

**HOW CAN OBESITY FIT WITHIN THE LEGAL CONCEPT OF
'DISABILITY'?**
**A COMPARATIVE ANALYSIS OF JUDICIAL INTERPRETATIONS
UNDER EU
AND US NON-DISCRIMINATION LAW AFTER *KALTOFT***

Joseph Damamme*

The recent change of the concept of 'disability' by the Court of Justice of the European Union (CJEU) in HK Danmark (Ring and Skouboe Werge) represents a valuable progress in the pursuit of consistency between the social model of disability and the corresponding concept of disability under non-discrimination law. However, even under the new concept, there may be disagreement to qualify certain conditions as a 'disability'. Recent CJEU's case of Kaltoft dealing with obesity reflects this difficulty. The purpose of this paper is to assess the relevance and the impact of including obesity in the scope of 'disability' as a discrimination ground. To that end, a comparative approach will be followed by confronting the Kaltoft ruling with judicial interpretations under the law of the United States of America. It will also be combined with an integrated approach considering the multi-layered nature of disability discrimination law from a European standpoint.

Keywords: Discrimination, Obesity, Disability, Weight, Appearance, Employment Equality Directive, Americans with Disabilities Act.

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* PhD candidate, Institute for European Studies, *Université libre de Bruxelles* and Equality Law Clinic (<http://www.philodroit.be/-ELC-?lang=en>). See for his personal webpage: <http://www.iee-ulb.eu/en/joseph-damamme>. This research has been funded by the French community of Belgium through a doctoral grant (*mini-Action de recherche concertée*). The author wishes to thank Professor Emmanuelle Bribosia, Professor Lisa Waddington, Dick Houtzager, Constantin Cojocariu and the anonymous peer-reviewers for their helpful comments and suggestions on an earlier draft. In addition, Hermine Damamme, Kinshuk Jha, Thomas Helman and Ana Lope García offered insightful comments throughout the writing process. The usual disclaimers apply.

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I INTRODUCTION

On December 18th, 2014 the Court of Justice of the European Union (CJEU) held in *Kaltoft*¹ that obesity can, under certain conditions, fall under the concept of 'disability' within the meaning of the EU Employment Equality Directive (EED).² The facts of the case, as presented by the referring court and set out by Advocate General (AG) Jääskinen,³ are as follows: Mr Kaltoft worked as a child-minder for the municipality of Billund (Denmark) since 1996 and was in charge of taking care of people's children in their own homes. He was dismissed in 2010 following an official hearing process during which his obesity was mentioned. On behalf of Mr Kaltoft, a workers' union (the applicant) sued a national association of Danish municipalities, acting on behalf of the municipality of Billund (the respondent) to challenge the dismissal. Before the national Court, the parties disputed whether Mr Kaltoft's dismissal was motivated by his obesity. Indeed, the only official reason given by the employer was the decrease in the number of children. However, it remains unclear why Mr Kaltoft was the only dismissed employee among all the child-minders working for the concerned municipality. Before the national court, Mr Kaltoft asserted that he was discriminated on the grounds of his obesity. Against this background, the national court referred several questions for a preliminary ruling, asking notably whether obesity can be qualified as a disability for the purposes of EU law (particularly under the EED).

¹ Case C-354/13 FOA acting on behalf of Karsten Kaltoft v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund [2014] ECLI:EU:C:2014:2463.

² Council Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

³ Opinion of AG Jääskinen, Case C-354/13 (n 1) paras 8-10.

Under EU law and policy, tackling ‘obesity’ through the lens of non-discrimination is a novelty. Up to that point, EU institutions had addressed obesity only as a public health issue, by developing a strategy to ‘combat’ it.⁴ At national level, some Member States have been seeking for different means to eradicate the so-called ‘obesity-epidemic’, such as the imposition of ‘food taxes’ (also called ‘fat taxes’).⁵ Contrastingly, obesity is tackled in *Kaltoft* as a feature to protect, here against alleged discrimination, rather than to eradicate. Ironically, the same definition of obesity is used in both of these contexts (public health and non-discrimination). As stated by several health authorities such as the World Health Organisation (WHO)⁶ and taken over by AG Jääskinen in *Kaltoft*,⁷ obesity is identified with reference to the ‘Body Mass Index’ (BMI). BMI is a formula that consists in dividing an individual’s weight (in kilogrammes) by square of his/her height (in metres).⁸ The obtained numeric result determines whether the individual is overweight or not (respectively BMI above or below 25) or obese (BMI equal to or above 30). Obesity is commonly classified into three categories: ‘mild’ (BMI ranging from 30 to 34.99) ‘moderate’ (from 35 to 39.99) and ‘severe’, also called ‘morbid’ or ‘extreme’ (BMI of 40 or more).⁹

Discrimination due to obesity, or generally being overweight, had not been a matter of great interest in Europe.¹⁰ Contrastingly, and as the reader will see along this paper, the issue has been massively discussed in the American legal literature. This is partly due to the substantial number of cases where obese claimants have sought legal redress before US courts against unfavourable treatment (eg refusals to hire or dismissals) allegedly based on their weight. More generally, a study of 2008 found that ‘weight

⁴ See eg European Commission, ‘A strategy for Europe on Nutrition, Overweight and Obesity related health issues’ (White Paper) COM (2007) 279 final.

⁵ See Alberto Alemanno and Ignacio Carreño, ‘Fat Taxes in the European Union between Fiscal Austerity and the Fight Against Obesity’ (2011) 4 *European Journal of Risk Regulation* 97.

⁶ World Health Organisation (WHO), ‘Obesity: preventing and managing the global epidemic: Report of a WHO consultation’ (Report) WHO Technical Report Series 894, 2000, 9, via <http://apps.who.int/iris/handle/10665/42330> (accessed 6 June 2015).

⁷ Opinion of AG Jääskinen (n 3) para 50.

⁸ If weight is measured in pounds and height in inches: $BMI = 703 \times \frac{(\text{Weight})}{(\text{Height})^2}$.

⁹ This categorisation is found in the WHO Report (n 6) 9 and referred to by AG Jääskinen in his Opinion (n 3) para 50.

¹⁰ See, for an exception, Stuart W Flint and Jeremé Snook, ‘Obesity and discrimination: The next “big issue”?’ (2014) 3 *International Journal of Discrimination and the Law* 183 (focusing on UK law).

or height'¹¹ discrimination was the fourth most common form of discrimination experienced by Americans (after gender, age and race).¹²

The purpose of this paper is to assess the relevance (in terms of reasons and suitability) and the impact of including obesity in the scope of 'disability' as a discrimination ground. For the relevance, legal arguments for qualifying, and conversely refusing to qualify, obesity as a disability will be analysed. The impact will be discussed with respect to two situations: the one of individuals who are 'regarded as' disabled, albeit they are not, and, although to a lesser extent, the one of those who have conditions often compared to obesity because allegedly 'self-inflicted' (eg alcoholism). The paper's argument can be summarised as follows: 'disability' is a valuable discrimination ground for obesity considering how this concept has been clarified. This should result in including the two aforementioned situations.

To this end, a comparative approach will be combined with an 'integrated one'. The comparative approach will consist in confronting judicial interpretations of 'disability' under EU and US non-discrimination law ('disability') in 'obesity-as-disability cases'. The integrated approach consists in taking into account all human rights provisions that are relevant to disability from a European standpoint. Both will be further explained.

As said, the comparison will focus on judicial interpretations of 'disability' under EU and US non-discrimination law in 'obesity-as-disability cases'. This means cases where an obese claimant alleges that he/she was discriminated against or that the employer failed to provide reasonable accommodation and seeks redress under disability discrimination law. More precisely, the *Kaltoft* ruling and EU non-discrimination law ('EU law'), will be compared with case law under US disability non-discrimination federal legislation, ie the Americans with Disabilities Act of 1990 (ADA),¹³ as amended in 2008 (ADAAA)¹⁴ and their predecessor, the Rehabilitation Act.¹⁵ An EU-US comparative analysis¹⁶ is justified for three

¹¹ For specific discussion on height discrimination in the US context, see Isaac B Rosenberg 'Height Discrimination in Employment' (2009) 3 Utah Law Review 907.

¹² Rebecca M Puhl, Tatiana Andreyeva, Kelly D Brownell, 'Perceptions of Weight Discrimination: Prevalence and Comparison to Race and Gender Discrimination in America' (2008) 32 International Law Journal of Obesity 992, 998.

¹³ Americans with Disabilities Act of 1990, Pub. L. No 101-336, § 12102(4)(A), 104 Stat 328 (1991).

¹⁴ ADA Amendments Act of 2008, Pub. L No 110-325, 112 Stat. 3553.

¹⁵ Rehabilitation Act of 1973 § 504, 29 U.S.C.A. § (West Supp. 1994).

¹⁶ The comparative approach between US and EU disability non-discrimination law has been the subject of several academic works. See generally the recent issue of the American Journal of Comparative Law (2012, Vol 60, Issue No 1) dedicated to the 'Evolutions in Antidiscrimination Law in Europe and North America'. More specifically on the concept of 'disability' under US and EU law, see eg Vlad E Perju, 'Impairment, Discrimination, and the Legal Construction of Disability in the

reasons further discussed throughout the paper. Firstly, and as already said, the question asked in *Kaltoft* has been numerously handled by US courts. Secondly, and as we argue, ‘disability’ is similarly shaped under EU and US law because of the sub-concepts supposed to clarify it. Thirdly, a similar phenomenon has been observed under both jurisdictions. In short, strong criticism towards judicial interpretations of disability has been expressed and changes have occurred to enhance a broader understanding of ‘disability’. On the basis of both US courts and CJEU’s jurisprudence, one can imagine a disability discrimination suit as a succession of doors, where meeting one of the suit’s specific condition represents passing each door. Indeed, facing the respondent’s refutation that a certain condition can be qualified as a ‘disability’, courts of both jurisdictions have tended to focus on this question, rather than on whether the alleged behaviour (or failure to act) has occurred.¹⁷ Applicants proved blocked at the ‘disability door’ very often before the US courts¹⁸, including in obesity cases as addressed along the paper. Before the CJEU, the ‘closed-door’ scenario occurred twice¹⁹ out of six cases where the qualification of disability was debated between the parties.²⁰ We will assess whether the jurisprudence in obesity-as-disability cases bear witness of the same evolution from a narrow to a broad interpretation. We submit that courts of both jurisdictions have an interest in ‘borrowing’²¹ from each other, with respect to the conditions imposed for qualifying obesity as a disability.²² On the one hand, *Kaltoft* leaves at least one question unanswered, potentially answerable in light of US experience (the ‘regarded as’ issue). On the other hand, it is worth noting that the US Supreme Court has not ruled on the matter yet, leaving discrepancies in the lower courts’ jurisprudence on the question of under

European Union and the United States’ (2011) 44 Cornell International Law Journal 101.

¹⁷ Problem pointed out by authors like Lisa Waddington, eg in ‘Not disabled enough: How European Courts filter non-discrimination claims through a narrow view of disability’ (2015) 1 European Journal of Human Rights 11 and Vlad E Perju (n 16).

¹⁸ See eg Vlad E Perju (n 16) 134.

