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**THE RATIFICATION OF THE UN CONVENTION ON THE
RIGHTS OF PERSONS WITH DISABILITIES BY THE
EUROPEAN UNION**

Study of the Consequences for Persons with Disabilities

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ABSTRACT

The 30 March 2007 the representative of the European Union signed the Convention on the Rights of Persons with Disabilities (CRPD), later ratified on 23rd December 2010. It was (and still is) the first time a regional organization became Party to an international human rights treaty. The EU, which competences have substantially increased since its creation, has demonstrated a willingness to protect human rights in particular since the adoption of the Charter of Fundamental Rights of the European Union, and more recently its attempt to accede the European Convention on Human Rights.

The objective of this master thesis is to examine the consequences of the ratification of the CRPD by the EU, and in particular its benefits from the perspective of its principal beneficiaries: persons with disabilities. The matter is to determine to which extent such ratification, beyond its symbolic aspect, offers greater human rights protection for the persons the most concerned by it. The thesis especially examines the competence(s) of the Union in the light of the principles of the EU, the consequences of the ratification and its limits. It also offers a good food for thoughts regarding prospective ratification of other human rights treaties.

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PART 1: GENERAL INTRODUCTION

Chapter 1: Introduction

I. Background information

Since World War II and until today the protection of human rights at national and international levels has highly increased. In order to provide a broader and more uniform protection worldwide the United Nations have in particular developed core international human rights instruments.¹ At the present day, two covenants and six conventions grant, protect and set the rules to monitor human rights. They focus either on a broad range of rights such as the two covenants on civil and political rights, and economic, social and cultural rights, or targets specific groups that are more vulnerable to human rights violations such as racial groups, woman, children, victims of torture and, for the most recent convention, persons with disabilities.² Once the instruments are drafted and adopted by the General Assembly, States can become party by signing and ratifying the treaties.

The 30 March 2007 the European Union (EU) signed the Convention on the Rights of Persons with Disabilities (CRPD) and ratified it three years later on the 23 December 2010. It marks the first time a regional organization becomes party to an international human rights treaty. Although the EU did not wait to ratify the CRPD to demonstrate its commitment to protect human rights, and in particular rights of persons with disabilities, it was not before this date party to any international or regional convention of this sort.

¹ The term “core international human rights instruments” is used by the United Nations to refer to the covenants and conventions adopted by the General Assembly of the United Nations and ratified by States. See website of the United Nations at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>.

² The instruments sub-mentioned are (by date of adoption): the International Convention on the Elimination of All Forms of Racial Discrimination (1965); the International Covenant on Civil and Political Rights (1966); the International Covenant on Economic, Social and Cultural Rights (1966); the Convention on the Elimination of All Forms of Discrimination against Women (1979); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); the Convention on the Rights of the Child (1989); and the Convention on the Rights of Persons with Disabilities (2006).

II. Objectives

The objective of this master thesis is to examine the consequences of the ratification of the CRPD by the EU, and in particular its benefits from the perspective of its principal beneficiaries: persons with disabilities. Inasmuch as the Convention has been signed by all EU Member States, one may wonder why the EU should as well become a party. By questioning the function of the EU as “Party State”, and in particular the extent of its competence, this master thesis aims to determine whether the ratification of the CRPD is mostly symbolic, or whether on the contrary it has a significant impact on persons with disabilities in term of human rights protection and monitoring.

Several scholars have already studied the particular nature of the ratification of the CRPD by the EU, especially regarding the competence of the Union. However, none has taken persons with disabilities as central point to assess the consequences of the ratification for disabled persons under the jurisdiction of the European Union. Persons with disabilities are above all persons, human beings, and not only individuals living with impairment. This is important to keep this in mind as they may be workers, travellers, customers, but also service providers, and may need to receive as such specific protection. Protecting the rights of persons with disability is about human rights but it may also be about protecting the EU single market and (some of) its four freedoms: free movement of goods, capital, services and people.³ It is thus another valuable benefit of the ratification, yet also possibly indicating that the European Union may be mainly motivated by an economic incentive.

The prior publication of scholars on the CRPD and the EU ratification is however relevant and came as a great help during research on this topic. In particular, but not

³ These freedoms are providing in the Treaty on the Functioning of the European Union. *See* article 26(2) and for more details, articles 45 (freedom of movement for workers), 49 (freedom of establishment), 56 (freedom to provide services) and 63 (freedom of capital).

exhaustively, the work of Lisa Waddington,⁴ Alexander Hoefmans⁵ and Delia Ferri⁶ is referred to and used as starting point. Other official documents such as the CRPD itself, the EU report to the Committee on the rights of persons with disabilities,⁷ the Declaration of Competence⁸ and Code of Conduct⁹ are also source of valuable information to assess the consequences of the ratification.

III. Structure

Following Part 1 that contains the preliminary introduction, the Part 2 focuses on giving more details on the ratification of the CRPD by the EU. Chapter 1 presents a short history of human rights and disability rights in the European Union before the signature and ratification of the CRPD. Chapter 2 enumerates the consequences of the ratification as stated in the treaties and stresses the potential benefits and issues that one can think of.

In Part 3, Chapter 4 starts by examining the relevant principles of EU law and division of competence in the EU, before establishing the consequences for the implementation by the European Union. Chapter 5 focuses on the benefits of the adhesion for persons with disabilities in Europe, from the substance of the rights in itself to their implementation and monitoring. Finally, Chapter 6 is dedicated to the limits and shortcomings of the ratification.

⁴ L. Waddington: Equal to the Task? Re-Examining EU Equality Law in Light of the United Nations Convention on the Rights of Persons with Disabilities. in: Waddington/ Quinn/ Flynn: *European Yearbook of Disability Law* Vol 4 (2013) p. 169 – 200; and The European Union and the United Nations Convention on the Rights of Persons with Disabilities: a story of exclusive and shared competences, 18 *Maastricht Journal of European and Comparative Law* 431 2011.

⁵ A. Hoefmans, The EU Disability Framework Under Construction: New Perspective Through Fundamental Rights Policy and EU Accession to the CRPD, 3 *European Yearbook of Disability Law* 35 2012, 35.

⁶ D. Ferri, The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: a constitutional perspective, 2 *European Yearbook of Disability Law* 47 2010.

⁷ Concluding observations to the initial report of the European Union / UN Committee on the Rights of Persons with Disabilities. CRPD/C/EU/CO/1. 2.10.2015.

⁸ Declaration concerning the competence of the European Community with regard to matters governed by the United Nations Convention on the Rights of Persons with Disabilities. Annex II to Council Decision 2010/48/EC. OJ L 23, 27.1.2010, 55-60.

⁹ Council Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and the representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (2010/C 340/08), [2010] OJ C 340/11.

To finish, Part 4 offers a conclusion as regards the actual benefits of the ratification of the CRPD as well as a broader reflection on the role the EU may play in the protection of human rights with some food for thought about prospective ratification.

The ratification of the CRPD by the European Union illustrates the increasing importance taken by human rights in an institution that started mainly with peace-keeping and economic purposes. It shows that the Union has adopted with time a particular strong stance regarding fundamental rights.¹⁰ It is not only committing to regional standards anymore, but making its way to the recognizance and implementation of internationally acknowledged standards. The example of disability rights with the CRPD as first UN human rights treaties signed and ratified by the Union is particularly representative of this growing commitment which comes with various duties, benefits and issues.

Chapter 2: Disability rights in the European Union

Disability rights, as part of the human rights law movement, appeared quite recently in the history of the European Union. When the European Economic Community (EEC) was created soon after World War II, its purpose was economic with an overall goal to ensure peace between the European states. However, as we all know the EEC which became the European Union with the Maastricht Treaty in 1992 went far beyond that.

