



Study on challenges and good practices in the  
implementation of the UN Convention on the Rights  
of Persons with Disabilities VC/2008/1214

# **Final Report**

Study for the European Commission  
Employment, Social Affairs and Equal  
Opportunities DG  
Unit G3: Integration of people with disabilities

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# ABOUT THIS REPORT

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The content of this study is based on the specifications of the Tender N° VT/2008/001.

Further information is available at:

<http://ec.europa.eu/social/main.jsp?pager.offset=30&catId=626&langId=en>

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- monitoring and reporting on the implementation of EU legislation and policies in PROGRESS policy areas;
- promoting policy transfer, learning and support among Member States on EU objectives and priorities; and
- relaying the views of the stakeholders and society at large.

Further information is available at:

<http://ec.europa.eu/social/main.jsp?catId=327&langId=en>

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# List of Abbreviations

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<b>ANED</b>	Academic Network of European Disability Experts
<b>CFI</b>	Court of First Instance
<b>CEDAW</b>	Convention on the Elimination of all forms of Discrimination Against Women
<b>CRC</b>	Convention on the Rights of the Child
<b>DAP</b>	Disability Action Plan
<b>DG</b>	Directorate-General
<b>DG EMPL</b>	Directorate-General Employment, Social Affairs and Equal Opportunities
<b>EASPD</b>	European Association of Service Providers for Persons with Disabilities
<b>EDF</b>	European Disability Forum
<b>EFC</b>	European Foundation Centre
<b>EU</b>	European Union
<b>EC</b>	European Community
<b>ECHR</b>	European Convention on Human Rights
<b>ECJ</b>	European Court of Justice
<b>FRA</b>	Fundamental Rights Agency
<b>HLGD</b>	High Level Group on Disability
<b>ICT</b>	Information Communication Technologies
<b>IE</b>	Inclusion Europe
<b>MDAC</b>	Mental Disability Advocacy Center
<b>NGO</b>	Non-governmental Organisation
<b>n.a.</b>	Non-applicable
<b>TEC</b>	Treaty establishing the European Community
<b>TEU</b>	Treaty on the European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UN</b>	United Nations
<b>UN CRPD</b>	United Nations Convention on the Rights of Persons with Disabilities

## EXECUTIVE SUMMARY

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*The ‘Study on Challenges and Good Practices in the implementation of the UN Convention on the Rights of Persons with Disabilities’ (hereinafter referred to as ‘the study’) was carried out by the European Foundation Centre (EFC) representing the European Consortium of Foundations on Human Rights and Disability for the Unit for the Integration of People with Disabilities (Unit G3) of the Directorate-General Employment, Social Affairs and Equal Opportunities (DG EMPL), under the Contract N° VC/2008/1214, during the period January 2009 to February 2010.*

The study aimed to analyse in detail the obligations set forth in the Convention, and in particular to gather information about the various practices related to the implementation of the Convention by the EU and its Member States. The goal was to identify challenges that may hinder the full and effective implementation of the Convention, and measures that would facilitate the achievement of its objectives (‘good practices’). The study is designed to support the objectives of the current EU Disability Action Plan with its emphasis on full participation and equal opportunities for all people with disabilities and to contribute to the preparation of the new EU disability strategy based more explicitly on the UN CRPD.

The findings of this study identified several challenges to the implementation of the UN CRPD at both the EU and Member States level. These challenges are mainly grouped around the following fields:

- **Uneven Implementation of the Paradigm Shift:** research has revealed that, in general, the paradigm shift embodied in the Convention has not yet been effectively reflected in the majority of the Member States. Some States have made progress, but the movement towards the main lesson of the paradigm shift (*i.e.* treating people with disabilities as full ‘subjects’ bearing equal rights and deserving equal respect, and not as ‘objects’ to be managed or pitied) has been uneven. The EU led the way in steering movement towards the paradigm shift in mid-1990s. The UN CRPD makes the implementation of the paradigm shift across all policy sectors more urgent. As regards the European Union, legislation appears to be implicitly based on a social model of disability, and therefore aims at removing physical and societal barriers that hinder full participation of persons with disabilities in society.
- **Lack of National Screening:** research has revealed that most of the Member States of the EU have not yet taken the first step towards the implementation of the UN CRPD, meaning that national legislation and policies have not yet been systematically reviewed. Only four complete national screening exercises were

identified by this study. In addition to States, the obligation to carry out a 'screening exercise' applies with equal force to the European Union. The latter has checked existing legislation in order to identify existing EU instruments related to matters covered by the Convention. The outcome of this process is the Appendix that accompanies the declaration of competences, which intends to specify the areas of the Convention that fall within the EU competence and better show to the other contracting parties the distribution of competence between the EU and its Member States. However, the mere identification of EU legal instruments is not sufficient to show fulfilment of the obligation to perform a 'screening exercise' which entails an obligation to examine and if necessary modify existing legislation. Nevertheless, it is important to consider that any possible modification of EU legislation (or adoption of new EU legislation) can not influence the allocation of powers fixed by the Treaties. It is therefore necessary for any screening to be conducted by the EU to evaluate EU legislation towards the requirements of the UN CRPD and consider the EU competence to act in the fields covered by the Convention. The latter consideration (i.e. EU competence) will be important to determine the type of measure that the EU would need to take in order to meet the requirements of the Convention.<sup>1</sup>

- **Uneven Reach of Non-discrimination Laws:** research has revealed that legislative acts on equality and non-discrimination exist mainly within the context of employment, at both the EU and Member State level. Many Member States have extended the application of the principle of non-discrimination beyond the workplace. However, significant challenges to implementing the UN CRPD remain and relate to the limited application of the duty to provide reasonable accommodation, the non-recognition of the denial of reasonable accommodation as an explicit form of discrimination, the general lack of laws addressing inter-sectional and multiple-discrimination, and limited material scope.
- **General Accessibility:** as regards the implementation of Article 9 UN CRPD, research has revealed that some progress has been made by the EU, but there is still room for improvement. Specifically one or more relevant EU instruments address accessibility and the built environment, transport, goods and services, information and communication technologies. However, even if the Member States have included in their national laws the principle of accessibility, this is not enough to guarantee enforcement of these laws and effective implementation of the UN CRPD accessibility requirements. Research in the Member States of the EU has also revealed that monitoring of implementation appears to be ineffective. In addition, exceptions included in some legislative acts (e.g. in some cases old buildings are not required to comply with the principle of accessibility), and the lack

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<sup>1</sup> For further information on this matter, please go to section 3.2 of this report.

of disability specific training for professionals (e.g. architects and engineers) may hinder the full access and inclusion of persons with disabilities.

- **Legal capacity – Giving a Voice Back to People:** research in the EU Member States has revealed that in the field of legal capacity, several challenges to implementing the UN CRPD exist. While a few Member States have reformed relevant legislative measures, embracing a decisive move away from over-broad plenary guardianship laws towards a ‘supported decision-making’ model, a large number of Member States continue to operate far-reaching restrictive guardianship laws and policies. Challenges also exist in Member States that are attempting to move away from guardianship. While legislative reforms provide for the appointment of assistants to support persons with disabilities in decision-making, the distinction between such assistants and guardians is not clear enough. In many cases there are insufficient safeguards in place to ensure that such assistants do not exceed their duties and end up displacing the legal capacity of the person they are purportedly assisting. Another challenge may arise from interpretative declarations or ‘explanatory memorandums’ that some States have submitted, or may consider submitting, in relation to Article 12 UN CRPD.
- **Independent Living – Using that Voice to Choose How to Live:** research in this field has revealed that the existence of national laws that still permit institutionalisation of persons with disabilities hampers significantly their social inclusion and full participation in their society. Several national policies are focused on improving institutional care, instead of moving residents of such institutions into the community. In cases where national policies promote independent living for persons with disabilities, the frequent absence of direct payments, or individualised funding schemes, to allow persons with disabilities to manage their own affairs is a significant challenge to the effective implementation of the UN CRPD. With regards to the EU, the Council Decision concerning the conclusion of the UN CRPD lists several instruments related to the functioning of the internal market (in particular indirect taxation and state aid), which are relevant to Article 19 UN CRPD. Instruments of such nature could positively contribute to the elimination of barriers (such as inaccessible, or insufficient, goods and services) for persons with disabilities to fully enjoy the right to independent living.
- **Employment – Earn a Living by Work freely chosen or accepted in the labour market:** research in this field has revealed that the EU Member States have been highly influenced by EU secondary legislation, and in particular the Employment Equality Directive 2000/78/EC. To this end, Member States have prohibited, by law, discrimination on the basis of disability within the context of employment, and have established provisions for reasonable accommodations for persons with disabilities.

Nonetheless, several challenges to the effective implementation of the UN CRPD remain. Research has revealed an inconsistent interpretation of key concepts, such as 'discrimination' and 'reasonable accommodation', by the Member States of the EU. In addition, as Directive 2000/78/EC does not explicitly define an unjustified denial of reasonable accommodation as a form of discrimination, many Member States have not done so either. Finally, poor implementation of employment quotas, and low participation rates in the labour market for persons with disabilities, suggest that existing legislation may not be effective in practice.

- **Education – Full Development of persons with disabilities' potential to participate effectively in society:** research for this study has revealed several challenges to the effective implementation of Article 24 UN CRPD by the EU Member States. Information compiled from the Member States revealed few efforts to move towards the provision of inclusive education on the basis of equal opportunity. In most Member States, while education for persons with special educational needs can take place in ordinary establishments, the option of sending children with disabilities to special educational facilities is permissible and in most cases favoured. This is a significant challenge to the effective implementation of Article 24 UN CRPD, because as long as the option of sending children with disabilities to special educational facilities remains available, their full and effective integration in an inclusive education system may not be realised. In addition, the frequent lack of resources for the provision of individualised services and support to learners with disabilities, and the lack of specialised training for teachers in supporting learners with disabilities, are also major challenges to the full and effective inclusion of persons with disabilities in the education system.
- **Uneven Participation in Political and Public Life:** Research in the Member States of the EU has revealed that even though most Member States have adopted legislative provisions in order to ensure that persons with disabilities can participate in voting procedures, these are not enough to ensure full and effective participation of *all* persons with disabilities. Indicative case-studies show that while States ensure accessibility to polling stations, ballots and general information about the elections are not provided in alternative formats (e.g. Braille or easy-to-read formats). In addition, there are cases where the right of persons with disabilities to vote by secret ballot is not effectively implemented. With regards to participation in decision making processes, research for this study has revealed that the majority of the EU Member States have created consultative disability forums in order to ensure the participation of persons with disabilities in public life. However, little information is available in relation to the effectiveness of such forums.

- **Lack of Training:** research for this study has revealed that there is an urgent need for both the EU and its Member States to initiate training seminars for all types of professionals, such as judges, lawyers, public administrators, architects, engineers and servants related to all policy fields with the aim to raise awareness about the obligations set forth in the UN CRPD. Such training should also be focused on the practical implementation of the Convention, and should be accessible to, and inclusive of, people with disabilities and representatives from organisations representing the rights of persons with disabilities.
- **Insufficient Disability-specific Statistics and Data:** this study could not identify adequate information within the Member States of the EU regarding practices related to the collection of statistics and data based on a social model of disability and being disaggregated, as appropriate, to support policy development and the monitoring of policy implementation. It logically follows that there is a need for further research in this field. Regarding the EU, instruments listed in the Council Decision concerning the conclusion of the UN CRPD have established methodological frameworks and systems for the compilation of reliable and comparable data in the fields of social protection and inclusion. However, it appears that there is a need to review existing instruments and evaluate whether (or not) such instruments are appropriate for the compilation of disaggregated data on disability for matters covered by the Convention.
- **Enhanced International Cooperation and Development Aid:** Despite some available information on mainstreaming disability in development cooperation, this study could not indicate clear challenges to the implementation of Article 32 UN CRPD as relevant practices that have been identified in the Member States of the EU are fairly new. With regards to the EU, research has revealed that several partnerships and development programmes have been established with many developing countries around the world. Such partnerships cover many areas that are relevant to the implementation of the UN CRPD. Therefore, the EU can (and as a party to the UN CRPD should) influence and support third, or candidate, countries to ensure the realisation of the UN CRPD objectives within their territory. This goal can be achieved through, for example, the use of the so called 'human rights clauses'.

Finally, research has revealed that existing communication channels with third countries, such as the Transatlantic Dialogue, could serve as a role model for the establishment by the EU of similar communication forums with other parties to the UN CRPD, and with the aim of enhancing learning about different approaches related to the implementation of the Convention.

- **National Implementation and Monitoring:** Research in this field has revealed that the majority of the designated focal points have, as required by Article 33(1) UN CRPD, been established at a high level of government (*i.e.* Ministry level). However, national information regarding the establishment, or designation, of a coordination mechanism is generally poor, which implies that EU Member States have yet to designate a coordination mechanism. In some cases it is clear that the possibility of establishing such a mechanism will be reviewed by the government of a Member State upon official ratification of the UN CRPD. Similarly, many Member States have yet to nominate a framework as envisaged by Article 33(2) UN CRPD, and may not do so until after the Convention is officially ratified.
- **EU Implementation and Monitoring:** Article 3 of the Council Decision concerning the conclusion of the UN CRPD designated the European Commission as the **focal point** of the EU for all matters covered by the Convention. The European Commission, as the executive body of the EU, has a unique and quite complex structure of governance, which results from the Treaty establishing the European Community. In this respect, this study considered which body within the Commission could perform the tasks of the focal point of the EU. In this respect the following options were reviewed: (a) the President of the Commission; (b) the Secretary-General; and (c) Commissioner for Justice, Fundamental Rights and Citizenship. The findings of this research suggest that the broad mandate of the President and the Secretary-General may become a barrier that will potentially hamper their optimal effectiveness as the EU's focal point for matters relating to the UN CRPD. Regarding the Commissioner for Justice, Fundamental Rights and Citizenship, it appears that the position can be considered as the equivalent of a Ministry, and therefore could be tasked with the responsibilities of the focal point for all matters related to the UN CRPD. However, it is suggested that the EU reviews the mandate of the Commissioner, and existing methodological frameworks for horizontal monitoring of EU legislation, policies and programmes that could be of added value to the Commissioner's work, if that position will be designated as the overall focal point within the European Commission.

For matters related to **coordination**, research has revealed that several mechanisms exist at the EU level and could facilitate coordination for matters related to the implementation of the UN CRPD by the EU. Such mechanisms involve, for example, the Inter-Service Group of Disability (ISGD), which could facilitate coordination among the DGs of the European Commission; and the High Level Group on Disability (HLGD), which could facilitate coordination between the EU and its Member States, and among the Member States of the EU. Similar to the HLGD, the EU could use the Open Method of Coordination (OMC), or could

consider the development of a European Pact on Equal Rights of Persons with Disabilities, as recently suggested by the European Disability Forum. No matter what the final choice, the EU should carefully review existing mechanisms and, if necessary, modify them in order to ensure effective coordination at *all* levels. It should also be noted, that research in this area did not identify a mechanism that would ensure effective coordination between Commission DGs and other EU institutions, such as the Parliament and the Council. Therefore, there is a need for further research in this respect.

For matters related to the establishment of a **'framework'** to 'promote, protect and monitor' implementation of the UN CRPD, research has revealed that there is no single EU body with the adequate mandate to effectively perform all the tasks set forth in Article 33(2) UN CRPD. Therefore, the EU should consider the establishment of a creative 'mix' of institutions, bodies, and agencies for matters related to Article 33(2) UN CRPD. For the purposes of such a 'mix' of EU organisations, this study reviewed several options (the Fundamental Rights Agency, the European Ombudsman and the European Courts) and identified that existing structures do not fulfil requirements such as independence, and therefore may pose critical challenges to the effective implementation of the obligations to 'promote, monitor and protect' implementation of the UN CRPD.

### **Recommendations for national and EU policy makers**

Based on the aforementioned findings and the obligations deriving from the UN Convention on the Rights of Persons with Disabilities, this study suggests the following good practices for EU and national policy-makers for the future and overall implementation of the Convention and the effective achievement of its objectives.

