

The implications of the UNCPRD for EU Disability Law

Is there room for direct effect?

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Since its ratification by the EU, the UNCPRD has become an integral part of the EU law. Therefore, can individuals make claims to individual rights based on the UNCPRD which their national courts must directly apply as part of the EU law ?

What if UNCPRD provisions have direct effect ?

- The UNCPRD provisions create rights which individuals may rely on before domestic courts
- The domestic courts must apply them
- They are supreme to any conflicting national provisions

Direct effect in the international legal order

A matter of national legal tradition

- “Dualist” tradition : international laws does not exist for citizens as laws. International law has to be national law as well, or it is no law at all. If a state accepts a treaty but does not adapt its national law in order to conform to the treaty or does not create a national law explicitly incorporating the treaty, then it violates international law but citizens cannot rely on it and judges cannot apply it.
- “Monist” tradition : a citizen who is being prosecuted by his state for violating a national law, can invoke the human rights treaty in a domestic court and can ask the judge to apply this treaty and to decide that the national law is invalid. He or she does not have to wait for national law that translates international law.

Direct effect in European Union law

In the Van Gend and Loos Case (case 26/62), ECJ ruled that the Community legal order constitutes a “*new legal order of international law*” in which the EC Treaty imposes legal obligations and confers legal rights on individuals and these obligations/rights are enforceable in the national courts.

About Van Gend and Loos

- ❑ Article 30 (then Art 12) of the Treaty : “*Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States*”
- ❑ Mr Van Gend was charged an 8% import tariff on good X from Germany into Netherlands based on a Dutch regulation in force since 1960. The EC Treaty had come into force in 1958. Mr Van Gend challenged tariff as unlawful.
- ❑ Preliminary ruling from Dutch Court under Art 234 (ex 177) : “Does article 30 (ex 12) have direct application in national law in the sense that nationals of Member states may, on the basis of this Article, lay claim to rights which the national court must protect?”

The Van Gend and Loos ruling

- ❑ The Treaty does not have a provision on direct effect.
- ❑ For the ECJ, it is necessary to consider the “spirit, the general scheme and the wording” of these provisions.
- ❑ Objective of the Treaty is to create a common market-of direct concerned to interested parties. This implies the Treaty is more than just an agreement between states
- ❑ The Community constitutes a new legal order for the benefit of which States have limited their sovereign rights...the subjects of which comprise the Member States and their nationals. Independently of national legislation, Community law therefore imposes obligations on individuals and also confers individual rights.

But they are restrictive conditions for direct effect

The provision in the Treaty :

- ❑ must be clear, unconditional, negative
- ❑ must require no legislative intervention by states
- ❑ must be capable of same interpretation in all Member States

Some provisions have also a “Horizontal direct effect”

Defrenne v Sabena (case 43/75) :

- ❑ Art 157 (then 119) states that Member States “*shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied*”
- ❑ Article 157 (then 119) confers individual rights which must be protected. The fact that the Article is addressed to Member States does not prevent such rights being conferred on individuals
- ❑ Art 157 (then 119), being mandatory, extends to all agreements intended to regulate paid labour collectively.

Direct effect of EU Secondary legislation

- ❑ Decisions
 - Binding in their entirety upon those to whom it is addressed (not general, but specific)
- ❑ Regulations
 - Directly applicable in all member states. They are self-executing
- ❑ Directives
 - Not directly applicable-no self-executing character. Transposition is in principle required but they are exceptions (non implementation, precise and clear)

About the status of international agreements in the EU legal order

- ❑ Article 216 of the Treaty : the international agreements concluded by the Community are binding for both the EC institutions and the Member States
- ❑ As a general rule, international agreements properly concluded by the Community prevail over EC secondary law and national provisions
- ❑ Once included in the EC legal order, international agreements are subject to the judicial control of the ECJ

Status of the UNCPRD in the EU legal order

- ❑ The European Union acceded to UN Convention on the Rights of Persons with Disabilities, with the Council Decision 2010/48/EC, formally adopted on 26 November 2009
- ❑ The instrument of ratification was deposited in December 2010, after the adoption of a Code of Conduct by the Council.

The UNCPRD ratification as a first time in history

- ❑ The EU competence to conclude the UNCPRD derives from Article. 19 TFEU which addresses disability discrimination and article 114 TFEU which addresses the internal market.
- ❑ It is the first time ever that the EU becomes a party to an international human rights treaty
- ❑ It is also the first time that an intergovernmental organization join a United Nations human rights treaty.