¹⁹ See Case C-13/05 *Chacón Navas v Eurest Colectividades SA* [2006] ECR I-06467 and case C-363/12 (Grand Chamber) *Z v A Government department, The Board of management of a community school* [2014] ECLI:EU:C:2014:159.

²⁰ In addition to these two cases and *Kaltoft*, see Case C-356/12 *Wolfgang Glatzel v Freistaat Bayern* [2014] ECLI:EU:C:2014:350 and joined cases C-337/11 and C-335/11 *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejds giverforening, acting on behalf of Pro Display A/S* [2013] ECLI:EU:C:2013:222.

²¹ Expression employed (with respect to disability discrimination law) by Gerard Quinn and Eilionóir Flynn. See ‘Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability’ (2012) 60 American Journal of Comparative Law 23.

²² Some attempts have already been made in this direction before the CJEU by referring to jurisprudence under US law to influence the interpretation of ‘disability’. See Opinion of AG Kokott in *HK Danmark (Ring and Skouboe Werge)* (n 20), para 34, fn 17 (reference to the US case on AIDS to highlight the broad understanding of disability) and Opinion of AG Jääskinen in *Kaltoft*, (n 3) (quoting the applicant’s argument) para 52, fn 48 (reference to the US case qualifying obesity as a disability).

which conditions can obesity be a disability under US federal law. In contrast, the solution adopted in *Kaltoft*, as well as the reasoning thereunder, holds for courts of all EU Member States as the judgment was delivered in the context of a preliminary ruling. This could be inspiring for the US Supreme Court, which might have to handle an obesity-as-disability case in the future.

The comparative approach will be combined with an integrated one,²³ considering the multi-layered nature of disability discrimination law from a European standpoint. In concrete terms, it will be assessed whether the interpretation (under EU law) of ‘disability’ with respect to obesity is influenced by the United Nations Convention on the rights of persons with disabilities (UNCRPD),²⁴ to which the EU is a party²⁵ and by the European Convention of Human Rights (‘ECHR’) whose requirements have been recognised to be of particular significance to EU law by the CJEU.²⁶

What is more, the analysis will be enhanced by cases at national level we are aware of (in some EU Member States) to determine how national courts and equality bodies have handled obesity-as-disability cases, and whether *Kaltoft* should imply a change in their jurisprudence. Without ignoring the fact that obesity raises equality issues in numerous spheres of

²³ Such an approach notably consists in highlighting convergences, divergences in different courts’ jurisprudence, as well as mutual influences between them. This approach is advocated, inter alia, in the framework of the IAP project ‘The Global Challenge of Human Rights Integration: Toward a Users’ Perspective’ (2012-2017), via <http://www.hrintegration.be/>. As Eva Brems puts it, ‘An integrated view requires taking into account all human rights provisions that are relevant in a particular situation and hence a maximum widening of the range of human rights sources that are on the tab’, see E Brems, ‘Should Pluriform Human Rights Become One ? Exploring the Benefits of Human Rights Integration’ (2014) 4 *European Journal of Human Rights*, 447, 452. For illustrative work, see the Columnist coordinated by Pr Bribosia and Pr Rorive since 2013 in the *European Journal of Human Rights*. For the last issue, see E Bribosia, I Rorive and J Damamme (coll), ‘Droit de l’égalité et de la non-discrimination’ (Equality and Non-Discrimination) (2015) 2 *European Journal of Human Rights* 223.

²⁴ United Nations, Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) (UNCRPD).

²⁵ Council of the EU, ‘Decision 2010/48/EC concerning the conclusion, by the European Community (now European Union), of the United Nations Convention on the Rights of Persons with Disabilities’ [2010] OJ L 23/35.

²⁶ European Network of Legal Experts in the non-discrimination field to the European Commission, Report, Olivier de Schutter, ‘The Prohibition of Discrimination under European Human Rights Law, Relevance for the EU non-discrimination directives - an update’, 2011, 9, with references to CJEU’s jurisprudence, http://ec.europa.eu/justice/discrimination/files/the_prohibition_of_discrimination_under_european_human_rights_law_update_2011_en.pdf (accessed 6 June 2015).

life,²⁷ the scope of this paper is limited to employment because EU disability non-discrimination law is confined to this sector to date.²⁸

The paper is divided into three sections. It examines first the reasons for connecting obesity to disability as a ground of discrimination (Part II). Then, it argues that judicial interpretations under EU and US law acknowledge a lowering of focus on the causes of disability, including in obesity-as-disability cases (Part III). Finally, it contemplates the shift of this focus from the causes to the effects of ‘disability’, with respect to obesity (Part IV). It ends with concluding remarks (Part V).

II CONNECTING OBESITY TO GROUNDS OF DISCRIMINATION

1. Obesity is Not a Stand-alone Ground

US federal law and EU law do not erect ‘obesity’ as an explicit ground of discrimination. Seemingly, the same holds true for sub-entities of both systems²⁹ under their own non-discrimination law.

At statutory level, US federal non-discrimination law is construed as offering protection only for explicitly listed characteristics³⁰ so that no protection can be granted on the grounds of obesity alone.

Under EU law, the legal basis allowing EU institutions to take action to combat discrimination contains an explicit list of discrimination grounds³¹

²⁷ For adverse treatment in the sector of access to services, see eg the US case of *Hallowich v. Southwest Airlines* BC035389 (Cal. 1991) (obese woman required to purchase a second seat in a plane).

²⁸ Pending the adoption of the ‘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) 426 final (see for its scope, art 3). The scope of the EED is confined to employment and occupation (see its scope, art 3).

²⁹ For the EU (sub-entities being here states and regions), we can reach this conclusion by reviewing all the country reports on measures to combat discrimination of the national experts of the European Network of Legal Experts in the non-discrimination field, see part 2.1 of each report. To accede to all the reports, see its website: <http://www.non-discrimination.net> (accessed 30 March 2015). For the US and at least for state level, we draw on a research on the NOLO’s database, see ‘Employment Discrimination in Your State’, via <http://www.nolo.com/legal-encyclopedia/employment-discrimination-in-your-state-31017.html> (accessed 6 June 2015).

³⁰ For the distinction between constitutional and statutory law in this respect, see European Network of Legal Experts in the non-discrimination field, ‘Comparative study of anti-discrimination and equality laws of the US, Canada, South Africa and India’, 2012, 32-36, via http://ec.europa.eu/justice/discrimination/files/comparative_study_ad_equality_laws_of_us_canada_sa_india_en.pdf (accessed 6 June 2015).

³¹ We follow here the distinction between ‘the use of the principle of non-discrimination law within internal market and citizenship law and the separate field of non-discrimination law’ as an ‘autonomous objective’. See for this distinction and

composed of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation.³² In *Kaltoft*, the CJEU was questioned on whether there is, under EU law, a general principle of non-discrimination in the labour market covering all grounds of discrimination, including obesity.³³ This echoes to the case of *Mangold*, where the CJEU found that such a principle exists with respect to age.³⁴ To support his allegation, the claimant in *Kaltoft* relied on several national Constitutions, Article 14 of the ECHR and Article 1 of Protocol n°12 to the ECHR.³⁵ The ‘national’ sources have not been addressed by the CJEU’s judges and the AG alike. We can note that some national Constitutions indeed have an open-ended list of discrimination grounds. However, this is not assuredly synonymous to a general prohibition of discrimination based on all grounds. Illustratively, the Constitutional Court of Spain (*Tribunal Constitucional*) established that Article 14 of the Spanish Constitution, albeit open-ended, encompasses only those grounds that have been historically linked to forms of oppression and segregation towards determined group of persons.³⁶ Based on this jurisprudence, a regional court refused to recognise that obesity is a discrimination ground.³⁷ Concerning Council of Europe’s sources quoted by the applicant in *Kaltoft*, both provisions contain an open-ended list of discrimination grounds.³⁸ Accordingly and contrary to the attitude of the Constitutional Court of Spain, the European Court of Human Rights (ECtHR)³⁹ has numerously expanded the list offered by Article 14 ECHR. In spite of all these references, the CJEU refuted that the alleged principle exists and refused to expand the list available under EU law. The judges relied on the sole absence of mention of obesity in EU (primary and secondary) law.⁴⁰ The AG had a more sophisticated reasoning. Up to now, non-listed grounds had experienced an unpleasant fate before the CJEU, as illustrated by *Chacón Navas*⁴¹ where dismissal on account of ‘sickness’ was found to be out of the scope of the EED.⁴² This judgment was, however, delivered before the entry into force of the EU Charter of Fundamental Rights (CFR) whose

explanation thereof, Dagmar Schieck, Lisa Waddington and Mark Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law, Ius Commune Casebooks for the Common Law of Europe* (Hart Publishing 2007), 3.

³² Article 19 (1) of the Treaty on the Functioning of the EU (‘TFEU’).

³³ Case C-354/13 (n 1) para 31.

³⁴ Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-09981.

³⁵ Adopted on 4th November 2000, entered into force on 1st April 2005.

³⁶ *Tribunal Constitucional* (Constitutional Court of Spain), STC 166/88.

³⁷ *Tribunal Superior de Justicia, Valencia*, 9 May 2012, Ar. 1843. I thank Pr. María José Gómez-Millán Herencia for making me aware of this case.

³⁸ Specifying that the enjoyment of the rights and freedoms set forth in the Convention (for the ECHR) or in national law (for the Protocol) ‘shall be secured without discrimination on any ground *such as* sex, (...) *or other status*’ (emphasis added).

³⁹ See for the list of grounds and corresponding case law, Report (n 26) 15.

⁴⁰ Case C-354/13 (n 1) paras 33-35.

⁴¹ Case C-13/05 (n 19).

⁴² *ibid*, para 47.

Article 21 contains an open-ended list of discrimination grounds⁴³ and has therefore been said to mirror Article 14 ECHR.⁴⁴ Then, as suggested by the AG in *Kaltoft*: ‘it might be argued that there is a general principle of non-discrimination in EU Law covering grounds not explicitly mentioned in Article 21 of the Charter’. Yet he recalled that the CFR does not extend the competences of the European Union as defined in the Treaties to opine that there is no general principle of law precluding discrimination in the labour market.⁴⁵ In other words, the non-expansion of grounds enshrined in the TFEU is an expression of devolution of powers. We can add to this conclusion (grounds *outside* Article 21 CFR are not protected by EU law) that grounds *inside* Article 21 CFR but *outside* the TFEU are not protected either. This holds true until the EU has exercised its competences with respect to this ground.⁴⁶ Illustratively, the Staff Regulation applicable to agents of the EU prohibits discrimination based on ‘genetic features’⁴⁷ (outside 19 TFEU, but inside 21 CFR), a ground which is potentially relevant to obesity as discussed below. In such a context, discrimination against an EU agent on the basis of his/her genetic features would be covered. Therefore, the mirror born by Article 21 CFR is a broken one, reflecting only some grounds from Article 14 ECHR to EU law.