- Use the process of **ratification** to raise awareness and promote understanding of the UN CRPD. To this end, the text of the Convention should be widely disseminated in national languages<sup>2</sup> and accessible formats to all interested parties (all governmental departments, persons with disabilities and their representative organisations, NGOs, political parties, the judiciary, academia, and others).
- **Avoid**, where at all possible, the use of reservations, interpretative declarations or 'explanatory memorandums', as they may diminish the scope of protection afforded by the UN CRPD. Where parties to the Convention determine that a reservation to

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<sup>2</sup> It should be noted that as the text of the UN CRPD was annexed in Council Decision 2010/48/EC concerning the conclusion of the Convention by the European Community, it has been translated into all EU languages by the Commission and is available at: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2010:023:SOM:EN:HTML>

the UN CRPD is unavoidable, they should endeavour to withdraw the reservation, if feasible, at the earliest possible opportunity.<sup>3</sup>

- As part of the UN CRPD implementation process, and as a matter of first priority, the EU and Member States should conduct a comprehensive ‘**screening exercise**’ of EU and national legislation and, if necessary, should modify or abolish existing instruments in order to ensure full compliance with the UN CRPD. Such a ‘screening exercise’ should be **horizontal** in order to ensure that all legislation, policies and programmes are reviewed and evaluated, and should consider the Convention not only **article by article**, but also **holistically**, recognising the interdependence and indivisibility of human rights. In the process of the ‘screening exercise’ the EU and Member States should seek and facilitate the meaningful contribution of persons with disabilities and their representative organisations. The outcomes of the screening process should be made **publicly available** and **disseminated** in accessible formats.
- Any draft legislation, or amendments to existing legislation, or administrative regulations designed to bring laws into alignment with the UN CRPD should be the subject of further consultation with persons with disabilities and their representative organisations and other interested parties (e.g. employers, teachers, legal operators, engineers or others). To this end, the EU and Member States should follow **participatory decision-making** processes.
- For any draft legislation, or amendments to existing legislation, or administrative regulations, the EU and Member States should take into account obligations deriving from the **paradigm shift**, and **article of general and cross-cutting nature** (i.e. Articles 3, 4, 5, 6, 7 and 9 of the UN CRPD).
- The EU and Member States should ensure that all legislation and policy springs from the **social model of disability**, and should thus be reflected in the overall statement of guiding principles for law and policy reform or development. As EU legislation is implicitly based on a rights-based approach to disability, it is suggested for the EU to lead by example or use soft law measures (such as communications, guidelines etc) in order to provide **guidance** for the Member States on how to approach disability, and effectively implement the principle of equal treatment and equality of opportunity.
- If the wording of EU or national legislation is open to more than one **interpretation**, the EU and Member States should adhere, as far as possible, to the interpretation that renders the provision most consistent with the UN CRPD. Therefore, all EU

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<sup>3</sup> For further information on reservations, please go to Section 1.1.3 of this report.

and national governmental institutions, including the judiciary (EU and national Courts), should apply EU and national law in a manner that is most consistent with the UN CRPD. To this end, both the EU and Member States should organise and provide appropriate training of public servants, including judiciary staff, on the rights recognised in the Convention and obligations deriving from it.<sup>4</sup>

- The EU and Member States should ensure that legislation (EU or national) does not limit the scope of the duty to provide **reasonable accommodation**. The provision of reasonable accommodation is a necessary measure to promote equality, and therefore its application should not be limited to the context of employment. It should thus be extended to all areas of social, political, civil and economic life covered by the prohibition of discrimination. Importantly, both national as well as EU non-discrimination legislation should clearly provide that the **unjustified denial of reasonable accommodation** is a form of discrimination.
- Equality legislation should foresee the adoption of **positive measures** required to promote *de facto* equality of persons with disabilities, in conformity with Article 5(4) UN CRPD.
- The EU and Member States should explicitly address the issue of **multiple-discrimination** in conformity with the general principles and Articles 6 and 7 of the UN CRPD. As multiple-discrimination is a fairly new topic in the area of non-discrimination, it is suggested for the EU and Member States to launch research activities with the aim to identify how a legal prohibition of multiple-discrimination could be framed in order to fully achieve the objectives set forth in the UN CRPD.
- For matters related to **general accessibility**, it is suggested for the EU and the Member States to work in close cooperation in order to ensure that the principle of accessibility applies to all policy sectors (employment, education, transport, ICT, justice etc) and that adequate accessibility requirements and standards are established.

Accessibility measures should also include a clear **timeframe for conformity**, indicate the nature of **interventions** in cases of non-compliance (e.g. financial sanction), and be applied in both urban and rural areas.

It is also suggested for the EU and Member States to approach accessibility as an investment that will positively contribute to the internal market. Any measure that encourages the development of **universally designed** goods, services, equipment

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<sup>4</sup> It should be noted that in 2009, the Commission committed to fund under PROGRESS training seminars for legal and policy practitioners on the UN Convention of the Rights of Persons with Disabilities. Such trainings are expected to be realised within 2011. More information is available at: <http://ec.europa.eu/social/main.jsp?catId=658&langId=en>

and facilities would reduce, or avoid, the costs of the subsequent dismantling of physical barriers as accessibility issues would be considered from the outset.

- The Member States of the EU should reform legislation in order to **abolish restrictive guardianship laws and policies**, in compliance with Article 12 UN CRPD. To this end, Member States should also take measures to ensure access for persons with disabilities to **supported decision-making**. In addition, Member States which, in line with Article 12 UN CRPD, provide for the appointment of assistants to support persons with disabilities in decision-making, should establish effective **safeguards** to ensure that such assistants do not exceed their duties and displace the legal capacity of the person they are assisting.
- The Member States of the EU should implement **direct payment or individualised funding schemes** to allow persons with disabilities to manage their own lives, as required by Article 19 UN CRPD. Such schemes should be accessible to *all* persons with disabilities. Member States should also establish **community based services**, which should be adequately funded and sufficiently resourced for the provision of the required hours of personal assistance to support the living needs and inclusion of persons with disabilities in all aspects of society. Importantly, Member States should **shift** their focus from improving institutional care to relocating the residents of such institutions into the community.

With regards to the **EU**, secondary legislation should ensure that any indirect tax reliefs for goods and services, or any funding to be given, should encourage and promote persons with disabilities' independent living, and should not support any residential, medical, or other institution that restricts the autonomy of persons with disabilities.

- For matters related to **employment**, and besides the application of the equality principle, it is suggested for the EU and the Member States to develop a common strategy to promote equal opportunities and combat the unemployment of persons with disabilities.
- For matters related to education, EU Member States should ensure that legislation and policy respect the rights of persons with disabilities to be educated in an **inclusive education system**, which guarantees a **common learning environment** for all persons with disabilities alongside those without disabilities.
- For matters related to the rights of persons with disabilities to fully **participate in all aspects of the political and public life**, EU Member States should ensure that legislation and policy take into account the general principle of accessibility, and address the needs of all persons with disabilities.

- The EU and its Member States should ensure that **disability specific data and statistics** are compiled and disaggregated, as appropriate, to support policy development and monitoring related to the implementation of the UN CRPD. In this respect, existing methodological tools should be tested, and if necessary should be modified, with the aim to ensure their suitability for matters covered by the Convention.
- The EU and its Member States should ensure that their **international development** programmes respect the principles set forth in the UN CRPD, and promote the rights of all persons with disabilities, as required by Article 32 UN CRPD.
- The EU and Member States should designate one (or more) **focal point(s)** within their governments for all matters relating to the implementation of the Convention and Article 33(1) UN CRPD. The focal point should be placed at the **highest level** of executive authority to **guarantee** the mainstream impact of its work, and the status of its recommendations, while also serving as a permanent reminder that the rights of persons with disabilities need to be respected in all areas of government.
- The EU and Member States should consider the establishment or designation of a **coordination mechanism** at government level to facilitate the consistency of related actions in different sectors and at different levels, in accordance with Article 33(1) UN CRPD.

As the UN CRPD is a 'mixed agreement', to which both the EU and its Member States are parties, Member States are subject to a **duty of loyal cooperation** between themselves and the EU (Article 4.3 TEU). In other words, the fields covered by the UN CRPD fall in part within the EU competence, in part within that of the Member States, and in part within the shared competence of the EU and its Member States. It is therefore essential for the EU and the Member States to closely cooperate in order to implement legislation stemming from the Convention in a coherent manner and to ensure unity in the international representation of the Union. To this end, any coordination mechanism to be established by the EU and the Member States should take into account the necessity to coordinate actions between national and EU levels.

- The EU and Member States should, in accordance with their legal and administrative systems, designate or establish a **'framework'** for all matters related to the UN CRPD. The framework's mandate should be to *'promote, protect and monitor'* the implementation of the UN CRPD. Such a framework should include one or more independent mechanisms, which should comply with the Paris Principles.

## Structure of this report:

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This report presents the findings of the *Study on Challenges and Good Practices in the Implementation of the United Nations Convention on the Rights of Persons with Disabilities* (hereinafter referred to as the UN CRPD or the Convention).

The main objective of the study is to analyse the obligations set out in the UN CRPD and, in particular, to gather information about the various practices of the EU Member States and the European Union in implementing the UN CRPD. The goal of the study is to identify challenges and measures to facilitate the achievement of the UN CRPD objectives ('good practices'). The purpose of the study is to provide help and long-term guidance for the EU Member States, the European Union and various stakeholders.

The work was carried out by the European Foundation Centre (EFC)<sup>5</sup> representing the European Consortium of Foundations on Human Rights and Disability<sup>6</sup> for the European Commission's Directorate-General for Employment, Social Affairs and Equal Opportunities (DG EMPL), under the Contract n° VC/2008/1214. The views contained in this report do not necessarily reflect the position or opinion of the European Commission, or the views of all the individuals involved in this study.

**Section 1** of this report sets the appropriate background for the analysis that will follow.

**Section 2** of this report provides an overview and general recommendations on the implementation of the social model of disability, and core obligations deriving from Article 1 and preambular paragraph (e) of the UN CRPD.

**Section 3** of this report provides an overview and general recommendations on the implementation of Article 3 (General Principles), Article 4 (General Obligations), Article 5 (Equality and Non-Discrimination), and Article 9 (Accessibility) of the UN CRPD. The section also reviews UN CRPD articles on inter-sectionality, namely Articles 6 (Women with disabilities) and Article 7 (Children with disability). It is worth noting that the articles addressed in this section are articles of general and cross-cutting application

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<sup>5</sup> The European Foundation Centre is an international association of foundations and corporate funders dedicated to creating an enabling legal and fiscal environment of foundations, strengthening the infrastructure of the sector, documenting the foundation landscape, and promoting collaboration, both among foundations and between the foundations and other actors, to advance the public good in Europe and beyond. Further information is available: [www.efc.be](http://www.efc.be)

<sup>6</sup> Established in 2009, the EFC European Consortium of Foundations on Human Rights and Disability brings together funders and other stakeholders committed to promoting implementation of the UN Convention on the Rights of Persons with Disabilities. Further information is available at: [www.efc.be/dig/consortium](http://www.efc.be/dig/consortium)

and therefore their application is relevant for the implementation of all articles of the Convention.

**Section 4** of this report provides an overview and general recommendations on the implementation of selected substantive provisions of the UN CRPD that apply existing civil, political, economic, social and cultural rights within the context of disability. Specifically, the section considers the implementation of Articles 16 (freedom from exploitation, violence and abuse) and 17 (protecting the integrity of the person) which are seeking to assert protections that underscore the humanity of all persons with disabilities. The section also considers the implementation of Articles 12 (equal recognition before the law) and 19 (independent living), both of which aim at maintaining and safeguarding the autonomy of the person. Furthermore, articles on specific accessibility rights, namely Article 13 (access to justice) and Article 29 (participation in political and public life), are likewise addressed. Finally, the section considers the implementation of Articles 24 (education) and 27 (work and employment).

**Section 5** of this report contains an overview and general recommendations on the implementation of articles that outline steps that are necessary to support reforms. Specifically, the section considers the implementation of Article 31 (statistics and data collection), Article 32 (international cooperation), and Article 33 (national implementation and monitoring).

**Section 6** of this report suggests good practices for the EU and national policy-makers for the future and overall implementation of the Convention and the effective achievement of its objectives.

Finally, the following Annexes accompany the findings of this study:

- **Annex I:** Guidelines for UN CRPD implementation: a tool for State Parties progress assessment
- **Annex II:** National key actors for the implementation of the UN CRPD
- **Annex III:** EU key actors for the implementation of the UN CRPD
- **Annex IV:** EU instruments listed in the Council Decision 2010/48/EC and giving the Union competence for matters related to the implementation of the UN CRPD

It is worth noting that, while it is hard to be definitive, given that the UN Committee on the Rights of Persons with Disabilities is still in its infancy and has yet to pronounce on the obligations of the UN CRPD, it is nevertheless possible on the basis of the general principles of the Convention and interpretative tools, such as the Vienna Convention on

the Law of Treaties,<sup>7</sup> to identify illustrative challenges to the implementation of the UN CRPD. For the purposes of this study, the review of EU and Member States policies and legal instruments is based on the analysis of the UN CRPD and checklists that were produced from this study to measure progress.<sup>8</sup>

Finally, for the purposes of this study, a '**challenge**' is defined as a 'difficulty' posed by existing national or EU practice which may potentially hamper the full and effective implementation of the UN CRPD by the EU Member States and/or the European Union. In order to meet such challenges it will be necessary *inter alia* for the EU (as appropriate)<sup>9</sup> and/or its Member States to review legislation and/or policy with a view to full compliance. On the other hand, a practice is defined as '**good**' if it fulfils certain requirements of the Convention or mainstreams the general principles, consistent with Article 3 of the UN CRPD, and has an awareness-raising impact.

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<sup>7</sup> Vienna Convention on the Law of Treaties, UN Doc A/CONF 39/38; UNTS 1155, 331, available at: [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)

<sup>8</sup> The checklists that this study has produced are available at Annex I of this report.

<sup>9</sup> For the particular situation of the EU on issues related to 'international responsibility', please see sections 1.2 and 3.2 of this report.

# 1.0 Introduction

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Section 1 is an introductory section and aims to set the appropriate background for the analysis that will follow. The section briefly presents an overview of the UN CRPD and defines its nature within the European legal order with the aim to understand the future impact of the Convention on the EU and its Member States.

It should be noted that since the UN CRPD has been signed by the European Community (now Union), and the decision to conclude it has been taken under the Treaty establishing the European Community (hereinafter referred to as the EC Treaty or TEC), this report will only refer to the EC Treaty. When relevant, references to the Treaty of Lisbon will be made (mainly in footnotes), but no thorough analysis will be provided.

As of 1 December 2009, due to the entry into force of the Treaty of Lisbon, the European Union replaced and succeeded the European Community pursuant to Article 1 of the Treaty on European Union (EU Treaty or TEU).<sup>10</sup> However, in the present contribution, the appropriate references to the “European Community” will be kept when referring to events, policies or competences relating to the period proceeding 1 December 2009. In all other general remarks as well as when writing about events, policies or competences relating to the period that follows 1 December 2009, the text will refer to the “European Union”.

## 1.1 The UN CRPD: an overview

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The United Nations Convention on the Rights of Persons with Disabilities, and its Optional Protocol were adopted in December 2006, and entered into force on May 3<sup>rd</sup>, 2008. The Convention is a landmark piece of international human rights law. Not only it is the first human rights treaty of the 21<sup>st</sup> century, but it also represents the official recognition of disability as a human rights issue on the international stage. The UN CRPD confirms a *radical shift* of approach regarding disability, from a medical/charity model to a human rights/social model.

The UN CRPD provides a clear legal, moral and political roadmap for change. It covers a wide variety of fields and addresses a full range of human rights; civil, political, economic, social and cultural rights. The UN CRPD does not intend to create new rights. It merely seeks to clarify the applicability of existing human rights law in the

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<sup>10</sup> See OJ C115, 9 May 2008, p. 16 available at: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2008:115:SOM:en:HTML>

specific context of disability. To this end, it tailors existing human rights law in the specific circumstances and obstacles faced by persons with disabilities.

Unlike other international instruments, the UN CRPD, by virtue of Article 44, allows for regional integration organisations (like the European Union), in addition to States, to become Parties.

Presently,<sup>11</sup> 146 States have signed the Convention, 90 States have ratified it and 89 States have signed the Optional Protocol and 57 have ratified it. At the EU level, all 27 Member States have signed the Convention, and 16 have ratified it as well, whilst 21 have signed the Protocol and 14 have ratified it. In addition to the EU Member States, the European Union signed the Convention (not the Optional Protocol)<sup>12</sup> on March 30<sup>th</sup>, 2007, and on November 26<sup>th</sup>, 2009 the Council of the European Union authorised the Union to conclude the Convention.<sup>13</sup> The instrument of formal confirmation by the EU is foreseen to be deposited after a 'Code of Conduct'<sup>14</sup> has been adopted between the EU and Members. This is the first time that the Union will become a party to a comprehensive international human rights treaty.

*Figure 1 UN CRPD State of Play in the EU Member States*

Member State	UN CRPD		Optional Protocol	
	Signature	Ratification	Signature	Ratification
Austria	30/03/2007	26/09/2008	30/03/2007	26/09/2008
Belgium	30/03/2007	2/07/2009	30/03/2007	2/07/2009
Bulgaria	27/09/2007	No	18/12/2008	No
Cyprus	30/03/2007	No	30/03/2007	No
Czech Republic	30/03/2007	28/09/2009	30/03/2007	No
Denmark	30/03/2007	24/07/2009	No	No
Estonia	25/09/2007	No	No	No
Finland	30/03/2007	No	30/03/2007	No
France	30/03/2007	18/02/2010	23/09/2008	18/02/2010
Germany	30/03/2007	24/02/2009	30/03/2007	24/02/2009
Greece	30/03/2007	No	No	No
Hungary	30/03/2007	20/07/2007	30/03/2007	20/07/2007

<sup>11</sup> Situation as of 23 September 2010. More information is available at:

[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en)

<sup>12</sup> It should be noted that the Commission submitted in 2008 a proposal for a Council Decision on the ratification of the Optional Protocol by the EU; however the proposal is still under negotiation and an official decision is pending. See European Commission proposal COM (2008)530 Proposal for a Council Decision concerning the conclusion, by the European Community, of the Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities. The progress of the file can be monitored at: [http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=en&DosId=197349](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=197349)

<sup>13</sup> Council Decision 2010/48/EC 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), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:023:0035:0061:EN:PDF>

<sup>14</sup> The adoption of a 'Code of Conduct' is a requirement set forth in Articles 3 and 4 of Council Decision 2010/48/EC.

