

# *The European Union*

## Federal Trends in Disability Rights

DELIA FERRI AND NEŽA ŠUBIĆ\*

### I. INTRODUCTION

THE UNITED NATIONS (UN) Convention on the Rights of Persons with Disabilities (CRPD) aims to ensure that persons with disabilities can participate on an equal basis with others in all areas of life. It covers a broad spectrum of rights, which partly fall within the remit of European Union (EU) competence and partly within that of the Member States. The CRPD has been ratified by both the EU, by means of Council Decision 2010/48/EC of 26 November 2009,<sup>1</sup> and all its Member States. From an EU legal perspective, the CRPD has become an integral part of EU law and, accordingly, provisions of EU secondary law must, as far as possible, be interpreted in a manner that is consistent with the Convention.<sup>2</sup> Even though the CRPD is hierarchically superior to secondary legislation, this does not automatically make EU provisions breaching the Convention invalid. The validity of EU secondary law can only be assessed vis-à-vis an international provision if the latter is capable of displaying direct effect: in *Z v A Government Department*, the Court of Justice of the European Union (CJEU) held that ‘the provisions of [the] Convention are not, as regards their content, provisions that are unconditional and sufficiently precise ... and that they therefore do not have direct effect in [EU] law’.<sup>3</sup>

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<sup>1</sup>Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ L23/25.

<sup>2</sup>Joined Cases C-335/11 and C-337/11 *HK Danmark* ECLI:EU:C:2013:222, para 32.

<sup>3</sup>Case C-363/12 *Z v A Government Department* ECLI:EU:C:2014:159, para 90.

Being a mixed agreement, which both the EU and its Member States are a party to,<sup>4</sup> the CRPD must be implemented ensuring close mutual cooperation.<sup>5</sup> However, mixity is both legally challenging and politically sensitive in light of the *sui generis* quasi-federal nature of the EU system.<sup>6</sup> While the EU's accession to the CRPD has been heralded as a historical advance in protection of disability rights,<sup>7</sup> little has been said on whether the burgeoning of disability legislation and policy at the EU level has provoked a progressive erosion of Member States' competences. This chapter addresses this gap in the literature and interrogates the extent to which the implementation of the CRPD has affected the division of powers between the EU and its Member States. Echoing Lenaerts' words,<sup>8</sup> it investigates the balance 'between unity and diversity' in the EU. This chapter uses federalism as a lens of enquiry, acknowledging that while federalisation can often be 'seen as an instrument for recognising and accommodating, rather than transcending, national diversity', when it comes to the EU, it 'appears to signify more unity, uniformity and (formal) equality throughout the Union, at the expense of the autonomous powers of its territorial subdivisions (i.e. the Member States)'.<sup>9</sup>

Further to these introductory remarks, section II examines the legal nature of the EU and its federal elements. It also gives an overview of the division of competences related to disability, in light of the EU's Declaration of Competence annexed to the Council Decision on the conclusion of the CRPD.<sup>10</sup> Section III goes on to discuss the 'Europeanisation' of the concept of disability, while section IV focuses on the three main areas identified by the overall volume: equality, accessibility and participation. It first addresses the role of the EU in protecting persons with disabilities from discriminatory treatment. It then explores the importance of Article 114 of the Treaty on the Functioning of the European Union (TFEU) in supporting the adoption of accessibility legislation. Finally, it examines the extent to which the EU has used its supporting competences to enhance participation of persons with disabilities in society. Section V

<sup>4</sup> M Chamon, 'Negotiation, Ratification and Implementation of the CRPD and its Status in the EU Legal Order' in D Ferri and A Broderick (eds), *Research Handbook on EU Disability Law* (Edward Elgar, 2020).

<sup>5</sup> Opinion 1/94 ECLI:EU:C:1994:384, para 108.

<sup>6</sup> D Ferri, F Palermo and G Martinico, 'Introduction: Conceptual and Methodological Approaches', in this volume.

<sup>7</sup> D Ferri and A Broderick, 'Introduction to the Research Handbook on EU Disability Law' in Ferri and Broderick (n 4) 1.

<sup>8</sup> K Lenaerts, 'EU Federalism in 3-D' in E Cloots, G De Baere and S Sottiaux (eds), *Federalism in the European Union* (Hart Publishing, 2012).

<sup>9</sup> E Cloots, G De Baere and S Sottiaux, 'Introduction: Federalism's Janus Face' in Cloots, Baere and Sottiaux (n 8).

<sup>10</sup> A Code of Conduct, which sets out the division of tasks between the EU and the Member States based on competence, was also agreed in 2010. Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ C340/11.

looks at the implementation of Article 33 CRPD at the EU level, discussing the ostensible lack of coordination with Member States in that regard. Section VI provides some concluding remarks.

## II. THE *SUI GENERIS* QUASI-FEDERAL NATURE OF THE EUROPEAN UNION AND ITS CROSS-CUTTING COMPETENCES ON DISABILITY

### A. The Legal Nature of the EU

This chapter (and indeed the whole volume) is premised on the, still contested,<sup>11</sup> idea of the EU as a constitutional quasi-federal entity.<sup>12</sup> The concept of a ‘Constitution’ proved to be too controversial to be explicitly mentioned in the Treaties.<sup>13</sup> However, the Treaties and the Charter of Fundamental Rights (CFR) are in fact deemed to be the EU’s Constitution, as the CJEU recalled in *Wightman*,<sup>14</sup> recasting the classic *Les Verts*.<sup>15</sup> Even before the 1990s, scholarship referred to the European constitutionalisation process, or to the EU as a constitutional entity.<sup>16</sup> According to von Bogdandy, the Treaties ‘constitutional character manifests itself especially clearly in the founding principles’.<sup>17</sup> Constitutional readings of the EU, while being varied, concur in denying the state-like nature of the EU. In that connection, several authors agree that the EU is not and will not become a federal state.<sup>18</sup> However, as indicated in the introduction to this volume, federalism entails ‘a set of measures and instruments that balance unity and diversity, autonomy and integration, self-rule and shared rule’, and is thus not necessarily wedded to statehood. In that regard, it has been highlighted that the EU possesses both elements of a federation and others of a confederation.<sup>19</sup> Federal elements are present in the legal principles

<sup>11</sup> D Marco and JM Agustin, ‘European Constitutional Imagination: A Whig Interpretation of the Process of European Integration?’ (2021) 243 *iCourts Working Paper Series*.

<sup>12</sup> F Palermo, ‘What Does The EU Tell Us About Federalism?’ 50 *Shades of Federalism* (2019).

<sup>13</sup> NW Barber, M Cahill and R Ekins (eds), *The Rise and Fall of the European Constitution* (Hart Publishing, 2019).

<sup>14</sup> Case C-621/18 *Wightman* ECLI:EU:C:2018:999, para 44.