Given that ECHR law is free from the ‘exhaustiveness hurdle’, appropriate redress can be obtained in employment cases (eg refusal to hire because of weight), through eg a claim based on Article 8 (right to private life) in conjunction with Article 14 ECHR.⁴⁸ To date, neither obesity nor weight has been tackled by the Strasbourg Court as a discrimination ground.⁴⁹ When such a suit would be brought, special attention should be paid to the choice of the discrimination ground (eg between ‘weight’ and

⁴³ The list offered in its Art 21 is preceded by ‘such as’.

⁴⁴ Ieva Kalnina and Ugis Zeltins, ‘The Impact of the EU Human Rights System on Operations of Private Military and Security Companies’, in Francesco Francioni and Natalino Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractor* (OUP 2011), 80, 82, fn 11.

⁴⁵ Opinion of AG Jääskinen (n 3), see for the full reasoning para 16 to 26 with further references. He notably makes reference to art 51(2) CFR which reads: ‘This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties’ (para 19).

⁴⁶ I thank Prof Bribosia for making this point and illustrating it with the example I use further.

⁴⁷ See Staff Regulations of Officials of the European Communities, 1st May 2004, Article 1(d), http://ec.europa.eu/civil_service/docs/toc100_en.pdf (accessed 6 June 2015).

⁴⁸ These provisions have been mobilised in several employment cases, see eg *I.B. v Greece* App no 552/10 (ECHR, 21 October 2013) (dismissal due to HIV leading the court to find discrimination based on ‘health’).

⁴⁹ We draw on a ‘hudoc’ search with keywords ‘obesity’ (we also did with ‘overweight’), in combination with ‘Article 14 ECHR’ or ‘Protocol no 12 to ECHR’. <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx?#%7B%22documentcollectionid%22%3A%22JUDGMENTS%22%2C%22DECISIONS%22%7D> (done on 10 March 2015).

'disability'). Indeed, the ECtHR has identified several grounds that warrant a higher level of scrutiny, further labelled in the literature as 'suspect'.⁵⁰ Disability is one of them.⁵¹ Concretely, it means that the State would have more difficulty to justify a different treatment based on this ground because the ECtHR leaves a narrower margin of appreciation to the concerned State in this case.⁵² Therefore, an obesity case may have more chances to prevail if based on 'disability' than on 'weight' or 'obesity' within the ECHR realm.

2. *Connecting Obesity with Available Grounds*

An array of grounds can be mobilised in an obesity case. We will focus in this part on all grounds except disability (examined below in section 3 in this Part). Some grounds can be the medium for a non-discrimination claim involving weight (and by extension obesity), even if apparently strayed from it. This is clear from the US experience, notably when courts faced weight restrictions in the professional context. In this respect, 'disparate treatment' (US law equivalent of 'direct discrimination' under EU law) to gender has been found in cases where weight restrictions were imposed only on women,⁵³ or enforced at a higher rate against them.⁵⁴ Other grounds are more straightforward for obesity. We can divide them into two categories: non-medically and medically related.

A. Non-medical Grounds: Appearance and Weight

Discrimination based on appearance is explicitly prohibited in a few jurisdictions within the US (at state⁵⁵ or sub-state level⁵⁶) and the EU.⁵⁷ 'Appearance' may be a difficult concept to grasp. Illustratively, the *District of Columbia Human Rights Act* defines it as the 'outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner style of personal grooming (...)'.⁵⁸ This definition could easily encompass physical traits such as weight. On the other side of the Atlantic, the French Equality Body

⁵⁰ See eg Janneke Gerards, 'Discrimination grounds' in Dagmar Schieck, Lisa Waddington and Mark Bell (n 31) 35-39 (the author borrows the expression from the jurisprudence of the US Supreme Court).

⁵¹ In *Glör v Switzerland* App no 13444/04 (ECtHR, 30 April 2009), para 84.

⁵² Gerards (n 50) 35-39.

⁵³ See eg *Gerdom v Continental Airlines, Inc*, 1982.

⁵⁴ See eg *Union of Flight Attendants v Pan American World Airways, Inc*, 1987.

⁵⁵ Michigan seems to be the only US State in this respect, see Elliott-Larsen Civil Rights Act, Section 37.2202 (2004).

⁵⁶ At least Santa Cruz (Santa Cruz Cal., Mun., § 9.83, 1995) and District of Columbia (District of Columbia Human Rights Act, D.C. Code Ann. S 2-1402.11, 2002).

⁵⁷ France (possibly Belgium through 'physical characteristics'); See European Network of Legal Experts in the non-discrimination field to the European Commission, Report prepared by Isabelle Chopin and Catharina Germaine-Sahl, 'Developing Anti-Discrimination Law in Europe', 2013, 12-13, http://ec.europa.eu/justice/discrimination/files/comparative_analysis_2013_en.pdf (accessed 6 June 2015).

⁵⁸ District of Columbia Human Rights Act (n 56).

(*Défenseur des droits*) has exemplified ‘appearance discrimination’ with a job refusal to an obese individual based on his/her sole physical outward without an assessment of his/her merits.⁵⁹ We can connect this with the institution’s investigation against the famous clothing retailer *Abercrombie and Fitch*. The investigation deals with the company’s recruitment methods used to hire sales staff on the sole basis of their physical appearance⁶⁰ (discrimination ground under French law)⁶¹. The link between appearance and weight has not been made in the decision of the *Défenseur des droits*. We argue that the link could be made as in nowadays’ society a requirement of a certain appearance often goes hand-in-hand with selecting slim workers and, as a matter of fact, with excluding job candidates who are considered to be overweight. In a recent anonymous decision of the institution associated with the investigation against *Abercrombie and Fitch*,⁶² it concluded on appearance discrimination because the company placed a crucial importance on physical appearance.⁶³ Bearing in mind that appearance discrimination is not prohibited at the EU level and in many EU Member States, we will address whether this type of claims could be captured through ‘disability’ (discussed below in Part 4, section 2 B).

Discrimination based on weight is neither prohibited in the EU⁶⁴ nor at the US federal level,⁶⁵ but is in some US sub-entities.⁶⁶ In Michigan, this recognition was justified by the link between weight and ‘certain ethnic groups or to women’.⁶⁷ ‘Weight’ can have an added value to ‘appearance’ in certain cases. This is especially true when it is targeted as a quantifiable

⁵⁹ See on the website, <http://www.defenseurdesdroits.fr/fr/theme/lutte-contre-les-discriminations/discrimination-liee-lapparence-physique> (accessed 6 June 2015).

⁶⁰ See in the press, The Business of Fashion, ‘French Watchdog Probes Abercrombie for Discrimination’ <http://www.businessoffashion.com/articles/news-analysis/french-watchdog-probes-abercrombie-for-discrimination> (accessed 6 June 2015).

⁶¹ Article L 1132-1 of the French Labour Code (*Code du travail*).

⁶² *Défenseur des Droits*, MLD No 2014-147, 3 November 2014, http://www.defenseurdesdroits.fr/fr/actions/protection-des-droits-libertes/decision/decision-mld-2014-147-du-3-novembre-2014-relative__ (accessed 6 June 2015), for the facts and company’s presentation see points 1-15.

⁶³ *ibid*, point 96 (*une valeur déterminante*). See for the association made between the investigation against *Abercrombie and Fitch* and the decision <http://www.defenseurdesdroits.fr/fr/actualites/abercrombie-and-fitch-grace-au-defenseur-la-societe-annonce-la-fin-de-recrutements> (accessed 6 June 2015).

⁶⁴ See Report (n 57) 12-13.

⁶⁵ Despite calls from several scholars. See eg Paula B Stolker, ‘Weigh my job performance, not my body: extending title VII to weight-based discrimination’ (1992) 10 New York Law School Journal of Human Rights 223.

⁶⁶ For the full list of sub-federal entities recognising weight as a discrimination ground, see ‘Weight discrimination laws’ on the website of the National Association to Advance Fat Acceptance, via <http://www.naafaonline.com/dev2/education/laws.html> (accessed 6 June 2015).

⁶⁷ See Sondra Solovay, *Tipping the Scales of Justice, Fighting Weight-Based Discrimination* (Prometheus Books 2000), 245.

reality (ie when weight standards are imposed) rather than a visible one.⁶⁸ Illustratively, in US case of *Tudyman v United Airlines*,⁶⁹ an airline steward was refused a flight attendant position because his weight exceeded the airline's weight standards. Ironically, this was due to the candidate's excessive muscle tissue, which was the result of bodybuilding. Here, 'appearance' would have proved useless, unlike 'weight' because the candidate actually looked very fit.

B. Medically-related Grounds

Medical disorders are, under various labels⁷⁰ ('sickness', 'genetic risks'...), recognised as a discrimination ground in some EU Member States, but not under EU law.⁷¹ In the US, it seems that this holds true only for genetic disorders, under the larger concept of 'genetic information' in the Genetic Information Nondiscrimination Act ('GINA').⁷²

We see four avenues allowing the connection between medical disorders and obesity: 'causation', 'effect', 'association' and 'equation'. We will also use these avenues later on with respect to 'disability' because this concept is identified under both EU and US law with reference to an 'impairment', a concept often associated with medical disorder.

Causation. This leads us to determine how one becomes obese. As we can read from medical research relayed by the WHO⁷³, obesity is due to an energy imbalance, which occurs when energy intake exceeds energy expenditure over a considerable amount of time. In simple terms, the regulation of energy balance may be disturbed by medical disorders such as of physiological⁷⁴ or genetic⁷⁵ kind. However, discrimination linked to 'causation' seems to be rather a textbook case as an unfavourable treatment (eg dismissal) against an obese individual is more likely due to other reasons (eg effects) than the medical disorders causing obesity. Still and as we will see (in Part III, section 1), obesity's causation may prove of significant importance for the purpose of interpreting 'disability' or 'impairment'.

⁶⁸ Jeffrey Garcia, 'Weight-Based Discrimination, Is There an End in Sight?' (1995) 13 Hofstra Labor and Employment Law Journal 209, 235.

⁶⁹ *Tudyman v United Airlines*, 608 F. Supp. 739 (C.D. Cal. 1984), ruled under the Rehabilitation Act.

⁷⁰ Also eg 'health condition' and, more narrowly, 'chronic disease', see Report (n 57) 12-13.

⁷¹ See case C-13/05 (n 19) and joined cases C-337/11 and C-335/11 (n 20). However, the CJEU made it clear in the latter case that a sickness can amount to a 'disability', and then fall under the EED protection, see para 47.

⁷² Pub. L. No 110-233 § 102(b)(1)(B) 122 Stat. 881 (2008). The accurate provision is 42 U.S.C § 2000ff (4).

⁷³ WHO Report (n 6) 101.

⁷⁴ *ibid*, 105.

⁷⁵ One may be more likely than others to become obese because some genes result in poor appetite control, leading to obesity; *ibid*, 135-136.

Effect. The ‘effect’ link works the other way around: obesity results *in* rather than *from* medical disorders.⁷⁶ This targets the situation where side effects of obesity (eg shortness of breath and cardiovascular problems) lead an employer to do a different treatment (eg dismissal) against his/her obese employee because these effects impact on the employee’s job performance.