Although it never had competence to act on human rights matters, including disability rights, the Union became more and more involved in the protection of human rights. In a speech given in 2010, the European Vice-President Viviane Reding noted the high and increasing number of persons living with one or several forms of disability in Europe, especially since the population grows older.¹¹ In practice persons with disabilities are often left aside, “all too often

¹⁰ The terms ‘human rights’ and ‘fundamental rights’ will be used as synonyms. In a traditional view, the term ‘human rights’ is used under international law whilst ‘fundamental rights’ is used in a constitutional setting. In the EU, ‘fundamental rights’ express ‘human rights’ within the Union internal context. See, European Union Agency For Fundamental Rights “FRA” website, at <http://fra.europa.eu/en/about-fundamental-rights/frequently-asked-questions#difference-human-fundamental-rights>.

¹¹ One in six people in the European Union were considered to have a disability ranging from mild to severe. *See infra*.

prevented from fully participating in society and the economy because of physical or other barriers, as well as discrimination”.¹² Protecting the rights of this category of persons became thus more and more important, on both on human rights and economic rhetoric. These two arguments will be thoroughly explored further on.

Intrinsically the Union was founded on common values and principles that promote protection of fundamental rights. Article 2 of the Treaty on European Union (TEU) highlights in particular “the respect for human rights, including the rights of persons belonging to minorities” as well as the importance of pluralism and non-discrimination. Early, the European Court of Justice (now Court of Justice of the European Union) took the lead in protecting human rights and played an important role in their development.¹³ Following Case 29/69 *Stauder v City of Ulm* in 1969 and Case 11/70 *Internationale Handelsgesellschaft* in 1970, the respect of fundamental rights was recognized as a the general principle of EU law protected by the Court of Justice.¹⁴ Thirty years later, the Union went beyond the meek obligation to respect human rights by granting their protection through the Charter of Fundamental Rights of the European Union (“the Charter”) adopted in December 2000.

In the mid-time the difficulties suffered by persons with disabilities started to be heard and the Union began to adopt few legal instruments, soft law and policy in order to protect the rights of disabled people. In 1996 the Union (at that time European Community) launched the EC Disability Strategy based the on equal opportunities model,¹⁵ succeeded by the the EU Disability Action Plan 2004-2010 and the European Disability Strategy 2010-2020 which each

¹² European Commission Vice-President Reding, Press Release, *Creating a barrier-free Europe: European Commission seeks better access for 80 millions persons with disabilities*, 15 November 2010, at http://europa.eu/rapid/press-release_IP-10-1505_en.htm?locale=en.

¹³ A. Hoefmans, The EU Disability Framework Under Construction: New Perspective Through Fundamental Rights Policy and EU Accession to the CRPD, 3 *European Yearbook of Disability Law* 35 2012, 37-38.

¹⁴ Case 29/69, *Stauder v City of Ulm*, [1969] ECR 3727; Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125. These decisions illustrate the importance of national influence in the protection of human rights with the example of the German constitutional court. According to Hoefmans, this was important in order accept the primacy of EU law that limits State sovereignty. See Hoefmans (2012), 38.

¹⁵ The first policy enacted by the Union dates of 1974 where the Council enacted an action plan for the rehabilitation of disabled workers and based on the “medical model” of disability. See D. Ferri, The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: a constitutional perspective, 2 *European Yearbook of Disability Law* 47 2010, 68 (footnote 75).

time deepen the commitment of the Union, the new disability strategy aiming for a “truly barrier-free Europe for persons with disabilities by 2020”.¹⁶

Disability was mentioned for the first time in the primary law with the adoption of the Treaty of Amsterdam in 1997. Ex article 13 TEC (now article 19 TFEU), a general non-discrimination provision, included disability in its list of discriminatory grounds. This article was notably used as legal basis to adopt the Employment Equality Directive of 2000 which includes discrimination on the ground of disability.¹⁷ Article 10 TFEU also mentions disability with the mainstreaming objective of combating discrimination from EU’s policies and activities.¹⁸ In parallel, the Charter of Fundamental Rights which came into force in 2000 contains, aside of a general non-discrimination provision,¹⁹ a specific provision concerning disabilities. Article 26 states that “The Union recognizes 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”. With the Treaty of Lisbon giving to the Charter the same legal value as the founding Treaties, this provision became part of primary EU law and the protection of disability rights more and more grounded.²⁰ Hoefmans argues that the Charter would present way to bypass the lack of specific competence for the Union to act on disability right. According to his view, although Article 26 does not constitute a legal basis, it should be read in conjunction with the founding Treaties that give power to act to the EU institutions.²¹

¹⁶ European Commission Vice-President Reding, Press Release, *Creating a barrier-free Europe: European Commission seeks better access for 80 millions persons with disabilities*, 15 November 2010, at http://europa.eu/rapid/press-release_IP-10-1505_en.htm?locale=en.

¹⁷ L. Waddington, *The European Union and the United Nations Convention on the Rights of Persons with Disabilities: a story of exclusive and shared competences*, 18 *Maastricht Journal of European and Comparative Law* 431 2011, 433.

¹⁸ TFEU, Article 10: “In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

¹⁹ Charter of Fundamental Rights of the EU, Article 21. This article also includes disability in its list of discriminatory grounds.

²⁰ Article 6 TEU.

²¹ See Hoefmans (2012), 39-40. He also notes that following an interpretation *sensu lato* of Article 26, all legislative and policy initiatives should take into account the fundamental rights of the EU and consequently the rights of disabled people. However, it was not certain whether EU law or policies may be checked by the Court of Justice of the European Union in the light of article 26 of the Charter.

In parallel, it is important to note that the protection of human rights has also been used as a mean to achieve the economic objectives of the Union.²² Indeed, the infringement of fundamental rights such as the access to education, work or healthcare, may as well infringe the four freedoms of the European Union²³ and have detrimental economic consequences. Subsequently, as noted by Hoefmans, in some circumstances the EU aims to achieve policy objectives that fall directly, but also indirectly, within fundamental rights protection and that are relevant for the disability policy agenda but that may actually be another “mean to guarantee the functioning of the internal market”.²⁴

The sporadic adoption of legal instruments paying attention to the situation of disabled people is a good illustration of this tendency. In the field of transport, the rights of persons with disabilities have been included in disability-specific instruments such as the Regulation relating to the rights of air passengers with reduced mobility,²⁵ as well as in mainstream secondary law as the Regulation on rail passengers’ rights and obligations.²⁶ Moreover, in 2008 the European Commission has also made a proposal for a general anti-discrimination directive, including disability, seeking to extend the principle beyond employment.²⁷ In other fields, as noted by Waddington, the inclusion of disability rights appeared in a more sporadic way. For instance, in the field of internal market, disability can be found in secondary law addressing approximation of the laws relating to lifts, public procurement or universal services and users’ rights²⁸ but has not been included in some other instruments that could have done so, such as

²² Hoefmans (2012), 38.

²³ The European Union guarantees in his Treaties the free movement of goods, capital, services and people. Infringement of human rights may in particular limit the free movement of service and people.

²⁴ Hoefmans (2012), 37-38. See also Article 3 TEU.

²⁵ Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when traveling by air [2006] OJ L 204/1.

²⁶ Regulation (EC) No. 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers’ rights and obligations [2007] OJ L 315/14. See also, Waddington (2011) 434.

²⁷ COM(08) 436 final.

²⁸ Directive 95/16/EC on the approximation of the laws of the Member States relating to lifts [1995] OJ L 213/1 as amended; Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L 134/1; Directive 2004/18/EC on the coordination of procedures for the award of public works contract, public supply contracts and public service contracts [2004] OJ L 134/114; Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive) [2002] OJ L 108/51.

the General Product Safety Directive.²⁹ Waddington highlighted this dilemma as well as the potential for the EU to adopt legislation specifically targeting persons with disabilities.³⁰

In these circumstances, the adoption of the CRDP by the United Nations and its ratification by the European Union came as an important step in the Union protection of the rights of persons with disabilities.

