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**Reasonable Accommodation for Workers with Disabilities:
Analysis of the New Italian Definitions
within the Multi-level Legal System**

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1. Disability as a “relational” concept: issues of domestic compliance and new perspectives

The landscape of disability rights has changed significantly over time. Recent international developments show that the definition of disability itself has been interpreted in recent years as a “relational” concept rather than a mere medical condition¹.

The international trend has certainly influenced both the law of European Union and several countries². However, Italy has struggled to comply

¹ MALZANI, *Dal collocamento mirato al diversity management. Il lavoro dei disabili tra obbligo e inclusione nella prospettiva di genere*, in RDSS, 2019, 4, p. 720 ff.; Cf. also BARBERA, *Le discriminazioni basate sulla disabilità*, in BARBERA (eds.), *Il nuovo diritto antidiscriminatorio. Il quadro comunitario e nazionale*, Giuffrè, 2007, p. 77 ff.

² LAWSON, *United Nations Convention on the Rights of Persons with Disabilities (CRPD)*, in

properly and there have been some differences between international and national law, which is still in the process of being adapted. Recently, within the framework of the “National Recovery and Resilience Plan” (PNRR)³, Legislators enacted Framework Law no. 227 of 22 December 2021, which, through several implementing Legislative Decrees, seeks to streamline and update the provisions related to disability in accordance with supranational standards⁴. Among the latter Decrees, d.lgs. no. 62 of 3 May 2024 amends the national legal definition of disability and the procedure for determining this condition. In addition, it introduces into the Italian legal system the concept of “Reasonable Accommodation”, which has never been previously addressed by the law⁵.

This paper aims to examine how the concepts of “Disability” and “Reasonable Accommodation” are – and have been – interpreted in international, European, and Italian labour law by comparing the definitions, and highlighting the crucial role of both Italian case law and recent domestic developments in mitigating the differences. The comparison between the medical and social models in addressing disability is analysed as a prerequisite for the further analysis of the regulatory framework, which is carried out using a vertical approach, starting from the international context, and moving towards national provisions.

ALES, BELL, DEINERT, ROBIN-OLIVER (eds.), *International and European Labour Law*, Nomos, 2018, p. 455 ff.

³ My translation of “Piano Nazionale di Ripresa e Resilienza”, www.governo.it (last accessed 17 June 2024). In this regard, cf., *inter alia*, GAROFALO, *Gli interventi sul mercato del lavoro nel prisma del PNRR*, in *DRI*, 2022, 1, p. 114 ff.; CALAFÀ, *Le politiche del mercato del lavoro nel PNRR: una lettura giuslavoristica*, in *LD*, 2023, 2, p. 163 ff.

⁴ For a comprehensive analysis of l. no. 227/2021, cf., *inter alia*, DE FALCO, *Ragionando attorno alla legge delega in materia di disabilità: una prospettiva giuslavoristica*, in *RCP*, 2022, 5, p. 1738 ff.; DAGNINO, *La tutela del lavoratore malato cronico tra diritto vivente e (mancate) risposte di sistema*, in *DRI*, 2023, 2, p. 336 ff. All the implementing decrees were published in the Italian Official Journal: d.lgs. no. 222 of 13 December 2023 focuses on the improvement of public services for inclusion and accessibility, whereas d.lgs. no. 20 of February 5, 2024, establishes the National Guarantor Authority for the Rights of Persons with Disabilities. As mentioned above, d.lgs. no. 62 of 3 May 2024 is the latest to be published.

⁵ MONACO, FALABELLA, *Prima analisi del decreto legislativo 3 maggio 2024, n. 62 in materia di disabilità: una “rivoluzione copernicana”*, in *BollettinoAdapt.it*, 20 maggio 2024, 20, p. 1 ff. (Last Accessed 17 June 2024), in particular, p. 5. D.lgs. no. 62/2024 enters into force on 30 June 2024. The enforcement of the provisions will be phased in over time, with some rules going through a first phase of experimental application on a sample of territories, starting on 1 January 2025, while the full implementation on all national territories will have to wait until 1 January 2026.

2. *Preconditions for the analysis: from the medical to the social perspective through the classifications of the World Health Organisation*

The evolution of the legal concept of disability lies in the fact that, in addition to a clinical component, a “relational” dimension has emerged over time, changing the understanding of the phenomenon. Before being reflected in legal norms, this shift in perspective begins within medical-legal science. Therefore, as a premise for this research, it is necessary to understand how the social approach to defining disability differs from the medical one.

The medical model is reflected in two World Health Organisation (WHO) classifications: the International Classification of Diseases (ICD) and the International Classification of Impairments, Disabilities and Handicaps (ICIDH)⁶.

The ICD determines the cause of diseases and their clinical manifestations but does not address their consequences on the individual’s existence. Complementarily, the ICIDH focuses on the consequences of diseases and their correlation, distinguishing the concepts of “Impairment”, “Disability,” and “Handicap”. “Impairment” is the loss or malfunction of an anatomical structure or function; “Disability” is the limitation or loss of the ability to perform a basic activity compared to a “normal” human being; “Handicap” is the condition of disadvantage resulting from an impairment or disability that prevents one from playing a “normal” role in society⁷. These three concepts are placed in a linear and constant causal sequence: from a “disease” or a “disorder” derives an “impairment” that leads to a “disability,” which im-