Association. This consists in focusing on medical disorders associated to (accompanying) obesity,⁷⁷ regardless of whether obesity results *in* or *from* medical disorders. In this case, courts would rather focus on the whole medical situation, including obesity but not exclusively on it. Illustratively, in a case under UK disability law,⁷⁸ the claimant was obese and suffered from a wide range of symptoms including asthma, dyslexia, knee problems, diabetes and chronic fatigue syndrome, compounded by obesity.⁷⁹ Herein, focus was not put on obesity but on all these symptoms, which were qualified as ‘impairment’ (also part of UK’s non-discrimination law definition of ‘disability’).

Equation. This consists in classifying obesity as a medical disorder per se. There are several examples of this approach, whilst not before courts. For instance, ‘obesity’ is inscribed in the WHO ‘International Statistical Classification of Diseases and Related Health Problems’ (CIM 10).⁸⁰ Similarly, the American Medical Association House of Delegates has explicitly classified obesity as a ‘disease’.⁸¹ Arguably, these statements could support a legal claim stating that obesity is a disease per se. ‘Equation’ has been followed by the Dutch Equality Body (*Commissie Gelijke Behandeling*), albeit not with respect to obesity in general, but to its most severe stage (morbid obesity). Indeed, it labelled ‘morbid obesity’ as a ‘chronic disease’

⁷⁶See Christine L Kuss, ‘Absolving a deadly sin: a medical and legal argument for including obesity as a disability under the Americans with Disabilities Act’ (1996) 12 *Journal Contemporary Health Law & Policy* 563, 574-576.

⁷⁷ According to several medical studies relayed by lawyers, obese persons have, in general, increased risk of diabetes, hypertension and various cardiovascular conditions. See eg Abigail Kozel, ‘Current Public Law and Policy Issues: Large and in Charge of Their Employment Discrimination Destiny: Whether Obese Americans Now Qualify as Disabled Under the Americans with Disability Act Amendments Act of 2008’ (2009) 31 *Hamline Journal of Public Law & Policy* 273, 279.

⁷⁸ Disability Discrimination Act 1995, now replaced by the Equality Act 2010.

⁷⁹ *Walker v Sita Information Networking Computing Ltd* [2013] UKEAT/0097/12.

⁸⁰ WHO, ‘International Statistical Classification of Diseases and Related Health Problems’ (CIM 10) (Code E66), see <http://apps.who.int/classifications/icd10/browse/2008/en#/E66> (accessed 6 June 2015).

⁸¹ American Medical Association House of Delegates, Resolution 420 (A-13), 16 May 2013, <http://media.npr.org/documents/2013/jun/ama-resolution-obesity.pdf> (accessed 20 March 2015).

or a 'disability' in a case concerning a job refusal based on the applicant's weight.⁸² As we will see (in Part I, section 3), discrimination was found. Still, disability proves more interesting than all these grounds in certain cases.

3. *Connecting Obesity to the Adequate Ground(s)*

This part aims at showing that disability can be considered as a magnet, including for obesity cases. It will then examine what is meant by 'disability' under US and EU law and who are the actors playing a role in interpreting it.

Among all grounds connectable to obesity, some are *better* than others from the claimant's perspective. This paves the way to a 'ground-shopping' exercise. Three factors influence the choice for the adequate ground(s): availability, suitability and advantages. Firstly, a ground may not be available under the concerned jurisdiction (eg 'weight' across the EU). In contrast, disability is a very widespread ground because it is recognised at the US federal and EU level. Consequently, an individual allegedly discriminated against his/her disability can seek for legal redress, no matter where on the EU or US territory the alleged facts occurred. Secondly, even if available, a ground may not suit the situation at hand. As previously illustrated, 'appearance' may not always suit a situation of different treatment based on weight as a quantifiable reality. Thirdly, disability is a privileged ground. Indeed, if the prohibition of discrimination (direct or indirect) applies to all grounds of discrimination, the imposition of the 'reasonable accommodation' duty on employers (under US⁸³ and EU law⁸⁴) is vested only to disability under EU law⁸⁵ and to disability and religion under the US one.⁸⁶ The duty requires, within the limits of 'reasonability',⁸⁷ to 'accommodate' the needs of persons with disabilities who can then carry out their professional duties. To that end, the conditions under which a job must be performed may have to be adjusted. The aforementioned case before the Dutch Equality Body illustrates that the concept is useful to some obesity cases. In this case, an obese woman applied to a postman job

⁸² Both chronic disease and disability are discrimination grounds under the Dutch non-discrimination legislation. For the decision, see *Commissie Gelijke Behandeling*, Opinion n° 2011-78, 13 May 2011, <https://mensenrechten.nl/publicaties/oordelen/2011-78/detail> (accessed 6 June 2015). It stressed that it is not important whether morbid obesity is the result of a chronic disease. Rather morbid obesity must be considered as a chronic disease (§ 3.17). I thank Dick Houtzager for having made me aware of this case.

⁸³ 42 U.S.C. §§ 12101-12117, 12201-12213 (1994) (codified as amended).

⁸⁴ EED (n 2) Article 5. No other ground was granted reasonable accommodation under EU law.

⁸⁵ Lisa Waddington, Mark Bell, 'More Equal than Others: Distinguishing European Union Equality Directives' (2001) 38 *Common Market Law Review* 587.

⁸⁶ Civil Rights Act of 1964, title VII, equal employment opportunities, 42 US Code Chapter 21, §701(j).

⁸⁷ The employer exonerates from the duty if the accommodation would create an 'undue hardship' (ADA) or 'disproportionate burden' (EED, n 2, art 5).

that consisted in delivering the mail by bicycle.⁸⁸ The company refused as it deemed that she would not be able to carry out the required professional duties because of her overweightness. The Dutch institution emphasised that the company did not consider other accommodation options: for instance delivering the mail by foot or car. Thus, it concluded that the decision was based on general assumptions and therefore discriminatory.⁸⁹

Now, what is meant by ‘disability’? Reading both US and EU versions of ‘disability’, we submit that they are construed in a similar way, namely endorsing a causal relationship formula. Under US law, disability has been defined by the legislator (Congress) in the successive Acts on disability discrimination (with respect to an individual) as: ‘(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; (C) being regarded as having such an impairment.’⁹⁰ Each prong tackles a different situation, usually referred to as, respectively, ‘actual’, ‘past’ and ‘perceived’ disability.⁹¹ Impairment appears in each prong of the definition. The causal relationship is particularly obvious for the actual and the past one, as the ADA states that an individual has a ‘disability’ when he/she has (or used to have) an impairment (causal element) that limits (or used to limit) a major life activity (consequence element). For the ‘regarded as’ prong, the origin of the disability lies in others’ reaction to the impairment.

In contrast with US law, EU non-discrimination law does not have a written definition of ‘disability’, which led the CJEU to construe this concept. Importantly, it has been recently reframed⁹² in the case of *HK Danmark (Ring and Skouboe Werge)*.⁹³ On the basis of this ruling, AG Jääskinen identified six constituting elements of ‘disability’. In his own words, the concept

must be understood as referring to limitations which result, in particular, from (i) long-term [...] (ii) physical, mental or psychological impairments (iii) which in interaction with various barriers [...] (iv) may hinder (v) the full and effective participation of the person in professional life (vi) on an equal basis with other workers.⁹⁴

⁸⁸ See *Commissie Gelijke Behandeling* (n 82).

⁸⁹ *ibid*, point 3.18.

⁹⁰ 42 U.S.C. §§ 12102(1)(A-C).

⁹¹ Jane B Korn, ‘Too Fat’ (2009) Arizona Legal Studies Discussion Paper, No 09-27.

⁹² The CJEU changed the definition of its ruling *Chacón Navas* (n 19).

⁹³ Joined Cases C-335/11 and C-337/11 (n 20) para 38. For an analysis of the reasons and the impact of the redefinition, see Joseph Damamme, ‘La socialisation de la notion de handicap en droit de la non-discrimination’ (2013) 5 *European Journal of Human Rights* 836.

⁹⁴ Case C-354/13 (n 3), Opinion of AG Jääskinen, para 30.

Out of all these elements, the causation element of ‘disability’ is worded as a ‘limitation’, itself resulting (in the CJEU’s words) from an impairment, which interacts with ‘various barriers’ (points (i) to (iii)). The consequence element emerges from points (iv) and (v). The remaining points (eg the long-term character) will not be addressed in this paper. The fact that the components of ‘disability’ are preceded by ‘in particular’ has unknown potential.

By carving up the concept into distinguished elements, the AG suggests that each of them constitutes a necessary piece of the puzzle. Supposedly, this means that each one is a potential deadlock on the disability door (to stay on the image of a disability discrimination claim as a series of doors).

As a consequence of the multi-layered nature of disability law, the CJEU has made it clear that the EU concept of ‘disability’ must be interpreted in a manner consistent with the UN one.⁹⁵ Pursuant to its article 1(2), (under ‘purpose’):⁹⁶

(P)ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

There are some differences between the UN and the EU concept, even though the former has been built upon the latter. These differences are further addressed below.

It is also important to highlight the institutional actors fulfilling functions with respect to the interpretation of ‘disability’. The first function consists in interpreting this concept and deciding on a case where ‘disability’ is discussed. This function lies with the courts and equality bodies, as we have already seen. Without deciding on a case in the strict sense, other actors may play a role in influencing courts or equality bodies in the interpretation of ‘disability’. Illustratively and concerning the CJEU, AGs have given their opinion on the issue in several cases. In the US, Congress has expressly delegated to the US Equal Employment Opportunity Commission (EEOC) the administration of the ADA’s relevant provisions.⁹⁷ Accordingly, this agency issued several documents, where we can find detailed guidance on how ‘disability’ should be interpreted. As we will see, US courts often rely on them. In addition, the EEOC can bring

⁹⁵ Joined Cases C-335/11 and C-337/11 (n 20), para 32. In contrast, the USA does not have such constraint as they have not ratified the UNCRPD.

⁹⁶ As suggested by Lisa Waddington this concept is meant to bring guidance rather than a definition (in the strict sense) (n 17) 27-28.

⁹⁷ 42 U.S.C. § 12205(A).

cases to courts on behalf of aggrieved individuals⁹⁸ and plead that a given condition (eg obesity) qualifies as a ‘disability’. Under the EU institutional framework, the European Commission (Commission) is vested with fewer powers than the EEOC in this respect. Accordingly, it has not provided general guidance on how to interpret ‘disability’ (and sub-concepts composing it).⁹⁹ However, and as illustrated in *Kaltoft*,¹⁰⁰ the Commission can give its opinion in a preliminary reference procedure by submitting written submissions to the CJEU and plead before it.

III. LOWERING FOCUS ON DISABILITY’S CAUSATION IN OBESITY CASES

I. (Ir)Relevance of Obesity’s Causation

As referred above, ‘impairment’ is part of the causation element of disability under both the ADA and EED. But what does ‘impairment’ mean? It is not clear under EU law as there is no guidance in this respect (including from the UNCRPD and jurisprudence thereunder)¹⁰¹.

Generally, this concept is associated with a medical disorder or medical condition.¹⁰² More guidance is provided in EEOC regulations under the ADA. Therein, physical and mental impairment are separately defined. Thus, physical impairment is:

[A]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs),

⁹⁸ 42 U.S.C. §§ 12117(A) which incorporates by reference sections 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964 as amended §§2000e-5(f)(1) and (3).