Chapter 3: New step forward: the CRPD and its ratification

I. The Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities is the most recent international core human rights treaty and first one in which the EU played a significant role from negotiation to ratification. This Convention came twenty-five years after the International Year of Disabled Persons spread global awareness on the impediments faced by persons with disabilities. It seeks to respond internationally to the long history of exclusion, dehumanization and discrimination suffered by disabled individuals.³¹ It was adopted in the United Nations General Assembly in December 2006 and entered into force on 3 May 2008. An Optional Protocol was also adopted to allow complains from individuals believing that the States Parties violated their obligations under the Convention.³²

The goal of the CRPD was not to create new rights for persons with disabilities but to clarify and elaborate existing human rights within the disability content.³³ Hoefmans notes that one of the main values of the Convention has been to give a global human rights status to

²⁹ Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety [2002] OJ L 11/4. See Waddington (2011) 434-435.

³⁰ Waddington (2011) 435.

³¹ UN Office of the High Commissioner for Human Rights (OHCHR), *Handbook for parliamentarians on the Convention on the Rights of Persons with disability: from exclusion to equality realizing the rights of persons with disabilities*, 2007, HR /PUB/07/6, III.

³² Optional Protocol to the Convention on the Rights of Persons with Disabilities, signed on 30 March 2007 and in force since 3 May 2009. See in particular, Article 1.

³³ Ferri (2010), p 52. See also, J. E. Lord, 'Disability Rights and Human Rights Mainstream: Reluctant Gate-Crashers?', in C. Bob, *The International Struggle for New Human Rights* (University of Pennsylvania Press, 2009), 83.

disability issues.³⁴ Although it does not give any definition of disability, Article 2 of the CRPD provides a comprehensive definition of discrimination on the ground of disability and affirms firmly the adoption of the social model of disability.

According to Article 2 “discrimination on the basis of disability” includes:

any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

The preamble of the Convention makes clear that disability is not seen as the consequence of an impairment (medical model of disability), but as the consequence of the failure of the social environment to accommodate the “needs and aspiration of people with impairments” (social model of disability).³⁵ Moreover, the Convention also views disability as an evolving concept³⁶ under which the concept of dignity and individual autonomy are crucial. Consequently, persons with disabilities may be regarded as such in one society or setting but not in another one, depending on the response of the society or general environment.³⁷

The scope of the CRPD is extremely broad and comprehensive, offering a complete protection from its substantive content to its implementation and monitoring mechanisms.³⁸ It particularly insists on the principle of equality and non-discrimination and addresses a variety of traditional human rights such as the right to life (Art. 10), freedom from torture (Art. 15),

³⁴ Hoefmans (2012), p 35.

³⁵ Waddington (2011), p 436. Also see, R. Kayess and P. French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, *Human Rights Law Review* 8:1 2008, 5-6, for more details on the medical and social models of disability.

³⁶ CRPD, Preamble (e): “(...) disability is an evolving concept [which] results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others”.

³⁷ OHCHR, *Handbook for parliamentarians on the CRPD* (2007), p 3. A simple example would be a person with a walking impairment. The disability will actually depend on the environment in which the person evolves and whether the impairment is accommodated or not. If the environment provides easy access for people with reduced mobility, via for instance lifts, sidewalk, buildings and transports specifically designed to take into account the impairment, the person may not be considered disabled as such as there is no “attitudinal or environmental barriers that hinder [his] full and effective participation in society on an equal basis with others”.

³⁸ Ferri (2010), p 55.

access to justice (Art.13), legal capacity (Art. 12) or the right to education (Art. 24) and employment (Art. 27). It imposes formal and substantive obligations on States Parties and generally outlines policy in general terms, without giving a precise description of the actions that should be taken by the States.³⁹ Additionally, it establishes monitoring mechanisms such as the creation of a focal point in the States Parties (Art. 33) and a reporting procedure similar to the other international core human rights instruments (Art. 35).

II. The negotiation and ratification by the EU

The European Union decided quite early to take part in the negotiations of the Convention.⁴⁰ According to the European Commission it ensured that the CRPD was in line with relevant EU legislation and jurisprudence, especially as regard the definition of discrimination and the principle of ‘reasonable accommodation’.⁴¹

For the first time a specific article was included in the agreement to allow signature and ratification by “regional integration organizations”. Article 44 paragraph 1 defines such organization as “an organization constituted by sovereign States of a given region, to which its Member States have transferred competence in respect of matters governed by this Convention” and had for purpose to explicitly allow the ratification of the Convention by the EU. As signature is opened by both the EU and its Member States, the CRPD is a “mixed agreement”. It means that there is a concurrent jurisdiction of both the Union and its Member States. Part of the Convention falls within the scope of competence of the Union and part falls within the powers of the Member States. This division of competences is crucial to understand which are the obligations of the Union and will be explore in more details further.⁴²

In practice the European Union derived the competence to sign the Convention from Article 13 EC (now Article 19 TFEU) and Article 95 EC (now Article 114 TFEU) which addresses respectively discrimination (including disability) and the internal market. Although the proposal referred to much more articles,⁴³ ultimately only these two legal bases were

³⁹ Ibid, p 53-54.

⁴⁰ Note that the EU derives its legal personality from Article 47 TEU. Moreover, Article 216(1) TFEU allows the Union to negotiate and conclude international agreements.

⁴¹ European Commission, Press Release, *EU signs new UN treaty on disability rights*, 30 March 2007, available at http://europa.eu/rapid/press-release_IP-07-446_en.htm .

⁴² See Part 2, Chapter 3(I)(a) and (II)(b).

⁴³ The proposal referred originally to Articles 13, 26, 47(2), 55, 71(1), 80(2), 89, 93, 95 and 285 EC (now Articles 19, 31, 53, 62, 91(1), 100(2), 109, 113, 114 and 338 TFEU) in conjunction with Article

chosen in conjunction with the procedural provisions of Article 300(2) EC (now Article 218(1) TFEU) and Article 300(3) EC (now Article 218(2) TFEU).⁴⁴ Whereas some have criticized this choice on the ground that it minimizes the scope of the Convention and may neglect the human rights nature of the CRPD, Ferri noted that in practice the choice of the legal basis was not decisive for the implementation by the Union.⁴⁵

The EU was originally waiting for all the Member States to ratify the Convention before depositing the instrument of ratification with the Secretary-General of the UN, as it usually does for mixed-agreements. Yet, prior ratification by all Member States is not compulsory before the Union itself ratifies a mixed-agreement. As long as no treaty provision requires so, the Union may actually decide to ratify the agreement before the Member States have done so.⁴⁶ In the end, the Union ratified the CRPD while some Member States had not yet ratified it. It was also a way to send a strong signal to Member States that they have to ratify the Convention promptly.⁴⁷ As of today, Ireland still has not ratified the Convention⁴⁸ and the Netherlands only ratified it earlier this year.⁴⁹ The EU went ahead and adopted a Council Decision concerning the conclusion of the CRPD in November 2009,⁵⁰ authorizing the

300(2) and the first subparagraph of Article 300(3) EC (now Articles 218(1) and 218(2) TFEU) as legal bases for the signature of the CRPD by the EU. See Proposal for a Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, COM (2008) 530 final/2.

⁴⁴ Ferri (2010), p 56-57 and Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC) [2010] OJ L 23/35.

⁴⁵ Ibid, 60.

⁴⁶ Ibid, 63. Also note that in any case, international law requires States Parties which signed the treaty to act in good faith and avoid to take any action contrary to the provisions of the treaty.

⁴⁷ "EU: Historic ratification of International Human Rights Treaty", State Watch, available at: <http://www.statewatch.org/news/2011/feb/eu-crpd.pdf>. See also, Keogh, *EU ratification of disability treaty sends strong signal to Member States*, available at <http://www.humanrights.ie/index.php/2011/01/11/eu-ratification-of-disability-treaty-sends-strong-signal-to-member-states/>.