⁶ WORLD HEALTH ORGANIZATION (WHO), *International Statistical Classification of Diseases and Related Health Problems (ICD)*, 1970; *International Classification of Impairments, Disabilities, and Handicaps (ICIDH)*, 1980, both on www.who.int (last accessed 17 June 2024). In this regards, *funditus*, SAGONE, *La tutela della disabilità secondo il modello bio-psico-sociale*, in *Federalismi.it*, 2023, I, p. 244 ff.; MANCHIKANTI, FALCO, HIRSCH, *Necessity and implications of ICD-10: facts and fallacies*, in *PP*, 2011, 14, p. 405 ff.; ALTMAN, *Disability Definitions, Models, Classification Schemes and Applications*, in ALBREDHT, SEELMAN, BURY (eds.), *Handbook of Disability Studies*, Thousand Oaks, 2001, p. 97 ff.; MASCI, *La tutela costituzionale della persona disabile*, in *Federalismi.it*, 2020, I, p. 146; BADLEY, *An introduction to the concepts and classifications of the International Classification of Impairments, Disabilities and Handicaps*, in *DisRe*, v. 15, 1993, 4, p. 161 ff.; MINISTERO DELLA SALUTE, *Linee guida per la redazione della Certificazione di disabilità in età evolutiva ai fini dell’inclusione scolastica e del profilo di funzionamento tenuto conto della Classificazione Internazionale delle Malattie (ICD) e della Classificazione Internazionale del Funzionamento, della Disabilità e della Salute (ICF) dell’OMS*, 10 November 2022, in www.salute.gov, p. 1 ff. (last accessed 17 June 2024).

⁷ WHO, *ICIDH*, cit., pp. 27-29.

plies a “handicap”⁸. As clarified, this sequence does not consider the relationship between disability and social factors, making the former static and immutable⁹. In other words, the medical perspective is so defined because it focuses on the pathological condition whose consequent impairments determine *per se* the disability, which lead to a handicap.

This aspect emphasises the difference with the social model, which examines, not only the pathology and its related impairments, but also how the latter interact with environmental factors that, acting as barriers or facilitators, can reduce or increase difficulties in performing daily activities: disability becomes a “social concept” because it does not depend only on the impairment, but also on how the difficulties arising from it manifest in the relationship between the individual and society¹⁰.

The latter perspective emerged after the WHO replaced the ICIDH with the International Classification of Functioning, Disability, and Health (ICF), which is now used to complement the ICD¹¹.

Unlike the ICIDH, the ICF allows an assessment that does not follow a sequential causal line but examines how the determinants of disability – *i.e.* impairments of functions and body structures, limitations in daily activities, and environmental factors – interrelate. The assessment outcome is never predetermined, even with the same disease, as the individual’s final condition depends on the interplay of such determinants¹².

The above-mentioned determinants are integrated by the ICF into the four components: “Body Functions”, “Structures”, “Activities and Participation,” and “Environmental Factors.” The “Activities and Participation” component is divided into six domains covering all life areas, analysed through two qualifiers: “performance” and “capacity”.

When assessing the individual’s capacity, the focus is on his or her ability

⁸ WHO, *ICIDH*, cit., p. 30. SAGONE, cit., p. 247; MARTELLONI ET AL., *Law 227 of 22 December 2021 and its implementation according to the United Nations Convention on the Rights of Persons with Disabilities (CRPD): the proposal of the Italian Scientific Societies accredited on the basic assessment of Disability*, in *RIMEDL*, 2023, 3, p. 553. MINISTERO DELLA SALUTE, *Linee guida*, cit., p. 34.

⁹ SAGONE, cit., p. 245. M. LEONARDI, *Salute, disabilità, ICF e politiche sociosanitarie*, in *SPS*, 2005, 8, 3, p. 80.

¹⁰ TAMBORRINO, *Tutela giuridica delle persone con disabilità. Diritti e libertà fondamentali delle persone diversabili*, in *Key*, 2019, p. 22.

¹¹ WHO, *International Classification of Functioning, Disability and Health (ICF)*, 2001, endorsed with Resolution no. WHA54.21 of 22 May 2001.

¹² MARTELLONI ET AL., cit., p., 548; SAGONE, cit., p. 247.

to complete an action or task at the highest possible level within a given domain at a given time, taking into account a standard environment, which is not tailored to the individual's needs. In this context, environmental factors are used to describe the environment in which capacity is tested.

On the other hand, performance relates to how a person with a disability interacts in his or her actual environment, with the related facilitators and barriers. In such an evaluation, the environmental factors affecting the individual's living environment are effectively considered¹³.

However, both capacity limitations without a lack of performance and, conversely, performance limitations without a reduction in capacity are crucial in determining the disability *status*¹⁴.

3. *The international development of the concepts of "Disability" and "Reasonable Accommodation"*

From a legal perspective, the highlighted paradigm shift led to several results. On the one hand, it modified the terminology used: "Disability" is not a loss of "normality", but a variation of human functioning caused by the interaction between individual characteristics and the social environment. Similarly, the concept of "Handicap" has become obsolete, though it should now express "a different way of participating in society" rather than a "social disadvantage".

On the other hand, the social approach has facilitated the connection between disability and anti-discrimination law, with greater consideration of the enforcement of reasonable accommodation as a crucial factor in promoting inclusivity, particularly in employment.

As regards the international level, disability is directly addressed by two Conventions: the International Labour Organization Convention no. 159 of 1 June 1983, supplemented by Recommendation no. 168/1983, and the United Nations Convention on the Rights of Persons with Disabilities of 13 December 2006 (CRPD), as interpreted by the Committee on the Rights of Persons with Disabilities (hereafter the Committee). The first focuses specifically on disability in employment. The second has a broader scope, in-

¹³ WHO, *ICF*, cit., p. 123. See also, MINISTERO DELLA SALUTE, *Linee guida*, cit., p. 36.