⁹⁹ This is typified by its Joint Report of 17 January 2014 on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘Racial Equality Directive’) and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (‘Employment Equality Directive’) COM (2014) 2 final, as well as the annexes to this report (see respectively point 4.5 and Annex II-5).

¹⁰⁰ Commission’s written submissions are not accessible but there are some insights of it in the AG’s opinion (n 3) paras 39, 43, 46 and 53.

¹⁰¹ The UN Committee on the Rights of Persons with Disabilities is entitled to ‘receive and consider communications from or 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’, see Optional Protocol to UNCRPD (entered into force with the UNCRPD on 3 May 2008), Article 1 § 1) provided that the concerned State has ratified it, (Article 1 § 2 of the same Protocol). For the full Committee’s jurisprudence: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Jurisprudence.aspx> (accessed 6 June 2015).

¹⁰² See eg Lisa Waddington when she states, commenting *Kaltoft*, ‘impairment, understood as an underlying medical condition [...]’ (n 17) 22.

cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine.¹⁰³

Before the US courts, obesity has been addressed rather with respect to ‘physical’ impairment, but could also have been a mental or psychological one.¹⁰⁴ Indeed, and as William C Taussig suggests, compulsive overeating is rather a psychological disorder than a physical one.¹⁰⁵ In addition to this definition, the regulations clearly exclude from the scope of ‘impairment’ characteristics ‘such (...) weight (...) that are within ‘normal’ range and are not the result of a physiological disorder’.¹⁰⁶

In the first version of these regulations, the EEOC stated that ‘except in rare circumstances, obesity is not considered a disabling impairment.’¹⁰⁷ Before the US courts, the interpretation of this concept has often been disputed in obesity cases, unlike in cases dealing with other conditions.¹⁰⁸

Two topics have often been subject of dispute. The first is common to both EU and US jurisdictions, whilst the second has been tackled by the US courts (and not by the CJEU in *Kaltoft*).

A. Irrelevance of One’s ‘Contribution’ to Obesity

At times, certain conditions are labelled before courts or in the literature as ‘voluntary disabilities’ endorsing the premise that they are caused, continue to exist, or are worsened by the individual’s conduct.¹⁰⁹ In several US obesity cases and in *Kaltoft*, the defendant typically argues that obesity is voluntary¹¹⁰ and therefore does not amount to an ‘impairment’ or a ‘disability’.¹¹¹ This argument is framed under two different facets. The first one, ‘action’, attributes obesity to certain behaviours (eg lifestyle, eating

¹⁰³ 29 C.F.R. § 1630.2(h)(1). Phrased the same way as in the Rehabilitation Act’s regulations, see 45 C.F.R. § 84.3(j)(2)(i)(A)–(B).

¹⁰⁴ Here, the definition takes the form of an illustrative list, and is therefore potentially broader. Indeed, mental or psychological disorder includes ‘mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities’ (45 CFR 1181.103).

¹⁰⁵ See William C Taussig, ‘Weighing In Against Obesity Discrimination: Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals and the Recognition of Obesity as a Disability Under the Rehabilitation Act and the Americans With Disabilities Act’ (1994) 35 Boston College Law Review 927, 958.

¹⁰⁶ 29 C.F.R § 1630 app to § 1630.2(h).

¹⁰⁷ 29 C.F.R § 1630.2(j).

¹⁰⁸ For conditions such as diabetes, the focus was laid on their effects rather than on their causes, see Jane B Korn, ‘Fat’ (1997) 77 Boston University Law Review 25.

¹⁰⁹ See eg Lisa E Key, ‘Voluntary Disabilities and the ADA: A Reasonable Interpretation of “Reasonable Accommodations”’ (1996) 48 Hastings Law Journal 75.

¹¹⁰ Lucy Wang, ‘Weight Discrimination: One Size Fits All Remedy?’ (2008) 117 Yale Law Journal 1900, 1919.

¹¹¹ At times, judges on their own motion assert that voluntary disabilities do not deserve disability discrimination protection, see *Missouri Commission on Human Rights v Southwestern Bell Telephone Co.* (699 S.W.2d at 79) (plaintiff denied protection because she took ‘no steps to treat and control her impairment’).

habits...). The second, 'inaction', posits that obesity is 'mutable' meaning that it can be eliminated or reduced thanks to different remedies (eg physical exercise, medical therapy, surgery). In the case of *Tudyman*, the court emphasised that weight was 'self-imposed and voluntary' because it resulted from 'avid bodybuilding' and not from 'physiological disorder', 'cosmetic disfigurement' or 'anatomical loss'.¹¹² With respect to obesity, courts have rather relied on the 'inaction' facet. Several have found obesity to be a 'mutable' condition that had to be distinguished from 'immutable condition such as blindness or lameness'.¹¹³ In this respect Lisa Key proposed to make a distinction between 'immutable impairments' that may originally be caused by voluntary conduct and those that persist or are exacerbated by voluntary conduct.¹¹⁴ This would lead to distinguish between an individual who became obese (supposed this can be qualified as a voluntary conduct, which is arguable) because of bad eating habits and an obese individual who does not follow the wellness programme advised by his/her doctor to lose weight.¹¹⁵

In *Cook*,¹¹⁶ the court foreclosed the voluntary argument, in both its facets (action and inaction). It particularly emphasised that US federal law 'contains no language suggesting that its protection is linked to how an individual became impaired, or whether an individual contributed to his or her impairment'.¹¹⁷

The CJEU ruled in the same way holding that 'disability' 'does not depend on the extent to which the person may or may not have contributed to the onset of his disability'.¹¹⁸ Particularly, the AG opined that the alternative would lead to the exclusion of 'physical disabilities resulting from conscious and negligent risk-taking in traffic or in sports'.¹¹⁹ This solution is to be welcome as the contrary would have led to adding another condition to the ones already required. What is more, the voluntary

¹¹² See *Tudyman v United Airlines* (n 69).

¹¹³ *Greene v. Union Pac. R.R. Co.*, 548 F. Supp. 3 (W.D. Wash. 1981).

¹¹⁴ Lisa E Key (n 109) 75. The author however concludes that excluding 'mutable impairments' from the definition of 'disability' is 'not practical' and proposes as an alternative to make the distinction when analysing the reasonability of an accommodation, see 93-103.

¹¹⁵ These programmes often include fitness and physical training sessions, as it was the case for Mr Kaltoft (see Opinion of AG Jääskinen (n 3) para 8). Their efficiency for losing weight is challenged for obese individuals. Some researchers contend that physical activity does not promote weight loss, see A Malhotra, T Noakes and S Phinney, 'It is time to bust the myth of physical inactivity and obesity: you cannot outrun a bad diet' (2015) *British Journal of Sports Medicine*, Editorial published online <http://bjsm.bmj.com/content/early/2015/05/07/bjsports-2015-094911.full> (accessed 6 June 2015).

¹¹⁶ *Cook v Rhode Island, Dep't of Mental Health, Retardation, & Hosps.*, 10 F.3d 17 (1st Cir. 1993).

¹¹⁷ *ibid.*

¹¹⁸ Case C-354/13 (n 1) para 56.

¹¹⁹ Opinion of AG Jääskinen (n 3) para 58.

character of these conditions is arguable.¹²⁰ As was the case in *Kaltoft*, the respondent often stresses that accepting to qualify obesity as ‘disability’ would run the risk of expanding this concept to conditions such as alcoholism or drug abuse.¹²¹ This argument was discussed by the AG, unlike by the CJEU’s judges. Recognising that these conditions can be a ‘disease’ in medical terms, he shifted the discussion from whether these conditions can be embodied in ‘disability’ to the practical consequences of this embodiment. In his own words, ‘[t]his does not, however, mean that an employer would be required to tolerate an employee’s breach of his contractual obligations by reference to these diseases’, stressing that the EED requires only ‘reasonable’ accommodation to be provided.¹²² Focusing on reasonable accommodation rather than on ‘disability’ may imply that the AG admits that these conditions can be qualified as a disability within the meaning of the EED. Interestingly, alcoholism has been qualified as a protected disability under US law.¹²³ In this respect, US experience shows that the link between alcoholism and breach of professional obligations is not as straightforward as the AG in *Kaltoft* seems to suggest. Indeed, some US courts have imposed accommodations for alcoholism¹²⁴ on employers in several cases. The case is slightly different for ‘current drug abuse’, which is explicitly excluded from the scope of ‘disability’ under the ADA.¹²⁵ CJEU’s judges failed to address this sensitive question, with respect to both alcoholism and drug abuse. This probably lies in the political discomfort towards potential consequences that the alternative solution would expose. We opine that the CJEU should equally refute the voluntary argument for alcoholism or drug abuse as it did for obesity in order to ensure consistency.

B. Relevance of ‘Physiological’ Cause of Obesity

In the US, obesity can result from ‘physiological’ disorders, which is precisely one of the concepts referred to in EEOC regulations to interpret ‘impairment’. Against this background, the question whether claimant’s obesity was physiologically-based or not was discussed in several cases.

In *Cook*, the court found that morbid obesity was, in this case, a physiological disorder as the claimant’s obesity involved ‘a dysfunction of

¹²⁰ Terry S Hyman, ‘Voluntary Handicaps – Should Drug Abuse, Alcoholism and Obesity be Protected by Pennsylvania’s Anti-discrimination Laws?’ (1980-1981) 85 Dickinson Law Review 475 and n 115.

¹²¹ Opinion of AG Jääskinen (n 3) para 60.

¹²² *ibid*, para 59.

¹²³ See for the evolution of US federal law, Judith J Johnson, ‘Rescue the Americans with Disabilities Act from Restrictive Interpretations: Alcoholism as an Illustration’ (2007) 27 North Illinois University Law Review 169.

¹²⁴ For a discussion and references of cases where the concept of reasonable accommodation was addressed with respect to alcoholism and drug abuse see *ibid*, 235-237.

¹²⁵ 42 U.S.C. § 12114(a) (1994). See for a concrete case, where the court endorses the exclusion, *Shafer v Preston Mem’l Hosp. Corp.*, 107 F.3d 274 (4th Cir 1997).

both the metabolic system and the neurological appetite-suppressing signal system, capable of causing adverse effects within the musculoskeletal, respiratory, and cardiovascular systems.¹²⁶ This reasoning was based on an expert's testimony. In subsequent cases, however, the 'physiological requirement' turned to be a deadlock. Indeed, in several landmark rulings (*Andrews*, *Watkins* and *Francis*),¹²⁷ courts dismissed obesity-as-disability claims where the physiological disorder was not proved, relying on *Cook* and EEOC regulations. According to the reasoning thereunder, the alternative solution would make of 'disability' a 'catch-all clause'.¹²⁸ In addition, the court found in *Andrews* that the physiological requirement applied to all stages of obesity, including morbid one.