<sup>15</sup> Case 294/83 *Les Verts* ECLI:EU:C:1986:166, para 23.

<sup>16</sup> GF Mancini, ‘The Making of a Constitution for Europe’ (1989) 26 *Common Market Law Review* 595; G Martinico, *The Tangled Complexity of the EU Constitutional Process. The Frustrating Knot of Europe* (Routledge, 2012). For an earlier discussion, see E Stein, ‘Lawyers, Judges and the Making of a Transnational Constitution’ (1981) 75 *The American Journal of International Law* 1.

<sup>17</sup> A von Bogdandy, ‘Founding Principles’ in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law*, 2nd edn (Hart Publishing, 2010) 13.

<sup>18</sup> F Palermo and K Kössler, *Comparative Federalism. Constitutional Arrangements and Case Law* (Hart Publishing, 2017) 62. This did not prevent scholars from using federal language in relation to the EU, see G Martinico, ‘The Federal Language and the European Integration Process: the European Communities Viewed from the US’ (2016) 53 *Politique européenne* 38.

<sup>19</sup> Palermo and Kössler (n 18) 64; R Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press, 2009).

underpinning the EU's constitutional structure,<sup>20</sup> as well as in its institutional set up and in some foundational principles of EU law. Those elements juxtapose with significant 'non-federal' characteristics,<sup>21</sup> such as the general reliance on the Member States to implement and enforce EU law, a lack of power to levy taxes, and a blurred European identity.<sup>22</sup> However, as Burgess notes, '[i]f we are to understand the contemporary EU as a federal model, it is vital that we are sensitised to the peculiarities and idiosyncrasies of European integration'.<sup>23</sup>

As early as in 1963, the CJEU declared in *Van Gend en Loos* that the EU 'constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals'.<sup>24</sup> This led the CJEU to find that EU law can have direct effect in the legal systems of Member States, and, in another seminal case, *Costa v Enel*, that EU law prevails over national law (principle of primacy).<sup>25</sup> While these two principles are still not explicitly set out in the Treaties, they are – at least from the perspective of EU law<sup>26</sup> – firmly embedded in the EU's constitutional structure. In addition to these principles, many other 'federal'-like principles are now contained in the Treaties, in particular the principle of loyal cooperation,<sup>27</sup> and the principles of conferral,<sup>28</sup> subsidiarity and proportionality,<sup>29</sup> but also of pre-emption and implied powers.

<sup>20</sup> A von Bogdandy, 'Neither an International Organization Nor A Nation State: The EU as a Supranational Federation' in E Jones, A Menon and S Weatherill (eds), *The Oxford Handbook of the European Union* (Oxford University Press, 2012); JHH Weiler, 'Federalism without Constitutionalism: Europe's Sonderweg' in K Nicolaidis and R Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press, 2001) 55–56.

<sup>21</sup> Palermo and Kössler (n 18) 62.

<sup>22</sup> K Lenaerts, 'Federalism: Essential Concepts in Evolution – The Case of the European Union' (1997) 21 *Fordham International Law Journal* 746, 747; EA Young, 'A Comparative Perspective' in R Schütze and T Tridimas (eds), *Oxford Principles of European Law: Volume I* (Oxford University Press, 2018) 157–71. In this light, the EU has been considered as a multinational federation. H Dumont, 'The European Union, a Plurinational Federation in *Sensu Cosmopolitico*' in M Seymour and AG Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan, 2012).

<sup>23</sup> M Burgess, *Comparative Federalism: Theory and Practice* (Routledge, 2006) 227; S Rehling Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press, 2021).

<sup>24</sup> Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1. Emphasis added.

<sup>25</sup> Case 6/64 *Costa v Enel* ECLI:EU:C:1964:66.

<sup>26</sup> Admittedly, not all (highest) national courts accept the 'absolute' and 'unconditional primacy' of EU law over national constitutional law, but in practice conflicts arise very rarely. See M Claes, 'The Validity and Primacy of EU Law and the Cooperative Relationship between National Constitutional Courts and the Court of Justice of the European Union' (2016) 23 *Maastricht Journal of European and Comparative Law* 151.

<sup>27</sup> Art 4(3) Treaty on the European Union (TEU); K Lenaerts and JA Gutiérrez-Fons, 'A Constitutional Perspective' in Schütze and Tridimas (n 22) 118–20.

<sup>28</sup> *Ibid* 112.

<sup>29</sup> Art 5 TEU. Lenaerts, for example, notes that '[t]he constitutional embedding of the division of powers between the central authority and the component entity' is one of the 'main characteristics of federalism'. Lenaerts (n 22) 775.

In elaborating on the quasi-federal nature, scholars have argued that asymmetry is the cypher that characterises the EU. In that regard, Palermo notes that EU competences are often exercised by means of Directives that bind Member States in regard to the outcome but allow them to ‘tailor implementation to their specific situation, with this becoming an element of asymmetry’.<sup>30</sup> Other elements of asymmetry derive from systems such as enhanced cooperation, the mechanism of differentiated integration,<sup>31</sup> and soft law.

Alongside a discussion on the processes of constitutionalisation, federalisation and integration, scholars have also extensively elaborated on the phenomenon of Europeanisation. The latter term is used to refer to an array of phenomena that span from ‘the mutual influence of the EU and its member states, to interactions within and between member states driven by the EU, and to the effect of the EU on EU applicant states’,<sup>32</sup> but broadly address the deepening of the EU influence over domestic law.<sup>33</sup>

## B. The Division of Competences from a Disability Perspective

The Treaty on the European Union (TEU) explicates the values and objectives of the EU. It does not explicitly mention disability, but states in Article 2 that ‘[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and *respect for human rights*, including the rights of persons belonging to minorities’, and refers to a society in which ‘non-discrimination’ among other values prevails. Article 3(1) TEU affirms that the EU’s aim is ‘to promote peace, its values and the well-being of its peoples’. In addition, it lists a number of goals that the EU must pursue, including the long-standing market integration goal. Although these provisions do not confer competences to the EU, they require that the EU ensures the protection of fundamental rights and equality, when exercising its powers.<sup>34</sup> Further, Article 6 TEU provides for the protection of fundamental rights in the EU context, and confers to the CFR constitutional value. The CFR lists disability as one of the grounds on which discrimination must be prohibited, and affirms that ‘the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and

<sup>30</sup>F Palermo, ‘Federalism and the European Union: Asymmetry, Policies and some Recurring Federal Dilemmas’ in J Kincaid (ed), *A Research Agenda for Federalism Studies* (Edward Elgar, 2019) 198.

<sup>31</sup>G Martinico, ‘Asymmetry as an Instrument of Differentiated Integration: The Case of the European Union’ (2016) 18 *European Journal of Law Reform* 139.

<sup>32</sup>S Dosenrode, ‘Europeanization’ in F Laursen (ed), *Oxford Encyclopedia of European Union Politics* (Oxford University Press, 2021).

