

# EU Disability Law, Charter of Fundamental Rights and the UNCRPD

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## The creation of a new EU legal framework on disability



1. The Development of a EU disability law and policy
2. The conclusion of the UN CRPD by the EU, status and effects of the UN CRPD as a mixed agreement.
3. Concluding remarks: the implementation of the UN CRPD in the EU

## **I. The Development of a EU disability law and policy: a brief overview**



### ***EC Disability Policy until 1996***

The original involvement of the EC (under the pre-Amsterdam treaties) in the area of disability was limited. This is due to the fact that none of the Pre-Amsterdam treaties contained a reference to disability.

The EC initiatives targeted to disabled people took the form of action programmes intended to exchange information, or were soft law documents. The only proposal for the adoption of a binding act in the field of transport was rejected.

## *EC Disability Policy until 1996*

The EC established **4 multi-annual disability action programmes**, in order to promote the exchange of information and best practice, and to contribute to the development of a wider EC disability policy:

- **Initial Community Action Programme for the Vocational Rehabilitation of Handicapped Persons 1974-1979 (OJ C80, 8 July 1974)**
- **First Community Action Programme on the Social Integration of the Handicapped People 1983-1988 (OJ C347, 21 December 1981)**
- **HELIOS I Community Action Programme for Disabled People 1988-1991 (OJ L10423 April 1988)**
- **HELIOS II Community Action Programme to assist Disabled People 1993-1996 (OJ L56, 9 March 1993)**

## *Council Recommendation 86/379/EEC of 24 July 1986*

- The first **soft law** instrument specifically addressing disability was a **Recommendation and Guideline on Employment**, adopted in 1986, which advised Member States “to take all appropriate measures **to promote fair opportunities for disabled people in the field of employment and vocational training**, including initial training and employment as well as rehabilitation and resettlement” and “to intensify and re-examine their policies to help disabled people, where appropriate after consulting disabled people's organizations and both sides of industry”

## *In 1996...*

- The Commission adopted the Communication on Equality of Opportunity for people with disabilities, which launched the **European Community Disability Strategy**.

This soft law instrument was inspired by the UN Standard Rules: through this Communication, the Commission endorsed the international move towards a rights based approach in the disability policy field. This *Strategy* laid the **policy foundations for future strategies and developments in the area of disability**

- The Council approved a **Resolution on the Equality of Opportunity for People with Disabilities**.

## *The legal breakthrough*

- The Treaty of Amsterdam restated the principle of non-discrimination in stronger terms, adding a new provision to the EC Treaty: **Art. 13 EC (now Art. 19 TFEU)**
- Art. 13 EC complemented Art. 12 EC (prohibiting discrimination on grounds of nationality), and enabled the Council to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, **disability**, age or sexual orientation.

### **Declaration regarding persons with disability**

- The Intergovernmental Conference that drew up the Treaty of Amsterdam decided to include a **declaration** in the Final Act, stating that the Community institutions must take account of the needs of persons with a disability when adopting measures under former Art. 95 EC to approximate Member States' legislation.

### *On the basis of Art. 13 EC, a non-discrimination package was adopted...*

- This package included **two-non discrimination directives** and a **non-discrimination action programme**
- The most relevant piece of legislation is **Council Directive 2000/78/EC** (establishing a general framework for equal treatment in employment and occupation)
- This Directive implements the principle of equal treatment in the area of employment and **prohibits discrimination on various ground, including disability**
- The Directive defines discrimination as including direct and indirect discrimination, as well as harassment and instruction to discriminate, and such discrimination is prohibited in employment and training related areas
- Art. 5 of the Directive requires that **reasonable accomodation** be made for disabled persons: “...employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer”

### The EU Charter of Fundamental Rights

- The EU Charter of Fundamental Rights, which was proclaimed in December 2000 (and **became binding in December 2009** when the Lisbon Treaty came into force), represented a new step towards a more comprehensive action in field of disability
- The Charter includes two explicit references to disability and contains other provisions which are of interest for persons with disabilities

## The EU Charter of Fundamental Rights

- **Art. 21** of the Charter lists disability as one of the grounds on which discrimination must be prohibited
- **Art. 26** deals with the “*Integration of persons with disabilities*” and states: “*The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community*”.

## The EU Charter of Fundamental Rights

- Art. 3:** “1. Everyone has the right to respect for his or her **physical and mental integrity**.
2. In the fields of medicine and biology, the following must be respected in particular:
- the **free and informed consent** of the person concerned, according to the procedures laid down by law,
  - the **prohibition of eugenic practices**, in particular those aiming at the selection of persons,
  - the prohibition on making the human body and its parts as such a source of financial gain,
  - the prohibition of the reproductive cloning of human beings”
- **Art. 14** (Right to education)
  - **Art. 15** (Freedom to choose an occupation and right to engage in work)
  - **Art. 25** (Rights of the elderly)
  - **Art. 34** (Social security and social assistance)
- Art. 34 para 3: “In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices”