Ireland	30/03/2007	No	No	No
Italy	30/03/2007	15/05/2009	30/03/2007	15/05/2009
Lithuania	30/03/2007	18/08/2010	30/03/2007	18/08/2010
Latvia	18/07/2008	1/03/2010	22/01/2010	31/08/2010
Luxemburg	30/03/2007	No	30/03/2007	No
Malta	30/03/2007	No	30/03/2007	No
The Netherlands	30/03/2007	No	No	No
Poland	30/03/2007	No	No	No
Portugal	30/03/2007	23/09/2009	30/03/2007	23/09/2009
Romania	26/09/2007	No	25/09/2008	No
Slovak Republic	26/09/2007	26/05/2010	26/09/2007	26/05/2010
Slovenia	30/03/2007	24/04/2008	30/03/2007	24/04/2008
Spain	30/03/2007	3/12/2007	30/03/2007	3/12/2007
Sweden	30/03/2007	15/12/2008	30/03/2007	15/12/2008
United Kingdom	30/03/2007	8/06/2009	26/02/2009	7/08/2009

### 1.1.1 UN CRPD Impetus and Rationale

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A major impetus for the elaboration of an international treaty on the rights of persons with disabilities was the persistence of discrimination and marginalisation experienced by disabled persons worldwide, coupled with the fact that no legally binding international instrument addressed disability rights with any specificity. Although the existing international covenants and conventions on human rights did theoretically apply to persons with disabilities, this did not always happen in practice. Moreover, as emphasised in the preamble to the UN CRPD, the isolation experience by persons with disabilities inhibits their meaningful contribution to their societies, thereby undermining community cohesion and development. Accordingly, a new UN ‘thematic’ human rights treaty on disability was deemed necessary.

The mandate according to which the UN CRPD was negotiated and adopted by the UN General Assembly provided for the applicability of existing human rights within the context of disability. Significantly, therefore, the obligations set forth in the UN CRPD represent the application of well-established and long-standing human rights obligations. The UN CRPD applies these existing human rights obligations to the particular situation of persons with disabilities. In some circumstances, UN CRPD obligations represent a progressive development of those existing standards (e.g., the explicit inclusion of ‘reasonable accommodation’ as a core element of non-discrimination); in other instances, they merely reassert such obligations and reinforce their application to persons with disabilities (e.g., right to life; freedom from torture).

### 1.1.2 Structure of the UN CRPD and its Optional Protocol

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The overall structure of the UN CRPD roughly corresponds to other human rights treaties. The UN CRPD includes a comprehensive range of rights in relation to persons with disabilities, although it also contains innovations going beyond other international human rights agreements.

The text of the UN CRPD is comprised of twenty-five preambular paragraphs and fifty articles. It includes an introductory set of provisions outlining its purpose (Article 1) and key definitions (Article 2), along with **articles of general (cross-cutting) application**, to be applied across the treaty text (Articles 3 to 9). This is one of the Convention's **innovative** features as none of the other core human rights conventions contain an explicit provision enumerating general principles, although these are commonly associated with framework agreements in the international environmental law realm. The UN CRPD also enumerates **specific substantive rights** elaborated across the full spectrum of civil, political, economic, social and cultural rights (Articles 10 to 30). Finally, it establishes a **system of monitoring and implementation** (Articles 31 to 40) and includes final provisions that govern the operation of the UN CRPD (Articles 41 to 50). **Specially innovative** for human rights treaties are the UN CRPD provisions requiring close consultation with and active inclusion of persons with disabilities, including children with disabilities, through their representative organisations in the development and implementation of legislation and policies to implement the Convention (Article 4(3) UN CRPD); the provision recognising the importance of international cooperation and disability inclusive development programmes in support of national implementation efforts (Article 32 UN CRPD); the provision requiring the establishment of national monitoring and implementation frameworks (Article 33 UN CRPD); and procedures to better manage reporting deadlines (Articles 35 to 37 UN CRPD). New bodies, including the **Committee on the Rights of Person with Disabilities** and **Conference of States Parties** have been created to monitor implementation of the UN CRPD by States Parties. All parties to the UN CRPD are obliged to submit regular reports to the Committee on how the Convention is being implemented. The Committee then examines each report and makes suggestions and general recommendations for the State Party concerned.

The **Optional Protocol** to the UN CRPD, comprised of eighteen articles, gives the Committee competence to examine individual complaints with regard to alleged violations of the Convention by States Parties to the Protocol. It also allows States Parties to opt into participation in a 'complaints mechanism'<sup>15</sup> as well as an inquiry

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<sup>15</sup> See Article 1 of the Optional Protocol to the UN CRPD. The Committee on the Rights of Persons with disabilities will receive and consider communications from or on behalf of individuals or groups of individuals who claim to be victims of a violation by a State Party to the UN CRPD.

procedure, all of which are overseen by the Convention's treaty monitoring body, the Committee on the Rights of Persons with Disabilities.

### 1.1.3 UN CRPD as an instrument of public international law

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The UN CRPD, as an international human rights treaty and an instrument of public international law, is governed by the international law of treaties. The cardinal rule in the law of treaties, expressed in Article 26 of the Vienna Convention on the Law of Treaties,<sup>16</sup> is *pacta sunt servanda*, meaning that “every treaty is binding upon the parties to it and must be performed by them in good faith”.<sup>17</sup> Of particular relevance in understanding the UN CRPD and obligations deriving from it are the rules of treaty interpretation and rules relating to the specific issue of reservations and interpretative declarations.

The obligations deriving from signature of the Convention by a State Party are also important to note, particularly given that the European Union and a number of Member States have signed, but not all have yet ratified the UN CRPD. Signature of an international treaty denotes certain limited obligations under public international law. Consistent with the Vienna Convention on the Law of Treaties (1969),<sup>18</sup> **signatories** to a treaty are bound by the obligation not to defeat the object and purpose of the treaty in question. Thus, a signatory State Party is obliged to refrain from acts that would defeat the object and purpose of the UN CRPD.<sup>19</sup> For example a signatory party to the Convention is obliged not to enact laws that discriminate against people with disabilities. Such action would violate the foregoing proscription.

The central objective of **rules of treaty interpretation** under international law is to identify with precision the rights and the obligations of participating parties to a treaty. The text of the UN CRPD itself assumes a central, though not dispositive, role in determining the rights and obligations of States Parties. Additional elements may assume importance, including not only the preparatory works (which are extensive in

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<sup>16</sup> Vienna Convention on the Law of Treaties, UN Doc A/CONF 39/38; UNTS 1155, 331, available at: [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)

<sup>17</sup> In Case C-149/96 *Portugal v Council*, the ECJ used Article 26 of the Vienna Convention as its starting point for verifying whether or not to grant direct effect to rules of the 1972 free-trade agreement between the EEC and Portugal and the GATT. Specifically the Court stated that: “[...] although each contracting party is responsible for executing fully the commitments which it has undertaken it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system, unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means [...]” See ECJ, 23 November 1999, *Portugal v Council*, Case C-149/96, [1999] ECR I-8395, para 35.

<sup>18</sup> See supra note 16

<sup>19</sup> In other words, a signatory party agrees to act in ‘good faith’, but is not legally bound by the Convention's specific provisions and obligations (Article 18 of the Vienna Convention on the Law of Treaties). The latter means that a signatory party is not obliged to take measures to implement the specific provisions of the UN CRPD.

the case of the UN CRPD), but also any interpretative declarations and understandings made by one or more States Parties. Reservations and objections to reservations are understood to impact on treaty relations between the parties.

The interpretation of international treaties is governed by the Vienna Convention on the Law of Treaties, specifically Articles 31-33, which are widely regarded as having codified pre-existing customary international law.<sup>20</sup> The **basic rule** of treaty interpretation holds that treaties shall be interpreted “*in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*”<sup>21</sup> In cases when interpretation of the text leaves the meaning of the text ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable, Article 32 of the Vienna Convention provides that recourse may be had to “*supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.*”<sup>22</sup> Furthermore, such recourse may verify or confirm a meaning that emerges as a result of the textual approach.<sup>23</sup>

It is a common - though much criticised – practice for States Parties to human rights conventions to enter **reservations** to treaties which essentially mean that the relevant provision does not apply to them.<sup>24</sup> States Parties may also make declarations or understandings which accept the applicability of the relevant provisions, but purport to put a particular interpretation on them. Article 46 of the UN CRPD (Reservations) provides: “*Reservations incompatible with the object and purpose of the present Convention shall not be permitted*” and further, that “[r]eservations may be withdrawn at any time.”<sup>25</sup> Entering reservations to ratification instruments is a **highly criticised practice** and has drawn the constant attention and scrutiny of treaty monitoring bodies as well as human rights courts and tribunals. It is possible that some declarations and understandings could be viewed as disguised reservations in which case their acceptability depends on whether they frustrate the ‘object and purpose’ of the

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<sup>20</sup> See, *inter alia*, Avena and Other Mexican Nationals (Mexico v. United States of America), [2004] ICJ Reports 37-38 para. 83, noting that the meaning of a particular treaty term stood to be interpreted “according to the customary rules of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.” *Id.* For a review of the recognition of the rules of treaty interpretation as customary international law by the ICJ and indeed other international as well as many domestic courts, see Richard Gardiner, *Treaty Interpretation* 12-15 (2008).

<sup>21</sup> Vienna Convention, *supra* note 16, at Article 31.

<sup>22</sup> *Ibid* at Article 32

<sup>23</sup> See Anthony Aust (2007), *Modern Treaty Law and Practice*, 2<sup>nd</sup> edition Cambridge University Press

<sup>24</sup> For some of the leading works relating to reservations in respect of human rights conventions, see B. Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination against Women*, 85 A.J.I.L. 281 (1991); R.J. Cook, *Reservations to the Convention on the Elimination of all forms of Discrimination against Women*, 30 V. J. Int'l L. 643 (1990); A. Schabas, *Reservations to Human Rights treaties: Time for Innovation and Reform*, 32 Canadian Y. Int'l L. 39 (1994).

<sup>25</sup> See UN CRPD at article 46.

Convention.<sup>26</sup> Treaty bodies are increasingly commenting on reservations in their concluding observations of States Parties reports. For that reason, States Parties should **consider the matter of reservations with great care and considerable caution.**

It is worth noting here that the EU (in its Decision 2010/78/EC on the conclusion of the UN CRPD) has entered a reservation to Article 27(1) UN CRPD, with the aim to clarify the extent of EU competence for matters related to employment. The reservation states that pursuant to the EU law (notably Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation), the Member States of the EU may, if appropriate, enter their own reservations to Article 27(1) of UN CRPD to the extent that Article 3(4) of the said Council Directive provides them with the right to exclude non-discrimination on the grounds of disability with respect to employment in the armed forces from the scope of the Directive.<sup>27</sup> In other words, the EU clarifies that employment in the armed forces is an area which remains within the exclusive competence of the Member States, and therefore it is up to the Member States to decide how to address equal treatment in the armed forces.

## 1.2 The Status of the UN CRPD in the European Legal Order

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A core question is whether the provisions of the UN CRPD, to which the European Union will be a party, will form part of the European legal order. Section 1.2 of this report aims to clarify this question.

In the international setting, the European Union has legal personality.<sup>28</sup> It can thus sign and conclude international treaties, with respect to its conferred powers.

In areas of EU competence, international treaties, once concluded by the EU, are binding on the European institutions and the Member States according to **Article**

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<sup>26</sup> See existing declarations, reservations and understanding to the UN CRPD at the UN Enable website, available at: <http://www.un.org/disabilities/default.asp?id=475>. Within the EU, the following Member States have entered reservations or interpretative declaration to the UN CRPD: Malta (reservation to Articles 25 and 29); the Netherlands (interpretative declarations to Articles 10, 15, 23 and 25); France (interpretative declaration to Article 15); Poland (reservation to Articles 23(1) and 25); and the UK (reservations to Articles 12(4), 24 and 27). The present contribution will briefly overview few of the aforementioned reservations (where appropriate). However, as the majority concerns UN CRPD articles outside of the general framework of analysis, a thorough analysis of all will not be provided.

<sup>27</sup> See Council Directive 2010/48/EC, Annex III Reservation by the European Community to Article 27(1) of the UN CRPD.

<sup>28</sup> Until 1 December 2009, the European Community had legal personality under Article 281 TEC. As of 1 December 2009, with the entry into force of the Lisbon Treaty, the European Union, which replaced and acceded the European Community, has legal personality under Article 47 TFEU. The latter article reads as follows: "The Union shall have legal personality"

**300(7) TEC.**<sup>29</sup> Article 300(7) TEC applies the international law principle of *pacta sunt servanda*<sup>30</sup> within EU law, providing that agreements concluded under the conditions set out in that Article shall be binding on the European institutions and on Member States. In cases of mixed international agreements, to which both the EU and Member States are contracting parties (such as the UN CRPD), conclusion by the EU denotes that all provisions of the agreement falling within EU competence are binding on the European institutions; while the Member States have a Community law obligation (not just an international law obligation) to implement a mixed agreement insofar as its provisions are “within the scope of Community (now Union) competence”.<sup>31</sup>

As interpreted by the European Court of Justice (ECJ) in several cases,<sup>32</sup> once an international treaty is concluded by the Council and enters into force, its provisions form an “*integral part*” of EC (now EU) law.<sup>33</sup> In light of Article 300(7) TEC, as interpreted by the ECJ and the Council’s authorisation for the European Union to conclude the UN CRPD, the provisions of the UN CRPD will be binding on the European institutions and will form an integral part of EC (now EU) law, meaning that no particular form of transposition would be necessary.<sup>34</sup>

With regards to where international agreements are placed in the hierarchy of different norms in the EC (now EU) legal order, the ECJ has stated in the *IATA case*<sup>35</sup> that agreements concluded under Article 300(7) TEC prevail over provisions of secondary Community (now Union) legislation. However, international agreements do not take precedence over primary EC (now EU) law, but would rank between primary and

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<sup>29</sup> See, e.g., ECJ, 30 April, 1974, *R. & V. Haegeman v Belgian State*, Case 181/73, ECR 1974, p. 449, para. 5. See also, **TREATY OF LISBON**, Article 216(2)

<sup>30</sup> See Section 1.1.3 of this report, p. 23

<sup>31</sup> For further information on mixed international agreements, see pp 33-34 of this report.

<sup>32</sup> See *inter alia* ECJ, 7 October 2004, *Commission of the European Communities v French Republic*, Case C-239/03, [2004] ECR I-09325. In case C-293/03 the ECJ argued that mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements. To this end, Article 300(7) TEC applies with equal force to mixed agreements, such as the UN CRPD.

<sup>33</sup> See *inter alia* ECJ, 30 September 1987, *Meryem Demirel v Stadt Schwäbisch Gmünd* - Reference for a preliminary ruling: Verwaltungsgericht Stuttgart, Case 12/86, [1987] ECR 03719.

<sup>34</sup> The fact that no act of transposition is needed shall not to be confused with questions of implementing measures. It is difficult, if not impossible, to generalize or find useful samples in EC practice about question of implementation and application, as each agreement is different and the UN CRPD is *per se a unicum*. Dr. avv. Delia Ferri, *Introductory Paper for the Study on Challenges and Good Practices in the Implementation of the UN Convention on the Rights of Persons with Disabilities VC/2008/1214*, p. 39. Whether the correct application of all the provisions of the UN CRPD requires particular implementation depends on their nature (and the nature of Convention itself). See *inter alia* Case 12/86, *supra* note 33, para 14.

<sup>35</sup> Case C- 344/04 *IATA v. Department for Transport* [2006] ECR I-403, para 35

secondary law.<sup>36</sup> It can therefore be concluded that the UN CRPD, once concluded by the Union, will in hierarchical terms be placed *below* the Treaties (primary EC/EU law) and *above* secondary EC/EU law (Regulations, Directives, Decisions, Recommendations or Opinions). In other words, the UN CRPD cannot breach the constitutional principles of the Treaty establishing the European Community (which has now been renamed the 'Treaty on the Functioning of the European Union'), but following its official conclusion by the EU, it will provide the basis for consistent interpretation of EC (now EU) secondary law.

The European Community (now Union) legal system, *sui generis* in nature, is an autonomous legal order. In 2008, the ECJ addressed the relationship between national, Community (now Union) and international legal systems, in the *Kadi case*.<sup>37</sup> Significantly, in its judgment the Court pointed out that no international agreements may either infringe on the autonomy of the EC (now EU) legal order, or breach the constitutional principles of the Treaty establishing the European Community, or influence the allocation of powers fixed by the Treaties.<sup>38</sup> It logically follows that the UN CRPD, as an international human rights treaty, can not affect the legal system of the EU or imply any change in the competence of the EU; it must therefore be interpreted in compliance with the constitutional principles of the EU. In other words, the implementation of the UN CRPD by the EU must be built on a commonly (common to international law and to EU law) accepted interpretation (and level of protection) of these rights. To enter in a further discussion in this area would however be to venture too far away from the intended scope of this report.

A question arises whether any UN CRPD articles could have **direct effect** within the European legal order. This is relevant for aggrieved individuals who might consider taking a legal action based on the UN CRPD in the European legal order. In determining whether provisions of international law can have direct effect, two interrelated elements are taken into account:

- a. whether the parties which negotiated the agreement had an *express or implied intention* to give the provision of that agreement direct effect; and

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<sup>36</sup> See M. Cremona, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law*, EUI WP, 22/2006, at <http://cadmus.eui.eu/dspace/bitstream/1814/6249/1/LAW-2006-22.pdf>

<sup>37</sup> ECJ, 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation vs. Council of the European Union and Commission of the European Communities*, joined cases C-402/05 P and C-415/05 P, ECR 2008. This case mainly deals with the UN obligations and the effect of a Security Council decision and concerns the meaning and the scope of Article 307 TCE

<sup>38</sup> It should be noted that in the *Kadi case* the Advocate General, expressed the following opinion: "[...] the relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can only take effect in such order under the conditions prescribed by the constitutional principles of the Community [...]". *Ibid*, Opinion of the Advocate General, para 24.