<sup>33</sup>See generally CM Radaelli, ‘The Europeanization of Public Policy’ in K Featherstone and CM Radaelli (eds), *The Politics of Europeanization* (Oxford University Press, 2003).

<sup>34</sup>E Howard, ‘EU Equality Law: Three Recent Developments’ (2011) 17 *European Law Journal* 785.

participation in the life of the community'.<sup>35</sup> The latter provision is intended to guide the EU institutions when they legislate, but it does not oblige them to act and is not directly enforceable.<sup>36</sup>

The TFEU distinguishes between three types of EU competences: exclusive, shared and supporting competences.<sup>37</sup> In areas of exclusive competence, the EU alone can legislate. Areas of exclusive competence comprise, among others, customs union, competition rules and monetary policy. In areas of shared competence, both the EU and its Member States are able to legislate, but Member States can exercise their own competence where the EU does not act or has decided not to exercise its competence. Fields of shared competence include the rules related to the internal market, but also social policy albeit with regard to limited aspects connected to the exercise of free movement rights. Where the EU has supporting competences, it can only intervene to support, coordinate or complement the action of its Member States, and EU legislation must not entail the harmonisation of national laws. Fields such as culture or health are included among the array of supporting competences.

Disability is not listed among areas of competence as such, but Article 19 TFEU confers upon the EU the competence to combat discrimination on the basis *inter alia* of disability. The TFEU also contains – in Article 10 – a horizontal provision, which supports the mainstreaming of non-discrimination within all EU policies and actions. Alongside Article 19 TFEU, as noted by Waddington, 'the full range of competences of both the EU and the Member States are engaged' in the context of the CRPD.<sup>38</sup> Chamon contends the following examples of areas of EU competence as relevant for the CRPD: social policy, research and development, internal market as cases of shared competences; and culture and education as cases of supporting competences.<sup>39</sup> Waddington points to transport and internal market as examples of areas in which legislative measures containing disability-specific references have been adopted.<sup>40</sup> Article 114 TFEU, which allows the EU to adopt approximating measures with the objective of 'the establishment and functioning of the internal market', has been an important legal basis for the adoption of disability-related legislation. Ferri and Broderick also highlight that disability issues span across the whole spectrum of EU competences and have been regulated within the remit of labour

<sup>35</sup> Art 26 Charter of Fundamental Rights (CFR).

<sup>36</sup> T Lock, 'Rights and Principles in the EU Charter of Fundamental Rights' (2019) 56 *Common Market Law Review* 1201.

<sup>37</sup> Arts 2–6 Treaty on the Functioning of the European Union (TFEU).

<sup>38</sup> L Waddington, 'The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences' (2011) 18 *Maastricht Journal of European and Comparative Law* 431, 438.

<sup>39</sup> Chamon (n 4) 55.

<sup>40</sup> Waddington (n 38) 434.

law, freedom of movement, transport, copyright law, accessibility of goods and services, standardisation, public procurement, public services, state aid, structural and investment funds, consumer law and asylum law.<sup>41</sup>

### **C. The Division of Competence between the EU and its Member States and the CRPD**

In the process of negotiation and ratification of the CRPD, the EU addressed the scope of its own competences to implement the CRPD at several junctures. The Council Decision concerning the conclusion of the CRPD sets out (only) Articles 13 EC (now Article 19 TFEU) and 95 EC (now Article 114 TFEU) as the legal bases for joining the CRPD.

In line with Article 44 CRPD, the EU submitted a Declaration of Competence in the form of an Annex to the Council Decision. This Declaration indicates the EU's competences in the areas covered by the CRPD. It lists State Aid and the Common Customs Tariff as relevant exclusive competences, as well as its own public administration.<sup>42</sup> It further notes combating discrimination on the ground of disability, free 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, as relevant shared competences.<sup>43</sup> However, in respect of those areas, to the extent that provisions of the CRPD or legal instruments adopted in its implementation affect EU common rules, the EU has exclusive competence.<sup>44</sup> On the other hand, when common rules exist but are not affected, the Member States retain competence to act. The latter instance seems, however, rather unlikely to occur. The CJEU (in particular in the context of ratification of international agreements) has tended to recognise that when EU rules have been adopted they are likely to be affected by international instruments and undermined by different implementing approaches at the national level.<sup>45</sup> Lastly, relating to supporting competences, the Declaration mentions EU policies and strategies on employment, education, vocational training, economic and social cohesion, and development cooperation policy and economic, financial and technical cooperation with third countries, as also potentially relevant to the CRPD.<sup>46</sup> An appendix listing pieces of EU legislation is attached with the intention to 'illustrate the extent of the area' of EU competence. Differently from the Declaration, the list of measures is not designed around the three categories

<sup>41</sup> Ferri and Broderick (n 7).

<sup>42</sup> Para 1 of Annex 2 to the Council Decision (n 1).

<sup>43</sup> *Ibid* para 2 of Annex 2.

<sup>44</sup> *Ibid*.

<sup>45</sup> Opinion 3/2015 ECLI:EU:C:2017:114.

<sup>46</sup> Para 3 of Annex 2 to the Council Decision (n 1).

of EU competence, but rather lists specific areas which correspond to (certain) CRPD provisions (ie, accessibility; independent living and social inclusion; work and employment; personal mobility; access to information; statistics and data collection; international cooperation),<sup>47</sup> and legislative measures adopted by the EU that are relevant to these areas.

The Declaration, as well as the attached list, have been considered rather ‘unhelpful’<sup>48</sup> both for the purpose of defining the scope of international responsibility (which is the aim of the Declaration), and for internal purposes (even though the Declaration is not intended for the EU and Member States).<sup>49</sup> Additionally, the comprehensiveness of the list has been questioned by scholars<sup>50</sup> and by the CRPD Committee in its Concluding Observations to the Initial Report of the EU, with repeated (yet unheeded) requests for an update of the Declaration.<sup>51</sup>

### III. THE PROGRESSIVE ‘EUROPEANISATION’ OF THE SOCIAL-CONTEXTUAL UNDERSTANDING OF DISABILITY

Disability-related provisions had been mainstreamed across different fields of EU legislation (eg, transport,<sup>52</sup> lifts,<sup>53</sup> public procurement,<sup>54</sup> electronic communications networks and services)<sup>55</sup> before the conclusion of the CRPD. However, none of these pieces of legislation explicitly engaged with the concept of disability. Only in 2005, in the infamous case of *Chacón Navas*,<sup>56</sup> did the CJEU attempt, for the first time, to define disability with reference to application of Directive 2000/78/EC of 27 November 2000 establishing

<sup>47</sup> Waddington (n 38) 443.

<sup>48</sup> Chamon (n 4) 61.

<sup>49</sup> Waddington (n 38) 443.