## *From 2000 onwards*

- Other steps have been taken towards a more comprehensive disability legislation and policy.
- Whilst the Directive 2000/78 is the most significant development, other **pieces of legislation addressing disability (directly or indirectly)** were adopted
- The EC/EU has been relatively successful in **mainstreaming** disability into its general legislation specifically in the area of transport
- In addition, a variety of **non-binding instruments** has been adopted (e.g. *inter alia* Council Resolution of 15 July 2003 on promoting employment and social integration of people with disabilities)

## *Some of the acts in which disability and the needs of persons with disabilities are taken into account...*

- Directive 2001/85/EC relating to special provisions for vehicles used for the carriage of passengers comprising more than eight seats in addition to the driver's seat
- Directive 2001/83/EC on the Community code relating to medicinal products for human use
- Directives 2004/17/EC and 2004/18/EC on public procurement
- Regulation (EC) 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights
- Regulation (EC) 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air
- Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services

## *The EU Disability Action Plan 2003-2010*



- The Commission adopted the Communication COM(2003) 650 of 30.10.2003 '*Equal opportunities for people with disabilities: A European Action Plan*'.
- This Communication introduced a **multi-annual Action Plan for 2003-2010**
- This Plan carries forward the *1996 Strategy* and proceeds in the direction already traced by the preceding initiatives.
- The EU Disability Action Plan was established by the European Commission<sup>1</sup> to ensure a **coherent policy follow-up to the European Year of Disabled people** in the enlarged Europe

## *The EU Disability Action Plan 2003-2010*

- 3 Communications on the situation of persons with disabilities:
  - **COM/2003/650**
  - **COM/2005/604**
  - **COM 2007/738**
- 3 pillars
  - **Antidiscrimination**
  - **Mainstreaming**
  - **Accessibility**
- Every two years the Commission identified priority areas of intervention under this *EU DAP* on the basis of an assessment of the situation of people with disabilities during the previous two-year phase



## II. The Conclusion of the UN CRPD by the EC/EU



### *The Conclusion of the UN CRPD by the EC/EU*

- After having been a signatory, the EC (now EU) acceded to *UN Convention on the Rights of Persons with Disabilities*, with the **Council Decision 2010/48/EC**, formally adopted on 26 November 2009, under the former EC Treaty.
- The instrument of ratification was deposited in December **2010**, after the adoption of a **Code of Conduct** by the Council



## *The UN CRPD is a “mixed agreement”*

- Mixed agreements are signed and concluded by the EU and its Member States on the one hand, and by a Third Party on the other hand.
- Mixity is due to the fact that part of an international agreement falls within the scope of the EU powers and part within the scope of the powers of the Member States. In such a case, neither the Member States nor the EU can fully exert the powers of a party to the agreement, and joint participation is unavoidable
- Mixity has been a very **complex topic** of scholarly debate: the phenomenon of mixed agreements is not only deeply interrelated to EU Law and its division of powers doctrine, but also to public international law.
- Recent practice related to mixed agreements has revealed many **legal challenges**

## *Competence to conclude the UN CRPD*

- The EC/EU competence to **conclude** the *UN CRPD* derived from **former Arts. 13 and 95 EC**, which addressed (disability) discrimination and the internal market respectively, in conjunction with the (procedural) provisions of Art. 300(2) EC and Art. 300(3) EC [now Art. 19, 114, 218 TFEU]
- Being absent in the former EC Treaty an adequate legal basis for accessing human rights treaties, and standing Opinion 2/94 (now overcome by the Treaty of Lisbon), Art. 13 EC, addressing combating discrimination, reflected the UN CRPD main purpose.
- Many areas of the Convention extend beyond non discrimination: this has been reflected in the **dual legal basis**. Given that the internal market is an extremely broad notion that encompasses the removal of all kinds of barriers to trade, it is not surprising to find Art. 95 EC

## *Legal basis*



The **choice of the legal basis for the decision concluding the agreement is very important but it is not decisive for the implementation.** In **Case C-178/03**, the ECJ stated that: «*the fact that one or more provisions of the Treaty have been chosen as legal bases for the approval of an international agreement is not sufficient to show that those same provisions must also be used as legal bases for the adoption of measures intended to implement that agreement at Community level*».

**The ECJ does not regard the issue of legal base as a purely internal affair.** On the contrary, the ECJ confirms the importance of the correct legal base as **a signal to other Contracting Parties of the extent of EU competence and the division of competence between the EU and the Member States** (Case C-94/03).