¹⁴ M. MARTELLONI *ET AL.*, cit., p. 554.

volving employment as well. In the areas of overlap, the CRPD develops the content of the previous Convention through several innovations, the most important of which is the approach to the concept of disability¹⁵.

The ILO Convention adopts the medical perspective since it does not consider environmental aspects: it defines the “Disabled Person” as one whose prospects of suitable employment are reduced because of a “duly recognised physical or mental impairment”¹⁶.

The CRPD, on the other hand, does not focus on the identification of a clinical condition *per se* as the only determinant of disability, but on the dynamic interplay of biological, psychological, and social factors. As a result, it specifies that persons with disabilities are those facing a “long-term physical, mental, intellectual, or sensory impairments” interacting “with various barriers” which hinders their full participation in society on an equal basis with others¹⁷.

The same shift can be seen in the interpreting the concept of “Reasonable Accommodation”. The ILO Convention and the Recommendation no. 168 of 1983 include “Reasonable Adaptations” among the measures to be taken, “whenever appropriate and possible”, to promote the participation of persons with disabilities in both employment and the work environment¹⁸. However, they do not specify when the “adaptation” is “reasonable”, and only hint at the issue of the balance between workers’ interests and employers’ needs. On the contrary, the CRPD mandates the States Parties to “promote the realization of the right to work” to persons with disabilities, ensuring that “reasonable accommodation is provided [...] in the workplace”¹⁹. The concept of “Reasonable Accommodation” is specifically defined as involving “necessary and appropriate modification and adjustments, not imposing a disproportionate or undue burden”, to ensure that persons with disabilities enjoy their fundamental rights “on an equal basis with others”²⁰.

¹⁵ For a comprehensive analysis of the contents of the Conventions, cf. NUNIN, *Disability work and protection principles in International law*, in *VTDL*, 2020, 4, p. 879 ff.; DESSI, *Riflessioni sulla Convenzione OIL in tema di reinserimento professionale e di occupazione delle persone disabili*, in FERRANTE (eds.), *A tutela della prosperità di tutti. L'Italia e l'Organizzazione Internazionale del Lavoro a un secolo dalla sua Istituzione*, Giuffrè, 2020, p. 201 ff.

¹⁶ ILO Convention no. 159/1983, art. 1.

¹⁷ CRPD, art. 1. See also Preamble (e). Cf. MALZANI, *cit.*, p. 720 ff.; NUNIN, *cit.*, p. 888.

¹⁸ ILO Convention no. 159/1983, art. 7 and Recommendation no. 168/1983, art. 11(a).

¹⁹ CRPD, art. 27(i).

²⁰ CRPD, art. 2.

The latter definition focuses on the two main concepts of “Reasonableness” and “Proportionality”, which have been interpreted by the Committee as involving two separate evaluations. An accommodation is “reasonable” if it achieves the purpose for which it is made and is appropriate and effective for the worker. This assessment does not consider the cost to the employer, as it is part of the “Proportionality test”. The latter balances the aim of granting equal rights to the interested person concerned with the cost of the means required, to ensure that the accommodation, although practically possible, does not impose an excessive burden. The “Proportionality test” is based on several factors, including financial costs, available resources, the impact on the accommodating party and on other workers, and reasonable health and safety requirements²¹.

Furthermore, since reasonable accommodation allows individuals to enjoy rights “on an equal basis”, refusal to provide it constitutes a “discrimination on the basis of disability”²².

4. *Dir. no. 2000/78/EC of the European Union and the role of the CJEU*

The comparison between the CRPD and EU law shows that the two regulations provide a very similar protection to persons with disabilities when it comes to their professional sphere²³.

²¹ Committee on the Rights of Persons with Disabilities, General Comment no. 6(2018), Sec.V(D), paragraph 25(a)(d)(e), p. 7.

²² CRPD, art. 2. Cf. also BARBERA, *cit.*, p. 77 ff.

²³ For a comprehensive analysis of the EU regulation on disability and reasonable accommodation cf., *inter alia*, CHIAROMONTE, *L'inclusione sociale dei lavoratori disabili fra diritto dell'Unione europea e orientamenti della Corte di giustizia*, in VTDL, 2020, 4, p. 897 ff.; As regards the influence of the CRPD on the EU anti-discrimination law, cf., *inter alia*, WADDINGTON, *The Influence of the UN Convention on the Rights of Persons with Disabilities on EU Non-Discrimination Law*, in BELAVUSAU, HENRARD (eds.), *EU Anti-Discrimination Law Beyond Gender*, Hart, 2018. According to the latter Author, the EU does not seem to fully meet the requirements of the Convention, as dir. no. 2000/78/EC only covers discriminatory acts in the area of employment and occupation, which means that people with disabilities do not enjoy the same protection in all other areas covered by the broader scope of the CRPD. In this regard, in 2008, the European Commission proposed a new non-discrimination Directive, which would have extended protection from discrimination beyond employment, complementing dir. no. 2000/78/EC, although it was never enacted. In examining the CJEU cases on the relations between obesity and disability, the Author also affirms that, although the Court formally

Even before the CRPD was adopted, the obligation to provide reasonable accommodation for individuals with disabilities was – and still is – established in dir. no. 2000/78/EC, which provides for a general framework for equal treatment in employment and occupation, and protects against discrimination based on several grounds, including disability²⁴.