<sup>50</sup> Ibid 444; JW Reiss, ‘Innovative Governance in a Federal Europe: Implementing the Convention on the Rights of Persons with Disabilities’ (2014) 20 *European Law Journal* 107, 114.

<sup>51</sup> CRPD Committee, ‘Concluding Observations on the Initial Report of the European Union’ (2015) CRPD/C/EU/CO/1, paras 16–17.

<sup>52</sup> See eg Regulation 1899/2006 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation [2006] OJ L377/1; Directive 2006/87/EC laying down technical requirements for inland waterway vessels [2006] OJ L389/1; Regulation 1370/2007 on public passenger transport services by rail and by road [2007] OJ L315/1; Regulation 1371/2007 on rail passengers’ rights and obligations [2007] OJ L315/14; Regulation 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air [2006] OJ L204/1.

<sup>53</sup> Directive 95/16/EC on the approximation of the laws of the Member States relating to lifts [1995] OJ L213/1.

<sup>54</sup> Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L134/1; Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114.

<sup>55</sup> See eg Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive) [2002] OJ L108/51.

<sup>56</sup> Case C-13/05 *Chacón Navas* ECLI:EU:C:2006:456.



a general framework for equal treatment in employment and occupation (hereafter ‘Employment Equality Directive’).<sup>57</sup> The Luxembourg judges established that the concept of ‘disability’ must be ‘given an autonomous and uniform interpretation’ and that it is not possible to refer to the laws of the Member States.<sup>58</sup> They adopted a narrow interpretation of disability, based on the medical model, distinguishing the concept of sickness from that of disability.<sup>59</sup> Namely, the CJEU argued that ‘the concept of “disability” must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life’.<sup>60</sup> As noted by Waddington, the CJEU focused on the individual ‘impairment’, irrespective of the role played by environmental barriers. Quinn and Flynn suggested that the Court opted for a definition of disability inflicting the lowest financial burden on Member States in effecting that same definition.<sup>61</sup>

The numerous critical voices raised against the outdated medical approach to disability adopted in *Chacón Navas*<sup>62</sup> did not lead to any immediate overruling, nor to the adoption of a broader prescriptive definition of disability. A paramount ‘paradigm shift’<sup>63</sup> only occurred in 2013, when the Court released its decision in the *HK Danmark* case.<sup>64</sup> For the first time, the CJEU, interpreting the Employment Equality Directive in light of the CRPD, attempted to align the definition of disability to the social-contextual model of disability that underpins the Convention. It held that:

if a curable or incurable illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one, such an illness can be covered by the concept of ‘disability’ within the meaning of Directive 2000/78.<sup>65</sup>

In almost all subsequent decisions in the field of non-discrimination on the ground of disability and in connection with the interpretation of the Employment Equality Directive, the CJEU recalled the conceptualisation embedded in

<sup>57</sup> Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

<sup>58</sup> *Chacón Navas* (n 56) para 40.

<sup>59</sup> 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’ (2013) 4 *European Yearbook of Disability Law* 169.

<sup>60</sup> *Chacón Navas* (n 56) para 43. The same definition is included in Case C-303/06 *Coleman* ECLI:EU:C:2008:415.

<sup>61</sup> G Quinn and E Flynn, ‘Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability’ (2012) 60 *American Journal of Comparative Law* 23.

<sup>62</sup> Among others L Waddington, ‘Case C-13/05, *Chacón Navas v Eures Colectividades SA*, judgment of the Grand Chamber of 11 July 2006’ (2007) 44 *Common Market Law Review* 487.

<sup>63</sup> Opinion of AG Wahl in *Z v A Government Department* ECLI:EU:C:2013:604, para 88.

<sup>64</sup> *HK Danmark* (n 2).

<sup>65</sup> *Ibid* para 41.

Article 1(2) CRPD.<sup>66</sup> Outside the remit of the Employment Equality Directive, in *Glatzel*,<sup>67</sup> the CJEU also interpreted the reference to disability in Article 21 of the Charter in light and in compliance with the CRPD.<sup>68</sup>

The progressive embracement of a social-contextual model oriented view of disability by the CJEU (although more formal than substantial)<sup>69</sup> aligns with a similar trend detectable in policy documents – such as the European Disability Strategy 2010–2020 (EDS)<sup>70</sup> and the Strategy for the Rights of Persons with Disabilities 2021–2030 (Strategy 2021–2030)<sup>71</sup> – and in the overall EU policy discourse, with institutions and bodies referring to Article 1(2) CRPD in their work.<sup>72</sup> In that connection, we can identify a horizontal ‘Europeanisation’, meaning the diffusion of the social-contextual concept of disability among different actors at the European level and across different dimensions of the EU governance of disability.

EU legislation has also progressively embedded definitions of disability that reproduce, wholly or partially, Article 1(2) CRPD. In the 2014 General Block Exemption Regulation (GBER),<sup>73</sup> a definition of ‘workers with disabilities’ quotes almost verbatim the wording of the CRPD, albeit leaving the door open to different national definitions. The Web Accessibility Directive (WAD)<sup>74</sup> refers to the CRPD conceptualisation of disability in its non-binding preamble.<sup>75</sup> The European Accessibility Act (EAA),<sup>76</sup> in a similar fashion to the WAD, mentions the CRPD in its preamble,<sup>77</sup> but most notably reproduces the text of Article 1(2) CRPD in Article 3 on Definitions. More general references to external barriers as a cause of disability are included in other pieces

<sup>66</sup> Among others Case C-397/18 *Nobel Plásticos Ibérica* ECLI:EU:C:2019:703, para 41; Case C-485/20 *HR Rail* ECLI:EU:C:2022:85, para 34.

<sup>67</sup> Case C-356/12 *Glatzel* EU:C:2014:350.

<sup>68</sup> See D Ferri, ‘The Unorthodox Relationship between the EU Charter of Fundamental Rights, the UN Convention on the Rights of Persons with Disabilities and Secondary Rights in the Court of Justice Case Law on Disability Discrimination’ (2020) 16 *European Constitutional Law Review* 275.

<sup>69</sup> L Waddington, ‘Saying all the Right Things and Still Getting it Wrong: The Court of Justice’s Definition of Disability and Non-Discrimination Law’ (2015) 22 *Maastricht Journal of European and Comparative Law* 576.

<sup>70</sup> Commission, ‘European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe’ (EDS) COM(2010) 636 final.

<sup>71</sup> Commission, ‘Union of Equality: Strategy for the Rights of Persons with Disabilities 2021–2030’ COM(2021) 101 final (Strategy 2021–2030).

<sup>72</sup> Eg the European Union Fundamental Rights Agency (FRA), for example in its report on ‘Violence Against Children with Disabilities: Legislation, Policies and Programmes in the EU’ (Publications Office of the European Union, 2015).

<sup>73</sup> Regulation 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L187/1.