- b. whether provisions of the agreement are *unconditional and sufficiently precise* to have direct effect. To this end, the ECJ examines the wording of the agreement's articles in the light of the context, object and purpose of the agreement.<sup>39</sup>

The ECJ's determination of direct effect is linked to a preliminary assessment of the nature and spirit of the agreement. As regards to the UN CRPD, all provisions are directed to States Parties and none seems to be clear and unconditional. It is, therefore, **unlikely** that any specific articles could have direct effect in the European legal order. However, as ruled by the ECJ in Case C-61/94,<sup>40</sup> the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements. It can therefore be concluded that accession to the UN CRPD creates an obligation to interpret EU law in manner that is consistent with the Convention.<sup>41</sup> To this end, if the wording of EU legislation is open to more than one interpretation, the ECJ should adhere, as far as possible, to the **interpretation** that renders the provision most consistent with the UN CRPD. Similarly, and in line with Article 300(7) TEC, all European institutions and the Member States (for matters falling within EU competence) are required to apply EU law in a manner that is consistent with the UN CRPD.

The selection of specific articles of the Treaty establishing the European Community to provide the **legal basis** for the conclusion of an international agreement is also important for its implementation in the European legal order.

- a. From the international law perspective: the ECJ has ruled that the legal basis gives an **indication** to the other contracting parties of the extent of EU competence,<sup>42</sup> and the division of competence between the EU and its Member States. However, the Court did not add any specification to this statement. We can argue though that those legal bases are to be considered in order to

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<sup>39</sup> See, e.g., ECJ, 26 October 1982, *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*, Case 104/81, ECR 1982 p. 03641.

<sup>40</sup> ECJ Case C-61/94 *Commission v. Germany* [1996] ECR I-3989, para 52

<sup>41</sup> See also Study of the High Commissioner for Human Rights on key legal measures for the ratification and implementation of the Convention on the Rights of Persons with Disabilities (A/HRC/10/48), para. 58, p. 18, available at: <http://www2.ohchr.org/english/bodies/hrcouncil/10session/reports.htm>

<sup>42</sup> ECJ, *Commission vs. Council*, Case 94/03, in ECR, 2006, p. I-1. In that case regarding the *Rotterdam Convention on international trade in hazardous chemicals*, the Commission and Council differed over the appropriate legal base for conclusion of the Convention, the Commission proposing Article 133 and the Council instead adopting the concluding Decision on the basis of Article 175 para 1 EC. Although the disagreement impacted on competence, the Court, having decided that this was case of genuinely dual legal base and therefore that the Decision should have been based on both Articles 133 and 175(1), discussed the implications of its finding purely in terms of procedure. Its conclusion was that there was no procedural incompatibility between the legal bases, the voting procedure in the Council being the same under both provisions, and the Parliament's prerogatives safeguarded by the use of Article 175 para 2 EC Treaty.

**evaluate** the responsibility of the EU at the international level.<sup>43</sup> However, we should also consider that apart from the legal basis used, the EU has accompanied Decision 2010/48/EC with the declaration of competence in which existing secondary legislation is listed in order to demonstrate the extent of EU competence for matters related to the Convention. To this ends, if the legal basis gives an ‘indication’, the declaration of competence annexed is intended to better show to the other contracting parties the distribution of competence between the EU and its Member States. In other words, the declaration aims at specifying which areas of the agreement fall within EU competence, for the purpose of a legal certainty at the international level; this means that the listed EU legislation (currently in force) is relevant to determine the existence of international responsibility upon the EU. However, we can also argue that acts listed in the declaration do not prevent the EU to implement the Convention, within areas that (according to the EU Treaty and the TFEU) fall under its competence, but are not yet covered by existent legislation. It is worth noting that in case of concurrent competences (*i.e.* shared between the EU and its Member States) both the Union and the Member States may legislate and adopt legally binding acts in that area. However, the Member States shall exercise their competence to the extent that the Union has not exercised its competence or has decided to cease its competence.<sup>44</sup> The latter statement means that once the EU moves to legislate in a certain field, Member States cannot enact autonomously new legislation within that field. In the exercise of these competences, both the principles of subsidiarity and proportionality have to be respected.

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<sup>43</sup> At this point, it is important to clarify the meaning of ‘international responsibility’. The term does neither refer to political accountability, nor to EU’s international credibility, nor exclusively to the scope of EU competence in the implementation of the Convention. ‘*International responsibility*’ is a legal (*i.e.* technical) issue, and it is related to the violation of an international obligation. The notion of international responsibility, in particular responsibility of international organisations (such as the EU which under international law is considered a *sui generis* international organisation), is an issue **still under development**. It is worth noting though that in 2009, the International Law Commission (ILC) adopted a set of 66 draft articles on the responsibility of international organisations which (based on the ILC’s work programme) will be further discussed in 2011. Based on the draft articles adopted by the ILC, ‘a wrongful act’ means an action or omission that is attributable to an international organisation under international law and constitutes breach of an international obligation by the international organisation in question. The latter definition may lead us to the conclusion that international responsibility may occur if the EU acts “not in conformity” with an obligation assumed under the UN CRPD, *i.e.* acts in breach of the general principle *pacta sunt servanda* (Article 24 of the Vienna Convention). Therefore, the EU must implement the UN CRPD in good faith, ensuring that its own domestic law is consistent with what is required by the Convention (compliance). As regards the practical implications for the EU in cases of ‘a wrongful act’, while it is hard to be definitive, given that the ILC is still working on this issue, it is nevertheless possible to indicate (based on the draft articles adopted by the ILC) the current position of the ILC which is the following: “*in case an international organisation conducts an ‘internationally wrongful act’, it will be under an obligation to cease that act, to offer appropriate guarantees of non-repetition (art. 29), and to make full reparation for the injury caused by the internationally wrongful act (art. 30). The responsible international organization may not rely on its rules as justification [for the ‘wrongful act’] (art. 31)*”. For further information, see at [http://untreaty.un.org/ilc/summaries/9\\_11.htm](http://untreaty.un.org/ilc/summaries/9_11.htm)

<sup>44</sup> See Article 2(2) TFEU

- b. From the EU law perspective: the legal basis for the conclusion of the UN CRPD **signals the appropriate legal basis for its implementation** within the EU. In this respect and in line with Article 4 UN CRPD, implementation implies that instruments may be adopted or modified by the Union in order to comply with the Convention and give effect to its provisions and principles. Although the choice of the legal basis for the decision concluding an international agreement is very important, it is not decisive for implementation. In Case C-178/03<sup>45</sup> concerned the implementation of the Rotterdam Convention on international trade in hazardous chemicals, the ECJ stated that *“the fact that one or more provisions of the Treaty have been chosen as legal bases for the approval of an international agreement is not sufficient to show that those same provisions must also be used as legal bases for the adoption of measures intended to implement that agreement at Community level”*.<sup>46</sup> The latter statement means that EC (now EU) Treaty provisions other than those mentioned in the Council decision to conclude the UN CRPD can be used as legal bases to implement UN CRPD obligations in specific fields.

The United Nations Convention on the Rights of Persons with Disabilities is an international human rights agreement where both the EU and its Member States are contracting parties. As already mentioned, the Convention is thus a **mixed agreement**. Mixed agreements involve a **shared contractual relationship** between the EU, its Member States and one or more third countries and/or international organisations. As a mixed agreement, the UN CRPD covers fields that fall in part within the competence of the EU, in part within that of the Member States and in part within the shared competence of the EU and its Member States. It is therefore essential for the EU and the Member States to closely cooperate in order to implement legislation stemming from the Convention in a coherent manner and ensure unity in the international representation of the Union.<sup>47</sup>

EU Member States, when participating in mixed agreements, do not act as entirely autonomous subjects of international law; they are subject to a duty of loyal cooperation between one another and the EU. This duty extends to each of the negotiation, conclusion and implementation phases. In this sense there is a collective management of the obligations under international law. The **duty of loyal cooperation**, deriving from Article 10 TEC,<sup>48</sup> embraces two sets of obligations: first, Member States shall take appropriate measures, whether general or particular, to

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<sup>45</sup> See ECJ, 10 January 2006 *Commission of the European Communities v European Parliament and Council of the European Union*, Case C-178/03, ECR 2006, I-00107, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003J0178:EN:HTML>

<sup>46</sup> Ibid, See Case C-178/03, para 40-46

<sup>47</sup> See also Decision 2010/48/EC, preambular paragraph (7)

<sup>48</sup> **TREATY OF LISBON**: Article 4(3) TEU

ensure fulfilment of the obligations arising out of the EC Treaty or resulting from action taken by the EU institutions; and second: Member States shall facilitate the achievement of the Union's tasks and shall abstain from any measure which could jeopardise the attainment of the objectives of the EC Treaty (now TFEU).

In relation to EU Member States' **compliance** with a mixed agreement concluded by the EU, the Court has inferred that for matters falling within EU competence, the Member States fulfil, within the EU system, an obligation in relation to the Union, which has assumed responsibility for the due performance of the agreement. In other words, if a Member State fails to take all appropriate measures to implement provisions of the mixed agreement that fall within the competence of the EU not only fails to fulfil its international obligation, but is also acting in breach of EU law. The Commission may thus bring an infringement case against a Member State that has not properly fulfilled its duty.<sup>49</sup> The principle underpinning such mechanisms is the duty of loyal cooperation, which provides the foundation for managing shared competence within mixed agreements.

The line dividing international responsibility for implementation of the international mixed agreement between the EU and its Member States depends on the obligations respectively assumed.<sup>50</sup> The UN CRPD contains a clause setting out "separate" responsibility. According to **Article 44(1) UN CRPD**, regional integration organisations acceding to the Convention should declare, in their instruments of formal confirmation or accession, the extent of their competence. This division of responsibility for implementation implies that the European Union only bears responsibility for the breach of the obligations it has assumed.

The **Council Decision 2010/48/EC** on the conclusion of the UN CRPD referred to the EU competence in respect to matters governed by the UN CRPD, and listed EU instruments that demonstrate such competence. Section 1.3 that follows provides an overview of the EU competence in matters governed by the Convention.

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<sup>49</sup> A prominent example is the *Etang the Berre* case (ECJ, 7 October 2004, *Commission of the European Communities v French Republic*, Case C-239/03, [2004] ECR I-9325). In this case, the ECJ held that a Member State could be in breach of its Community law obligations by failing to implement a mixed agreement, even though the alleged breach concerned an aspect of the agreement which was not covered by Community legislation; it was enough that the field in general was "covered in large measure" by Community legislation and in such cases "there is a Community interest in compliance by both the Community and its Member States with commitments entered into". Once the agreement has been concluded, it has become a part of Community law and the Community interest in holding the Member States to account under Community law is relevant to its enforcement as well as its interpretation. See M. Cremona, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law*, cit., especially p. 18 et seq.

<sup>50</sup> For the notion of international responsibility, see supra note 43.

## 1.3 EU declared competence in matters governed by the UN CRPD

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As mentioned earlier in this report, the UN CRPD has been signed by the European Community (now Union), and the decision to conclude it has been taken under the EC Treaty. Therefore, section 1.3 will only refer to the EC Treaty. When relevant, references to the Treaty of Lisbon will be made, but no thorough analysis will be provided.

Before the Council adopted its final Decision on the conclusion of the UN CRPD by the EU, the High Level Group on Disability (HLGD), in its First Report on the UN CRPD implementation,<sup>51</sup> identified nine areas of **mutual interest** for the EU (considering both the EU and its Member States) with regard to implementation. These areas are: accessibility (Article 9 UN CRPD); legal capacity (Article 12 UN CRPD); access to justice (Article 13 UN CRPD); independent living (Article 19 UN CRPD) and adequate standard of living (Article 28 UN CRPD); voting rights (Article 29 UN CRPD); monitoring mechanisms (Articles 33 and 35 UN CRPD); and empowering of persons with disabilities (Article 3 UN CRPD). Some of the matters addressed by the HLGD are beyond the scope of EU legal competence to act. Nonetheless, at the Ministerial Meeting of 22 May 2008, Member States confirmed that collaboration at the European level (e.g. exchanges of information and good practice) would be of added value for implementing the paradigm shift and achieving effective implementation of the UN CRPD.<sup>52</sup> To this end, the EU could become the 'platform' to facilitate Member States collaboration.

On November 26<sup>th</sup>, 2009 the Council adopted Decision 2010/48/EC concerning the conclusion, by the European Union, of the UN CRPD. Section 1.3 briefly outlines competences that were explicitly referred to in the Decision. These competences set the general framework for the UN CRPD implementation by the EU.

Firstly, as explained in previous section 1.2, the **legal basis** of Decision 2010/48/EC gives an indication of the extent of EU competence for matters related to the Convention. Regardless of the Commission's proposal to use multiple legal bases,<sup>53</sup>

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<sup>51</sup> First Disability High Level Group Report on Implementation of the UN Convention on the Rights of Persons with Disabilities (2008), available at:

<http://ec.europa.eu/social/BlobServlet?docId=2293&langId=en>

<sup>52</sup> Following the Ministerial Meeting of May 2008, EU Member States and representatives of civil society have reported to the HLGD progress in implementing the UN Convention in these areas and have noted evidence of the need for collaboration.

<sup>53</sup> COM(2008) 530 final, of 2/09/2008, Proposal for a Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, Presented by the European Commission.

the Council decided to use only Articles 13 and 95 in conjunction with the second sentence of the first paragraph of article 300(2) and the first subparagraph of article 300(3) of the Treaty establishing the European Community as legal bases for the conclusion of the UN CRPD.

**Article 13 TEC**<sup>54</sup> empowers the Council to take appropriate action to combat discrimination on the grounds of disability, and requires unanimous voting in the Council (Article 13(1) TEC). Article 13(2) TEC provides that when the Council acts, it does so, on a proposal from the Commission and after consulting the European Parliament, using the co-decision procedure. In addition, actions under Article 13 should exclude any harmonisation of laws and regulations of the Member States.

Article 13 TEC established the EU competence in the field of **non-discrimination**. In this respect the EU can take measures to combat discrimination on the basis of, *inter alia*, disability. However, Article 13(2) TEC only allows for the adoption of supporting (and not harmonising) measures. Furthermore, Article 13 TEC does not produce direct effect, and therefore it does not confer rights on individuals. The article also allows for the adoption of not only legally binding measures, but also *sui generis* soft measures, such as guidelines and action programmes. It should further be noted that combating discrimination on the basis of disability falls under the shared competence of the EU and the Member States.

**Article 95 TEC**<sup>55</sup> enables the Union to adopt harmonising measures which have as their object the establishment and functioning of the **internal market**. Given that the internal market is a broad concept that encompasses the removal of all kinds of barriers to free movement of goods, persons, services and capital, the Union can, on the basis of Article 95 TEC, address many different areas linked to the UN CRPD. To date, a handful of instruments based on Article 95 TEC have already recognised a specific disability dimension to securing the internal market.<sup>56</sup> For example, Directive 95/16/EC<sup>57</sup> on lifts refers to the need to ensure accessibility for disabled persons;

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<sup>54</sup> In the **Treaty of Lisbon**, principles of Article 13 TEC are set forth on Article 19 TFEU. In addition Article 10 TFEU foresees that in defining and implementing its policies and activities, the Union shall aim to combat discrimination on the basis of *inter alia* disability

<sup>55</sup> In the **Treaty of Lisbon**, principles of Article 95 TEC set forth in Article 114 TFEU. It should be noted though, that the new article 114 has a significantly different text of article 92, as it provides for exceptions in the areas of environment and health.

<sup>56</sup> See Waddington, Lisa (2008), *The Internal Market and Disability Accessibility: Using EC Law to Establish an Internal Market in Disability Accessible Goods and Services*, Maastricht Faculty of Law Working Paper no. 3, August 2008

<sup>57</sup> Directive 1995/16/EC of the European Parliament and of the Council of 29 June 1995 on the approximation of the laws of the Member States relating to lifts [1995] OJ L213/1 as amended. The Directive establishes EU legal requirements for the design, installation and placing on the market of new lifts. It also sets out the conformity assessment procedures to be followed by lift installers to ensure conformity with these requirements. The provisions of the Directive are implemented in the national law

Directives 2004/17/EC<sup>58</sup> and Directive 2004/18/EC<sup>59</sup> on public procurement allow accessibility for disabled people and design for all requirements to be taken into account during the different stages of public procurement; and many other examples could be given. Lastly, it should be noted that in the internal market area, the European Union shares competence with the Member States, and therefore close cooperation between EU and Member States actions is deemed necessary.

Finally, **Article 300 TEC** establishes the procedure for the conclusion of international agreements. The article provides that a Council decision is the only appropriate legal instrument for the Union to conclude an international normative text. The Council should only conclude such agreements after consulting with the European Parliament. Moreover, Article 300(6) TEC provides that the Court may be requested by the Council, the Commission or a Member-State to assess whether an agreement to be concluded is compatible with the provisions of the Treaty. To date, no opinion has been requested from the ECJ regarding the UN CRPD. This could be seen as evidence that no questions can be raised on EU competence in dealing with human rights, while the overall compatibility of the UN CRPD with the Union's legal system as it stands could not be denied.