Given its scope, art. 5, dir. no. 2000/78/EC grants the right to reasonable accommodation only in the field of employment. The definition is similar to that of the CRPD: “Reasonable Accommodation” means the appropriate measures, determined on a case-by-case basis, to facilitate the participation of persons with disabilities, unless it constitutes a “Disproportionate Burden” for the company. The definition is developed in recitals no. 20 and no. 21: the former provides for some examples of reasonable accommodation, the latter lists the factors on which the “Proportionality test” is based, with no significant differences compared to the CRPD. Furthermore, art. 2(2)(b)(ii), dir. no. 2000/78/EC implicitly qualifies the denial of reasonable accommodation under art. 5, cit., as indirect discrimination.

On the other hand, the Directive does not provide a definition of persons with disabilities, which is established by the Court of Justice of the European Union (CJEU). In defining the latter, the CJEU upheld the traditional medical approach until the EU ratified the CRPD in 2009, which represented a turning point for the EU law²⁵. As a result, the Court reinterpreted dir. no. 2000/78/EC in line with the Convention and moved towards the social model, focusing not only on the individual’s medical condition – as it used to do – but also on the barriers resulting from the interaction of their long-term impairments with social or environmental factors. The CRPD had also an impact on the concept of reasonable accommodation, which was interpreted by the CJEU in line with the earlier statements of the Committee on its negotiability, the “Proportionality test” and in considering its denial as indirect discrimination²⁶.

expresses principles in line with the Convention, it does not effectively apply them when addressing concrete cases, resulting in a violation of international standards. Cf. p. 9–10.

²⁴ Council Directive 2000/78/EC of 27 November 2000. See ROCCELLA, TREU, AIMO, IZZI, *Diritto del lavoro dell’Unione europea*, Cedam, 2023, p. 336 ff.

²⁵ The CRPD was ratified by Council Decision 2000/43/EC of 26 November 2009, and it became binding under art. 216, par. 2, TFEU. Cf. CHIAROMONTE, *cit.*, p. 901.

²⁶ The medical model was stated for the first time in CJEU, C-13/05 of 11 July 2006, *Chacón Navas*, whereas the first case where the Court supported the social approach was CJEU, Joined Cases C-335/11 and C-337/11 of 11 April 2013, *HK Danmark*. See CHIAROMONTE, *cit.*,

5. *Disability and Reasonable Accommodation in national law: critical aspects and related case-law trends*

Although the CRPD was ratified by l. no. 18 of 3 March 2009, it was only after the CJUE condemned Italy for not having a specific provision that the Italian Parliament introduced Article 3(3-*bis*) in d.lgs. no. 216 of 9 July 2003, which transposed dir. no. 2000/78/EC²⁷. Although the introduction of a specific article was a necessary step towards a more protective regime, it posed – and still poses – some critical aspects, which can be highlighted as follows.

First, art. 3(3-*bis*), cit., does not define the concept of reasonable accommodation, as it refers to art. 2 of the CRPD for its elements. Specifically, the provision requires public and private employers to provide such accommodation “as defined in the United Nations Convention on the Rights of Persons with Disabilities [...]”²⁸.

Secondly, neither art. 3(3-*bis*), cit., nor d.lgs. no. 216/2003 define the concept of disability. Thus, the provision grants the right without identifying its recipients.

Thirdly, art. 3(3-*bis*), cit., supplements, without a proper harmonisation, a fragmented legal framework, where other laws already address disability with a medical perspective. Specifically, art. 3, l. no. 104 of 5 February 1992, which considers a “Handicapped Person” as who has a “physical, psychic or sensory impairment, whether stabilised or progressive, which causes difficulties in learning, relationships or work integration and which leads to a process of social disadvantage or marginalisation”²⁹. The norm clearly expresses the medical approach seen in the ICIDH: the individual’s clinical condition determines an “impairment”, which causes “difficulties” (*i.e.*, “disability”), which leads to an “handicap” as a “social disadvantage or marginalisation”³⁰.

p. 915 ff. and ALES, *Il benessere del lavoratore: nuovo paradigma di regolazione del rapporto*, in this journal, 2021, I, p. 48. Cf. also CJEU 10 February 2022, C-485/20, *HR Rail SA* which recently summarized the European case-law trend on the topic.

²⁷ CJEU, Case C-312/11, 4 July 2013, *Commission v. Italy*, commented by AGLIATA, *La Corte di Giustizia torna a pronunciarsi sulle nozioni di “handicap” e “soluzioni ragionevoli” ai sensi della direttiva 2000/78/CE*, in *DRI*, 2014, I, p. 263 ff.

²⁸ As well as, dir. no. 2000/78/EC, d.lgs. no. 216/2003 only recognises the right to a reasonable accommodation in employment, neglecting other areas of the CRPD which should now be addressed by Framework Law no. 227/2021.

²⁹ My translation of art. 3, l. no. 104/1992.

³⁰ SAGONE, *cit.*, p. 248; ROSSI, *Forme della vulnerabilità e attuazione del programma costituzionale*, in *RA*, 2017, 2, p. 28.

Complementarily, there are several other regulations related to the concept of “Civil Disability”³¹ – such as l. no. 68/1999, on targeted employment for people with disabilities – which lists several protected persons focusing on the percentage of incapacity, assessed by different bodies depending on the category of impairment³².

All these shortcomings led to several issues in the national framework. The first one concerned the beneficiaries of the right to reasonable accommodation, since the d.lgs. no. 216/2003 does not define the concept of disability and does not match with other national laws, which, by using a medical approach, clearly do not meet either the Supranational and European standards or the scope of art. 3(3-*bis*), cit.

Furthermore, the lack of a legal definition of “reasonable accommodation” itself raises some questions concerning what adjustments are required of the employers and how they may conduct the “Proportionality test”³³.

The issues highlighted, which have never been addressed by Legislators before Framework Law no. 227/2021, have been solved by the Supreme Court over time³⁴.