<sup>74</sup> Directive 2016/2102 on the accessibility of the websites and mobile applications of public sector bodies [2016] OJ L327/1.

<sup>75</sup> Recital 12 Web Accessibility Directive (WAD).

<sup>76</sup> Directive 2019/882 on the accessibility requirements for products and services [2019] OJ L151/70.

<sup>77</sup> Recital 3 European Accessibility Act (EAA).

of legislation, such as the so-called Marrakesh Directive,<sup>78</sup> implementing the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. In that regard, we identify a vertical effect of ‘Europeanisation’, with a visible progressive shift towards the EU level when it comes to the definition of disability.

The CJEU had already highlighted the need for an EU autonomous concept of disability in EU non-discrimination law long before the conclusion of the CRPD. However, the CRPD has determined a spill-over effect in several other areas of EU law, from state aid to the broader remit of internal market legislation. The EAA is exemplary in that Member States will not be able to derogate from the definitions included in Article 3, and will not be able to adopt narrower or medically oriented views of disability in transposing legislation. Undoubtedly, Member States still have some leeway within the remit of social policy or with regard to legal capacity (although they should still align to Article 1(2) CRPD having ratified the Convention in their own capacity). However, there is a progressive erosion of their space to adopt diverse conceptualisations of disability. On the whole, the Europeanisation of the concept of disability, while asymmetrical, shows, to varying degrees, a push towards a more centralised governance, or towards more ‘unity’.

#### IV. THE IMPLEMENTATION OF THE CRPD IN SELECTED KEY AREAS: A PUSH TOWARDS HARMONISATION?

##### A. EU Non-Discrimination Legislation

As noted above, combatting discrimination on the ground of disability is an area of shared competence. In that regard, Broderick and Watson note that ‘the EU is not bound to implement in their entirety all provisions of the CRPD that relate to discrimination’,<sup>79</sup> but both the EU and its Member States are obliged to take implementation measures in combination.<sup>80</sup>

The Employment Equality Directive, adopted in 2000, remains the main piece of legislation that addresses discrimination, *inter alia*, on the ground of disability. The Directive prohibits direct and indirect discrimination as well as harassment on the listed grounds and sets out minimum requirements, allowing Member States to adopt broader and more protective non-discrimination

<sup>78</sup> Directive 2017/1564 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2017] OJ L242/6.

<sup>79</sup> A Broderick and P Watson, ‘Disability in EU Non-Discrimination Law’ in Ferri and Broderick (n 4) 121.

<sup>80</sup> L Waddington and A Broderick, ‘Disability Law and the Duty to Reasonably Accommodate Beyond Employment: A Legal Analysis of the Situation in EU Member States’ (European Commission, 2018) 44.

legislation.<sup>81</sup> The material scope of the Directive is limited to the employment field, albeit broadly interpreted to cover conditions of access to employment or self-employment, employment and working conditions, or access to vocational training and membership, as well as involvement in an organisation of workers or employers, or a professional organisation, and to the benefits provided by such bodies.<sup>82</sup> However, Article 3 establishes that Member States may introduce exceptions to the prohibition of discrimination on the ground of disability with regard to the armed forces. It is also worth recalling that Article 5 imposes a duty on employers to provide reasonable accommodation for persons with disabilities, while Article 7 allows Member States to adopt positive actions, ie:

specific measures to prevent or compensate for disadvantages experienced by disabled persons, and to maintain or adopt measures relating to health and safety at work, or measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.<sup>83</sup>

As yet, the CJEU has interpreted the Employment Equality Directive in light of and in compliance with the CRPD in a rather comprehensive and extensively commented line of cases.<sup>84</sup> On the whole, the CRPD has contributed to a broadening of the personal scope of application of the Directive, by offering a definition of disability that attempts to align with the letter of Article 1(2) CRPD. The CRPD has also supported a more robust application of Article 5. Most recently, in *HR Rail*,<sup>85</sup> the CJEU confirmed that the purpose of reasonable accommodation is that of eliminating the barriers that hinder the full and effective participation of people with disabilities in employment, as it had stated in *HK Danmark*.<sup>86</sup> In *Commission v Italy*, the Luxembourg judges also held that this obligation to adopt reasonable accommodation measures applies to all employers, and national laws cannot create exceptions to exempt certain categories of employers.<sup>87</sup> The Court has adopted a wide approach to the Employment Equality Directive's personal scope. This is evident in *VL*,<sup>88</sup> where the Luxembourg judges held that the prohibition of discrimination on the grounds of disability also applies in relation to differential treatment of two groups of disabled people. The Court, referring to the *ratio* of the Directive, suggested that the protection granted by it 'would be diminished if it were to be considered that a situation where such discrimination occurs within a group of persons, all of whom have disabilities, is, by definition, not covered by the

<sup>81</sup> Art 8(1) of the Employment Equality Directive.

<sup>82</sup> *Ibid* Art 3(1).

<sup>83</sup> Broderick and Watson (n 79) 126.

<sup>84</sup> L Waddington and A Lawson, 'The Unfinished Story of EU Disability Non-Discrimination Law' in A Bogg, C Costello and ACL Davies (eds), *Research Handbook on EU Labour Law* (Edward Elgar, 2016).

<sup>85</sup> *HR Rail* (n 66) para 44.

<sup>86</sup> *HK Danmark* (n 2).

<sup>87</sup> Case C-312/11 *European Commission v Italian Republic* ECLI:EU:C:2013:446.

<sup>88</sup> Case C-16/19 *VL v Szpital Kliniczny* ECLI:EU:C:2021:64.

prohibition of discrimination laid down thereby'.<sup>89</sup> In that regard, Xenidis argues that the Court extended 'the protection to intragroup discrimination and thus broaden[ed] the pool of rights holders'.<sup>90</sup> This extensive interpretation does not seem strictly related to the CRPD. Rather, it appears linked to a teleological approach in the application of the Directive.

Further, as noted by Xenidis, employment, occupation and vocational training 'are entry points for multi-dimensional demands that extend beyond the scope of material and distributive disadvantage, and include grievances relating to participation in social life and recognition of diversity and difference'.<sup>91</sup> In that regard, from a disability perspective, notable are *Tartu Vangla*<sup>92</sup> and *Komisija*,<sup>93</sup> whereby the CJEU addressed the discrimination faced by prison officers and jurors respectively. While the organisation of justice falls within the competence of Member States, as argued elsewhere, EU non-discrimination legislation is pragmatically used to advance the right of access to justice of persons with disabilities in the EU.<sup>94</sup>

On the whole, while the CRPD as such has not been the single cause for extending the reach of existing EU non-discrimination legislation, it has supported this trend. The need to comply with the CRPD has not, however, been a sufficiently strong driver for the adoption of new non-discrimination legislation. A proposal for a horizontal non-discrimination Directive<sup>95</sup> to tackle discrimination outside the labour market has been under discussion at EU level since 2008. The proposed Directive should extend protection on the ground of, inter alia, disability to the fields of social protection, including social security, healthcare and social housing; education; and access to, and supply of, goods and services, including housing.<sup>96</sup> Scholars tend to concur on the fact that the eventual adoption 'would serve to bring the content of EU non-discrimination law somewhat closer to the requirements set out in the CRPD'.<sup>97</sup> Due to the requirement of unanimity in the Council, the proposal has yet to be adopted. As evidenced in parliamentary debates, challenges concern the division of

<sup>89</sup> Ibid para 35.