The UNCPRD as 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
- ❑ The UNCPRD, as other multilateral agreements that make provision for participation by regional organisations such as the EU alongside its Member States, provides for a Declaration of competence by the regional organization, specifying which areas of the agreement fall within the competence of the Regional organization and which within that of its Member States

The EU competences with regard to matters governed by the CPRD

- Exclusive competence of the EU : the compatibility of State aid with the common market, the Common Customs Tariff, and obligations with respect to the EC/EU's own public administration
- Shared competence : combating discrimination on the grounds of disability; free movement of goods, persons, services and capital; agriculture; transport; taxation; internal market; equal pay for men and women; trans-European network policy; and statistics.
- Supporting or coordinating competence : employment; education; vocational training policy; actions strengthening economic and social cohesion; and cooperation with third countries

Scope of the control of the ECJ on mixed agreements

The ECJ have no right to rule on them :

- If there is truly no Union law on the matter (Case C-431/05 *Merck Genericos*)
- If it deals with area largely covered by Community Law, but not the precise subject matter (Case C-239/03 *Commission v France -Etang de Berre*)

Effects of international agreements concluded by the Community in the EC's legal order

- ❑ The ECJ has adopted a “monist” approach for evaluating the legal effects of international agreements: an international agreement has legal effect in the EU legal order and does not require further acts of implementation, as a regulation or directive (Case 181/73, Haegeman/ État Belge)
- ❑ **AND** Under certain condition can international agreements be invoked before the court by an individual; there is **direct effect** (Demirel - Case 12/86)

About Demirel

- ❑ The Agreement Establishing an Association between the European Economic Community and Turkey provides some key provisions regarding the free movement of workers (admission and residence , right to equal treatment...)
- ❑ The ECJ stated that many provisions of the agreement are programmatic in nature and “*are not sufficiently precise and unconditional to be capable of governing directly movement of workers*” (Case 12/86 Demirel)
- ❑ However some provisions are sufficiently precise and can thus be relied upon directly by workers (Case C-192/89 Sevince)

Precision and unconditionality

- ❑ Example of provision not having direct effect : Art. 12 AA: *The Contracting Parties agree to be guided by Articles 48, 49 and 50 the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them.*
- ❑ Example of provision having direct effect : Art 37 AP: *“As regards conditions of work and remuneration, the rules which each Member State applies to workers of Turkish nationality employed in the Community shall not discriminate on grounds of nationality between such workers and workers who are nationals of other Member States of the Community”.*

In a nutshell

- ❑ Have direct effect the provisions of the CRPD which
 - ❑ address areas already largely covered by Community law
 - are sufficiently clear, precise and unconditional so as to have direct effect under the standard established by the ECJ
- ❑ Are there any ?
 - ❑ *“All provisions of the CPRD are directed to States Parties and none seems to be clear and unconditional.”*

The UNCPRD has an interpretation tool of European Union law

- The primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements (ECJ Case C-61/94)
- The accession to the UN CRPD creates therefore an obligation to interpret EU law in manner that is consistent with the Convention

The UNCPRD has an interpretation tool of European Union law (cont)

- The ECJ case law leaves the door open to the review of EU measures in light of the UNCPRD, in particular when interpreting EU and national anti-discrimination laws in respect to disability as it was introduced in the European Union through the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
- The UNCPRD may require a much more vigorous consideration of the need to incorporate disability accessibility standards in internal market harmonisation legislation.

The role of the EU Charter of fundamental rights

Article 6 (1) EU Treaty:

“The Union recognises the rights, freedoms and principles set out in the *Charter of Fundamental Rights of the European Union* of 7 December 2000, as adapted at Strasbourg on 12 December 2007, which shall have the **same legal value** as the Treaties”.

Disability in the Charter

- The Charter includes two explicit references to disability and contains other provisions which are of interest for persons with disabilities
 - 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”*.

Scope of application of the Charter

Art. 51 : “The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”

“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”

Conclusion

- ❑ The inclusion of fundamental rights into primary EU law could lead the ECJ to attribute binding ‘direct effect’, vertical and horizontal, to provisions of the Charter.
- ❑ However those provisions would have to meet at least the same standards as those of the UNCRPD.
- ❑ The ECJ may be aided by the provisions of the UNCRPD in interpreting the scope of the Charter.