On the one hand, regarding the beneficiaries of reasonable accommodation, the Supreme Court affirms that the scope of the obligation stated under art. 3(3-*bis*), d.lgs. no. 216/2003, should be interpreted in accordance

³¹ My translation of the legal concept of “Invalidità Civile”.

³² Without claiming to be exhaustive, about l. no. 68/1999, RICCARDI, *Disabili e lavoro*, Cacucci, 2018; On both, D’ASCOLA, *Reasonable accommodation in the EU and national legal system. The duty to adopt adequate organizational measures as a limit to the employer’s power of dismissal*, in *VTDL*, 2022, 2, p. 192 ff.; GAROFALO, *La tutela del lavoratore disabile nel prisma degli accomodamenti ragionevoli*, in *ADL*, 2019, 6, p. 1211 ff.; GAROFALO, *Illegitimacy of the dismissal of the disabled worker. The different sanctions regimes*, in *VTDL*, 2022, 2, p. 252 ff.; TORSELLO, *I ragionevoli accomodamenti per il lavoratore disabile nella valutazione del centro per l’impiego*, in *VTDL*, 2022, 2, p. 209 ff.

³³ The latter question not only refers to what aspects the employers must take into account for an accommodation to be “reasonable”, but it also concerns the potential overlap of this employer’s obligation with other similar duties, such the obligation of *repêchage* in case of dismissal. On this topic, *inter alia*, GAROFALO, *Illegitimacy of the dismissal*, cit., p. 256 ff.; VOZA, *Sopravenuta inidoneità psicofisica e licenziamento del lavoratore nel puzzle normativo delle ultime riforme*, in *ADL*, 2015, 4-5, p. 778 ff.

³⁴ Cf., *inter alia*, Cass., Civ. sec. lav., no. 6497 of 9 March 2021, commented by ALESSI, *Disabilità, accomodamenti ragionevoli e oneri probatori*, in *RIDL*, 2021, 4, p. 613 ff. and DE PETRIS, *L’obbligo di adottare accomodamenti ragionevoli nei luoghi di lavoro: approdi definitivi della Suprema Corte e questioni ancora aperte*, in *ADL*, 2021, 4, p. 1061 ff.; Cass., civ., sec. lav., no. 27243 of 26 October 2018, commented by AIMO, *Inidoneità sopravvenuta alla mansione e licenziamento: l’obbligo di accomodamenti ragionevoli preso sul serio dalla cassazione*, in *RIDL*, 2019, 2, p. 145 ff.

with dir. no. 2000/78/EC, since the former transposes the latter. Consequently, to determine who deserves a reasonable accommodation, the Court uses the social approach suggested by the CJEU, despite the definitions provided by other laws.

On the other hand, the Supreme Court offers a thorough explanation of the concept of “Reasonable Accommodation”, following the coordinate of the CRPD. The Court defines it as the organizational modification that enables work to be performed under equal conditions and must be decided on a case-by-case basis, following the worker’s request³⁵. As in the CRPD, the selected measure needs to be “reasonable” and must not impose an “undue burden” on the employer, although the Court marks a notable difference compared to the international interpretation of the two concepts.

According to the international trend, “Reasonableness” relates only to the ability of the measure to achieve its aim, and “Proportionality” concerns the cost to the employer. On the contrary, the Supreme Court believes that both concepts involve a balancing of the interests of all parties concerned. In this regard, the “Proportionality test” takes into account the economic cost of the required adjustment, which must be assessed by focusing on subjective and objective factors³⁶, whereas the evaluation on the reasonability of the accommodation examines the effects on the organisation of the enterprise. The Court considers the reasonability test as a concrete application of the principle of good faith in legal relations. Thus, the employer must make all the organisational changes allowing people with disabilities to work in an environment appropriate to their condition, but it must also balance the concerned individual’s interest with the productivity of the company and other employees’ needs. The measure adopted is “reasonable” when the employer sets all the interests involved within objectively acceptable parameters³⁷.

³⁵ Cass. Civ. sec. lav., no. 6497/2021, cit.

³⁶ The subjective parameters involve the employer’s circumstances and include the size of the company, the discrepancy between expenditure and income, or a possible internal crisis. The objective criteria pertain exclusively to the cost of the resources required and the employer’s eligibility for public support to mitigate the associated costs. Cf., *inter alia*, GAROFALO, *La tutela del lavoratore disabile*, cit., p. 1218 ff.

³⁷ Cass. Civ., sec. lav., no. 6497/2021, cit., 5.4. Cf. GAROFALO, *La tutela del lavoratore disabile*, cit., p. 1229 and D’ASCOLA, *cit.*, p. 202–208, for the analysis of the interactions among the principle of good faith, the obligation to provide reasonable accommodation and the possibility of a judicial control on the employer’s organisational choices.

6. *Framework Law no. 227/2021, Reasonable Accommodation and the two assessments of Disability*

The research shows that national law has not been properly aligned with international and European standards in defining the concepts of disability and reasonable accommodation: as mentioned above, the former has only been addressed from a medical perspective, while the latter has not even been provided for in legislation. This is one of the reasons why Framework Law no. 227/2021 was enacted, as it mandates, among other things, its implementing Legislative Decrees to revise the current legislation to redefine both concepts in line with supranational developments.

L. no. 227/2021 aims to amend art. 3, l. no. 104/1992 – which, as mentioned above, currently defines the concept of “Handicapped Person” – to align it “with the UN Convention on the Rights of Persons with Disabilities”³⁸. On the other hand, the new Law entrusts the Implementing Decrees to introduce the definition of “Reasonable Accommodation” in l. no. 104/1992³⁹.

