita ot diskriminatsia*, the situations of both XX and VA were considered from the standpoint of their right to work, in relation to the application of the Employment Equality Directive and the concept of 'reasonable accommodation' contained therein. The CJEU cited the CRPD, and in *Komisija za zashtita ot diskriminatsia* referred specifically to Articles 5(3) and 27 CRPD. However, both cases can be understood to fall within the scope of Article 13 CRPD, as they pertain to the participation of individuals with disabilities as professionals within the justice system. Although the organisation of justice is a competence of the Member States, this contribution argues that, ultimately, the CJEU's recourse to the Employment Equality Directive effectively serves the implementation of Article 13 CRPD in the EU. The new Strategy for the Rights of Persons with Disabilities 2021–2030 reflects the EU's growing interest in the area of access to justice, as the Commission indicates that it will, among other measures:

provide guidance to Member States on access to justice for persons with disabilities in the EU, building on international guidance provided by the United Nations [and] develop measures to support Member States in boosting the participation of persons with disabilities as professionals in the justice system and collect good practices on supported decision-making.<sup>153</sup>

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<sup>152</sup> Ibid.

<sup>153</sup> EUROPEAN COMMISSION, *Union of Equality: Strategy for the Rights of Persons with Disabilities 2021–2030*, COM(2021) 101 final, 03.03.2021, pp. 16–17.



These judicial developments tally with the Commission's willingness to enhance access to justice for persons with disabilities, and demonstrate that the EU has a significant role to play beyond merely providing support to Member States in implementing Article 13 CRPD. Further, they are the latest (but not certainly the last) evidence of the wide reach of EU non-discrimination law.<sup>154</sup>

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<sup>154</sup> E. FLYNN and A. LAWSON (2013), 'Disability and Access to Justice in the EU', *supra* note 18, p. 32.