This jurisprudence resulted in several drawbacks. First, by requiring obesity to be physiologically-based, the courts indirectly reintroduced the 'voluntariness argument', as the individuals whose obesity was caused by non-medical factors (labelled as voluntary conduct or lack of action) were excluded. Second, the physiological requirement was applied not only when the claimant alleged to be 'actually' disabled, but also to be 'regarded' as such (see below Part IV, section 2). This gave rise to denying protection to obese individuals who, albeit able to perform required professional duties, had received unfair treatment on the basis of stereotypes (eg an obese individual not hired because presumed to be less motivated at work).

Against this background, an alternative solution has been found in some instances, thereby relaxing scrutiny on 'impairment'.

2. Obesity as a *per se* 'Impairment'?

In contrast to its peers from the 2nd and 6th circuits, a court seated in Louisiana (5th circuit) established in *EEOC v Resources for Human Development*¹²⁹ (quoted by the applicant in *Kaltoft*)¹³⁰ that there was no need for a 'physiological disorder' in case of morbid obesity. Interestingly, the court came to this conclusion, even though the EEOC provided an expert testimony showing that the claimant's obesity resulted from a physiological disorder. In subsequent cases, courts of some circuits followed the same solution, equally confined to morbid obesity.¹³¹

One of the justifications given under this alternative line of cases was built on Congress' general message when adopting the ADAAA in 2008

¹²⁶ *Cook v Rhode Island* (n 116)..

¹²⁷ Respectively *Andrews v State of Ohio*, 104 F.3d 803; *EEOC v Watkins Motor Lines, Inc*, 463 F.3d 436; *Francis v City of Meriden*, 129 F. 3d 281.

¹²⁸ *Andrews v State of Ohio* (n 127).

¹²⁹ *EEOC v Resources for Human Dev., Inc*, 827 F. Supp. 2d 688, 693-94 (E.D. La. 2011): '[I]f the charging party is severely obese- there is no explicit requirement that obesity be based on physiological impairment'.

¹³⁰ See Opinion of AG Jääskinen (n 1) para 53 and fn 48.

¹³¹ See eg *Lowe v American Eurocopter, LLC*, 1:10CV24-A-D, WL 5232523 (N.D. Miss. Dec. 16, 2010).

(amendment of the ADA). Therein, Congress urged the courts to construe disability ‘in favor of a broad coverage to the maximum extent permitted.’¹³² By the same token, it rejected cases where federal courts had ‘narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom [it] intended to protect.’¹³³ Although targeted cases did not concern obesity,¹³⁴ some courts found in this message a justification for departing from the case law requiring a physiological cause.¹³⁵ The EEOC followed these dynamics by removing from its regulations that obesity is rarely an impairment¹³⁶ and inserting in its Compliance Manual that morbid obesity is clearly one.¹³⁷

Duntworth’s observation in 1999 that ‘(...) obesity discrimination remains a fluctuating and non-cohesive area of law’¹³⁸ still holds true today. Indeed, there is a significant split among federal circuit courts on whether a physiological disorder is necessary to meet the impairment condition. Under the initial line of cases, all stages of obesity must be physiologically-based to be qualified as an ‘impairment’. Under the alternative line, stages of obesity are treated differently (no need to show a physiological cause for morbid obesity).

In the EU context, the fact that Mr Kaltoft was morbidly obese has seemingly not played any role when interpreting ‘disability’. Further, neither the judges, nor the AG, have questioned whether obesity qualifies as an ‘impairment’. There may be two reasons for this. The first one is that the defendant in *Kaltoft* has not asserted before the CJEU that obesity does not qualify as an ‘impairment’ for the purposes of the EED. Indeed, he only refuted that obesity was a disability from a general standpoint. This significantly distinguishes *Kaltoft* from the US cases we addressed. Additionally, one must recall that *Kaltoft* was delivered in the framework of a preliminary ruling. Accordingly, the CJEU held that it is incumbent on the national court to determine whether the different conditions arising when interpreting ‘disability’ are met in the present case.¹³⁹ It would be interesting to see whether this issue will be discussed or not by the

¹³² 42 U.S.C. § 12102(4)(A).

¹³³ *ibid.*

¹³⁴ *Sutton v United Air Lines, Inc.*, 527 US 471 (1999); *Toyota Motor Manufacturing, Kentucky, Inc v Williams*, 534 U.S. 184 (2002); *Murphy v United Parcel Service, Inc.*, 527 US 516; *Albertson's, Inc v Kirkingburg*, 527 US 555 (1999) were mentioned by the Congress as illustrations of narrow understanding of ‘disability’. See note to 42 U.S. Code § 12101 <http://www.gpo.gov/fdsys/pkg/PLAW-110publ325/html/PLAW-110publ325.htm> (accessed 6 June 2015).

¹³⁵ *Lowe v. American Eurocopter* (n 131).

¹³⁶ 29 C.F.R. pt 1630 app § 1630.2(j) (2008).

¹³⁷ EEOC Compliance Manual § 902.2(c)(5)(ii), 2011.

¹³⁸ Kimberley B. Duntworth, ‘Cassista v. Community Foods, Inc.: Drawing the Line at Obesity?’ (1994) 24 Golden Gate University Law Review 523, 537.

¹³⁹ Case C-354/13 (n 1) para 64.

referring court's in its final judgment.¹⁴⁰ The second reason for the court not to examine 'impairment' with respect to obesity is that it considered that obesity met the impairment (medical element of 'disability') requirement.¹⁴¹ This would follow an 'equation' approach, whereby obesity equates to an 'impairment' in the sense of a medical disorder. This could be inferred from both the AG's opinion¹⁴² and the judgment.¹⁴³ The CJEU may also want to focus less on the medical element of disability, although recognising that obesity generally raises medical issues. This would indeed be a manifestation of the shift from the so-called 'medical' model of disability to the 'social' one that it recently realised. Indeed, after having stated in *Chacón Navas*¹⁴⁴ that disability is a limitation caused by an 'impairment' (exclusively by the 'medical element') it changed its approach in *HK Danmark (Ring and Skouboe Werge)*,¹⁴⁵ holding that disability results from the interaction between the impairment and 'various barriers' ('social element').¹⁴⁶ As observed by AG Wahl in *Z.*, commenting on this shift, disability 'arises from a failure of the social environment to adapt to and accommodate the needs of people with impairments.'¹⁴⁷ By endorsing the social model, less scrutiny may therefore be put on the medical element of 'disability', which would be arguably less difficult to prove (a deadlock less difficult to open) than under the medical model. Under US law, the lowering of focus, when observed, is limited to morbid obesity, where it is a per se impairment.

To conclude this section, we note that under US law, the scrutiny of 'impairment' (part of the causation element of disability) has decreased with respect to obesity. *Kaltoft* goes in line with the evolution of US law and may go even further by presumably equating obesity to impairment.

¹⁴⁰ On 27 March 2015, this judgement had not yet been delivered. We draw on a phone call to the clerk authorities to the referring Court on that date.

¹⁴¹ Alternatively Lisa Waddington remarks that the CJEU has simply not explored the meaning of impairment with respect to obesity and that obesity may be caused by an impairment. This reasoning differs from qualifying obesity as a per se impairment. See Lisa Waddington (n 17), 23.

¹⁴² In the opinion, obesity is presented as 'growing problem in modern society' with reference to the already mentioned Commission's White Paper (n 4), see Opinion of AG Jääskinen (n 3) para 1 and fn 2.

¹⁴³ Where it is mentioned that obesity is registered in the 'International Statistical Classification of Diseases and Related Health Problems' of the WHO (ICD-10), see Case C-354/13 (n 1) para 18.

¹⁴⁴ Case C-13/05 (n 19), see for a criticism for embracing the medical model of 'disability' in this case, Lisa Waddington, 'Case C-13/05, *Chacón Navas v Euresit Colectividades SA*' (2007) 44 Common Market Law Review 487.

¹⁴⁵ See Joined Cases C-337/11 and C-335/11 (n 20).

¹⁴⁶ This shift of approach was justified by the ratification of the UNCRPD by the EU to which the CJEU makes explicit reference, *ibid*, para 37.

¹⁴⁷ Opinion of AG Wahl in Case C-363/12 (n 19) para 88, quoting Lisa 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 Maastricht Journal of European and Comparative Law 431, 436.

It is difficult to predict whether this evolution would be applied to conditions such as alcoholism or drug abuse. This may give rise to tensions between EU and some national laws on a very delicate issue. Indeed, at least in the UK, alcoholism and drug abuse have been expressly excluded from the scope of ‘impairment’ (and consequently disability) by the legislator.¹⁴⁸ Contrastingly, alcoholism has been qualified as a disability under Irish non-discrimination law by the Irish Equality Body, albeit not in the employment context.¹⁴⁹ Consequently, there are discrepancies between at least two Member States on this question and there may be more in the future now that the concept of disability is expanding. One could argue that the CJEU should leave a certain margin of appreciation to EU Member States in this regard. This would, however, run counter to the CJEU’s statement¹⁵⁰ that ‘disability’ under the EED must be given a ‘uniform’ interpretation throughout the Union.

IV. SHIFTING THE FOCUS ON DISABILITY’S EFFECTS IN OBESITY CASES

1. Obesity’s Limiting effects on the Employee (Actual Disability)

The interpretation of ‘disability’ will be still disputed before the US and EU courts, despite less scrutiny on the causation element. Indeed, it seems that the courts’ focus of attention is shifting from the causation element (what originates in disability) to the consequence one (how disability manifests itself).

Recall that the basic idea of disability is that it involves a limitation and, for our purpose, an individual’s limitation in relation to his/her professional activity. This is the ‘consequence element’. We see two approaches to the assessment of the limitation: a general and a contextual one. Under the general approach, the limitation is assessed with respect to various activities. By contrast, under the concrete one, a certain condition may be limiting in some contexts and not in others. Illustratively, colour blindness is not limiting (at least in principle) for an array of jobs (eg lawyer, writer, computer programmer...), but may be for others (eg painter). Thus, in employment cases, the concrete perspective would lead to determining whether obesity has limiting effects in consideration of a specific job’s functions. On the basis of judicial interpretations, it seems that the US and the EU have followed divergent paths.

¹⁴⁸ See Equality Act 2006. Note, however, that the effects of alcoholism (eg liver diseases) are not precluded from qualifying as an ‘impairment’ (therefore potentially as a ‘disability’), see ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’, A7, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85010/disability-definition.pdf (accessed 6 June 2015).

¹⁴⁹ Irish Equality Officer has found it to be included within ‘disability’ under the Equal Status Act 2000 (*A Complainant v Cafe Kylemore*, DEC-S2002-024 of 2 May 2003) (alcoholic customer refused access to a restaurant).

¹⁵⁰ Case C-13/05 (n 19) para 42.

A. The General Approach to the Worker's Limitation (US)

To recall, the 'actual' prong of disability in the ADA (the 'regarded as' prong is addressed below in section 2) requires an 'impairment', '(...) that substantially limits one or more major life activities of such individual.'¹⁵¹ The expression 'major life activities' was clarified in the EEOC implementing regulations by means of a non-exhaustive¹⁵² list of 'activities'. Several of those are relevant to obesity such as 'walking', 'standing', 'sitting', 'lifting', 'bending' and 'breathing',¹⁵³ as they may be affected by it. When interpreting the expression, courts endorsed in several cases a general perspective.