⁴⁸ Ratification will hopefully take place before the end of 2016 according to the Government and the Minister of Justice. See, 'UN convention on disabilities will be ratified, says Finian McGrath', *The Irish Time*, 10 May 2010, available at <http://www.irishtimes.com/news/social-affairs/un-convention-on-disabilities-will-be-ratified-says-finian-mcgrath-1.2641487/>.

⁴⁹ See for instance, 'The Netherlands Finally Adopting the UN CRPD' on ENIL website, available at <http://www.enil.eu/news/the-netherlands-finally-adopting-the-un-crpd/>.

⁵⁰ Council Decision of 26 November 2009 concerning the conclusion, by the European Community of the United Nations Convention on the Rights of Persons with Disabilities 2010/48/EC [2010] OJ L 303/16.

President of the Council to deposit the instrument of formal confirmation of the Convention.⁵¹ This led to an agreement of a code of conduct between the Council, Commission and the Member States (“the Code of Conduct”)⁵² as well as a declaration of competence (“the Declaration of Competence”)⁵³ in accordance with its obligations under Article 44(1) of the Convention.⁵⁴ On the 23rd of December 2010 the European Union officially ratified the CRPD and became the 67th party of the Convention and first regional organization bound by an international human rights convention. However, it did not ratify the Optional Protocol to the CRPD. The Convention came into force in January 2011.

III. Consequences of the ratification

Since the CRPD came into force for the EU in January 2011, the Union is bound to all the obligations in the same way as the other States Parties. Indeed, under Article 216(2) TFEU “agreements concluded by the Union are binding upon the institutions of the Union and on its Member States”. Consequently, the European Commission, the European Parliament and the European Council, as well as the other EU institutions, have the duty to act in conformity with the provisions of the CRPD and to take additional measures to implement the stated rights. Member States of the EU must as well act in conformity with the CRPD when implementing EU law. Yet, for those who have ratified the Convention, they are already bound by it in its entirety. The only difference is that, in case of failure to comply with the provisions of the Convention, the EU may be able to hold them responsible when the failure is related to the implementation of EU law.

The Convention generally commits the States Parties to ensure that people with disabilities fully enjoy their rights on an equal basis with all other citizens and to protect the

⁵¹ Waddington (2011), p 440.

⁵² Council Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and the representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (2010/C 340/08), [2010] OJ C 340/11.

⁵³ The Declaration of Competence is attached in annex of the Council Decision to adopt the Convention (n 50 supra).

⁵⁴ According to Article 44(1) of the CRPD regional integration organization “shall declare in their instruments of formal confirmation or accession, the extent of their competence, with respect to matters governed” by the Convention.

respect for their inherent dignity.⁵⁵ Article 4 of the CRPD lists a wide variety of general obligations binding each State Party. For the EU, this means that it has to comply with each of them, from ensuring that all of its legislation, policies and programmes comply with the provisions of the Convention, to ensuring its practical implementation and monitoring. The obligations cover various areas such as access to justice (Art. 13), education (Art. 24), health (Art. 25), work and employment (Art. 27), adequate standard of living and social protection (Art. 28) or the right to vote (Art. 29). Moreover, Article 33 on the national implementation and monitoring that requires the establishment of a focal point for matter related to the implementation of the Convention also applies to the EU. This obliges the Union to put in place the necessary structure to ensure implementation and monitoring. It also has a duty to reports on its implementation of the Convention under Article 35. In practice the EU submitted its initial report to the Committee on the Rights of Persons with Disabilities (“the Committee”) on 5 June 2014. Finally, as the Union must comply with the same obligations than the other States Parties, the Union also has the same rights. Article 44(4) particularly asserts the right for regional integration organizations to vote in the Conference of States Parties. Moreover, the Union may also propose a candidate to the election of members to the Committee under Article 34(4).⁵⁶

Consequently, the EU is thoroughly regarded as any other State Parties of the Convention. However, as the CRPD is a mixed agreement all these obligations only concerned areas that fall within the competence of the Union. In the other areas, the Member States of the EU are responsible for the implementation of the Convention. This question of competence will be further explored in Part 3.

IV. Potential benefits and issues of the ratification

Numerous authors have noted the significant benefits of the ratification of the CRPD by the European Union but also the various challenges coming with it. Hoefmans noted that it

⁵⁵ European Commission Vice-President Reding, Press Release, *EU ratifies UN convention on disability rights*, 5 January 2011, available at http://europa.eu/rapid/press-release_IP-11-4_en.htm. See also Article 1, CRPD.

⁵⁶ During the negotiation stage of the Convention the Commission insisted that the EU be granted the right to present a candidate during the elections for the CRPD Committee. The candidate put forward by the Commission for nomination need to be approved first by consensus by the Member States. See Hoefmans (2012), p 46-47 and Provision 10 of the Code of Conduct.

offered new policy opportunities but also institutional challenges both from an external and internal European perspective.⁵⁷

On one hand the ratification of the Convention is very promising. As seen previously, the European Union already started to protect the rights of persons with disabilities, but the CRPD came as a welcome step forward as it ensures the respect of international human rights standards which would ensure a better and more coherent protection within the Union. Ferri noted that the indeed the Convention commits the Union to achieve higher standards of non-discrimination and that it could even have a “positive influence on the overall conception of human rights” in the EU.⁵⁸ She also stressed that it may have a profound impact on EU secondary law and in any case it fosters the “debate about human rights dimension and standards at the supranational level”.⁵⁹ This would mean that the ratification has potentially important benefits for the first concerned by the Convention, persons with disability. Yet, whether these benefits exist in practice depends of the implementation by the Union and will be discussed further.

On the other hand, the ratification came with several challenges and potential issues. Firstly, mixed-agreements often present procedural challenges. Indeed, although a Code of Conduct and a Declaration of Competence have been adopted to determine the internal and external role of the Union and its Member States, it is not always clear who will have to do what. Hoefmans took the example of the reporting procedure. He noted that the framework is not transparent and that there may be a risk of divergent reports submitted by the Union and the Member States.⁶⁰ Secondly, there may be a fear that some parts of the Convention may fall in between competences and be left aside. In this case, persons with disabilities are not able to enjoy the protection from the Convention, without it being clear who between the EU and its Member States fail to its obligation. Consequently, implementation issues also have to be discussed. Finally, another concern may be actual purpose of the Union in ratifying the Convention. Although the European Commission Vice-President Reding considered it as a

⁵⁷ Hoefmans (2012), p 41. See also, L. Waddington, ‘Breaking New Ground: The Implications of Ratification of the UN Convention on the Rights of Persons with Disabilities for the European Community’, in: O. M. Arnardottir and G. Quinn (eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff Publishers, 2009), 111-140.

⁵⁸ Ferri (2010), p 50.

⁵⁹ Ibid, p 66.

⁶⁰ Hoefmans, p 45-46.

“milestone in the history of human rights”,⁶¹ it is not certain whether the EU is more animated by the protection of its internal market and economic aspect than by the genuine protection of human rights. If, while implementing the Convention the Union focuses mainly on areas that have economic advantages, once again some persons with disabilities may be left aside. This goes with the importance of a focus on fundamental rights in the implementation of the Convention as noted by Hoefmans.⁶² States Parties, and in particular the European Union, must be aware that when implementing the CRPD and protecting the rights of persons with disabilities, they are not acting only in function of their own economic agenda but on the opposite acting “under a human rights guise”.⁶³

⁶¹ European Commission Vice-President Reding, Press Release, *EU ratifies UN convention on disability rights*, 5 January 2011, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/4>.

⁶² Hoefmans, p 42. Hoefmans refers to the necessity of a “mentality shift”.

⁶³ Ibid.

Chapter 4: The implementation by the European Union determined by the principles of EU law

The implementation of the CRPD by the Union has to be examined in the light of relevant principles of EU law in order to assess to which extent it can actually protect the rights of persons with disabilities.