In addition to the aforementioned legal bases, Annex II of the Decision indicates the competence of the EU for matters governed by the UN CRPD. The Decision states that, at present, the Union has **exclusive competence** as regards the compatibility of state aid with the common market, the common custom tariffs, and matters related to its own public administration (e.g. recruitment, remuneration, training etc). In the fields of discrimination, free movement of goods, persons, services and capital agriculture, transport, taxation, internal market, equal pay for male and female workers, and Trans-European policy and statistics, the Union **shares competence** with its Member States. The Decision further clarifies that in the aforementioned areas of shared competence, the Union has exclusive competence to enter into the UN CRPD in respect of those matters only to the extent that provisions of the UN CRPD or legal instruments adopted in its implementation thereof affect common rules previously established by the Union.

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of each Member State of the EU. Accessibility for persons with disabilities is address in Annex I of the Directive.

<sup>58</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L134/1. The Directive coordinates legislation on public procurement procedures of entities in the fields covered. Accessibility for persons with disabilities is mentioned in Articles 28 and 34 as well as in Annex XXI of the Directive. For further information, see Annex IV of this report.

<sup>59</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114. The Directive coordinates legislation on public procurement procedures in the fields covered. Accessibility for persons with disabilities is mentioned in Articles 19 and 23 in conjunction with Annex VI of the Directive. For further information, see Annex IV of this report.

In addition, the Decision lists, in the Appendix of Annex II, specific Community acts that illustrate the extent of the area of competence of the Community (now Union) in accordance with the EC Treaty. As the Decision clarifies,

the extent of the European Union's competence ensuing from these acts must be assessed by reference to the precise provisions of each measure, and in particular, the extent to which these provisions establish common rules.<sup>60</sup>

In other words, each individual instrument mentioned in the Decision must be examined to establish the exact extent of the competence exercised by the EU with regard to the rights of people with disabilities in the relevant field thus far. It should though be recalled that the fact that only existing legislation (meaning legislation that is currently in force) is listed in the decision, does not prevent the Union to implement the Convention, within areas that (according to the EU Treaty and the TFEU) fall under its competence, but are not yet covered by existent legislation.<sup>61</sup>

Importantly, Decision 2010/48/EC underlines that:

The scope and the exercise of EU competence are, by their nature, subject to continuous development and the EU will complete or amend this Declaration, if necessary, in accordance with article 44(1) of the Convention.<sup>62</sup>

It is in other words recognised that while it is hard to be definitive, given that EU competences are *sui generis* in nature, it is nevertheless possible on the basis of the EC Treaty (now TFEU) and secondary legislation adopted by the EU thus far, to indicate which areas of the Convention fall under the EU competence. In addition, we may argue that the aforementioned statement may also imply a need for the EU to perform a *continuous examination* of EU legislation for matters related to the implementation of the Convention, with the aim to verify the line dividing international responsibility for implementation between the EU and its Member States, which is critical in managing the implementation of the Convention at the EU level, and forms the basis for an ultimate division of international responsibility.<sup>63</sup>

Finally, the Decision refers to EC (now EU) policies that may be relevant to the UN CRPD. These policies include: (a) cooperation between the Union and its Member States for the development of a coordinated strategy for employment; (b) contribution to the development of quality of education by encouraging cooperation between the Member States of the EU and, if necessary, by supporting and supplementing their

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<sup>60</sup> See Decision 2010/48/EC, *supra* note 13, Annex II, p. 4

<sup>61</sup> For further details see Section 1.2 of this report.

<sup>62</sup> See Decision 2010/48/EC, *supra* note 13, Annex II, p. 2

<sup>63</sup> For further information on the notion of 'international responsibility' see *supra* note 43

action; and (c) development cooperation policy with third countries without prejudice to the respective competence of the Member States of the EU.

## 1.4 Framework of Analysis

Following the introductory analysis that aimed to set the appropriate background, section 1.4 provides a brief overview of the study's framework of analysis.

This study did not cover each and every article of the UN Convention on the Rights of Persons with Disabilities. Articles most relevant to the study's goals were selected for analysis. Therefore, the UN CRPD has been classified into **thematic areas**, which provide the main framework of the analysis and the structure of this report.<sup>64</sup> The thematic areas were chosen in order to address the core areas of the paradigm shift and areas of mutual interest identified by the High Level Group on Disability (HLGD).

The table below illustrates the UN CRPD thematic areas, and articles to be analysed in the following sections of this report. The table also identifies whether or not the implementation of an article falls under the EU and/or Member States competence. It should be noted that for the purposes of this study, the identification of EU competence is solely based on the Council Decision 2010/48/EC, and the list of instruments that were included in the Decision to illustrate the extent of such competence.

Figure 2 Framework of Analysis

Framework of analysis	UN CRPD Articles	Competence	HLGD Priority Area	Decision 2010/48/EC
Paradigm Shift <i>Should be established in all legislation/policies</i>	Preambles Art. 1	EU + Member States	<i>n.a.</i>	<i>n.a.</i>
Articles of General Cross-Cutting Application				
General principles and obligations	Arts. 3 - 4	EU + Member States	<i>n.a.</i>	<i>n.a.</i>
Equality & Non-Discrimination	Art. 5	EU + Member States	No	Yes
Inter-sectionality	Arts. 6 - 7	EU + Member States	No	No
Accessibility	Art. 9	EU + Member States	Yes	Yes
Substantive Provisions				
<i>Dignity Rights</i>				

<sup>64</sup> The framework of the Study was discussed and adopted by the team in 1<sup>st</sup> Coordination Meeting held in Brussels on March 3<sup>rd</sup>, 2009.

Right against Violence, Exploitation and Abuse	Art. 16	Member States	No	No
Integrity of the Person	Art. 17	Member States	No	No
<i>Autonomy Rights</i>				
Legal Capacity	Art. 12	Member States	Yes	No
Living Independently	Art. 19	EU + Member States	Yes	No
<i>Specific Accessibility Rights</i>				
Access to Justice	Art. 13	Member States	Yes	No
Access to, and Participation in, the Political and Public life	Art. 29	Member States	Yes	No
<i>Solidarity Rights</i>				
Education	Art. 24	Member States EU supplementary competence	No	Yes
Employment	Art. 27	EU + Member States	No	Yes
<i>The Dynamic of Reform<sup>65</sup></i>				
Statistics and Data Collection	Art. 31	EU + Member States	No	Yes
International Cooperation	Art. 32 <sup>66</sup>	EU + Member States	No	Yes
Implementation and Monitoring	Art. 33	EU + Member States	Yes	Yes

The analysis that follows considers how UN CRPD obligations, derived from the aforementioned articles, can be implemented at EU and Member States levels. Indicative examples of EU and Member States instruments will be reviewed in light of the purpose and objectives of the Convention. The final aim of the analysis is to provide general guidance for future implementation of the Convention by both the EU and its Member States.

<sup>65</sup> This thematic area includes articles of the Convention that outline practical steps that are necessary to support national implementation efforts.

<sup>66</sup> Article 32(1) of the UN CRPD explicitly recognises the importance of international cooperation in support of national implementation efforts for the realisation of the purpose and objectives of the Convention on national levels. For further analysis of Article 32, go to section 5.2 of this report

## 2.0 The Paradigm Shift: A social model of disability

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Section 2 of this report provides an overview of the social model of disability and core obligations derived from Article 1 and preambular paragraph (e) of the UN CRPD. The section is accompanied by general recommendations on the application of the paradigm shift. Detailed checklists, contained in Annex I of this report, also accompany this analysis.

### 2.1 Obligations derived from the Paradigm Shift

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The UN CRPD embodies a social understanding of disability according to which **societal** constraints and barriers (not individual limitation) serve to inhibit full participation by, and inclusion of, persons with disabilities in society. It is this understanding that creates the conceptual point of departure for articulating disability rights. The UN CRPD requires a **holistic application of human rights**, and therefore medical models of disability do not afford the conceptual breadth required for full and effective implementation of the Convention.

Significantly for shaping the overall thrust of the UN CRPD, preambular paragraph (e) together with Article 1 UN CRPD, evoke the social model, by describing disability as a condition arising from *“interaction with various barriers [that] may hinder their full and effective participation in society on an equal basis with others”* instead of inherent limitations. This situates the UN CRPD firmly within a **social model**, which is rights-based, as opposed to a medical model of disability which involves health-oriented legislative instruments.<sup>67</sup>

The paradigm shift is not only ethical or ideological, but also legal. The UN CRPD is the first international human rights treaty to embrace the social model of disability. International instruments adopted in the past (both binding and non-binding)<sup>68</sup> could have been interpreted to apply in the context of disability, but were not. Therefore, it may be necessary for some provisions in earlier general and thematic conventions to be re-considered in light of the UN CRPD. The UN CRPD should be considered as the **highest standard** of protection of the human rights of persons with disabilities, and therefore, when a state or regional integration organisation accede to the Convention,

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<sup>67</sup> See Report A/HRC/10/48, supra note 41, at p. 11

<sup>68</sup> For example: Principles 1(6), 11(6) or 11(15) of the Principles for the protection of persons with intellectual or psycho-social disability and the improvement of mental health care; Principle 82 of the Standard minimum rules for the treatment of prisoners (referring to insane and prisoners psycho-social disability); Article 1(2)(b) of the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities; Article 5(e) of the European Convention on Human Rights; and the Council's of Europe Convention on Human Rights and Biomedicine (Oviedo, 4.IV.1997)

its provisions, including its reflection of the social model of disability, should prevail. This statement finds support in both, the *lex-posterior*,<sup>69</sup> and *pro-homine*<sup>70</sup> principles.<sup>71</sup>

The **challenge**, when applying the paradigm shift at domestic level, is the subtle, and not always acknowledged, difference between the terms ‘impairment’ and ‘disability’.<sup>72</sup> The notion of ‘disability’ used in the UN CRPD focuses on barriers, which may hinder full and effective participation in society on an equal basis with others, and not on individual impairments. This is particularly important for the application of certain rights, such as legal capacity (Article 12 UN CRPD). In recognising the evolving concept of disability, the UN CRPD places a strong emphasis on removing social barriers. This reflection of the social model of disability recognises that the major obstacle in the realisation of rights for persons with disabilities relates to attitudinal, physical, communication, legal and other barriers that inhibit the full participation of persons with disabilities in society.<sup>73</sup>

Research for this study in the Member States of the EU has revealed that, in general, the paradigm shift embodied in the Convention has not yet been effectively reflected in the majority of the Member States. Some progress has been made, but overall the embracement of the social model of disability in all policy areas related to the Convention, has not yet been achieved.<sup>74</sup> Regarding definitions of disability in national laws, even though some states have conceptualised disability within a social context, this is not the case for the majority. Furthermore, reference to specific types of impairments within some national definitions, may hamper the full protection and inclusion of all persons with disabilities. Examples of national definitions on disability will be outlined in the following sections of the report, when specific legislative acts from the Member States of the EU will be presented, in order to understand challenges that may arise to the effective implementation of the UN CRPD.

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<sup>69</sup> This means that when there is a contradiction between laws, the most recently adopted prevails. In other words, the UN CRPD prevails over international instrument adopted in the past and are relevant for matters related to disability.

<sup>70</sup> This means that the provisions of the UN CRPD prevail over international instruments adopted in the past, because the Convention offers higher protection to persons with disabilities.

<sup>71</sup> Agustina Palacios, statement at the Open-ended consultation on key legal measures for the ratification and implementation of the Convention on the Rights of Persons with Disabilities, 24 October 2008, Geneva. Available at:

<http://www2.ohchr.org/english/issues/disability/docs/FinalConsultationreport.doc>

<sup>72</sup> See Palacios A. & Walls M, “*Changing the Paradigm – the Potential impact of the United Nations Convention on the Rights of Persons with Disabilities*”, Irish Yearbook of International Law Vol. 1, 2007.

<sup>73</sup> Traustadóttir, Rannveig (2008), *Disability Studies, the Social Model and Legal Developments*, in Oddný M. Arnardóttir and Gerard Quinn (eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, pp. 14-24

<sup>74</sup> For example in the area of legal capacity, the majority of the Member States continue to operate guardianship laws premised on a medical model of disability.

As regards the European Union, even if a clear definition of disability is not incorporated in EU law, it appears that legislation is implicitly based on a rights-based approach to disability, and therefore aims at removing physical and societal barriers that hinder full participation of persons with disabilities in the society. Both the Commission and the Council have recognised the need to base EU policy on the social model of disability.<sup>75</sup> Already back in 1996, a Communication of the Commission on Equality of Opportunity for People with Disabilities<sup>76</sup> noted that the way in which society is organised serves to exclude citizens, and further elaborated about the development of an ‘equal opportunities model’ for persons with disabilities. In the same year, the Council adopted a Resolution on Equality of Opportunity for People with Disabilities<sup>77</sup> and reaffirmed its commitment to the principles and values of the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities,<sup>78</sup> and in particular the principles of equality of opportunity and the eliminating negative discrimination on the basis of disability. Since then, EU legislation sustains a rights-based approach to disability and EU institutions continue to stress regularly their commitment to the social model disability.<sup>79</sup>

Today, as the EU is a party to the UN CRPD, the obligation to apply the social model of disability applies to all EU institutions, including the ECJ, which should apply EU law in manner consistent with the Convention. Furthermore, the Member States of the EU, when transposing EU law into their national systems, should ensure fulfilment of the obligation to implement a rights-based approach to disability.

## 2.2 General Recommendations for States Parties

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States Parties’ **law and policy reform** should spring from the social model understanding of disability and this should be reflected in the overall statement of guiding principles for domestic law and policy.

The **social model of disability** should also inform the approach taken to defining disability in law and policy, no matter the specific context, whether employment, education, pensions or other area.

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<sup>75</sup> See Waddington, Lisa (2007), Case C-13/05 *Chacón Navas vs Eurest Colectividades SA*, judgement of the Grand Chamber of 11 July 2006, nyr, in *Common Market Law Review*, Kluwer Law International

<sup>76</sup> Communication of the Commission on “Equality of Opportunity for People with Disabilities” of 30 July 1996, COM(96) 406 final.

<sup>77</sup> Resolution of the Council and of Representatives of the Governments of the Member States meeting within the Council of 20 December 1996 on equality of opportunity for people with disabilities, O.J. 1997, C12/1

<sup>78</sup> UN General Assembly Resolution 48/47 of 20 December 1993

<sup>79</sup> See Waddington, Lisa (2007), *supra* note 75, pp 491-492

## 3.0 Articles of General and cross-cutting application

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Section 3 will provide an overview of the obligations derived from Articles 3 to 9 of the UN CRPD. These are articles of *general application*, and thus should be applied across the treaty text. Specifically, this section of the report highlights core obligations arising out of Article 3 (General principles), Article 4 (General obligations) and Article 9 (Accessibility) and provides general recommendations for implementation. Articles on *inter-sectionality*, namely, Article 6 (Women with disabilities) and Article 7 (Children with disabilities) are likewise addressed. Detailed checklists contained in Annex I of this report accompany this analysis.

It is important to note that given the *cross-cutting nature* of Articles 3 to 9, they have a role to play in guiding the implementation of *all* UN CRPD obligations. In other words, beyond the specific obligation to implement the provisions of Articles 3 to 9, obligations deriving from these articles are of cross-cutting nature and therefore should also be applied within any assessment of a specific substantive provision (*i.e.* Articles 10 to 30 UN CRPD) and in relation to certain monitoring and implementation provisions (*i.e.* Articles 31 to 33 UN CRPD) of the Convention.

### 3.1 General Principles of the UN CRPD

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Article 3 of the UN CRPD sets forth the Convention's general principles,<sup>80</sup> and thus enunciates the general (or normative) principles upon which the UN CRPD is based. Section 3.1 presents the core elements and obligations for States Parties, deriving from Article 3 UN CRPD. The section aims to provide general recommendations for future implementation. Due to the general character of Article 3, it is not possible to provide a distinct overview of practices related to its implementation by the EU and its Member States. However, the general principles of the UN CRPD will be examined (where appropriate) in the context of specific Articles of the Convention.

#### 3.1.1 Article 3 obligations

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Article 3 of the UN CRPD articulates the general principles that will serve to guide the interpretation of the entire text of the Convention. The general principles of the UN CRPD provide what one senior commentator has referred to as the Convention's

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<sup>80</sup> A detailed overview of the general principles is provided in the Briefing Paper "*General Principles and Core Obligations under the Convention on the Rights of Persons with Disabilities*", written by Janet E. Lord and Prof. M. Stein for the Study VC/2008/1214.

“moral compass”.<sup>81</sup> They are **benchmarks** against which EU and Member States legal frameworks should be assessed in order to determine overall compliance. General principles include: respect for individual dignity, autonomy, and independence; respect for difference and acceptance of disability as human diversity; non-discrimination and equality of opportunity; full and effective participation; accessibility; gender equality; and respect for children’s rights and support of their evolving capacities.

While the terms ‘*respect for inherent dignity*’, ‘*individual autonomy*’ and ‘*independence of persons*’ (Article 3(a) UN CRPD) are not specifically defined in the UN CRPD, together they encompass the overall thrust of the Convention, namely, that persons with disabilities, as human beings, have the right to all human rights and freedoms.