An interesting aspect of l. no. 227/2021 is that the condition of disability is determined by two different assessments. The first involves a basic evaluation to determine the individual’s impairment and support needs⁴⁰. The second consists of a “multidimensional” assessment, explicitly based on the social approach, which begins at the request of the applicant, and is necessary to develop an “Individualised, Personalized and Participatory Life Plan” (IPPLP)⁴¹. The IPPLP aims to identify the resources, methods, and expertise needed to realize the person’s life goals and aspirations and to determine the reasonable accommodation needed to support individuals with disabilities’ involvement in all aspects of life, including employment⁴². Whereas the basic

³⁸ Art. 2(2)(a)(1), l. no. 227/2021.

³⁹ Art. 2(2)(c)(5), l. no. 227/2021. Cf. CONSIGLIO DEI MINISTRI, press release no. 57 of 3 November 2023, in www.governo.it (last accessed 17 June 2024).

⁴⁰ L. no. 227/2021 entrusts the basic evaluation to a single body, the INPS – “National Institute for Social Services” (my translation of “Istituto Nazionale della Previdenza Sociale”) – which follows a single procedure, replacing the previous fragmented system of different bodies and processes depending on the type of disability and on the purpose of the application. Cf. art. 2(2)(b)(2), l. no. 227/2021.

⁴¹ My translation. Cf. art. 2(2)(a)(1), l. no. 227/2021.

⁴² Art. 2(2)(c)(8), l. no. 227/2021.

evaluation is linked to the primary legal protection and measures, the second one is voluntary and serves only to draft the IPPLP.

The multidimensional nature of the second assessment, which is the only one explicitly based on a social approach, could lead one to believe that the basic assessment would continue to follow a medical perspective. In this case, one might wonder how Framework Law no. 227/2021 would affect the national system, bringing it into line with the CRPD, if only the second assessment appears to be multidimensional.

The answer to this question seems to lie in the parameters used in the basic assessment to determine the condition of disability, since l. no. 227/2021 states that the ICD and ICF classifications must be considered when conducting the basic evaluation⁴³. This circumstance may have a huge impact when compared to the previous system: the use of the ICF classification has never been addressed by the national law as a general basis to ascertain individual's disability, although it interprets such condition as a social concept rather than a purely medical one⁴⁴.

However, if the basic evaluation also adopts a social approach, one might wonder about the difference with the multidimensional evaluation, which is highlighted below.

7. *Innovations of d.lgs. no. 62/2024 on the definition and assessment of Disability*

To answer the latter question, one must analyse the recent d.lgs. no. 62/2024, enacted to implement l. no. 227/2021 and to develop its content with several innovations⁴⁵.

Firstly, as required by l. no. 227/2021, art. 3, d.lgs. no. 62/2024 amends art. 3, l. no. 104/1992, replicating exactly the definition of “Persons with Dis-

⁴³ Art. 2(2)(b)(1), l. no. 227/2021.

⁴⁴ Before l. no. 227/2021, the ICF was legally adopted only in small and very specific contexts. Recently, art. 4, d.lgs. of 7 August 2019, no. 96, amended art. 5(2), d.lgs. no. 66 of 13 April 2017 (“*Norme per la promozione dell’inclusione scolastica degli studenti con disabilità, a norma dell’articolo 1, commi 180 e 181, lettera c), della legge 13 luglio 2015, n. 107*”) to adopt the criteria of the ICF for assessing the disability *status* of school students. Complementarily, the Italian Ministry of Health issued some guidelines to enforce the latter regulation. Cf. MINISTERO DELLA SALUTE, *Linee guida*, cit., p. 1 ff. Cf. SAGONE, *cit.*, p. 250; MARTELLONI ET AL., *cit.*, pp. 554–555.

⁴⁵ MONACO, FALABELLA, *cit.*, p. 1 ff.

abilities” found in the CRPD. As a result, the new article abandons the concept of “handicap”⁴⁶ and refers to the persons with disabilities as those who have “a long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”⁴⁷.

However, the article specifies that this condition will be ascertained by the basic evaluation: the latter is indeed crucial, as it will be the general procedure for determining the condition of disability, which also includes any type of assessment of “Civil Disability”⁴⁸.

At this point, one might wonder why the Legislators have resorted to two evaluations and why the basic one plays a decisive role in determining the condition. The answer lies in the fact that the assessments have different objectives. The basic focuses on determining the individual’s support needs. Thus, it evaluates the latter’s degree of autonomy.

It is no coincidence that d.lgs. no. 62/2024 states that such an evaluation uses the ICD and the ICF mainly to assess how the functional and structural impairments resulting from the person’s pathology influence their daily activities. Among other aspects, the basic assessment specifically focuses on ascertain the individual’s “capacity” in the domains related to ICF “Activities and Participation” component⁴⁹.

⁴⁶ L. no. 104/1992, art. 4.

⁴⁷ L. no. 104/1992, art. 3(1) (my translation). Furthermore, for granting access to the different legal benefit, the article now classify disability by the “amount of support needed” rather than the “gravity” of the condition. According to art. 3(2), the need for support is assessed by the basic evaluation, using the ICF classification. Cf. l. no. 104/1992, art. 4. Cf. MONACO, FALABELLA, *cit.*, p. 2;

⁴⁸ Cf. the list in art. 5, d.lgs. no. 62/2024. In addition, art. 12, d.lgs. no. 62/2024 requires the Minister of Health to adopt, by 30 November 2024, a regulation updating the definitions, criteria and procedures for the assessment of “Civil Disability”, “Civil Blindness”, “Civil Deafness” and “Civil Deafblindness” in order to bring them into line with the new definition of disability and the parameters of the ICD and ICF classifications.