I. Relevant principles of EU law

The EU as a *sui generis* supra-national union of States is governed by rules that give it various competences to act and which define the reach of its actions. This was necessary for the Member States to consent the transfer of part of their sovereignty. Four principles are particularly relevant for the implementation of the CRPD: the principle of conferral taking into consideration the principles of subsidiarity and proportionality, and the principle of autonomy of EU law in relation to the hierarchy of (EU) norms.

a. Principles of conferral, subsidiarity and proportionality

The principle of conferral which determines the division of competence between the Union and its Member States is fundamental to determine to which extent the EU may act by itself or in parallel of the Member States. Under Article 5 TEU and Article 4(1) TEU, the Union may act only within the scope of competence established in the founding Treaties. Moreover, even when it has competence to act, it must do so in respect with the principles of subsidiarity and proportionality.

Article 2 of the TFEU details the type of competence attributed to the Union. Four scenarios may occur: the EU has exclusive competence to act on the matter (1), the Member States have exclusive competence to act on the matter (2), the EU and the Member States share the competence to act (3) or the EU can only support and supplement the action of the Member States. The areas in which the Union has exclusive competence are fairly limited and listed in

Article 3 of the TFEU.⁶⁴ In areas where the competence of the Union is not exclusive, the Member States remain free to act collectively, individually or jointly with the Union to fulfil the obligation under international agreements.⁶⁵ Areas in which the Union has shared and supporting competences are listed in Articles 4, 5 and 6 of the TFEU.

Whilst in the area of shared competence the Member States may act only to the extent than the Union has not exercised its competence or has ceased to exercised its competence,⁶⁶ the EU is bound to act according to the principles of subsidiarity and proportionality sub-mentioned.⁶⁷ The Union shall in principle only act “in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”.⁶⁸ Moreover, “the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties”.⁶⁹

b. Principle of autonomy of EU law

The principle of autonomy in the EU has not been established by the founding Treaties but developed through the jurisprudence of the Court of Justice.⁷⁰ The Community (now the European Union) was considered a “new legal order of international law”⁷¹ and EU law consequently became “an independent source of law”.⁷² Moreover, according to the principle of primacy, EU law prevails on the law of the Member States and in some cases, it may have a direct effect in national orders. This means that individuals may invoke directly European

⁶⁴ Under Article 3 TFEU the EU has exclusive competence in areas of custom union, the establishment of the competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is the euro, the conservation of marine biological resources under the common fisheries policy and common commercial policy. Moreover, it also has exclusive competence “for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.”

⁶⁵ Waddington (2011), p 440. See also *Re: European Development Fund*, Case C-316/91 *European Parliament v Council*, [1994] ECR I-625.

⁶⁶ Article 2(2) TFEU.

⁶⁷ Article 5 TEU.

⁶⁸ Article 5(3) TEU.

⁶⁹ Article 5(4) TEU.

⁷⁰ J. Odermatt, *When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relation Law*, EUI MWP, 2016/07, 1.

⁷¹ Case C-26/62 *Van Gend en Loos v Administratie der Belastingen*, [1963] ECR 1.

⁷² Case C-6/64, *Costa v E.N.E.L.*, [1964] ECR 584.

acts before national and European courts under certain conditions.⁷³ These principals are very important as one may wonder whether it is possible for individuals to invoke directly the CRPD or its implementation by the Union before national or European courts.

Another important result of this principle is the existence of a hierarchy of (EU) norms. At the top of EU legal system is the “constitutional bulk” of EU law,⁷⁴ composed by the founding Treaties (primary law), its protocols, the Charter of Fundamental Rights and the European Convention of Human Rights (below “ECHR”). Below are all international sources such as international agreements,⁷⁵ decisions of international organizations and international customary law. And finally, under it is secondary EU law which comprises regulations, directives and decisions.⁷⁶ Establishing at which level is situated the CRPD is also important for its implementation and monitoring.

II. Consequences for the implementation of the CRPD by the Union

a. The CRPD in EU legal system

Under the hierarchy of norms in EU law the CRPD would be situated below the constitutional bulk of EU law but would be superior to secondary law. Yet, Ferri brought the interesting argument that the Convention may also be seen as part of primary law. Indeed, according to the scholar the Convention is a human rights convention that represents a clarification of rights already conferred in pre-existing international treaties, notably part of primary law (i.e. the Charter, the ECHR and the constitutional traditions of the Member States).⁷⁷ Moreover, she recalls the fact that the Convention is based on the concept of equality and non-discrimination which are fundamental principles firmly embedded in EU law and in the constitutions of its Member States. Consequently, the CRPD could be seen as an application

⁷³ See judgment in *Van Gend en Loos v Administratie der Belastingen*. The obligations derived from EU law and invoked by individuals must notably be clear, precise and unconditional and must not call for any additional measures in national or European orders.

⁷⁴ Ferri (2010), p 64.

⁷⁵ Including mixed-agreements according the decisions by the Court of Justice of the European Union in C-239/03, *Commission of the European Community v French Republic*, [2004] ECR I-9325.

⁷⁶ Ferri (2010), p 64.

⁷⁷ *Ibid*, p 64-65. Note that Ferri was also inspired by the concept of ‘composite constitution’ envisaged by Besselink which refers to “a constitution whose component part mutually assume one another’s existence, both *de facto* and *de jure*”. See, L. Besselink, *A Composite European Constitution/Een Samengestelde Europese Constitutie*, (Europa Law Publishing, 2007).

of these concepts as well as an interpretation of Article 26 of the Charter which deals with disability.

However, although this argumentation is partly accurate, it is doubtful that the European Court of Justice would adopt it. Indeed, the same could be argued for many other instruments that comes as an extension or clarification of primary law. Moreover, if the Court would follow this view, it may have to proceed article by article to see to which extent each of them would actually refer to primary law and the constitutional traditions of the Member States. It is thus unlikely that the CRPD would actually be part of primary law. In any case, the Convention is situated above secondary law, meaning that all EU secondary law must respect the rights and obligations provided by the Convention.

b. The competences of the European Union

As was discussed above, the EU is bound by the Convention only for the parts falling within its competence. Waddington discussed the issue particularly in depth in the light of the list of competences found in the TFEU, the Declaration of Competence and the Code of Conduct. Whilst the Declaration of Competence indicates to third countries the distribution of competence of the EU, the Code of Conduct deals with the internal arrangement for implementation by, and representation of, the EU relating to the Convention with four articles addressing the division of task based on competence.⁷⁸ However, as reminded by Waddington these two instruments represent the view of the Commission and were not subject to external review or control of any sort.⁷⁹ More, we deliberately focus on the internal competence of the Union and not its external representation.

The Declaration identifies very few areas falling within the exclusive competence of the Union in comparison with the long list of areas that are shared between the EU and its Members States. Three areas are part of the exclusive competence of the Union: the compatibility of State aid with the common market; the Common Customs Tariffs; and obligations with respect to the Union's own public administration to the extent that provisions of EU law are affected by the provision of the Convention.⁸⁰ As far as shared competence are concerned, the Declaration refers to combatting discrimination on the ground of disability; free

⁷⁸ Waddington (2011), p 439-441.

⁷⁹ Ibid, p 441-442.