The principle ‘*respect for difference and acceptance of disability as human diversity*’, (Article 3(a) UN CRPD) is also not defined in the UN CRPD, nor does it attach to existing human rights convention terminology; though the principle clearly acknowledges, *for example*, a basic idea of human rights law that individuals are active subjects of human rights, as opposed to objects to be acted upon. Moreover, in recognising disability as a natural part of human diversity, Article 3(a) UN CRPD underlines the **social context of disability**. It thus obliges States Parties to abolish existing practices based on outmoded approaches to disability.

*Non-discrimination* requires States Parties to ensure the equality of individuals with disabilities, as well as prohibiting any discrimination on the basis of disability. As recognised under human rights law, a robust non-discrimination and equality framework recognises that the achievement of *de facto* equality may require the introduction of specific, or affirmative action measures in order to achieve equality, and to lessen, and eradicate conditions that reinforce and perpetuate discrimination.<sup>82</sup> The principle of non-discrimination is further articulated as a substantive right in Article 5 UN CRPD, and exemplifies a particularly robust version of equality. Thus, formal equality measures, such as simple guarantees of equality, without any supporting measures, are not enough to realise the substantive equality vision of the UN CRPD.

*Participation and inclusion* denote the right to participate in decision-making and should be understood broadly and well beyond the voting context. The context of participation is further elaborated in Article 29 UN CRPD.

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<sup>81</sup> Gerard Quinn, Key Note Address to German European Union Presidency Ministerial Conference: Empowering Persons with Disabilities, *The UN Convention on the Human Rights of Persons with Disabilities: A Trigger for Worldwide Law Reform*, Berlin, 11 June 2007, available at: <http://www.eu2007.bmas.de/EU2007/Redaktion/Deutsch/PDF/2007-06-12-rede-quinn.property%4pdf,bereich%4eu2007,sprache%4de,rwb%4true.pdf>

<sup>82</sup> See Human Rights Committee, General Comment 18, non-discrimination, para. 10; CERD, art. 1(4); CEDSAW, Article 4(1).

The principle of *'equality of opportunity'* (Article 3 (e) UN CRPD) compliments the principle of non-discrimination. Equality of opportunity reflects the social model of disability in recognising that the inclusion of persons with disabilities requires modification of societal systems and the environment.

The principle of *accessibility* (Article 3(f) UN CRPD) requires State Parties to dismantle and prevent barriers resulting from discriminatory attitudes by promoting different forms of accessibility in the public and private spheres, including physical, technological, economic and social accessibility, as well as information and communication accessibility. The principle of accessibility is further elaborated in Article 9 of the UN CRPD, and therefore will be elaborated in Section 3.5 of this report.

*Gender equality* (Article 3(g) UN CRPD) refers to equality between men and women with disabilities. The principle is also addressed in Article 6 of the UN CRPD, and therefore will be elaborated in Section 3.4 of this report.

Finally, the principle *'respect for the evolving capacities of children with disabilities'* (Article 3(h) UN CRPD) requires that the human rights and fundamental freedoms set out in the UN CRPD, be interpreted and applied in a manner that recognises and accommodates the development and independence of children with disabilities towards adulthood. The principle is also addressed in Article 7 of the UN CRPD, and therefore will be elaborated in Section 3.4 of this report.

### 3.1.2 General Recommendations for States Parties to the UN CRPD

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States Parties should, as part of the implementation process of the UN CRPD, **assess** whether the general principles of the UN CRPD are reflected in legislation, policy and in administrative arrangements related to the overall implementation of the UN CRPD.

States Parties should, *inter alia*, **ensure** respect for the general principles of the UN CRPD in all measures related to the implementation of the UN CRPD, including in arrangements for preparing States Parties reports under the UN CRPD, and in mechanisms for the development of legislation, policy and practice which may affect persons with disabilities.

## 3.2 General Obligations of the UN CRPD

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Article 4 of the UN CRPD requires States Parties to give effect to UN CRPD obligations within their domestic legal orders.<sup>83</sup>

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<sup>83</sup> A detailed overview of the general obligations is provided in the Briefing Paper *"General Principles and Core Obligations under the Convention on the Rights of Persons with Disabilities"*, written by Janet E. Lord and Prof. M. Stein for the Study VC/2008/1214

Section 3.2 presents the core elements and obligations for States Parties, deriving from Article 4 UN CRPD. The section also provides an overview of indicative practical examples from the European Union and its Member States, and aims to provide general recommendations for future implementation of the UN CRPD.

### 3.2.1 Article 4 obligations and overview of practices

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Article 4 (paragraph 1 in particular) requires States Parties to take measures that ensure the promotion and full realisation of all human rights and fundamental freedoms for all persons with disabilities, while also prohibiting any form of discrimination in their attainment. Article 4 imposes both **obligations of conduct**<sup>84</sup> and **obligations of result**.<sup>85</sup> Specifically, the provision enumerates the obligations on States Parties to **adopt** legislative, administrative and other measures to implement the Convention and to **abolish or amend** existing laws, regulations, customs and practices that discriminate against persons with disabilities (Articles 4(1)(a) and (b) UN CRPD). It logically follows, that the UN CRPD requires States Parties to conduct some form of **screening exercise**, in order to measure compliance with the UN CRPD across legislative and regulatory schemes, as well as reviews of customs and practices. The conduct of a screening exercise should be a matter of first priority for the UN CRPD implementation. This natural reading of the wording of Article 4 UN CRPD finds support in a recent statement of the Chair of the CEDAW<sup>86</sup> Committee in 2008 that the obligation to modify and abolish laws contained in the parallel provision of CEDAW (Article 2) is an **'immediate' obligation** of States Parties even if in practice it takes time to implement.<sup>87</sup> Furthermore, the OHCHR has also underlined that the obligation for a comprehensive review requires rigorous action, and that such a review should consider the UN CRPD *"not only article by article, but also holistically, recognising the interdependence and indivisibility of human rights."*<sup>88</sup>

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<sup>84</sup> See, Richard Pierre Claude and Burns Weston, Human Rights in the World Community 159 (1992). Obligations of conduct may be defined as specified behaviour, whether active or passive, that the duty bearer should either follow or abstain from doing.

<sup>85</sup> Ibid, Obligations of result are broadly crafted obligations associated with attaining a particular effect, applied especially in relation to economic, social and cultural rights. An obligation of conduct, as noted above, refers to the result that the duty bearer must either achieve or refrain from doing.

<sup>86</sup> Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)

<sup>87</sup> See Ms. Šimonović's statement, Informal panel discussion on the UN mechanisms, 4 April 2008, p 5 available at:

[http://www2.ohchr.org/english/bodies/cedaw/docs/statement/Discriminatory\\_Laws\\_Statement\\_Simonovic\\_04.04.08.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/statement/Discriminatory_Laws_Statement_Simonovic_04.04.08.pdf)

<sup>88</sup> See A/HRC/10/48, supra note 41, p. 10, para. 30. See also Committee on the Rights of the Child, General Comment No. 5 (CRC/GC/2003/5), para 18, available at:

<http://www2.ohchr.org/english/bodies/crc/comments.htm>

The obligation to modify and abolish any laws, regulations, customs and practices that discriminate against people with disabilities (Article 4(1) UNCRPD) clearly entails an obligation to **examine** whether existing laws and practices do so discriminate, and not simply to wait until a person who has been discriminated against, brings an action to challenge that practice, or for a party to the Convention to wait until it adopts new legislation in that particular field anyway. Otherwise the obligation to *'modify and abolish'* discriminatory laws would be rendered virtually empty.

Article 4 further requires States Parties to adopt an **inclusive approach** to protect and promote the rights of persons with disabilities in all policies and programmes, which suggests the need for a screening exercise to assess policy and programming inclusion across all sectors.

Article 4 should be read in conjunction with Article 33 of the UN CRPD, which recommends States Parties to give due consideration to the establishment or designation of a governmental coordination mechanism to facilitate **cross-sectoral** and **multi-tiered implementation**. Consistent with other human rights conventions, the UN CRPD provides that States Parties should refrain from conduct that violates the Convention, and also requires that public bodies respect the rights of persons with disabilities.<sup>89</sup> The UN CRPD likewise requires States Parties to take measures to abolish disability discrimination by persons, organisations or private enterprises.<sup>90</sup>

Implementation of Article 4 UN CRPD by States Parties entails a **variety of methods** beyond the enactment of legislation, or screening of existing legislation to assess compliance with the UN CRPD.<sup>91</sup> These methods include, for example, policy reviews, robust training on disability rights, and information sharing. The UN CRPD also requires States Parties to engage in research and development of accessible goods, services and technologies for persons with disabilities and to promote others to undertake such research.<sup>92</sup> States Parties should also provide accessible information about assistive technology to persons with disabilities,<sup>93</sup> and promote professional and staff training on the UN CRPD for those working with persons with disabilities.<sup>94</sup> Article 4 also requires consultation with, and involvement of, persons with disabilities in

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<sup>89</sup> UN CRPD at article 4(1)(d).

<sup>90</sup> UN CRPD at article 4(1)(e).

<sup>91</sup> The method of translating international legal obligations into national law is dependent upon the nature of the domestic legal system. For a straight-forward account of this process, see *Report of the United Nations Consultative Expert Group Meeting on International Norms and Standards Relating to Disability*, Berkeley, California, pp 20-24 (December 8-12, 1998).

<sup>92</sup> UN CRPD at articles 4(1)(f) & (g).

<sup>93</sup> UN CRPD at article 4(1)(h).

<sup>94</sup> UN CRPD at article 4(1)(i).

developing and implementing legislation and policies and in decision-making processes concerning UN CRPD rights.<sup>95</sup>

Considering obligations set forth in Article 4, research for this study in the **EU Member States**<sup>96</sup> has revealed that most Member States have not yet taken the first step towards fulfilment of obligations arising out of the UN CRPD, meaning that national legislations and policies have not yet been systematically reviewed. Only four complete national screening exercises were identified by this study. The EU Member States, which have fulfilled their 'screening obligation' under the UN CRPD, are Austria,<sup>97</sup> Germany, Sweden and the UK.

For example, **Sweden** launched its screening exercise in 2007, before the UN CRPD ratification. The process was mainly largely centralised, and the responsibility of an investigator who was appointed within the Government's office to perform the following tasks: (a) to review (and translate) the Articles of the UN CRPD; (b) identify relevant Swedish legislation and policies; and (c) evaluate whether or not changes were needed. The screening process lasted approximately a year, and results were published in a report in March 2008.<sup>98</sup> The main conclusion of the report was that "*although much remains to be done*" before Sweden fully satisfies its obligations under the UN CRPD, "*no legislative changes were needed*" in order to ratify the UN CRPD and its Optional Protocol.<sup>99</sup> Even though the screening report does identify some gaps in Swedish practices related to disability, the report's conclusions contain no concrete proposals for necessary changes (e.g. legislative amendment, adoption of new policies or other).<sup>100</sup>

Regarding the involvement of persons with disabilities, as stated by a Swedish representative, a reference group representing the disability movement was appointed

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<sup>95</sup> UN CRPD at article 4(3).

<sup>96</sup> See Research paper on "National overview of legislation and policies that needed/needs to be adjusted in order to comply with the UN CRPD", written by Karen Walsh of the Center for Disability Law and Policy of the National University of Ireland, Galway, for the Study VC/2008/1214.

<sup>97</sup> Austrian response to Study's questionnaire on "National Institutional and Policy Apparatus". Austria launched a screening exercise *during* UN CRPD negotiations. As the Austrian representative stated, "many topics, which the UN CRPD constitutes, were determined in Austria before UN CRPD signature and ratification. All federal ministries were involved in the screening process of Austrian law concerning compatibility with the UN CRPD". However it was not clearly determined whether persons with disabilities were consulted or whether the results of this screening exercise were made available for the public. Information about the outcomes of the Austrian screening exercise was obtained by this study, but a single report containing all outcomes of the exercise was not identified.

<sup>98</sup> The published results of the Swedish screening process are available (in Swedish) at: <http://www.regeringen.se/sb/d/10055/a/101918>

<sup>99</sup> Swedish response to the Study's Questionnaire on "good practices in the implementation of the UN Convention on the Rights of Persons with Disabilities"

<sup>100</sup> It should be noted though that some guidance for changes is given in the report.

to help the investigator, and the screening report was developed in close cooperation with representatives from disability organisations.<sup>101</sup>

In addition to national governmental screening exercises, a screening exercise was also identified in **Spain** that was a non-governmental initiative. This civil society initiative satisfies the screening requirements set forth in Article 4 of the UN CRPD, and therefore the initiative could be characterised as a ‘**good practice**’.

In 2007, the Spanish Committee of People with Disabilities (CERMI)<sup>102</sup> in cooperation with University Carlos III of Madrid and supported by Fundación ONCE, decided to launch a screening of Spanish practices relevant to the UN CRPD, evaluate compliance, and identify areas where changes are needed. To this purpose, the screening exercise addressed the following issues:

- a. the situation of persons with disabilities in Spain;
- b. the existing legal framework for ensuring the rights of persons with disabilities;
- c. the need for law and policy reform in the light of the UN CRPD; and
- d. an examination of national bodies that could play the role of a focal point, and/or coordination mechanism, and/or mechanisms with the mandate to monitor, protect and promote the rights of persons with disabilities.

University Carlos III of Madrid assembled a team of high level professionals from a diverse range of fields to perform the legislative evaluation, and ensure a cross-sectoral analysis. Representatives of organisations representing the rights of persons with disabilities also participated in the project team.

In addition to the legislative screening, CERMI compiled information on the situation of persons with disabilities, on the basis of a number of sources, including queries and complaints received by CERMI, information from other associations and the media. As a result of this process, a report entitled “Human Rights and Disability” was published in 2008.<sup>103</sup> The aim of the report was to raise awareness of the real situation of persons with disabilities within Spain, through the provision of information on where the rights of disabled persons were being violated, and the provision of concrete recommendations on necessary steps that need to be taken by the State in order to protect and promote the rights of disabled people, as encompassed in the UN CRPD.

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<sup>101</sup> Swedish response to the Study’s Questionnaire on good practices. As indicated in the foreword of the report, reference group representing the disability movement includes representatives from The Swedish Disability Federation (Handikappförbundens samarbetsorgan - HSO) and The Swedish Association of Persons with visual impairments (Synskadades Riksför-bund)

<sup>102</sup> CERMI is a Spanish umbrella group for disabled people’s organisations, representing more than 5,000 associations and organisations of persons with disabilities and their families.

<sup>103</sup> The CERMI Report is available (in Spanish) from <http://www.cermi.es/NR/rdonlyres/A6D627AE-6A58-4213-884D-6C4F9BE20C5A/28913/DerechosHumanos2.pdf>

Both screening reports, prepared by University Carlos III of Madrid, and CERMI were presented to Spanish parliamentarians.

This Spanish civil society initiative fulfils all the necessary requirements for an effective screening exercise. Practical experience gained from Spanish actors involved in the screening process could be of added value for EU Member States which have not yet conducted a screening exercise, as required by Article 4 UN CRPD.

In addition to States, the obligation of a 'screening exercise' applies with equal force to the **European Union** upon the conclusion of the Convention. Among the more important of these general obligations, Article 4(1) UN CRPD implies an **ongoing process of reflection** with regard to existing laws (Union *acquis*) and policies against the requirements of the UN CRPD. The EU is not exempted from this obligation. In other words, the argument that the EU has limited competence for matters related to the implementation of the Convention is not sufficient to show that the EU is exempted from the obligation to examine and, *if necessary*, to modify existing legislation with regard to matters covered by the Convention and falling under EU competence.<sup>104</sup> To argue otherwise would militate against the plain meaning of the text and frustrate one of the main objects and purpose of the UN CRPD, which is to challenge the legacy of the past.

As mentioned earlier in Section 1.2, Article 44(1) of the UN CRPD requires for the EU to declare the extent of its competence with respect to matters covered by the Convention. As such, the EU has performed an exercise to identify existing EU instruments related to matters covered by Convention. The outcome of this process is the Appendix that accompanies the declaration of competences (annexed in Council Decision 2010/48/EC), which intends to specify the areas of the Convention that fall within the EU competence and better show to the other contracting parties the distribution of competence between the EU and its Member States.<sup>105</sup> However, the mere identification of EU legal instruments is not sufficient to show fulfilment of the obligation to perform a 'screening exercise' which entails an obligation to examine and *if necessary* modify existing legislation. It is important though to recall that, if an examination of EU legislation suggests that changes need to be made, such changes can not affect the legal system of the EU or imply any change in the competence of the EU. In other words, any change to be made in EU legislation, or the adoption of new EU legislation, with the aim to implement the Convention, may not infringe on the autonomy of the EC (now EU) legal order, or influence the allocation of powers fixed by the Treaties.<sup>106</sup> It logically follows that any screening to be conducted by the EU should

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<sup>104</sup> For further details on 'international responsibility' of the EU, see *supra* note 43

<sup>105</sup> *Ibid*

<sup>106</sup> See ECJ ruling in the *Kadi* case, *supra* note 37

evaluate EU legislation towards the requirements of the UN CRPD and consider the competence of the EU to act in the fields covered by the Convention. The latter consideration (*i.e.* EU competence) will be important to define the type of measures that the EU would need to take in order to meet the requirements of the Convention.

In conclusion, the EU is required to examine (within the areas of its competence) existing EU instruments in order to identify whether they are in line with the Convention or may need to be adapted (as appropriate) in order to ensure that are consistent with what is required by the Convention.