*Swam v Commonwealth of Virginia Department of State police*¹⁵⁴ typified this approach. In this case, an obese woman was hired as a State trooper. She exceeded maximum weight allowable under the personnel guidelines of the Virginia Department of State Police and was hired with the understanding that she would reach the appropriate weight during the course of her employment. After having received numerous warnings because of not reaching the prescribed weight, she was terminated from her employment as a trooper. Basing its reasoning on EEOC regulations and case law, the court found that 'working' could be an 'activity' within the meaning of 'major life activities'. However, it stressed that this expression could not be interpreted with respect to one particular job.¹⁵⁵ Thus, the court found that the skills required for a trooper (eg protecting oneself from assault, pursue, confront or capture offenders) were 'job-specific', and therefore, could not qualify as 'major life activities'.

This general approach has at times been applied with reference to an abstract standard when interpreting 'substantially' (the impairment must be *substantially* limiting). Illustratively, in *Hill v Verizon Maryland*¹⁵⁶ the claimant was originally employed for installing and repairing customers' telephone service and making cross connects. Because of his weight, he was unable to work aloft and was reallocated because he exceeded the company's weight standards. Ultimately, his salary was reduced, a development that Mr Hill claimed to be discriminating. The court found he was not 'substantially' disabled because he could still do a handful of activities despite his obesity (eg 'walking', 'cooking', 'doing laundry', 'caring

¹⁵¹ 42 U.S.C. § 12102(1)(A).

¹⁵² Recognised by the Supreme Court in *Bragdon v Abbott*, 524 US 624 (1998).

¹⁵³ See for the full list, 42 U.S.C § 12102(2)(A).

¹⁵⁴ *Swam v Commonwealth of Virginia Department of State Police*, 862 F.Supp. 1469 (E.D.Va.1994).

¹⁵⁵ This approach was also subsequently followed by the US Supreme Court, see *Toyota Motor Manufacturing v Williams* (n 134) where it held that the worker's ability to do the required manual work (having to use hands and arms extended at and above shoulder for extended periods of time) were not central 'in most people's daily life' and therefore she was not substantially limited in performing tasks'.

¹⁵⁶ *Hill v Verizon Maryland, Inc*, WL 2060088 (D. Md. July 13, 2009).

for himself...). The Court came to this conclusion by using an abstract standard of reference as it noted that the worker was ‘able to perform all of the normal activities that the average person performs, even if a bit slower, or to a lesser degree.’¹⁵⁷ This contrasts with the contextual approach.

B. The Contextual Approach to the Worker’s Limitation (EU)

On the basis of its jurisprudence and of several AG’s opinions thereunder, we can assert that the CJEU has endorsed the contextual approach, at least at first glance. To recall, under the *HK Danmark (Ring and Skouboe Werge)* definition, disability refers to a ‘limitation’ that ‘may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers’ (‘the consequence element’).¹⁵⁸ Importantly, the CJEU has not taken verbatim the consequence element as in the UNCRPD, which refers to participation ‘in society’ (article 1). This has had an impact in the case of *Z*.¹⁵⁹

Notwithstanding this consideration and as stressed by AG Wahl,¹⁶⁰ ‘disability is context-dependent and situational: for instance, a long-term illness such as diabetes or indeed an allergy may, depending on the surrounding environment, constitute a disability.’ This has also been illustrated by AG Bot in *Glatzel*¹⁶¹ (dealing with visual impairment for truck drivers) with the historical example of Admiral Nelson, who led his men and won the Battle of Trafalgar in 1805, whilst he had lost one eye at the siege of Calvi in 1794. In the AG’s words: ‘although objectively suffering from a visual deficiency, that deficiency did not constitute a disability in those circumstances.’¹⁶² Therefore, the limitation is assessed with respect to participation in professional life in a given context. In *Kaltoft*, AG Jääskinen endorses the same approach at first glance, stressing that ‘the applicability of the concept of disability depends on the concrete circumstances of the work’.¹⁶³ However, two elements suggest that his reasoning is characterised by the general approach. First,¹⁶⁴ he opined that the consequence element can be met if the impairment ‘causes limitations in full and effective participation in professional life *in general* on equal

¹⁵⁷ *ibid.*

¹⁵⁸ Case C-354/13 (n 1) para 38.

¹⁵⁹ As illustrated by case C-363/12 (n 19). In this case a disabled mother, having had recourse to a surrogacy arrangement, was refused a maternity leave, what she alleged to be discrimination based on disability. The CJEU refuted that the mother had a ‘disability’ for the purposes of the EED as ‘the inability to have a child by conventional means does not in itself, in principle, prevent the commissioning mother from having access to, participating in or advancing in employment’, para 81. As remarked by Lisa Waddington, this amounted to denying the mother access to an ‘employment-related benefit’. See Lisa Waddington (n 17) 21.

¹⁶⁰ Opinion of AG Wahl (n 147) para 84.

¹⁶¹ Case C-356/12 (n 20), Opinion of AG Bot, ECLI:EU:C:2013:505.

¹⁶² *ibid.*, fn 19.

¹⁶³ Opinion of AG Jääskinen (n 3) paras 42-43.

¹⁶⁴ I thank Prof Lisa Waddington for making this point.

terms with persons not having that condition.¹⁶⁵ He illustrates the idea with a wheelchair worker (travel bound agent) whose participation in professional life is not affected by his condition.¹⁶⁶ Even if in this concrete case, this participation is not limited, the worker could be qualified as having a ‘disability’ ‘because of the physical difficulties that inevitably arise in performing tasks, even if it does not affect the capacity of the person concerned to carry out the specific work in question.’¹⁶⁷ In other words, some individuals, like those in a wheel chair would always be ‘disabled’ within the meaning of EU law. The approach runs counter to the contextual one enhanced by the social model of disability. Indeed, if, according to the social model, disability arises because of the interaction between the impairment and the environmental barriers (eg inaccessible buildings) it would disappear (or at least be reduced) thanks to the removal of these barriers. One hint suggests that the AG wanted to include both situations, contextual and general, when he says that the general limitation is ‘sufficient’, meaning it could also include a contextual one. Another element characterising a general approach lies in the reasoning’s application to obesity. Indeed, the AG tackled the consequence element with a strong emphasis on morbid obesity, stating that ‘most probably only (...) morbid obesity will create limitations, such as problems in mobility, endurance and mood, that amount to a ‘disability’ under the EED.’¹⁶⁸ As for individuals in a wheel chair, this suggests that some medical conditions are more likely than others to endorse functional limitations. Possibly true from a statistical and medical point of view, the approach runs afoul of the social-based approach in our view. Indeed, he addressed this condition with respect to the consequences that morbid obesity *generally* has, rather than on focusing on Mr Kaltoft’s case. In addition, his statement suggests that ‘moderate’ obesity is less likely to be a disability than ‘morbid’ obesity.

In contrast, CJEU’s judges have not drawn a distinction between morbid and other stages of obesity. Indeed, they emphasised that obesity can be a disability ‘under given circumstances’ for the concerned worker, stressing that it can limit his participation in professional life ‘on account of reduced mobility or the onset in that person, of medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity.’¹⁶⁹ This examination is left to the concrete examination of the referring court.

Therefore, limiting effects of obesity on the individual participation in professional life are taken into account by both the US courts and the CJEU to determine whether obesity amounts to a disability or not in a different manner.

¹⁶⁵ Opinion of AG Jääskinen (n 3) para 47.

¹⁶⁶ *ibid*, para 39.

¹⁶⁷ *ibid*, para 45.

¹⁶⁸ *ibid*, para 56.

¹⁶⁹ Case C-354/13 (n 1) para 58-59.

What was not addressed in *Kaltoft* by the CJEU is whether ‘disability’ covers the case of obese individuals who are perceived as not able to perform professional duties, whilst they are (or may be able to, but have not been given the opportunity to show it). This is especially relevant for obesity cases, as obesity may endorse limiting effects, not in reality, but in minds.

2. *Obesity’s Effect on Minds (Perceived Disability)*

A. Coverage of Obese Individuals ‘Regarded as’ Disabled

Under US law, individuals who are perceived as disabled, albeit they are not, are included in the definition of ‘disability’ (under the ‘regarded as’ prong) and may therefore be entitled to protection under US law. As Justice William J Brennan stated ‘Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.’¹⁷⁰ Under EU law, it is still unsure whether these individuals fall under ‘disability’.¹⁷¹ *Kaltoft* represents a missed opportunity in this respect, whilst obesity raises this question as a matter of fact.

Indeed, it has been noticed in the US¹⁷² and beyond¹⁷³ that obese individuals are subject to a handful of stereotypes. To give some examples, they are often perceived as ‘less motivated’ or ‘lazy’¹⁷⁴ and ‘having health problems’. Illustratively, in *Cook*,¹⁷⁵ the employer refused to hire an obese candidate believing obesity heightened the risk of a heart disease. As already discussed, obese individuals are indeed likely to have medical problems (see above Part II, section 2). However, and as found by the court in *Cook*, applying this general statement to a concrete case, without further examination, is discriminatory.¹⁷⁶

Another ‘regarded as’ case is worth mentioning. *Texas Bus Lines*¹⁷⁷ concerned an obese woman who was denied a bus driver job, although she had good references and successfully passed a road test. The bus company based its refusal on a doctor’s opinion who concluded after an examination lasting five to six minutes that the job applicant ‘can’t move swiftly in case

¹⁷⁰ *School Bd. of Nassau County v Arline*, 480 US 273 (1987).

¹⁷¹ See eg Lisa Waddington (n 17) 24 and (n 144) 497.

¹⁷² See eg Jane B Korn (n 91) and (n 108).

¹⁷³ Tamar Kricheli-Katz, ‘Choice-Based Discrimination: Labor-Force-Type Discrimination Against Gay Men, the Obese, and Mothers’ (2013) 10 *Journal of Empirical Legal Studies* 670, 677.

¹⁷⁴ See eg Stuart W Flint and Jeremé Snook (n 10) 189: ‘Obesity may lead to the stigmatizing of obese persons as less productive, lazy and feckless’ and Jane B Korn (n 91) 14.

¹⁷⁵ See eg *Cook*, (n 126).

¹⁷⁶ *ibid*, para 27.

¹⁷⁷ *EEOC v Texas Bus Lines*, 923 F. Supp. 965 (S.D. Tex. 1996).

of an accident.¹⁷⁸ The court concluded that the blind reliance on a limited doctor's examination led to the perception of disability.

Under EU law, the discussion is only beginning to take shape. Among all disability cases before the CJEU, none concerned a 'regarded as' situation,¹⁷⁹ whilst the EED is silent on this point. In *Kaltoft*, the AG did refer to it unlike CJEU's judges (calling it 'falsely presumed' disability),¹⁸⁰ but opined that it was not necessary for the case at hand.¹⁸¹ However, he referred to a report of the Commission,¹⁸² where the institution stated that EU directives (including the EED) cover direct discrimination 'on the basis of a wrong perception or assumption of protected characteristics.'¹⁸³ In the report, the institution illustrates the idea only with 'ethnic origin' and 'homosexuality'.¹⁸⁴ With respect to disability, it addresses the question in the annexes of this report in a rather cautious manner stating that '[t]he same reasoning would appear to apply, mutatis mutandis, to all other grounds of discrimination protected under the two Directives.'¹⁸⁵

Considering that the CJEU may recognise 'disability' to cover individuals 'regarded as' disabled, it is worth examining what kind of situations could be captured under this expression. The US experience is again relevant. Three situations have been identified by the EEOC in this regard.¹⁸⁶ Each of them is illustrated with a general example (from S Parott)¹⁸⁷ that we then transpose to obesity.

