

# **The implications of the UNCRPD for EU Law**

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## ***The UNCRPD is a “Mixed Agreement”***



- 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 (see *ex multis* Koutrakos, 2006, p. 150 *et seq.*; Eeckhout, II ed., 2011, p. 213 *et seq.*)
- 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 (see Hillion, Koutrakos, 2010)

## ***The implications of the UNCRPD for EU Law***



- I. The conclusion of the UNCRPD by the EU
- II. Status and the effects of the UNCRPD within the EU legal order
- III. Concluding remarks on the implementation of the UNCRPD in the EU



## **I.**



### **THE CONCLUSION OF THE UNCRPD BY THE EU**

## ***The Conclusion of the UNCRPD by the EC/EU***



- The EC (now EU) acceded to the UNCRPD with **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 Decision has 2 substantive **legal bases**, namely **Arts. 13 and 95 EC** (now Arts. 19 and 114 TFEU), in conjunction with the procedural provision of Art. 300 EC (now Art. 218 TFEU).
- A **Declaration of competence** is annexed to the Decision, in compliance with Art. 44 UNCRPD

## ***Declaration of Competence***



*“... this Declaration **indicates the competences transferred to the Community** by the Member States under the TEC, in the areas covered by the Convention. The scope and the exercise of Community competence are, by their nature, **subject to continuous development** and the Community will complete or amend this Declaration...”*

- The **Declaration is intended to specify to Third Countries the distribution of competence** (cfr. *Opinion 2/2000, Cartagena Protocol*).

## ***Declaration of Competence***



- The Declaration is relevant to determine the ultimate **international responsibility** for the performance of the UNCRPD (see *inter alia* Cremona, 2006).
- Legal scholars have expressed criticism on this kind of declarations, because they are vague and they have “the unwarranted effect of exporting internal EU problems to the international context” (*ex multis* Govaere, 2010)

## **II.**



### **STATUS AND EFFECTS OF THE UNCRPD IN THE EU LEGAL ORDER**

## ***Status of the UNCRPD***



- International agreements concluded by the EU are binding upon the institutions of the Union and on its Member States (Art 216 TFEU).
- “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**” (Case C-239/03, *Etang de Berre*)

## ***Status of the UNCRPD***



**The UNCRPD has become an integral part of EU law** [incorporation of international agreements in EU law; some scholars deal with a monist approach of EU legal order towards international law, see *inter alia* Schutze, 2010]

**In hierarchical terms, the UNCRPD 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**

### ***...but the UNCRPD is a Human Rights Treaty***

- The UN CRPD represents a progressive development of existing human rights law by placing the rights of the disabled within the conceptual framework of classical human rights
- The UNCRPD encapsulates fundamental rights which are already “constitutional norms” within the EU legal order
- The UNCRPD is in line with the EU Charter of Fundamental Rights, especially with Arts. 21 and 26
- Could the UNCRPD be considered a “constitutional source” of the EU?????

### ***The Jurisdiction of the CJEU***

- The CJEU has the jurisdiction to interpret mixed agreements (and so the UNCRPD) under Art. 267 TFEU (*inter alia* Case 12/86, *Demirel*; Case C-53/96, *Hermes*; Joined Cases C-300/98 and 392/98, *Dior*).
- It is a task of the CJEU, under the preliminary ruling procedure, to determine whether a provision of a mixed agreement can be invoked by individuals before a national court, but only when the provision falls within the scope of EU law (Case C-431/05, *Merck Genéricos*)

## ***The Jurisdiction of the CJEU***



- The CJEU has jurisdiction to **rule on the validity** of EU measures *vis a vis* an international agreement, but the legality of a EU measure can be called in question on grounds of breach of international agreements to which the EU is a party **only if the provisions of those agreements have direct effect**.
- There are two famous **exceptions** (cases C-69/89 *Nakajima*, and C-70/87 *Fediol*): the legality of EU measures can be reviewed in the light of international rules when the EU measure is intended to implement a particular obligation or “refers expressly” to the international agreement (see also Case C-352/96 *Italy v Council*)
- In another case, the CJEU did not consider the requirement of direct effect to be necessary with regard to the CBD (Case C-377/98, *The Netherlands v EP and Council*)