⁸⁰ Declaration of Competence, Article 1.

movement of goods, persons, services and capital; agriculture; transport by rail, road, sea and air transport; taxation; internal market; equal pay for male and female workers; trans-European network policy; and statistics.⁸¹ Moreover, in some circumstances matters that are initially shared competences may become exclusive competence “where the Convention affects existing – or presumably new – EU provisions that establish ‘common rules’, from which the Member States cannot deviate”.⁸² This *transfer* of competence is stated clearly in the Declaration⁸³ as well as in the last part of Article 3(2) TFEU.⁸⁴ Finally, some EU policies are seen as supporting competence of the Union. The Declaration mentions policies related to the development of a coordinated strategy for employment; development of quality education; a vocational training policy; development cooperation policy and economic and social cohesion; and cooperation with third countries.⁸⁵

The Declaration of Competence lists in its appendix ‘Community Acts which refer to matters governed by the Convention’, divided according to six fields of the CRPD (accessibility; independent living and social inclusion, work and employment; personal mobility; access to information; statistics and data collection; and international cooperation). To one extent this lists give an overview of concrete EU legal instruments under the competence of the Union mentioning disability. Yet, on the other hand it can be misleading as mentioned by Waddington. Indeed, the Declaration only listed the acts precisely mentioning disability and kept silent about one that omitted to do so. She warned that this may lead to the perception that there is no disability-related competence in some fields whereas the EU actually has the competence to act on them.⁸⁶ The Committee is aware of this issue as it recommended the Union to “regularly update the declaration of competence and its list of instruments to include recently adopted instruments and instruments that may not specifically refer to persons

⁸¹ Declaration of Competence, Article 2.

⁸² Waddington (2011), p 445.

⁸³ Declaration of Competence, Article 2 second paragraph.

⁸⁴ Article 3(2) TFEU specifies that “The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope”. For more details on the notion of ‘common rules’ and ‘minimum standards’ in the context of the CRPD see Waddington (2011), p 445-446.

⁸⁵ Declaration of Competence, Article 3.

⁸⁶ Waddington (2011), p 445.

with disabilities, but that are relevant to persons with disabilities”.⁸⁷ Yet, so far no update has been made.⁸⁸

c. The question of direct effect

The question of the direct effect of the CRPD is important to determine to which extent individuals may actually rely directly on the Convention. As Ferri noted in her article, the Court of Justice hold that to be able to judge of the compatibility of EU measures with an international treaty, the provisions invoked in the latter must have direct effect.⁸⁹ Yet, although the CRPD clarifies the rights of persons with disabilities, it does not comply with the conditions necessary to give its provisions direct effect which are to be clear, precise and unconditional and not require for additional measures to be implemented. Indeed, as said previously, these provisions are broad in order to give States Parties a margin of action and most obligations require the adoption additional measures to be implemented.

In few instances however, the Court of Justice recognized that it does not require direct effect to invoke the provision of an international treaty.⁹⁰ This is the case when the Union act is intended to implement a particular obligation arising from an international agreement⁹¹ or when it expressly refers to a specific provision of an international agreement which is to be used when interpreting the act.⁹² Moreover, it has also stated that EU secondary law and national measures of implementation have to be interpreted in accordance with the international

⁸⁷ Concluding observations to the initial report of the European Union / UN Committee on the Rights of Persons with Disabilities. CRPD/C/EU/CO/1. 2.10.2015, points 16 and 17.

⁸⁸ However, the European Parliament recently asked the Commission to provide a list of legislation with a view to proposing an update of the declaration of competence. See, European Parliament resolution of 7 July 2016 on the implementation of the UN Convention of the Rights of Persons with Disabilities, with special regard to the Concluding Observations of the UN CRPD Committee, (2015/2258(INI)), point 18.

⁸⁹ Ferri (2010), p 66. See also Joined Cases 21 to 24/72, *International Fruit Company NV and others v Produktschap voor Groeten en Fruit*, [1972] ECR 1219. The Court said regarding the provisions of the GATT that “before the incompatibility of a Community measure with a provision of international law can affect the validity of that measure, the Community must first of all be bound by that provision. Before invalidity can be relied upon before national court, that provision of international law must also be capable of conferring rights on citizens of the Community which they can invoke before the courts”.

⁹⁰ Ferri (2010), p 66, see footnote 68.

⁹¹ Case C-69/89, *Nakajima All Precision Co. Ltd v Council of the European Communities*, [1991] ECR I-2069.

⁹² Case C-70/87, *Fediol v Commission*, [1989] ECR 1781.

agreements ratified.⁹³ This is a direct consequence of the principle of primacy of EU law and of the hierarchy of norm mentioned earlier. As international agreements, including the CRPD, are situated above EU secondary law, the latter must comply with their provisions.

Consequently, as the CRPD cannot be interpreted as having direct effect individuals cannot directly rely on its provisions before the Court of Justice. As the EU also did not ratify the additional Protocol, they cannot as well turn to the Committee if the EU fail to fulfil its obligations. In spite of this, EU secondary law is still bound to respect the Convention and the Court of Justice may operate a control-check on its own initiative.⁹⁴

Chapter 5: Benefits of the ratification for persons with disabilities

In practice, in the light of the principles of EU law and development since 2010, the ratification of the CRPD brought significant benefits for persons with disabilities. It uniformized disability law both at EU and national levels, created a more coherent and comprehensive disability policy, and offered a, yet limited, but still additional way to monitor implementation.

I. Uniformization of disability law

The ratification of the CRPD had an important influence on disability rights in the EU. Although the EU participated to the negotiation preliminary to the adoption of the Convention and had the opportunity to promote its interpretation (for instance regarding the concept of reasonable accommodation), not all its previous views on disability rights were in line with the way disability rights were recognized at the international level. In this way, the ratification led to an uniformization of disability rights and laws at the different international, EU and national levels.

The ratification in particular required legal reforms in the Union that resulted in a greater uniformity in its Member States. Indeed, the EU, under its areas of competences adopts

⁹³ Case C-53-96, *Hermes International v FHT Marketing Choice BV*, [1998] ECR I-3603.

⁹⁴ See Part 2, Chapter 4(III).

legal measures such as regulations and directives, that are either directly applicable in all Member States (regulations) or that have to be implemented in national legal systems (directives).⁹⁵ Consequently, persons with disability does not only receive a better protection by both the EU and the Member States since the ratification of the CRPD, they also enjoys a more uniform protection. Indeed, the European Union should avoid different levels of protection from one Member State to the other, and guarantee a “truly barrier-free Europe”.⁹⁶ This would also ensure a similar interpretation of disability principles throughout the Union.

An important example of such uniformization is the modification of the interpretation of the concept of disability adopted by the Court of Justice of the European Union after the ratification of the CRPD. In the past, the Court had adopted an interpretation of disability based on the medical model. In a decision of 2006, the Court stated that the concept of “disability” within the Employment Equality Directive referred to a limitation resulting in particular from physical, mental or psychological impairments which hinders the participation in professional life. Using this interpretation, it made a distinction between the concept of ‘disability’ and sickness’.⁹⁷ This approach was however not in line with the CRPD which, on the opposite, is based on the social model of disability.⁹⁸ Subsequently, the Court moved away from its previous decision. In 2013, basing its decision on the primary of international agreement and pointing out the adoption of the CRPD, the judges of Luxembourg adopted the social model of disability that provides an “inclusive, non-exhaustive list of impairments, which when combined with societal barriers, can constitute disability”.⁹⁹ The Court of Justice, to justify this decision, notably underlined that the Directive had to be “as far as possible, interpreted in a manner consistent [with the CRPD]”.¹⁰⁰ Hence, the definition of disability was uniformised between EU law and international law. Concretely, it ended up recognizing that the cases of two woman dismissed from employment once they returned from work following a period of sick leave was falling within the scope of the Employment Equality Directive.

⁹⁵ Article 288 TFEU on the legal acts of the EU.

⁹⁶ That is the goal set in the Disability Strategy for 2010-2020. See, European Commission Vice-President Reding, Press Release, *Creating a barrier-free Europe: European Commission seeks better access for 80 millions persons with disabilities*, 15 November 2010.

⁹⁷ Case C-13/05, *Sonia Chacon Navas v Eurest Colectividades SA*, [2006] ECR I-6467.

⁹⁸ See Article 2 CRPD and Chapter 2, Part II(1) of the thesis.