⁴⁹ Cf. d.lgs. no. 62/2024, art. 5(3). However, cf. also art. 10(1), which specifies that the basic evaluation must particularly ascertain the following aspects: “a) the assessment and verification of the individual’s health condition, indicated in the introductory certificate with ICD codes; b) the evaluation of long-term and significant impairments of health *status*, functional, mental, intellectual, or sensory, in accordance with ICF indications and taking into account the ICD; c) the identification of functional and structural *deficits* that hinder the individual’s activities in terms of health, relevant in terms of capacity according to the ICF; d) the identification of the individual’s functioning profile, limited to the domains of mobility and autonomy in basic and instrumental activities of daily living, requiring continuous support; e) the evaluation of the

However, if the analysis focuses on capacity, the context taken as a reference point should be standard and independent of the specific factors belonging to the individual's living environment⁵⁰.

The difference with the multidimensional assessment seems to be in the latter aspect. In this sense, d.lgs. no. 62/2024 explicitly states that the multidimensional assessment is based on the social approach, as it focuses on the performance of the individual, which consists in the ability to carry out certain daily activities in the specific context in which he or she lives, with all the environmental factors that are part of it. In this perspective, since the multidimensional appraisal aims exclusively at drafting the IPPLP, it must necessarily take into account the environmental factors that the person will encounter in the life course that he or she wishes to follow⁵¹.

As a result, the two evaluations seem to complement each other: the basic assessment identifies the individual's disability, focusing on his or her support needs, while the second one contextualizes the outcome of the first, assessing how the individual's specific condition relates to the barriers in his or her environment, to determine what measures are needed to ensure equal participation in society.

In this context, given that the multidimensional evaluation considers the specific environmental factors emerging in the chosen context, the IPPLP provides for the reasonable accommodations needed to achieve the goals that have been set.

impact of functional and structural impairments in terms of capacity according to the ICF classification, in the domains related to activities and participation, also considering the domains related to work and learning in higher education; f) the evaluation of the level of support needs, mild or moderate, or intensive, high, or very high support, related to the ICF domains of activities and participation" (my translation).

⁵⁰ WHO, ICF, cit., 123. See also, MINISTERO DELLA SALUTE, *Linee guida*, cit., p. 36.

⁵¹ D.lgs. no. 62/2024, art. 25(2). The evaluation is specifically divided into four phases. The first step is to identify the objectives that the person wishes to pursue, in line with the basic assessment, and in relation to these to determine the functioning profile, both in terms of "capacity" and "performance". Secondly, the assessment identifies the "environmental factors" – i.e. the barriers and facilitators – which may be found in the contexts chosen by the person through the indication of objectives. Thirdly, it evaluates the physical, mental, intellectual, and sensory health profile, along with the person's needs in the domains of quality of life, taking into account the individual's priorities. Finally, it determines the specific objectives that can be achieved with the IPPLP, according to the person's aspirations.

8. *Innovations of d.lgs. no. 62/2024 on the concept and enforcement of Reasonable Accommodation*

The definition of “Reasonable Accommodation” is now contained in the new art. 5-*bis*, l. no. 104/1992, introduced by art. 17, d.lgs. no. 62/2024.

Reasonable accommodation is granted to individuals who have been recognized as having a disability through the basic evaluation process⁵², where “the application of legal provisions” does not ensure that they can effectively and promptly exercise their “human rights and fundamental freedoms on an equal basis with others”. In this sense, reasonable accommodation “identifies the necessary, relevant, appropriate, and adequate measures and adjustments that do not impose a disproportionate or undue burden on the obligated party”⁵³.

The concept is further detailed in art. 5-*bis* (5), l. no. 104/1992, which specifies that reasonable accommodation must be “necessary, adequate, relevant, and appropriate to the level of protection to be provided and to the contextual conditions in the specific case, as well as compatible with the resources actually available for this purpose”⁵⁴.

The article seems to implicitly recall the concepts of “Reasonableness” and “Proportionality”, in line with international and European standards: as clarified by the Committee, an accommodation is “reasonable” if it is necessary and appropriate to the needs of the individual and “proportional” if it is compatible with the resources available⁵⁵. In this regard, it appears that art. 5-*bis*(5) may contrast with the latest decisions of the Italian Supreme Court, which holds that, in employment relationships, the “Reasonableness test” – as an application of the principle of good faith – implies a balancing of interests of all parties involved⁵⁶. Conversely, according to the latter article, if a measure is “necessary” and “appropriate” to the needs of the individual, it is reasonable *per se*, thus eliminating any other evaluation concerning the interests of third parties, since the only limit seems to concern the cost of the measure required.

⁵² D.lgs. no. 62/2024, art. 5(4).

⁵³ L. no. 104/1992, art. 5-*bis*(1). Cf. also art. 5-*bis*(2), which assigns a subsidiary function to reasonable accommodation when the normal benefits and supports of existing legislation are not sufficient.

⁵⁴ L. no. 104/1992, art. 5-*bis*(5).

⁵⁵ Cf. Committee on the Rights of Persons with Disabilities, General Comment no. 6(2018), Sec.V(D), paragraph 25(a)(d)(e), p. 7 and *supra* § 3.

⁵⁶ *Supra*, § 5.