<sup>90</sup> R Xenidis, 'The Polysemy of Anti-Discrimination Law: the Interpretation Architecture of the Framework Employment Directive at the Court of Justice' (2021) 58 *Common Market Law Review* 1649, 1657.

<sup>91</sup> Ibid 1653.

<sup>92</sup> Case C-795/19 *Tartu Vangla* ECLI:EU:C:2021:606.

<sup>93</sup> Case C-824/19 *Komisija za zashtita ot diskriminatsia* ECLI:EU:C:2021:862.

<sup>94</sup> D Ferri and L Urzel, 'The Role of the Employment Equality Directive in Advancing Access to Justice for Persons with Disabilities in the European Union' (2022) *European Yearbook on Human Rights*.

<sup>95</sup> Commission, 'Proposal for a Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation' COM(2008) 426 final.

<sup>96</sup> Ibid Art 3.

<sup>97</sup> Broderick and Watson (n 79) 138. See S Favalli and D Ferri, 'Defining Disability in the European Union Non-Discrimination Legislation: Judicial Activism and Legislative Restraints' (2016) 22 *European Public Law* 541.

competences, legal certainty and the financial implications of the proposal, in particular in relation to reasonable accommodation outside the workplace.<sup>98</sup> After almost 14 years of stalling, and in spite of the Commission's renewed commitment to bring this forward,<sup>99</sup> the adoption of such a piece of legislation seems highly unlikely. However, if it were to happen, this will support a centralising dynamic in the implementation of the CRPD in the EU.

## B. The Internal Market as Gateway for Accessibility Legislation

Since the ratification of the CRPD, accessibility has become a priority field of action for the EU. While accessibility of different means of transportation had been addressed extensively by EU legislation long before the CRPD,<sup>100</sup> a portfolio of legislative and other instruments to improve access for people with disabilities to an array of goods and services and implement the CRPD was envisaged in the EDS. The WAD and the EAA have represented the most significant tools in this portfolio, and the Strategy 2021–2030 indicates that the Commission 'will pay close attention to [their] correct implementation and evaluation'.<sup>101</sup> Both the WAD and the EAA are based on Article 114 TFEU, whereby access to goods and services for persons with disabilities are considered essential to the creation of a 'deeper and fairer' internal market.

The WAD was adopted in 2016 with the aim to 'approximate the laws, regulations and administrative provisions of the Member States relating to the accessibility requirements of the websites and mobile applications of public sector bodies, thereby enabling those websites and mobile applications to be more accessible to users, in particular to persons with disabilities'.<sup>102</sup> In essence, it provides that Member States shall ensure that public sector bodies' websites and mobile applications are accessible,<sup>103</sup> unless this imposes a 'disproportionate burden' upon public sector bodies.<sup>104</sup> Given that the WAD entails minimum harmonisation, 'Member States may maintain or introduce measures in conformity with Union law which go beyond the minimum requirements' established by the Directive.<sup>105</sup>

The EAA provides for accessibility of a range of key products and services, such as computers, smartphones, tablets, TV sets, banking ATMs and services, payment terminals, e-books and e-readers, e-commerce websites and mobile

<sup>98</sup> See eg European Parliament debate from 22 October 2019.

<sup>99</sup> Strategy 2021–2030 (n 71).

<sup>100</sup> See generally E Varney and A Pearson, 'Disability in EU Transport Legislation' in Ferri and Broderick (n 4).

<sup>101</sup> Strategy 2021–2030 (n 71).

<sup>102</sup> Art 1(1) WAD.

<sup>103</sup> Art 4 WAD.

<sup>104</sup> Recital 39 of the Preamble and Article 5 WAD.

<sup>105</sup> Art 2 WAD.

applications and ticketing machines, and check-in machines. It places a range of accessibility obligations on manufacturers, authorised representatives, importers, distributors and service providers,<sup>106</sup> and applies equally to economic operators from the public and private sectors.<sup>107</sup> Similarly to the WAD, Article 14 of the EAA establishes that accessibility requirements do not apply where they would impose a disproportionate burden on the economic operators concerned. This provision includes an additional limit in that accessibility requirements would not apply when they cause significant change in the product or service at stake that results in the fundamental alteration of its basic nature.

The WAD and the EAA tally with an array of other EU legislative instruments that for the most part predate the CRPD, or have been recast or amended after the ratification of the Convention, and address accessibility, such as the Directive that harmonises laws related to radio equipment<sup>108</sup> or the Audio-Visual Media Services Directive.<sup>109</sup> The latter was most recently amended in 2018,<sup>110</sup> and requires, in Article 7, Member States to ensure that audio-visual media services are made accessible for persons with disabilities. Most of those instruments have been based on Article 114 TFEU. In that regard, while the extensive use of this legal basis is certainly not a novelty and has given rise to a debate on the competence creep,<sup>111</sup> it can be safely argued that the CRPD has provoked a ‘quantitative shift’ in the adoption of new harmonising legislation addressing accessibility. Even when the approach adopted is that of minimum harmonisation, the capacity for Member States to conduct an autonomous policy to increase access appears rather limited.

### C. Participation of Person with Disabilities: Soft Law, ‘Mutual Recognition’ as Stepping Stones Towards an EU ‘Centralised’ Approach

Participation is a general principle of the CRPD, and is mentioned at various junctures of the Convention.<sup>112</sup> Given such a cross-cutting nature of participation

<sup>106</sup> Art 7 *et seq* EAA.

<sup>107</sup> Recital 57 EAA.

<sup>108</sup> Directive 2014/53/EU on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC [2014] OJ L153/62.

<sup>109</sup> Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services (Audio-Visual Media Services Directive) [2010] OJ L95/1.

<sup>110</sup> Directive 2018/1808 amending Directive 2010/13/EU [2018] OJ L303/69.

<sup>111</sup> S Garben and I Govaere, ‘The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future’ in S Garben and I Govaere (eds), *The Division of Competences Between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart Publishing, 2017).