First, it covers those who have an impairment that does not substantially limit 'major life activities' but is treated as constituting such limitation such as an employee with controlled high blood pressure. Such a situation was met in aforementioned Dutch case on mail delivery by bicycle.¹⁸⁸ Herein, the Equality Body noted that the post company refused to hire the obese candidate, on the basis of general assumptions, instead of actual facts, to conclude that this candidate was not suitable for the concerned job. Importantly, it stressed that the Dutch equality legislation aims at

¹⁷⁸ *ibid.*

¹⁷⁹ There is only one case where a claimant was protected under the EED against discrimination without having the protected characteristic (discrimination by association of mother discriminated against because of her having a disabled child), see Case C-303/06 *S. Coleman v Attridge Law and Steve Law* [2008] ECR I-5603.

¹⁸⁰ Opinion of AG Jääskinen (n 3) para 48.

¹⁸¹ *ibid.*, para 49.

¹⁸² European Commission (n 99).

¹⁸³ *ibid.*, point 4.5.

¹⁸⁴ *ibid.*

¹⁸⁵ Annexes to the Joint Report (n 99) Annex II-2-c.

¹⁸⁶ 29 C.F.R. § 1630.2(l)(1)-(3) (2005).

¹⁸⁷ Sarah J Parrot, 'The ADA and Reasonable Accommodation of Employees Regarded as Disabled: Statutory Fact or Bizarre Fiction?' (2006) 67 *Ohio State Law Journal* 1509, 1512, fn 59.

¹⁸⁸ *Commissie Gelijke Behandeling* (n 82). See for the company's full reasoning, point 3.14.

preventing employers from basing their recruitment practices on 'stereotypical expectations and assumptions'¹⁸⁹ and concluded that the candidate was directly discriminated against on the grounds of 'disability' or 'chronic illness'.

The second situation is when an individual has an impairment that substantially limits major life activities only as a result of others' attitudes towards such impairment. It can happen when a worker's prominent facial scarring or obesity (provided that it is qualified as an impairment) prompts clients' or colleagues negative reactions and that consequently, the worker's employer decides to dismiss him/her. Such a case was handled by the ECtHR, even if it did not mention 'disability'. *I.B v Greece*¹⁹⁰ concerned an employee whose contract was terminated following exerted pressure by his colleagues on their employer to do so after they found out that he was HIV-positive. The Court noted that HIV-status was the basis of the dismissal and concluded that the employee had been directly discriminated on the grounds of his health.¹⁹¹ We think it would be covered under the 'regarded as' prong of disability as the stigmatised worker was perfectly able to do his job, but was limited in his participation in professional life because of his colleagues' reactions to his impairment.

In the third situation, an individual is treated as having a substantially limiting impairment: an employee rumoured to have AIDS although it was not true for instance. This appears to be a less useful situation for 'obesity' as it seems unlikely that an individual is rumoured to be obese, while he/she is not.¹⁹²

B. Capturing Appearance Discrimination through Disability?

At least one other deadlock could, however, be put on the way to the finding of 'disability' when addressing the 'regarded as' avenue. We will address it with respect to different treatment based on appearance. Recall that appearance discrimination is not prohibited under EU and US federal law. Direct discrimination ('adverse treatment' under US law) based on appearance would arise if a company refuses to hire an obese (or overweight) candidate (or to systematically hire slim individuals), unless this different treatment is justified by the fact that a certain appearance (such as slimness, which would exclude obesity) is under EED's language a 'genuine and determining occupational requirement' (EU law)¹⁹³ or, under US law, a 'bona fide qualification'.¹⁹⁴ Indeed, this argument is at times

¹⁸⁹ *ibid*; 'De Commissie wijst erop dat één van de doelstellingen van de WGBH/CZ nu juist is om te voorkomen dat werkgevers zich bij hun aannamebeleid laten leiden door stereotype verwachtingen en vooronderstellingen' (point 3.18).

¹⁹⁰ *I.B. v Greece* (n 48).

¹⁹¹ *ibid*, para 91.

¹⁹² As remarked by Jane B Korn, '(obesity) is apparent to all and impossible to hide' (n 91) 14.

¹⁹³ Article 4 (i), EED (n 2).

¹⁹⁴ See 42 U.S.C. § 12113(A).

brought to justify that bearing certain physical characteristics is essential for the company's image. We could also imagine that a company asserts that fitting with its image is a competence or an essential function. This would justify a refusal to hire.¹⁹⁵

Against this background, we will address two questions. To which extent can a different treatment based on appearance be justified under the guise of image? Can a worker considered by an employer as not fitting with this image be 'regarded as' disabled?

In our view, the appearance requirement is not justified for jobs such as restaurants' or cafés' waiters as the essential function of such jobs is rather taking customers' orders and serving them accordingly in a courteous and efficient manner. This issue is even more difficult in sectors where obesity may contradict a company's image based on the opposite profile of the obese individual. Two French cases can be mentioned in that respect. The first one involved the famous company *Weight Watchers*. On its website, the company presents itself as dedicated 'to helping (customers) lose weight'.¹⁹⁶ In a case brought before a civil court (ruling is dated 2007),¹⁹⁷ one of the company's animators was dismissed because she exceeded the weight prescribed by the maximum weight clause contained in her employment contract. The court found the dismissal not to be discriminatory relying on the company's image. We personally opine that too much reliance on a company's image leads to unfair differential treatment, whilst a worker may be perfectly capable of performing the required duties. Indeed, the employee was in charge of helping customers to lose weight by providing advice. Why would a *Weight Watcher* coach not be able to give valuable advice for losing weight only because he/she is obese? Interestingly, and this comes back to our discussion on the relevance of obesity's causes (Part III, section 1), the court held that it would have found the dismissal discriminatory (on the basis of appearance), if overweightness of the person concerned would have been immutable because in that case it would be a 'disability'.

The second case, already mentioned, was recently handled (2014) by the French Equality Body in an anonymous decision and concerned a clothing retailer (probably Abercrombie and Fitch),¹⁹⁸ which clearly argued that appearance is an 'essential genuine and determining occupational requirement', on the basis of the French domestic legal Act¹⁹⁹ that

¹⁹⁵ Neither EU nor US law requires recruiting or prohibits dismissing an individual who is not competent or capable. See, respectively, 42 U.S.C. § 12112 and EED (n 2) Recital 17.

¹⁹⁶ For more information on this company, see its website 'who we are': <https://welcome.weightwatchers.com/who-we-are/> (accessed 6 June 2015).

¹⁹⁷ CA de Douai 29 September 2004 n° 00-523, ch.soc., *Dalle-Lepers c. Sarl Weight Watchers Operations France*.

¹⁹⁸ See n 63.

¹⁹⁹ See Article L.1133-1 of the French Labour Code (*Code du travail*).

transposed the EED.²⁰⁰ Indeed, the company argued that the physical representation of the clothing brand thanks to one's 'body, charm, attractiveness and youth' is essential and determining.²⁰¹ In this respect, prioritising recruitment of managers with an 'exceptional outward appeal' (*un attrait personnel exceptionnel*) was deemed disproportionate to the objective of promoting the brand's image.²⁰² Addressing the recruitment of managers, the institution put the focus on the concerned job's functions highlighting that it consists, for managers, in leading a team.²⁰³ Interestingly, the French institution stressed in its reasoning the importance that appearance is not a changeable characteristic (*une caractéristique manipulable*).²⁰⁴ This would imply a distinction between medically-caused obesity (and being overweight) and other types and it takes us back again on obesity's causation (Part III, section 1).

Could these cases be tackled through the 'regarded as' avenue? We can see two directions. The first consists in putting focus on other questions than 'disability' (eg if being slim, or not obese, is a 'genuine and determining occupational requirement' or a 'bona fide qualification'), leaving aside the question whether there is a 'disability' or not. The second direction is to integrate the 'regarded as' avenue, as existing in the US, into the EU concept of 'disability'. An argument supporting such step would be the shift from a medical to a social model of disability, seemingly realised in *HK Danmark (Ring and Skouboe Werge)*, as well as the fact that the EU is a party to the UNCRPD. Indeed, as recognised by the CJEU in that case, which made a reference to the UNCRPD, the social model argues that 'various barriers' play a role in causing disability. Quoting the UNCRPD, AG Wahl specifies that 'barriers' can be of attitudinal nature,²⁰⁵ suggesting others' reaction (including stereotypes) towards one's characteristic. In our view and as we draw from the US experience, these barriers would cover the situation of a worker deemed not to be able to work for a company because his/her obesity does not fit with its image. In turn, this would open the 'disability' door, leading to other ones such as whether there has been a direct or indirect discrimination or whether a reasonable accommodation has not been provided (unless appearance is considered in this case as a 'genuine and determining occupational requirement' or a 'bona fide qualification'). Therefore, under this framework, and through the 'regarded as' avenue, disability could cover appearance cases.

V. CONCLUSION

²⁰⁰ Loi n°2008-496, 27 May 2008, *portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations*.

²⁰¹ See *Défenseur des Droits*, MLD n° 2014-147 (n 62) point 83.

²⁰² *ibid*, point 95.

²⁰³ *ibid*, point 89.

²⁰⁴ *ibid*, point 64.

²⁰⁵ Opinion of AG Wahl (n 147) para 96.

On both sides of the Atlantic, litigation practice shows that the interpretation of 'disability' within the contemplation of non-discrimination law is not only a question of semantics. It has also legal repercussions as the interpretation can either include or exclude an individual from the scope of disability discrimination. The different sub-concepts (eg impairment) or elements (causation and consequence) mobilised to construe 'disability' can be subject of more or less strict judicial scrutiny. In the US, we have seen that courts, at least in some circuits, tend to interpret 'impairment' less strictly than before. If our assumption that the CJEU equates obesity with 'impairment' proves true, its jurisprudence would be more inclusive than the US courts' most lenient one that equates only morbid obesity to disability if obesity is not physiologically-based. The paper has shown that disability is a valuable discrimination ground with respect to obesity. The consequence element is still interpreted by the US courts from a general (and sometimes abstract) perspective. This has proved to exclude individuals who would have been included under a contextual understanding of 'disability' that the CJEU seems to have embraced.

Kaltoft is an important step. However, as shown in the paper, the CJEU should have borrowed (and could in the future) the 'regarded as' prong of 'disability' from US law. The AG and the Commission both touched upon this issue, but failed to clearly admit that 'regarded as' disabled could be covered under the EED. In this regard, we argued that appearance cases could be captured under the 'regarded as' avenue. Consequently, some companies would have to show that their recruitment policy based on appearance is not discriminatory.