Regarding the implementation of reasonable accommodations, art. 5-bis, l. no. 104/1992 now provides a specific procedure applicable to Public Administrations, public service concessionaires, and private entities. The person with a disability – or the subjects referred to in art. 5-bis(3) – must submit a written request for Reasonable accommodation, possibly including a concrete proposal, which will be evaluated by the recipient. In case of rejection, the applicant – or the associations protecting the same interests – may either start a claim based on disability-discrimination⁵⁷ or submit a request to the new National Guarantor Authority for the Rights of Persons with Disabilities, to verify whether there the refusal of reasonable accommodation consisted in an indirect discrimination and, in such cases, to propose possible solutions⁵⁸.

9. *The impact of the recent reform on the multi-level legal framework*

The analysis of the impact of the reform on the previous regulatory framework rises several points for consideration.

The first question is whether d.lgs. no. 62/2024 has achieved the long-awaited shift from the medical to the social model: the answer seems to be affirmative.

From a purely legal perspective, the definitions of “Disability” and “Reasonable Accommodation” finally reflect those of the CRPD. Moreover, the Decree implicitly incorporates the concepts of “Reasonableness” and “Proportionality” in line with the General comments of the Committee.

The shift towards a social model also seems evident in the way disability is assessed. Clearly, the multidimensional evaluation has more social aspects than the medical one, since it ascertains the individual’s performance in his or her concrete environment, taking into account all the factors of his or her life context.

⁵⁷ L. no. 104/1992, art. 5-bis(8-11), which refer to arts. 3-4, L. no. 67 of 1 March 2006, which relate to the anti-discrimination procedure under art. 28, d.lgs. no. 150 of 1 September 2011.

⁵⁸ L. no. 104/1992, art. 5-bis(8-11), according to which the Guarantor does not seem to have direct sanctioning powers, in accordance with the provisions of L. no. 227/2021. On this point, see ABRIL, CHOUBEY, M.A. LEONARDI, ZAMPIERI, *Reasonable Accommodation and Disability: a Comparative Analysis*, in *DSL*, 2024, 1, p. 32, where it has been highlighted that L. no. 227/2021 does not grant neither sanctioning powers to the new Authority nor does it confer on the latter advisory powers towards private entities.

However, there seems to be a shift towards the social approach even in the basic assessment. In this regard, the use of the ICF is crucial, since even in ascertaining the individual's capacity in a standard environment there are environmental factors to consider. It can be noticed that even the latter factors, although uniform and unspecific, relates to the individuals' impairment, determining different degrees of disability. This is confirmed by the ICF itself, which states that environmental factors are taken into account in describing the context in which the individual's capacity is assessed. Not surprisingly, it has been pointed out that both capacity limitations in the absence of performance limitations and, conversely, performance limitations in the absence of capacity limitations, have value⁵⁹.

On the other hand, one might wonder whether the new concept of disability can lead to the uniformity that was lacking in the previous legal framework. The answer seems positive as well.

The legislators adopted a single definition of disability under art. 3, l. no. 104/1992, which is determined through a single procedure that is valid for nearly all legal purposes⁶⁰. Moreover, the new "social" dimension of the legal definition of disability is in line with art. 3(3-*bis*), d.lgs. no. 216/2003 and, more generally, with the anti-discrimination legislation, which is now expressly referred to by art. 5-*bis*, l. no. 104/1992, in cases of refusal to provide reasonable accommodation.

The only aspect that needs to be clarified is the possible difference between the new legal concept of "Reasonable Accommodation" and the one described by the Supreme Court, when applying art. 3(3-*bis*), d.lgs. no. 62/2024. In particular, it may be questioned whether the "Reasonableness test" can still be considered as a specification of the principle of good faith in contracts, since, according to d.lgs. no. 62/2024, a measure is reasonable if it satisfies the applicant's needs, which should not be balanced with interests of third parties, as instead provided for by the parameter under arts. 1175 and 1375 c.c.

On a more practical level, there are other issues that can only be touched upon in this essay.

⁵⁹ M. MARTELLONI *ET AL.*, *cit.*, p. 554.

⁶⁰ In this regard, it is important to recall that the different definitions of "civil disability" – which, under art. 5, d.lgs. no. 62/2024, are included in the condition of disability under art. 3, *cit.* – should be revised according to the ICD and ICF parameters, through a regulation of the Italian Ministry of Health.

On the one hand, it is necessary to assess how the new procedure for requesting reasonable accommodation relates to the procedure provided for in art. 10(3), l. no. 68/1999, which was not updated by d.lgs. no. 62/2024. The latter norm states that, in the event of a deterioration in the worker's state of health, he or she may be dismissed if the commission referred to in art. 4, l. no. 104/1992 finds that it is impossible for him or her to be reinstated, even after the possible adjustments to the organisation of work have been made.

On the other hand, the relationship between the IPPLP and the employer's discretion in organisational management should be examined, as reasonable accommodation under the IPPLP may be designed for the person with a disability without the involvement of the potential employer, who may not have been identified in the specific case⁶¹.

In conclusion, the reform seems to achieve the long-awaited "Copernican revolution"⁶² that will certainly reduce the difference between supranational and national law. Of course, how it will be implemented needs to be further examined, with more certain answers after the trial period.

⁶¹ See also ABRIL, BRAJ CHOUBEY, M. A. LEONARDI, ZAMPIERI, *cit.*, p. 31.

⁶² MONACO, FALABELLA, *cit.*, p. 1.

Abstract

The essay examines the concepts of “Disability” and “Reasonable Accommodation” in labour law, providing critical insights into the differences between international, European and national legal interpretations. The analysis takes into consideration the impact of the recent legislative developments in Italy, including Framework Law no. 227 of 22 December 2021 and Legislative Decree no. 62 of 3 May 2024.

Keywords

Disability, Reasonable Accommodation, Definitions, Multi-Level, Comparison.