<sup>112</sup> See Arts 3 (General principles), 19 (Living independently and being included in the community), 24 (Education), 26 (Habilitation and rehabilitation), 29 (Participation in political and public life), and 30 (Participation in cultural life, recreation, leisure and sport) CRPD.

for the purpose of the CRPD, an array of EU shared and supporting competences are relevant. Although measures adopted by the EU on accessibility, for example in the area of transport, are an important part of guaranteeing inclusion of persons with disabilities in society, this section focuses on what the Commission itself has identified as pertaining to participation as priority area of action in the EDS, ie free movement rights, community-based living, and participation in cultural and sporting activities.<sup>113</sup> In all those areas the EU has considered its role subsidiary to that of the Member States, making extensive use of soft law, funding, and pilot projects limited to a number of Member States.<sup>114</sup>

The new Strategy 2021–2030 does not contain a specific section on participation, however the theme of participation runs across its priorities. While measures on participation for the most part maintain a ‘soft’ nature, centralising tendencies can be observed even in relation to most sensitive areas. Most notably, the Commission proposes to create a European Disability Card with a view to ‘expand the scope of the mutual recognition of disability status in areas such as labour mobility and benefits related to conditions of service provision’.<sup>115</sup> This measure builds on the pilot European Disability Card (which was not only voluntary in terms of the participation of Member States, but also restricted mainly to areas of culture, leisure, sport and transport)<sup>116</sup> and the European Parking Card; the scope of application of the newly proposed Card seems much broader, extending into highly sensitive areas for the Member States such as social security. While it may be argued that mutual recognition is a tool to avoid integration through harmonisation,<sup>117</sup> the more recent experience of applying it in areas of significant differences among Member States – such as criminal law – has shown that some level of basic comparability among national laws must exist in order for its successful and legitimate application,<sup>118</sup> and adopting mutual recognition measures can, in fact, in turn lead to a need for further approximating measures to support mutual recognition.<sup>119</sup> Thus, the introduction of the principle of mutual recognition into the area of disability might not only require recognising decisions on disability status adopted in one Member State in other Member States, but could also lead to calls for approximation in

<sup>113</sup> EDS (n 70) 5.

<sup>114</sup> For example, the Commission adopted the ‘Inclusion and Diversity Strategy’ which promotes the participation of young people with disabilities in Erasmus+ youth mobility projects, and taking funding and awareness-raising initiatives in relation to participation in sports. See European Commission, ‘Commission Staff Working Document Evaluation of the European Disability Strategy 2010–2020’ SWD(2020) 289 final, 24–25.

<sup>115</sup> Strategy 2021–2030 (n 71) 6.

<sup>116</sup> See Commission, ‘EU Disability Card’ (2021) [www.ec.europa.eu](http://www.ec.europa.eu).

<sup>117</sup> C Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press, 2013) 258; M Möstl, ‘Preconditions and Limits of Mutual Recognition’ (2010) 47 *Common Market Law Review* 405.

<sup>118</sup> S Peers, ‘Mutual Recognition and Criminal Law in the European Union: Has the Council got it wrong?’ (2004) 41 *Common Market Law Review* 5, 20.

<sup>119</sup> See generally V Mitsilegas, *EU Criminal Law After Lisbon: Rights, Trust and the Transformation of Justice in Europe* (Hart Publishing, 2016) 153.



areas of Member State competence (eg legal capacity). Indeed, a need for *more* EU involvement was identified in the area of legal capacity, where the EU (in principle) does not have any competence.<sup>120</sup>

## V. THE IMPLEMENTATION OF ARTICLE 33 CRPD IN THE EU

### A. The Commission as the EU's Only Focal Point and the Lack of a Coordination Mechanism

Article 33(1) CRPD envisions the implementation of the CRPD through national implementing mechanisms, consisting of 'one or more focal points within government' and, potentially, a 'coordination mechanism'. The Council's Decision on the conclusion of the CRPD<sup>121</sup> entrusted the Commission with the role of the EU's focal point, but is silent on the coordination mechanism. The functioning of the focal point is then set out in the Code of Conduct,<sup>122</sup> which, as pointed out by Reiss, is 'preoccupied foremost with management within the UN monitoring context but not truly with the division of responsibilities between the levels of governance'.<sup>123</sup>

According to De Beco and Hoefmans, the purpose of focal points is '[ensuring] a legitimate place for disability rights on the political agenda' and acting as an 'administrative tool meant for rationalising and centralizing all possible institutional players involved in disability rights policies'.<sup>124</sup> Given its role in the EU's institutional structure,<sup>125</sup> the choice of the Commission as a focal point seems appropriate, and, indeed, necessary. It is, however, more questionable whether the Commission *alone* can fulfil the tasks of an EU focal point, and whether it would not be, in the light of the EU's institutional structure and the division of competences between the EU and the Member States, more appropriate and more effective to add further focal points. At a horizontal level, the CRPD Committee (and indeed the European Parliament)<sup>126</sup> recommended that the EU consider 'the designation of focal points in each European Union institution, agency and body'.<sup>127</sup> While this recommendation was not heeded

<sup>120</sup> Commission, 'Commission Staff Working Document Evaluation of the EDS' (n 114) 26.

<sup>121</sup> Art 3 of the Council Decision (n 1).

<sup>122</sup> Code of Conduct (n 10).

<sup>123</sup> JW Reiss, 'The Convention on the Rights of Persons with Disabilities in the Post-Lisbon European Union' (2012) 19 *Human Rights Brief* 18, 21.

<sup>124</sup> G de Beco and A Hoefmans, 'National Structures for the Implementation and Monitoring of the UN Convention on the Rights of Persons with Disabilities' in G de Beco (ed), *Article 33 of the UN Convention on the Rights of Persons With Disabilities. National Structures for the Implementation and Monitoring of the Convention* (Brill, 2013) 23.

<sup>125</sup> See in particular Art 17 TEU.

<sup>126</sup> European Parliament, 'European Parliament Resolution of 7 July 2016 on the Implementation of the UN Convention on the Rights of Persons with Disabilities, with Special Regard to the Concluding Observations of the UN CRPD Committee' P8\_TA(2016)0318, para 166.

<sup>127</sup> CRPD Committee (n 51) para 77.

by the EU,<sup>128</sup> the Commission in its latest Strategy 2021–2030 agreed to ‘invest in strengthening coordination at EU level in line with the recommendations’ by the CRPD, in particular by ‘working with the European Parliament and the Council to ensure that disability matters are adequately taken into account in inter-institutional negotiations’, and to ‘work together to identify gaps in existing legislation’.<sup>129</sup> In this vein, it suggested designating disability coordinators for EU institutions, bodies, agencies and delegations; organising regular high-level meetings between the Parliament, the Council, the Commission and the European External Action Service, involving also representative organisations of persons with disabilities; and arranging an annual exchange of views with the European Economic and Social Committee and the Committee of Regions. It also encouraged the Member States to mainstream disability in the work of the Council.