## *Declaration of competence*

- **The UN CRPD**, as other multilateral agreements that make provision for participation by regional economic integration organisations (REIOs) such as the EU alongside its Member States, **provides for a Declaration of competence by the REIO, specifying which areas of the agreement fall within the competence of the REIO and which within that of its Member States.**
- In compliance with Art. 44 UN CRPD, **a declaration of competence has been annexed to the Decision on the Conclusion of the UN CRPD**

## *Declaration of competence*

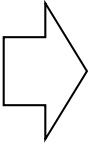
This declaration is intended to specify to Third Countries the distribution of competence (cfr. ECJ, *Opinion 2/2000, Cartagena Protocol*), indicating the competence that the Member States have transferred to the EU under the Treaties in matters governed by the Convention: the Declaration is relevant to determine the ultimate international responsibility for the performance of the UN CRPD

The Declaration underlines that the **Union competence** in the fields covered by the Convention **is not static and may evolve over the time.**

## *Status of the UN CRPD in the EU legal order*

- According to **Art. 216(2) TFEU** (former Art. 300(7) EC) international agreements concluded by the EU are binding for institutions as well as for the Member States  
“*In accordance with case-law, **mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements in so far as the provisions fall within the scope of Community competence** (see, to that effect, *Case 12/86 Demirel* [1987] ECR 3719, paragraph 9, and *Case C-13/00 Commission v Ireland* [2002] ECR I-2943, paragraph 14)” [Case C-239/03, *Etang de Berre*, at (25)]*

## *Status of the UN CRPD in the EU legal order*

- Do the provisions of the UN CRPD form part of the EU legal order?
  - Are these provisions ranked higher in the hierarchy *vis-à-vis* an EU act?
- 
- From an EU law perspective, **the UN CRPD has become an integral part of EU law.**
  - The UN CRPD is situated formally below the provisions of the Treaties.
  - In hierarchical terms, the Convention is *inferior* to the provisions of the Treaty on the Functioning of the European Union (and the Treaty on European Union), but *superior* to secondary EU law

## *Effects of the UN CRPD in the EU legal order*

- *In abstracto*, the UN CRPD seems capable, in light of its objectives and ‘spirit’, of conferring rights upon individuals. However, the provisions are literally addressed to the Parties. Thus, it could be argued that none of its provisions seems to be sufficiently clear, precise and unconditional so as to have direct effect under the standard established by the ECJ.
- On the other hand, the ECJ’s case law leaves the door open to the review of EU measures in light of the UN CRPD, in particular where the EU intends to implement a specific obligation entered into within the framework of international rules, or if an EU act expressly refers to specific provisions of the Convention (*Nakajima* and *Fediol* exceptions). The judgment of the Court in *Netherlands v Parliament and Council* provides good grounds to consider that the review of EU measures in light of the UN CRPD may be possible regardless of whether the Convention has direct effect

## *The Jurisdiction of the ECJ*

- The ECJ has the jurisdiction to interpret mixed agreements under Art. 267 TFEU (*ex multis* Joint cases C-300/98 and 392/98)
- The Commission might bring an infringement case against a Member State not properly implementing the UN CRPD under Art. 258 TFEU (former 226 EC). **A Member State has a EU law obligation to implement the UN CRPD (as mixed agreement) insofar as its provisions are within the scope of EU competence.**

*“In ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement”* [Case C-239/03, *Etang de Berre*, at (25)]

See also *Mox Plant Case* (case C-459/03 *Commission v. Ireland*)

## *The duty of cooperation*

- When considering issues in the context of mixed agreements, the ECJ has emphasized the need for common action, or close cooperation, between the EU and its Member States.

In its *Opinion 1/94*, the ECJ stated: “[...] *it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into*”.

- The principle of cooperation expressed in a general manner in the Treaty (now **Art. 4(3) TEU**) has been consistently “applied” by the ECJ to mixed agreements: there is a duty (i.e. a legal obligation) upon the EU and its Member States to collaborate among themselves during all the phases of the agreement.

### III. Concluding remarks



### *Implementing the UN CRPD*

- With the new **European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe (COM (2010)636 fin)**, launched in November 2010, the Commission aims at ensuring effective implementation of the UN Convention across the EU



[http://ec.europa.eu/news/justice/101115\\_en.htm](http://ec.europa.eu/news/justice/101115_en.htm)  
<http://ec.europa.eu/social/main.jsp?catId=420&langId=en>

## *European Disability Strategy 2010-2020*

- The Strategy “*is intended to harness the combined potential of the EU Charter of Fundamental Rights, the Treaty on the Functioning of the European Union, and the UN Convention, and to make full use of Europe 2020 and its instruments*”
- The Commission has identified 8 main **areas for action: Accessibility, Participation, Equality, Employment, Education and training, Social protection, Health, and External Action.**
- For each area, key actions are identified (SEC(2010) 1324/2):
  - E.g. prepare a EU Accessibility Act setting out a general legal framework in relation to good and services
  - E.g. support the negotiation in Council of the new **Directive on equal treatment**

### *The new Commission Proposal for a Directive on Implementing the Principle of Equal Treatment*

- The Commission recently proposed a “Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation” in order to supplement the existing legal framework on anti-discrimination, beyond the sphere of employment and occupation.
- The proposal makes explicit reference to the UN CRPD

[http://europa.eu/legislation\\_summaries/human\\_rights/fundamental\\_rights\\_within\\_european\\_union/emooo8\\_en.htm](http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/emooo8_en.htm)



**THANK YOU  
FOR YOUR ATTENTION**

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