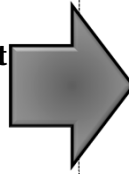
## ***Effects of the UNCRPD***



- *In abstracto*, the UNCRPD seems capable, in light of its objectives and ‘spirit’, of conferring rights upon individuals. However, its provisions are literally addressed to the Parties. Thus, it could be argued that none of its provisions have direct effect under the standard established by the CJEU.
- Case law leaves the door open to the review of EU measures in light of the UNCRPD, where the EU intends to implement a specific obligation entered into within the framework of international rules, or if a EU act expressly refers to specific provisions of the UNCRPD
- The judgment of the Court in *The Netherlands v EP and Council* provides good grounds to consider that the review of EU measures in light of the UNCRPD may be possible regardless of whether the Convention has direct effect.

## ***Effects of the UNCRPD***

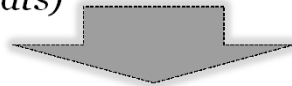
International agreements or provisions of those agreements that are not directly applicable may have effect in the EU legal order on the basis of the **principle of consistent interpretation**, derived from the primacy of international agreements binding the Union over secondary legislation (Art. 216 (2) TFEU)



EU law must be interpreted in a manner consistent to the UN CRPD (e.g. on the meaning of disability: overruling of *Chacon Navas*??)

## ***UNCRPD e EUCFR***

*“The EU CFR has become the reference text and the starting point for the CJEU’s assessment of the fundamental rights which that legal instrument recognises”* (Joint communication from Presidents Costa and Skouris- Jan 2011; see also Case C-92/09 and C-93/09 *Volker and Markus Schecke*; Case C-236/09 *Tests-Achats*)



- The validity of EU acts can be assessed in light of the EUCFR (interpreted in a manner consistent with the UNCRPD)



## ***The Jurisdiction of the CJEU in Enforcement Proceedings***

*“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 Case C-459/03 *Commission v. Ireland*)*

The Commission might bring an infringement case against a Member State not properly implementing the UN CRPD under Art. 258 TFEU. **A Member State has a EU law obligation to implement the UN CRPD insofar as its provisions are within the scope of EU competence.**

## ***Criticism***

- The jurisdiction of the CJEU on mixed agreements “remains ill-defined and questions persist as to which parameters constitute the basis for its definition” (Koutrakos, 2010, p. 136) ...but it is solely up to the CJEU to interpret the limits of its own jurisdiction!



## III.



### IMPLEMENTING THE UNCRPD

#### *Code of Conduct*



1. ...sets out the arrangements between the Council, the Member States and the Commission on cooperation on various aspects of the implementation
2. ...applies to preparation of and participation in meetings of the bodies created by the Convention
3. ...lays down the details of the function of focal point.



The EU institutions and the Member States will ensure close cooperation in the implementation of the UNCRPD, bearing in mind the **principle of sincere cooperation** (Art. 4(3) TEU; see *inter alia* Delgado Casteleiro, Larik, 2011)

## ***Implementing the UN CRPD***



- **European Disability Strategy 2010-2020** (COM (2010)636 fin), launched in November 2010, is intended to harness the combined potential of the EUCFR, the TFEU, and the UNCRPD and to make full use of Europe 2020 and its instruments”

*“The European Disability Strategy sets an ambitious agenda for the next 10 years. The EU remains committed to empowering people with disabilities so that they can enjoy their full rights, and benefit fully from participating in society and the economy”*

J.M. Barroso, 6 December 2011

- **Proposal for a Council Directive** on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual in areas outside of employment.

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**THANK YOU  
FOR YOUR ATTENTION!**



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