Surprisingly, the CRPD Committee did not express any objection to a lack of a coordination mechanism. The Evaluation Study of the EDS mentioned that there was sufficient engagement with Member States, EU institutions and organisations representing persons with disabilities through institutional mechanisms, public events, public consultations and informal meetings.<sup>130</sup> In its initial report to the CRPD Committee, the Commission indicated that ‘[f]ormal coordination with the Member States is ensured through the human rights working group (COHOM) of the Council’.<sup>131</sup> However, its description – with reference to the Code of Conduct – concentrates on the coordination of international responsibility and representation.<sup>132</sup> Other coordinating methods mentioned by the Commission, ie the High-Level Group on Disability and the annual Work Forum on the Implementation of the CRPD, also ‘hardly qualify as a proper governmental coordination mechanism’.<sup>133</sup>

In the EU’s quasi-federal structure, in particular having regard to the cross-cutting nature of the CRPD and the array of concurrent powers shared by the EU and the Member States, omitting the creation of a coordination mechanism seems to be functional to the centralising dynamic in the implementation of the CRPD and the Europeanisation of disability rights, while potentially losing out on the benefits of learning from the experience of the Member States.

## **B. The EU’s Multi-Prong Monitoring Mechanism**

The EU’s monitoring mechanism was first laid out in October 2012, when the Council confirmed a structure comprised of five actors: the European Parliament’s

<sup>128</sup> A Hoefmans, ‘The EU Framework for Monitoring the CRPD’ in Ferri and Broderick (n 4) 83.

<sup>129</sup> Strategy 2021–2030 (n 71) 23.

<sup>130</sup> Commission, ‘Commission Staff Working Document Evaluation of the EDS’ (n 114) 42.

<sup>131</sup> Commission, ‘Initial Report of the European Union’ (2014) CRPD/C/EU/1, para 220.

<sup>132</sup> *Ibid*; see also Hoefmans (n 128) 77.

<sup>133</sup> Hoefmans (n 128) 77.

Petitions Committee, the European Ombudsman, the European Commission, the EU Agency for Fundamental Rights (FRA) and the European Disability Forum (EDF).<sup>134</sup> Following the observations by the CRPD Committee,<sup>135</sup> as well as concerns expressed by scholars,<sup>136</sup> in 2017 the Commission stepped aside.<sup>137</sup> The tasks of the framework – promoting, protecting and monitoring CRPD rights – are to be exercised ‘primarily in relation to EU legislation and policy (areas where the Member States have transferred competences to the EU) and, secondarily, vis-à-vis the EU institutions themselves and their internal implementation of the CRPD’.<sup>138</sup>

While the EU’s monitoring framework aims to complement national frameworks and independent mechanisms,<sup>139</sup> a mechanism for collaboration and coordination among the EU monitoring framework and the Member States’ ones would support an effective monitoring in a quasi-federal structure such as the EU. In its 2016 report, the FRA also argued in favour of closer cooperation between the EU monitoring framework with, inter alia, national frameworks and national human rights institutions (NHRIs).<sup>140</sup> The European Group of NHRIs called for the recognition of the role of the Eurogroup, of Equinet members and of EDF members in relation to undertaking some of the tasks under Article 33(2).<sup>141</sup> In a similar vein, Birtha proposes the establishment of a ‘European Platform for CRPD monitoring’, including ‘representative[s] of the national-level independent mechanisms’ as ‘the sixth element of the designated European-level framework’.<sup>142</sup> Such a platform could be, inter alia, a forum for ‘exchange of experience between national and EU-level CRPD implementation, which might be useful considering the issue of shared competency in many areas, which also effects implementation and monitoring of the Convention in many ways’.<sup>143</sup>

## VI. CONCLUDING REMARKS

The EU presents a unique legal nature – it is not a state and it is not a typical international organisation – a federal-like structure that encompasses features

<sup>134</sup>Ibid 76; M Birtha, ‘A Chance to Pioneer or a Lost Opportunity? Monitoring Disability Rights Effectively and Independently in the EU in Line with Article 33 of the UN CRPD’ (2014) 5 *European Yearbook of Disability Law* 43, 62.

<sup>135</sup>CRPD Committee (n 51) para 77.

<sup>136</sup>Birtha (n 134) 64–65.

<sup>137</sup>Hoefmans (n 128) 82–83. See also the Council, ‘Revised EU-Level Framework Required by Article 33.2 of the UN Convention on the Rights of Persons with Disabilities’ (2017) 6170/17.

<sup>138</sup>Hoefmans (n 128) 76.

<sup>139</sup>See Commission (n 131) paras 227–28.

<sup>140</sup>FRA, ‘Opinion of the European Union Agency for Fundamental Rights concerning Requirements under Article 33(2) of the UN Convention on the Rights of Persons with Disabilities within the EU Context’ (20 May 2016) [www.fra.europa.eu](http://www.fra.europa.eu).

<sup>141</sup>See Birtha (n 134) 71.

<sup>142</sup>Ibid 73.

<sup>143</sup>Ibid.

of a cooperative federalism. In this context, the implementation of the CRPD has rather deeply affected the balance ‘between unity and diversity’, provoking a centralising effect. It is undeniable that the push towards a deep integration is long-standing, and so is the harsh debate about the *longa manus* of the internal market, which certainly predates the CRPD. However, the need for ensuring some level of uniformity throughout the EU in the enshrinement of disability rights has supported the Europeanisation of disability rights, with the overall deepening of the EU influence over domestic disability law.

The Europeanisation of the concept of disability upheld by the CJEU and endorsed by political institutions and other EU bodies has gone hand in hand with the expansion of disability related legislation. Article 114 TFEU, which, as Schütze notes, is per se a ‘functional competence that cuts horizontally across (almost) all other policy areas’ not thematically limited, and typical of federal unions,<sup>144</sup> has been the gateway for the ‘centralisation’ of accessibility legislation. Paradoxically, the CRPD-led centralising dynamic is less pronounced in the non-discrimination field, which is the traditional remit of EU disability law, but where no new legislation was adopted. Further, in the EU’s *sui generis* legal order and complex institutional structure, the implementation of Article 33 CRPD has been challenging.<sup>145</sup> The fundamental lack of a coordination mechanism with Member States, although being crucial both for the successful implementation of the CRPD and for a balanced power relationship between the EU and the Member States, is a notable gap. While the EU acting in isolation from its Member States is not reflective of the cooperative federalism-like nature of the EU, it is somewhat ‘self-serving’ and supports the progressive Europeanisation of disability rights.

On the whole, the implementation of the CRPD in the EU shows a federal centripetal dynamic, in that the EU tends to centralise powers related to disability eroding Member States’ prerogatives.

<sup>144</sup>R Schütze, ‘Limits to the Union’s ‘Internal Market’ Competence(s)’ in L Azoulai (ed), *The Question of Competence in the European Union* (Oxford University Press, 2014) 215.

<sup>145</sup>Birtha (n 134) 44.