⁹⁹ Cases C-335/11 and C-337/11, *Ring and Skouboe Werger*, [2013] (not yet published).

¹⁰⁰ *Ibid*, paragraph 32.

This ruling is significant and relevant not only to employment cases but to all secondary law affecting persons with disability as it clearly recognises the primacy of international agreement (i.e. the CRPD) over secondary EU law. It ensures that EU law is on the same line with disability rights as interpreted by international law. The ratification of the CRPD thus truly constitutes a step forward and had concrete consequences.

II. Development of a more coherent and comprehensive disability policy

The commitment of the EU to the CRPD also led to the adoption of a more coherent and comprehensive disability policy. In order to fulfil its obligations under the Convention, the Union adopted the EU's Disability Strategy for 2010-2020.¹⁰¹ As noted by Ferri, the ratification by the CRPD by the EU implied that it had assumed an obligation under international law to “do something more”,¹⁰² in comparison with the other action plans it adopted in the past.¹⁰³ The ratification of the CRPD deepened and offered a more comprehensive disability policy in the European Union. Moreover, because the implementation lies on its competence, the coherence of the policy became also extremely important. As noted by Vice-President Reding, the Strategy adopted and based on the Convention focuses on the empowerment of persons with disabilities and aims at helping to implement the CRPD at both EU and national level, notably by complementing and supporting action by the Member States.¹⁰⁴

The Union and the Member States have to work hand-in-hands to offer a full protection of disability rights. The ratification of the CRPD also led the Union to increase its support to Member States but also to add incentives based on disability rights. This may be illustrated in the funding allocated by the Union. The European Union Agency for Fundamental Rights (FRA) noted that the European Structural and Investment Funds constitute important source of funding for measures promoting independent living and inclusion in the community. It emphasized that the regulation governing the disbursement of structural funds for 2014-2020 remarkably includes several *ex-ante* conditionality, referring to the CRPD, to be fulfilled

¹⁰¹ European Commission (2010), *European Disability Strategy 2010-2020: A renewed commitment to a barrier-free Europe*, COM (2010) 636 final, Brussels, 15 November 2010.

¹⁰² Ferri (2010), p 70.

¹⁰³ See Chapter 2, Part I, on disability rights in the European Union before the ratification of the CRPD.

¹⁰⁴ European Commission Vice-President Reding, Press Release, *EU ratifies UN convention on disability rights*, 5 January 2011.

before funds are allocated.¹⁰⁵ Moreover, in relation to the implementation of directives, especially the Employment Equality Directive, the Commission provided funding in the training of judges and legal practitioners in order to promote the correct application of secondary EU law.¹⁰⁶ While the influence of the CRPD can only be speculated, it does in any case participate to the fulfilment of its obligation under the Convention.¹⁰⁷

Additionally, the CRPD has definitely brought a new human rights perspective in the policy-making arena. Hoefmans noted that the adoption of the Convention merges two previously distinct fields of law and policy-making in the EU.¹⁰⁸ Before the ratification of the Convention, disability and policy-making and fundamental rights and policy making were distinct fields. With the adoption of the Convention, human rights, disability rights and policy-making had to be merged in order to comply with its provisions. Although this aspect is less tangible for persons with disability, it also participates in the development of a comprehensive disability law both in EU and national levels.

III. Sanction of incoherent national law: the monitoring role of the Commission

A final and important advantage of the ratification of the CRPD is the (limited) judicial control that may be operated by the Commission to monitor national implementation by Member States. Although the Convention created a monitoring mechanism with periodical review of States Parties and a communication procedure for States having ratified the Additional Protocol, these mechanisms are not judicial *per se*. They result in ‘observations’

¹⁰⁵ FRA, Implementing the United Nations Convention on the Rights of Persons with Disabilities: An overview of legal reforms in EU Member States, 05/2015, 12. See in particular, Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, L347/455.

¹⁰⁶ European Commission (2014), Joint report 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, Brussels, 17 January 2014, 4.

¹⁰⁷ For instance, Article 13(2) on access to justice requires the promotion of appropriate training for people working in the field of administration of justice.

¹⁰⁸ Hoefmans, p 36.

and ‘recommendations’ addressed to States but have no legal force and cannot be enforced. Their effect depends entirely on the willingness of State Parties to take them into consideration.

With the ratification by the EU, albeit persons with disabilities cannot directly invoke their rights under the CRPD before the Court of Justice, the latter may control the way Member State actually implement EU law based on the Convention, and sanction their negligence or incorrect implementation. Indeed, while the EU has to enforce and protect disability rights that fall under its competence, possibly by adopting EU legal measures, Member States may have to transpose them in their national legal system (i.e. in the case of directives).¹⁰⁹ In this circumstance, the European Commission acting as ‘guardian of the treaties’ has the power to launch infringement procedures¹¹⁰ when it deems that a Member State has incorrectly transposed the EU measure into its national law.¹¹¹ In a case of 2013,¹¹² the Commission brought an infringement procedure against Italy in which the Court of Justice found the State in breach of its obligation to properly implement Directive 2000/78/EC in relation to reasonable accommodation for disabled persons in employment.¹¹³ Moreover, the Commission may also take further action when a Member States fails to comply with a judgment of the Court of Justice, such as a fine in the form of a penalty payment or a lump sum payment.¹¹⁴

Hence, it can be said that the Commission adopts an additional monitoring role in the implementation and respect of the CRPD. However, this role is limited to the incorrect transposition or application of EU directives in national law and the decision to bring an action is at the discretion of the Commission itself. The Commission do not and cannot deal with individual cases of discrimination that are expected to be examined by national courts.¹¹⁵

¹⁰⁹ Article 288 TFEU.

¹¹⁰ Article 258 TFEU.

¹¹¹ FRA, *Implementing the United Nations Convention on the Rights of Persons with Disabilities: An overview of legal reforms in EU Member States*, 05/2015, 12.

¹¹² Case C-312/11 *Commission v Italy*, [2013] (not yet published).

¹¹³ European Commission (2014), *Joint report 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, Brussels, 17 January 2014, 3.

¹¹⁴ Article 260 TFEU.

¹¹⁵ European Commission (2014), *Joint report* (n 113 above).

Despite these limitations, it is nonetheless an important advantage because as far as the areas are under the Union competence, it actually enhances the monitoring of the CRPD.

Chapter 6: Shortcomings

Although the ratification of the CRPD was mostly beneficial, some shortcomings still limit a broader achievement in the protection of disability rights. Most of these shortcomings have been emphasized by the Committee on the Rights of Persons with Disabilities when it examined the initial report of the EU in 2015.¹¹⁶ Two shortcomings appear as fundamental in the protection of disabled people and should be urgently addressed.

The first shortcoming lies in the lack of a horizontal mainstreaming instrument as well as the lack of a genuine harmonizing policy. Ferri noted in 2010 the need to create a new all encompassing instrument as before the ratification of the CRPD only discrimination based on disability was only prohibited in the workplace.¹¹⁷ Yet, so far the Union has not adopted any horizontal directive that would cover discrimination on the ground of disability in all its areas of competence. Despite the proposal a general Equal Treatment Directive covering also other grounds of discrimination, the adoption of such instrument has not yet taken place.¹¹⁸ Although Waddington considered that the Union may not have under the CRPD an legal obligation adopt a new directive addressing disability discrimination beyond employment,¹¹⁹ the Committee noted in its 2015 concluding observation the lack of a comprehensive EU instrument explicitly prohibiting discrimination on the ground of disability and providing reasonable accommodation “in the areas of social protection, health care, (re)habilitation, education and the provision of goods and services, such as housing, transport and insurance”. It thus recommended the EU to adopt its proposed horizontal directive on equal treatment.¹²⁰ Moreover, concerning international cooperation it also noted the need of a “harmonized policy

¹¹⁶ Concluding observations to the initial report of the European Union / UN Committee on the Rights of Persons with Disabilities. CRPD/C/EU/CO/1. 2.10.2015.