### 3.2.2 General Recommendations for States Parties to the UN CRPD

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States Parties should undertake a **comprehensive screening exercise** to assess what measures have been taken, and should still be taken, to implement the rights recognised in the UN CRPD, including, legislative, administrative and other types of measures. More specifically:

- The screening exercise should include an **assessment of**:
  - a. measures needed to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities
  - b. measures to ensure that the protection and promotion of the human rights of persons with disabilities is reflected in all policies and programmes (across all relevant fields covered by the UN CRPD);
  - c. measures to ensure that the State Party refrains from acts or practices inconsistent with the UN CPRD;
  - d. measures to ensure that public authorities and institutions act in conformity with the UN CRPD;
  - e. measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise;
  - f. measures to implement economic, social and cultural rights; and
  - g. whether persons with disabilities are actively involved in the development of legislation and policies to implement the UN CRPD
- The assessment should also **address** whether law prohibits disability discrimination (across all relevant fields, *e.g.*, in employment, education, sport & recreation, health, voting) and whether remedies are available for infringements.
- The screening exercise should also **determine** whether legislation includes or could include provisions more conducive to the realisation of rights of persons with disabilities than those in the UN CRPD and should also include coverage -

in relevant jurisdictions – of all parts of federal states without any limitations or exceptions.

- Persons with disabilities, including children with disabilities, through their representative organisations, should be closely consulted and actively involved in the process of the screening exercise.

States Parties are required by Article 4(1)(f) UN CRPD to develop measures on **universally designed** goods, services, equipment and facilities and standards and guidelines to promote universal design.

States Parties should also take measures to **provide accessible information** to persons with disabilities about their rights, forms of assistance available to them (Article 4(1)(h) UN CRPD), and legislation adopted or adapted to implement the UN CRPD.

States Parties should, with the involvement of persons with disabilities and their representative organisations, establish programmes to promote **training** on the rights recognised in the UN CRPD for professionals and staff working with persons with disabilities (Article 4(1)(i) UN CRPD).

States Parties should closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations in the development and implementation of legislation and policy and other decision-making processes concerning issues relating to persons with disabilities (Article 4(3) UN CRPD).

### 3.3 Equality and Non-Discrimination

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Section 3.3 presents the core elements and obligations for States Parties, deriving from Article 5 UN CRPD. The section also provides an overview of examples of legislation from the EU and its Member States, and aims to provide general recommendations for future implementation.

Detailed checklists, contained in Annex I of this report, accompany this analysis.

#### 3.3.1 Article 5 obligations and overview of existing practices

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Article 5 UN CRPD enumerates obligations relating to **equality and non-discrimination**,<sup>107</sup> including the obligation to provide reasonable accommodation. These obligations have general (horizontal) application across the UN CRPD.

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<sup>107</sup> Apart from Article 5 UN CRPD, references to equality and non-discrimination are also included in the UN CRPD preambles, purpose (Article 1), and general principles (Article 3)

Therefore, Article 5 UN CRPD should be read in conjunction with all specific measures included in the Convention; for example in matters related to education, parenthood, employment, standard of living, health, participation in public and political life, and others.

Article 5(1) UN CRPD affirms that “all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.” More specifically, Article 5(2) established the obligation for States Parties to **prohibit** all forms of discrimination on the basis of disability. Disability discrimination is defined in Article 2 UN CRPD to mean:

[A]ny 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.<sup>108</sup>

The prohibition of discrimination on the basis of disability is thus focussed on the result of an action, and not the intention.<sup>109</sup> Since it is discrimination ‘on the basis of disability’ that is prohibited, it is perhaps fair to infer that the protection extends to persons who work with, or are related to, persons with disabilities, and persons, who might, for example, acquire a disability in the future. The former is also compatible with the ECJ ruling in the case *S. Coleman vs Attridge Law*, in which the ECJ held that the Employment Equality Directive 2000/78/EC prohibited direct discrimination against a mother of a disabled child, where that discrimination was based on the disability of her child (discrimination by association).<sup>110</sup>

Consequently, discrimination on the basis of disability includes all forms of discrimination; direct, indirect, structural, multiple or other, as well as discrimination by association and discrimination based on assumed or future disability. Crucially, the drafters of the UN CRPD were very careful to explicitly link a denial of reasonable accommodation to discrimination. That is to say, an unjustified denial of reasonable accommodation is a form of discrimination. This notion should apply across the Convention. Moreover, the integration of reasonable accommodation into the definition of non-discrimination establishes that the realisation of fundamental civil and political rights requires **individualised measures**, in order to address ongoing systemic

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<sup>108</sup> See UN CRPD at Article 2

<sup>109</sup> See, *inter alia*, Agustina Palacios, statement at the Open-ended consultation on key legal measures for the ratification and implementation of the Convention on the Rights of Persons with Disabilities, Geneva, 24 October 2008. Available at <http://www2.ohchr.org/english/issues/disability/docs/FinalConsultationreport.doc>

<sup>110</sup> See ECJ, 17 July 2008, *S. Coleman vs Attridge Law, Steve Law*, Case C-303/06, OJ C 223 of 30.08.2008, p.6

discrimination against persons with disabilities. Specifically, States Parties should “take all appropriate steps to ensure that reasonable accommodation is provided”<sup>111</sup> in order to “promote equality and eliminate discrimination”.<sup>112</sup> Article 5, along with Article 8 (Awareness-raising) of the UN CRPD, requires not only the provision of reasonable accommodation but also positive measures in relation to raising awareness of the duty to accommodate and compliance mechanisms.<sup>113</sup> Accordingly, Article 5(4) UN CRPD, which requires specific measures to accelerate, or achieve *de facto* equality, necessitates the adoption of **specific positive measure** (such as positive action programmes, or education at all levels on non-discrimination, or the provision of fiscal and economic incentives, or others) to facilitate substantive equality.

On the basis of Article 5(3) UN CRPD States Parties should (by means of national legislation) extend the **duty to provide reasonable accommodation** to a broad array of social actors, such as national administrations, employers, education providers, health care providers, testing and qualification bodies, providers of goods and services, and private clubs. The duty requires these actors to reasonably adjust policies, practices and premises that impede the inclusion, and participation, of persons with disabilities. While the duty of reasonable accommodation falls within the articles of general application, and therefore applies across all of the articles of the UN CRPD, it is also specifically referred to in the substantive articles, such as Article 13 which refers to access to justice and the “provision of procedural and age appropriate accommodations”.<sup>114</sup> The link between reasonable accommodation and disability discrimination in the UN CRPD creates an **obligation of immediate effect**.<sup>115</sup> Accordingly, the UN CRPD ensures that reasonable accommodation is equally required in relation to civil and political rights, and economic, social and cultural rights.

The provision of reasonable accommodation requires an individual analysis that takes account of the situation of the individual. Therefore, an appropriate accommodation should always be an **individually tailored solution**.<sup>116</sup> As it is not possible to foresee all reasonable accommodation interventions that may be required, it is important for domestic legislation to incorporate the concept of ‘reasonable accommodation’ in an

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<sup>111</sup> See UN CRPD at Article 5(2)

<sup>112</sup> See UN CRPD at Article 5(3)

<sup>113</sup> See Anna Lawson (2008), *Disability and Equality Law in Britain: The Role of Reasonable Adjustment*, Hart Publishers 32

<sup>114</sup> See UN CRPD, at article 13(1)

<sup>115</sup> See Anna Lawson, *The UN Convention on the Rights of Persons with Disabilities and European Disability Law: A Catalyst for Cohesion?* in O. Arnardottir & G. Quinn, (eds.) *The United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* 19 (2009).

<sup>116</sup> See Prof. Waddington, Lisa, *When it is Reasonable for Europeans to be Confused: Understanding when a Disability Accommodation is ‘Reasonable’ from a Comparative Perspective*, 29 *Comparative Labor Law & Policy Journal* 3, April 2008, pp. 101-124.

open-format and ensure that accessibility measures are taken as general measures,<sup>117</sup> and are effectively implemented.

Research for this study<sup>118</sup> has revealed that EU **Member States** have adopted legislation ensuring equality and non-discrimination in the context of employment. National legislation mainly results from the need to transpose the Employment Equality Directive 2000/78/EC.<sup>119</sup> The Directive, due to its material scope, will be analysed under section 4.5.3 of this report dedicated to employment (Article 27 UN CRPD).

Additionally, research has revealed that many Member States have extended the application of the principle in non-discrimination beyond the fields of employment, and have adopted general non-discrimination legislation.<sup>120</sup> However, a significant **challenge** in order to reach full compliance with Article 5 UN CRPD is the limited application of reasonable accommodation obligations outside the context of employment.

The “Thematic Report on Disability Non-Discrimination Law in the European Union” of the European Network of Legal Experts in the Non-Discrimination field, has noted that many countries provide some protection from disability discrimination in fields other than employment.<sup>121</sup> The Report further notes that all Member States, other than Denmark, Greece and Poland, address disability discrimination outside of the employment context in some way. Additionally, it is highlighted that:

[..] in different countries, the relevant concepts and obligations are set out in a variety of different types of legal instrument, e.g. in constitutional guarantees of equality, in criminal law provisions and in dedicated non-discrimination law statutes.<sup>122</sup>

For the purposes of this study, examples of anti-discrimination or equality legislative acts identified in Austria, Belgium, Ireland and the United Kingdom are presented

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<sup>117</sup> It is worth recalling that the principle of accessibility features in the Convention as general principle (Article 3(f) UN CRPD) as well as an article of general and cross-cutting application (Article 9 UN CRPD) and therefore applies across the treaty text. In other words, the principle of accessibility should be incorporated within every specific or general measure that implements the rights recognised in the Convention.

<sup>118</sup> Research on the Member States was conducted by Karen Walsh of the National University of Ireland, Galway and findings are presented in the Research Paper on “National overview of legislation and policies that needed/needs to be adjusted in order to comply with the UN CRPD”, written for the Study VC/2008/1214.

<sup>119</sup> Examples of Member States and EU legislation related to non-discrimination in the context of employment are presented in Section 4.4 of this report.

<sup>120</sup> For example non-discrimination acts (covering disability beyond employment) exist in Austria, Belgium, Bulgaria, Finland, Germany, Hungary, Ireland, Spain, and the UK.

<sup>121</sup> European Network of Legal Experts in the Non-Discrimination Field, Report on Disability Non-Discrimination Law in the European Union, 2009, prepared by Lisa Waddington and Anna Lawson

<sup>122</sup> Ibid p. 46 - 47

below, and aim to illustrate the different approaches taken by the EU Member States in the area of non-discrimination.

**Austria** adopted in 2005 the *Federal Disability Equality Act* (Behindertengleichstellungsgesetz, hereinafter referred to as BGStG),<sup>123</sup> with the aim to eliminate (and/or prevent) discrimination on the basis of disability; thus ensuring the equal participation of people with disabilities in the community, and enabling them to live independently (BGStG Section 1). Disability is defined in Article 3 to mean ‘the effects of not merely temporary impairment of a bodily, mental or psychosocial function or an impairment of the functions of the senses, which makes participation in the life of society more difficult’.<sup>124</sup> The Act does not cover discrimination in the fields of employment,<sup>125</sup> and prohibits discrimination on the ground of disability in access to, and supply of, goods and services that are available to the public, including housing (BGStG Section 2). The definition of discrimination is similar to the one included in the Employment Equality Directive 2000/78/EC, but encompasses both direct and indirect discrimination, while harassment is also included as a form of discrimination (BGStG Sections 4 and 5). Finally, penalties in cases of violation (e.g. compensation of the disabled person for damage suffered) are also listed in Section 9 of BGStG. The provisions of the Act do not explicitly refer to reasonable accommodation, or to the denial of reasonable accommodation as a form of discrimination, as required by Article 5(3) of the UN CRPD. However, Section 6 of BGStG states that:

[...] It shall not be deemed indirect discrimination if the removal of conditions which constitute the disadvantage, especially of barriers, would be illegal or would pose a disproportionate burden<sup>126</sup> [...] In case the removal of conditions which constitute the disadvantage turns out to be a disproportionate burden it shall still be deemed discrimination if the provider failed to improve the situation of the affected person at least in a considerable way in order to reach the best possible approximation to equal treatment [...]

The aforementioned provision seems to imply a duty of reasonable accommodation, suggesting that when the issue of discrimination because of barriers is examined, an assessment has to be made as to whether the removal of barriers would cause an

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<sup>123</sup> Available in DE at: <http://www.bizeps.or.at/gleichstellung/rechte/bgstg.php>

<sup>124</sup> See Williams, Anthony (2009), An introduction to the Austrian Federal Disability Equality Act, in G. Quinn and L. Waddington (eds), *European Yearbook of Disability Law*, (Intersentia, 2009).

<sup>125</sup> Discrimination in the fields of employment is covered by the Act on the Employment of People with Disabilities, *Behinderteneinstellungsgesetz*,. BGBl. Nr. 22/1970, last amended by Federal Law Gazette I Nr. 82/2005

<sup>126</sup> See European Network of Legal Experts in the Non-Discrimination Field, Austrian report on measures to combat discrimination. Available at <http://www.non-discrimination.net/content/media/2007-AT-Country%20Report%20Final.pdf>

*unreasonable* burden.<sup>127</sup> In addition, if barriers cannot be removed due to unreasonable burden (e.g. unreasonably high cost), a decisive improvement in the situation still has to be attained for the person concerned, in order to achieve equal treatment.<sup>128</sup> Concluding, it appears that the Act is in line with the UN CRPD, and even if reasonable accommodation is not explicitly referred to, practical implementation of BGStG Section 6 appears to be in line with the obligation deriving from the duty to provide reasonable accommodation.

**Belgium** adopted, in 2007, the *General Anti-discrimination Federal Act*.<sup>129</sup> The Belgian Act prohibits discrimination on different grounds, including on the basis of disability. The Act also takes into account the gender dimension (as required by Article 6 UN CRPD). The list of prohibited grounds of discrimination is inspired by the EU Charter of Fundamental Rights, and the Act applies the principle of non-discrimination in a broad range of fields.<sup>130</sup>

The Belgian Act addressed both direct and indirect discrimination. The scope of the Act covers areas which fall within the competence of the Federal State (not areas under the competence of regions or communities). It applies to social rights, including matters relating to access to employment, health care, social security and benefits, public life (such as access to labour and trade unions), and access to goods and services in as far as these areas fall under Federal competence. It further provides that a denial of reasonable accommodation for persons with disabilities is a form of prohibited discrimination. Reasonable accommodation is defined in conformity with the Employment Equality Directive 2000/78/EC, while the principle is applicable to a much broader range of fields.<sup>131</sup> The Act also foresees legal protection not only for victims of discrimination, but also for witnesses in cases of discrimination.

In conclusion, we could say that the Belgian Act reveals positive ways of implementing Article 5 of the UN CRPD. It can thus be characterised as being a '**good practice**' in the area of non-discrimination. It should further be taken into account that harassment is addressed in the context of employment by the Belgian Act of August 4<sup>th</sup>, 1996,<sup>132</sup>

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<sup>127</sup> See Williams Anthony (2009), supra note 124

<sup>128</sup> Ibid

<sup>129</sup> More information are available on the website of the Belgian Federal Public Service Employment, Labour and Social Dialogue: <http://www.employment.belgium.be/defaultTab.aspx?id=6224>

<sup>130</sup> Information about the basic principles of Belgian Labour Law is available at: <http://www.employment.belgium.be/defaultTab.aspx?id=6224>

<sup>131</sup> See European Network of Legal Experts in the Non-Discrimination Field, Belgian report on measures to combat discrimination. Available at <http://www.non-discrimination.net/content/media/2007-BE-Summary%20Final.pdf>

<sup>132</sup> Federal Act of 4 August 1996 on welfare of workers in the performance of their work and its implementing decision. Information about Belgian Labour Law is available at: <http://www.employment.belgium.be/defaultTab.aspx?id=6224>

which covers the welfare of employees and transposes into Belgian law Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

**Ireland** adopted, in 2004, the *Equality Act*, amending the Employment Equality Act 1998, Pensions Act 1990 and Equal Status Act 2000, in order to establish better provisions in relation to equality of treatment in the workplace and elsewhere. The Equality Act gives effect to EU anti-discrimination legislation. More specifically, the Act aims at transposing Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation; and the Directive 2002/73/EC of the European Parliament and of the Council amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

The Irish Equal Status Act, as amended by the Equality Act, addresses access to and disposal of goods and provision of services,<sup>133</sup> the disposal of premises and the provision of accommodation and education.<sup>134</sup> Under section 4 of the Equal Status Act, *discrimination* is defined as a refusal or failure by a provider to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, if without such special treatment or facilities it would be impossible or unduly difficult for the person to avail himself or herself of the goods, services, accommodation, education etc. In other words, a person selling goods,<sup>135</sup> or providing any kind of services, must do all that is reasonable to accommodate the needs of persons with disabilities. A failure to provide the necessary special treatment or facilities will not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the provider of the service in question.<sup>136</sup> However, the

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<sup>133</sup> The Equal Status Act defines services as a facility of any nature, which is generally available to the public, or a section of the public. The Act particularly lists the following services: (a) Access to and the use of any place. (b) Facilities for: (i) banking, insurance, grants, loans, credit or financing; (ii) entertainment, recreation or refreshment; (iii) cultural activities; and (iv) transport or travel. (c) A service or facility provided by a club (whether or not it is a club holding a certificate of registration under the Registration of Clubs Acts, 1904 to 1999) which is available to the public generally or a section of the public, whether on payment or without payment. (d) A professional or trade service.