¹¹⁷ Ferri (2010), p 70.

¹¹⁸ COM (2008) 426: Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

¹¹⁹ Waddington (2011), p 447-448.

¹²⁰ Concluding observation, points 18 and 19.

on disability-inclusive development” and of the establishment of a “systematic approach to mainstream the rights of persons with disabilities in all EU international cooperation policies and programmes”.¹²¹ Consequently, in spite of its prior effort, the Union still have to increase its harmonization in the protection of disability rights as stated in the Convention.

The second shortcoming is the absence of direct access for persons with disability seeking judicial remedy. In fact, as stated previously, individuals do not have the possibility to directly invoke the provisions of the CRPD in front of the EU judges as such provision do not have direct effect.¹²² Likewise, it may also be mostly the case in front of national judges as most jurisdiction require implementation of international instruments in national law.¹²³ In addition, as the EU did not ratify the Optional Protocol, the Committee cannot receive communication from individuals. Consequently, persons with disability have great difficulty to claim their rights. The Committee called the EU to ratify the Optional Protocol to at least grant individuals the possibility to claim a violation of the Convention by the EU.¹²⁴ The Union seems to go in this way as the Action Plan on Human Rights and Democracy 2015-2019 foresees the accession to the Protocol “as one of the measures to be taken to achieve its objective 12 ‘Cultivating an environment of non-discrimination’”.¹²⁵ If the Union both ensure a good implementation of the Convention, while as well ratifying the Optional Protocol, persons with disabilities would see their rights better protected as the access to justice is quite limited.¹²⁶

¹²¹ Concluding observations, point 75.

¹²² Part 2, Chapter 3(II)(c).

¹²³ According to the monist system of law national and international legal systems are unified and international law does not need to be translated in the national legal system as it is directly applicable. On the other hand, the dualist system requires a translation of international law for it to be recognized and applicable in the domestic legal system.

¹²⁴ Concluding observations, points 6 and 7.

¹²⁵ European Parliament, EU Implementation of the UN Convention of the Rights of Persons with Disabilities – European Implementation Assessment, available at [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/536347/EPRS_IDA\(2016\)536347_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/536347/EPRS_IDA(2016)536347_EN.pdf); Action Plan on Human Rights and Democracy (2015-2019) 'Keeping human rights at the heart of the EU agenda'. Joint communication by the European Commission and the EU High Representative for Foreign Affairs and Security Policy to the European Parliament and the Council. JOIN(2015) 16 final of 28.4.2015, p. 11.

¹²⁶ As developed previously, direct effect in the European Union depends on strict conditions and infringements procedures are at the discretion of the Commission.

Finally, another point which may be to some extent a shortcoming for persons with disabilities is the risk of a focus on an economic rhetoric instead of human rights purposes. On one hand, economic aspects cannot and should not be ignored as they are a good incentive for action by both the EU and its Member States. The protection of disability rights has favorable economic impacts. Vice-President Reding was not shy to recognize it, noting that “breaking down barriers is not only a societal task, but it can also create new market opportunities”. He took the examples of a British study that showed that by investing £35 000 in making their website accessible, a supermarket brought an additional revenue of over £13 million a year and a German study that found that creating more accessible facilities would increase travel by persons with disabilities, generating a revenue of between €620 million and €1.9 billion for the German tourism industry.¹²⁷ While those figures are not negligible and show the importance of the inclusion people with disabilities, they may jeopardize rights that are less or not profitable. Hoefmans noted that in practice the Union still bases much of its action according to its economic objective instead of being human rights centered. He noted as an example the Disability Strategy which “part of legitimacy still lies with the realization of the economic objectives of the Union”.¹²⁸ In the long term, it may be an important issue if the Union actually focuses only on what it considers lucrative and does not legislate on other areas relevant for persons with disabilities.

¹²⁷ European Commission Vice-President Reding, Press Release, *Creating a barrier-free Europe: European Commission seeks better access for 80 millions persons with disabilities*, 15 November 2010.

¹²⁸ Hoefmans (2012), 38 and 55. See also, M. Daly, ‘EU Social Policy after Lisbon’, 44 *Journal of Common Market Studies* 3 (2006), 461-481; E. Marlier, A. B. Atkinson, B. Cantillon and B. Nolan, *The EU and Social Inclusion. Facing the Challenges* (The Policy Press, 2007), 307.

PART 4: CONCLUSION

Chapter 7: Conclusive reflections on EU ratification

I. The positive effects of the accession of the CRPD for persons with disabilities

The accession of the CRPD by the EU went far beyond being simply symbolic. From the moment the Union ratified the Convention it became bound by it in the same way as the other States Parties for all matter falling under its competence. Hence, in order to comply with its obligations, it had to take active measures to protect the rights of disabled individuals. The impact of the CRPD is particularly significant in term of human rights protection and monitoring. It had a positive influence in the EU as it exceeded the sole protection of the internal market and also generated real benefits for persons with disabilities. The ratification strived for a more coherent and comprehensive harmonization of disability rights in the Union and its Member States through the adoptions of legal instruments and policies. Without the accession of the Union, such harmonization would not be possible. Moreover, the Commission has the power to play an additional monitoring role by bringing infringement procedures against Member States that incorrectly implement EU measures derived from the CRPD. Unfortunately, despite this monitoring role, persons with disabilities still lack access to judicial remedy when the Union or Member States acting within the scope of EU law fail to comply with the CRPD.

That being said, it is important to keep in mind that it is the first time the EU ratified an international human rights treaties and that positive developments may be expected, especially since the Committee examined the initial report of the EU and published its concluding observations. The European Parliament seems to go this way in its resolution of 7 July 2016 on the implementation of the CRPD following the concluding observation of the Committee.¹²⁹

¹²⁹ European Parliament resolution of 7 July 2016 on the implementation of the UN Convention of the Rights of Persons with Disabilities, with special regard to the Concluding Observations of the UN CRPD Committee, (2015/2258(INI)).

II. The accession by the EU to other international human rights instruments

In a broad sense, the EU definitely has a role to play in the protection and implementation of human rights standards. From the moment the Union extended its role to cover fundamental rights, it was expected that international standards would take an increasing importance. Since the Treaty of Lisbon, the EU has in particular committed itself to accede the European Convention of Human Rights and recognized that the fundamental rights guaranteed and resulting from the constitutional traditions common to the Member States constitute general principles of Union's law.¹³⁰ In practice, the accession to the ECHR revealed itself difficult, especially as the Court of Justice expressed in an opinion delivered in December 2014 that the draft accession agreement between the EU and the Council of Europe was in breach with EU law. It stated in particular that it would affect the supremacy of the Court of the Union by giving to the European Court of Human Rights the power to examine cases that were previously under its jurisdiction.¹³¹ The EU is thus currently tied up between its obligation under the Treaty of Lisbon and the previous rejection of the agreement by the Court of Justice.

On the other hand, it would also be beneficial that the EU ratifies the other international human rights treaties although it has no obligation to do so. Such ratification would not be as controversial because it does not deprive the Court of Justice of part of its jurisdiction. Still, a potential issue is that contrary to the CRPD the previous core international human rights instruments do not contain a specific provision allowing signature and ratification by non-State actors. One may thus wonder whether such ratification would be possible. If so, it would deepen, harmonized and generally offer a greater human rights protection within the EU. Harmonization is particularly important as far as human rights are concerned and ensuring that the Union and its Member States act under the same international principles is beneficial for both the internal market and individuals.

¹³⁰ Article 6(2) and (3) TEU. See also, Protocol No 8 relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

¹³¹ Opinion 2/13, Accession to the ECHR (Full Court, 18 December 2014). See also the view of Advocate General Kokott delivered on 13 July 2014 that contradicts the Court opinion. The Advocate General considered that the agreement was compatible to EU law and that only minor modifications or additions were necessary.

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