<sup>134</sup> In other words, the Act applies to people who: (i) buy and sell a wide variety of goods; (ii) use or provide a wide range of services; (iii) obtain or dispose accommodation; and (iv) attend at or are in charge of educational institutions. For detailed information on the application of the Act and fields covered by it, see the booklet "*The Equal Status Acts 2000 to 2004*" by the Equality Authority of Ireland, available at: [http://www.equality.ie/getFile.asp?FC\\_ID=162&docID=226](http://www.equality.ie/getFile.asp?FC_ID=162&docID=226)

<sup>135</sup> It is important to clarify that the Irish Equal Status Act, when referring to providers of goods, is referring to persons selling goods and not manufacturers of goods.

<sup>136</sup> European Network of Legal Experts in the Non-Discrimination Field, Irish report on measures to combat discrimination. Available at

standards of necessary reasonable accommodation, under the Equal Status Act, are much lower (only in nominal costs) than the ones expected in the context of employment (disproportionate burden), under the Employment Equality Act.<sup>137</sup> Consequently, such limitations on the circumstances in which the provider of a service has an obligation to provide reasonable accommodation, may prove challenging for the effective implementation of Article 5 of the Convention.

In the **UK**, the Disability Discrimination Act (DDA)<sup>138</sup> of 1995 and 2005, as amended by the Equality Act 2010,<sup>139</sup> has established the prohibition of discrimination on the basis of disability in employment, education, provision of goods and services,<sup>140</sup> the built environment, and buying and renting property.<sup>141</sup> The Disability Act requires that, in areas covered by the Act, reasonable accommodation should be provided for persons with disabilities. In relation to employers, the duty to provide reasonable accommodation is *non-anticipatory*, meaning that employers do not have a duty to make reasonable adjustments if they do not know that a person is disabled and could not reasonably be expected to know.<sup>142</sup> On the other hand, in relation to providers of goods and services, the duty to provide reasonable accommodation is *anticipatory*. More specifically, Section 21 of the Disability Discrimination Act of 1995, referring to service providers, states that

where a provider of services has a practice, policy or procedure which makes it impossible or unreasonably difficult for disabled persons to make use of a service which s/he provides, or is prepared to provide, to other members of the public, it is his/her duty to take such steps as it is reasonable in all the circumstances of the case for him/her to

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<http://www.non-discrimination.net/content/media/2007-IE-Country%20Report%20Final.pdf>

<sup>137</sup> On the basis of the Employment Equality Act an employer is obliged to take appropriate measures to enable a person with disabilities to participate in employment unless such measures would impose a disproportionate burden on the employer. The Irish Employment Equality Act will be discussed in greater detail under Article 27 UN CRPD.

<sup>138</sup> The UK Disability Discrimination Act is available at:

[http://www.direct.gov.uk/en/DisabledPeople/RightsAndObligations/DisabilityRights/DG\\_4001068](http://www.direct.gov.uk/en/DisabledPeople/RightsAndObligations/DisabilityRights/DG_4001068)

<sup>139</sup> From 1 October 2010, the majority of the Equality Act 2010 will be implemented and will replace major parts of the provisions of the Disability Discrimination Act. Further information on the Equality Act 2010 is available at: [http://www.equalities.gov.uk/equality\\_act\\_2010.aspx](http://www.equalities.gov.uk/equality_act_2010.aspx)

<sup>140</sup> It should be clarified that in relation to goods the Act does not cover manufacturers of goods but only the providers. Section 19 of the Disability Discrimination Act of 1995 defines that: “*provision of services includes the provision of any goods or facilities*”; and a person is ‘a provider of services’ if s/he is concerned with the provision, in the United Kingdom, of services to the public or to a section of the public; and it is irrelevant whether a service is provided on payment or without payment. For further details see at: [http://www.opsi.gov.uk/acts/acts1995/ukpga\\_19950050\\_en\\_4#pt3-pb1-l1q21](http://www.opsi.gov.uk/acts/acts1995/ukpga_19950050_en_4#pt3-pb1-l1q21)

<sup>141</sup> Further information are also available at the UK country profile, by ANED at

<http://www.disability-europe.net/content/pdf/United%20Kingdom%20-%20ANED%20country%20profile.pdf>

<sup>142</sup> European Network of Legal Experts in the Non-Discrimination Field, United Kingdom Report on measures to combat discrimination. Available at

<http://www.non-discrimination.net/content/media/2007-UK-Country%20Report%20Final.pdf>

have to take in order to change that practice, policy or procedure so that it no longer has that effect.

Because the wording of the Act specifically refers to ‘disabled persons’, the duty to provide reasonable accommodation targets *all* persons with disabilities. Therefore providers of any goods or service to which Sections 20 and 21 of the 1995 Disability Discrimination Act apply,<sup>143</sup> should consider what reasonable adjustments could be made to ensure that provision of goods and services is accessible to *all* persons with disabilities; and they should not wait until a disabled person requests their goods or services.<sup>144</sup> A provider of any services is not however required by the Act to take any steps that would fundamentally alter the nature of the service in question or the nature of his/her trade, profession or business.

In addition to the EU Member States, the **European Union** is also a party to the UN CRPD with shared (with the Member States) competence in the field of non-discrimination.<sup>145</sup> Such competence, derive from Article 13 TEC, which (as mentioned in Section 1.3 of this report) empowers the Council to take appropriate action to combat discrimination on the basis of, *inter alia*, disability. However, instruments listed in the Appendix of the declaration of competence (annexed in Decision 2010/48/EC) include only instruments that indicate the EU competence to combat discrimination for matters related to employment. Therefore, existing EU practices related to non-discrimination will be examined in Section 4.5.3 of this report and within the context of Article 27 of the UN CRPD.

Nevertheless, as highlighted in Section 1.2 of this report, the fact that the listed EU legislation does not include any EU legislative instrument addressing non-discrimination beyond employment does not imply that the EU has no competence to do so. The Appendix of the declaration only quotes legislative acts that exist and are in force. The legal basis used for the adoption of the Decision to conclude the UN CRPD also gives an indication of the extent of the EU competence for matters covered by the Convention.<sup>146</sup> To this end, the EU, by virtue of Article 13 TEC, which is used *inter alia* as the legal basis of Decision 2010/78/EC, shows that the EU is competent to address non-discrimination in general and beyond the context of employment. Therefore, the

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<sup>143</sup> See supra note 140

<sup>144</sup> Rune Halvorsen (2009), Briefing paper on “The accessibility principle in the UN CRPD and implications for EU disability law and policy” for the Study VC/2008/1214, when referring to Disability Rights Commission: Code of Practice. Rights of Access: services to the public, public authority functions, private clubs and premises of 2006. Dr. Rune Halvorsen is Senior Researcher on the Norwegian Social Research Institute (NOVA) and a member of the Academic Panel for the Study VC/2008/1214

<sup>145</sup> See Decision 2010/48/EC, supra note 13, Annex II, p. 4 and Appendix, p. 11

<sup>146</sup> For further information, see Section 1.2 of this report.

Commission proposal for a new Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation,<sup>147</sup> which is currently under discussion in the Council,<sup>148</sup> should be in line with the requirements set forth in the Convention.

It is important to note that the OHCHR has stated, for the effective implementation of the principles of equality and non-discrimination, it is above all necessary for States Parties to include in legislation a **general guarantee** of equality and prohibition of non-discrimination on the basis of disability.<sup>149</sup> Furthermore, as is evident from the national practices examined above, the EU Member States are highly influenced in the area of non-discrimination by EU secondary legislation (mainly directives). National legislative acts on non-discrimination identified generally aim to transpose EU legislation. To this end, the European Union can play a key role in the implementation of the equality principle by the EU Member States.

### 3.3.2 General Recommendations for States Parties to the UN CRPD

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States Parties should conduct a **screening exercise** to ensure that all legislation is in line with the principles of equality and non-discrimination. Persons with disabilities, including children with disabilities, through their representative organisations, should be closely consulted and actively involved in this process.

States Parties should **prohibit** by law discrimination on the basis of disability.

**Discrimination** should, under law, be defined as including direct and indirect discrimination and multiple-discrimination, meaning discrimination on more than one ground (e.g. disability and age, sex, religion etc). **Denial of reasonable accommodation** should also be, by law, prohibited as a form of discrimination.

Anti-discrimination legislation should incorporate the **concept of 'reasonable accommodation' in an open-format** and ensure that accessibility measures are taken as general measures, and are effectively implemented.

States Parties should adopt **positive measures** designed to promote and achieve equality for persons with disabilities (for example, positive action programmes and policies).

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<sup>147</sup> COM/2008/0426 final, European Commission Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation

<sup>148</sup> The process of the proposal can be monitored at [http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=en&DosId=197196](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=197196)

<sup>149</sup> See A/HRC/10/48, supra note 41, at p. 11, para 39

States Parties should establish an effective legal framework and implementation and monitoring **mechanisms** to protect persons with disabilities against discrimination on the basis of disability.

States Parties should **consult with and actively involve** persons with disabilities, including children with disabilities, through their representative organisations, on the development and implementation of non-discrimination legislation.

States Parties should develop a **strategy** (fully inclusive of, and accessible to, persons with disabilities) identifying clear goals to be achieved in the area of non-discrimination. Development of progress indicators would be very useful in this respect.

States Parties should **raise awareness** (for example through public awareness campaigns) on the situation and rights of persons with disabilities.

### **3.4 Inter-sectionality: women and children with disabilities**

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Articles 6 (Women with disabilities) and 7 (Children with disabilities), in addition to certain preambular paragraphs, are directed at specific groups who may experience particular forms of disability discrimination. In this sense, these provisions evoke inter-sectionality within the UN CRPD framework; they are also **horizontal** in effect, meaning that they apply across the text of the Convention. In some instances, specific substantive provisions of the UN CRPD have gender-specific or child-specific references (for example Article 24 on education or Article 30(5) on sport and recreation). Notwithstanding specific references, all obligations should be read and applied in such way that is sensitive and responsive to women, girls and all children with disabilities. Legislation and policy should appropriately reflect the specific needs of women and girls with disabilities and all children with disabilities.

Section 3.4 provides an overview of the core obligations and guidelines for implementation of Articles 6 and 7 UN CRPD.

#### **3.4.1 Article 6 obligations and overview of existing practices**

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Article 6 UN CRPD recognises that women and girls with disabilities are subject to multiple-discrimination, requires States Parties to tackle this issue and in addition obliges them to “take all appropriate measures to ensure the full development, advancement and empowerment of women”. The purpose of both duties is to ensure equal enjoyment of all human rights and fundamental freedoms. The UN CRPD is the first UN human rights treaty that specifically addresses the issue of multiple-discrimination. In addition, references to disabled women are to be found in the

preamble and Articles 8, 16, 25 and 28 UN CRPD. Thus, the Convention contains explicit duties relating to women with disabilities in the following areas:

- anti-discrimination policies and measures;
- awareness raising;
- protection from exploitation, violence, and abuse;
- health policy and programmes; and
- poverty policy and programmes

Multiple-discrimination is a **challenge** for non-discrimination law for various reasons. First of all, it is a fairly new topic in the area of non-discrimination and therefore different and diverse approaches exist. Currently, many non-discrimination laws are single-ground oriented.<sup>150</sup> There are often different levels of protections for different grounds leading to a hierarchy of grounds. While discrimination based on race and gender often is strictly prohibited, (broad) justifications allowing for difference of treatment related to disability and age may exist. While racial discrimination may be prohibited in employment, education and the area of goods and services, disability-based discrimination may only be prohibited, for example, in employment (this is the case in EU Law).

Research for this study has not revealed any **EU Member State** legislation that explicitly addresses issues of multiple-discrimination and this is a critical **challenge** for the effective implementation of the UN CRPD. General non-discrimination, disability-specific, or gender-specific legislative acts do exist in the Member States. However, non-discrimination legislation is mainly single-ground oriented. This may be the case because EU non-discrimination legislation, which influences national legislation in the field of non-discrimination, is also single-ground oriented.

With regard to the **European** Union, Council Decision 2010/48/EC did not explicitly refer to competence to address multiple-discrimination (*i.e.* discrimination on the basis of gender and disability). However, the Appendix of the Decision included instruments that demonstrate EU competence to address discrimination on the basis of disability, and (separately) on the basis of gender, and within the context of employment. In the context of gender, the instrument to illustrate the competence of the EU is the Recast Gender Directive 2006/54/EC,<sup>151</sup> which will be examined in section 4.5.3 of this report, within the context of employment (Article 27 UN CRPD). Nevertheless, as EU secondary legislation highly influences national non-discrimination legislation, and since the EU has competence to address discrimination on different grounds, it is

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<sup>150</sup> This is also the case EU Law.

<sup>151</sup> Council Directive 2006/54/EC of the EP and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204, 26.07.2006 p. 0023.

**recommended** that the EU discusses with the Member States how to better address the issue of multiple-discrimination.

In conclusion, the findings of this study suggest that in the field of multiple-discrimination there is an urgent **need** for both the EU and its Member States to conduct research with the aim of identifying approaches that would ensure the effective protection of people with disabilities (such as women and girls with disabilities) who may face multiple forms of discrimination.

### 3.4.2 Article 7 obligations and overview of existing practices

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Article 7 UN CRPD imposes an obligation on States Parties to ensure that children with disabilities are able to exercise their human rights and fundamental freedoms on an equal basis with other children. Article 7 has an **integrative goal**, and thus aims to ensure that *all* of the general and specific obligations in the UN CRPD are implemented in a manner that acknowledge the particular susceptibility of children and youth with disabilities to human rights violations, as well as the particular needs this group may have in realising their rights. Thus, Article 7 obliges States Parties to take into account the child dimension of the implementation of the UN CRPD, understanding not only the particular barriers that might stand in the way of the realisation of disability rights for this group, but likewise underscoring that children with disabilities may require specifically tailored measures in order for their rights to be realised.

Research for this study in the **EU Member States**, has revealed that some Member States have adopted legislative acts with the aim to generally protect the rights of children,<sup>152</sup> while others have adopted legislation only within the context of education.<sup>153</sup> However, the findings of this study suggest that problems arising from legislation that is established in Member States of the EU, pose challenges to the full enjoyment of all human rights and fundamental freedoms by children with disabilities on an equal basis with other children.<sup>154</sup> In this respect, indicative examples from Bulgaria and Estonia are presented below.

**Bulgaria**, adopted the Child Protection Act in 2000.<sup>155</sup> The Act calls for special protection for ‘children at risk’ or ‘children of prominent talent’. The Act defines ‘at risk’ a child who is ‘afflicted’ with intellectual or physical disabilities and difficult to treat

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<sup>152</sup> This is the case for example in the Bulgaria and Estonia

<sup>153</sup> This is the case for the majority of the Member States

<sup>154</sup> This failure is particularly evident in the context of education, which will be examined in Section 4 of this report.

<sup>155</sup> The Bulgarian Child Protection Act of 2000 is available in English on the website of Child Rights Information Network (CRIN). See at <http://www.crin.org/Law/instrument.asp?InstID=1300>

illnesses.<sup>156</sup> As is evident, the definition used in the Act approaches disability from a medical perspective, while the UN CRPD requires the recognition of societal constraints and barriers (not individual limitation) which inhibit full participation by, and inclusion of, persons with disabilities in society. Therefore, a critical challenge to the full and effective protection of all children with disabilities may arise from the Act. Furthermore, as the Mental Disability Advocacy Centre (MDAC) noted in its 2008 Shadow Report on the Implementation of the Convention on the Rights of the Child, the Act does not contribute to the establishment of an inclusive educational system for children with disabilities,<sup>157</sup> and this another challenge for the effective implementation of the UN CRPD.

**Estonia** also adopted in 1992 a Child Protection Act. The Act has established that a disabled or ill child has an equal right to receive assistance and care and to develop.<sup>158</sup> In addition, Section 52 of the Act has further established that a physically or intellectually disabled child has the right to live in conditions which promote dignity, self-reliance and development. The text of the Act appears to have positive elements for children's protection and equality of opportunity. However, a supplementary report to Estonia's country report on the implementation of the UN Convention on the Rights of the Child in 2002, noted that the legislation may challenge the integration of children with disabilities in all aspects of society, and in particular into schools.<sup>159</sup> The absence of any indication as to who (the State or the parents of a disabled child, or other) is responsible for any financial cost that may be required for the integration of disabled children in ordinary schools may hamper the effective implementation of children's rights as envisaged by the UN CRPD.

Finally, with regards to the **European Union**, Council Decision 2010/48/EC did not explicitly referred to competences for matters related to Article 7 UN CRPD. As no instrument was listed in the Appendix of the Decision, EU practices will not be presented in this report.

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<sup>156</sup> Ibid, See Additional Provision, para 5(d)

<sup>157</sup> MDAC's Shadow Report on the Implementation of the Convention of the Rights of the Child by Bulgaria, available at:

[http://rs6.net/tn.jsp?t=xsf5cncab.0.0.zjvx9icab.0&p=http%3A%2F%2Fwww.mdac.info%2Fimages%2Fpage\\_image%2FMay%25202008%2520MDAC%2520shadow%2520report%2520CRC.doc&id=preview](http://rs6.net/tn.jsp?t=xsf5cncab.0.0.zjvx9icab.0&p=http%3A%2F%2Fwww.mdac.info%2Fimages%2Fpage_image%2FMay%25202008%2520MDAC%2520shadow%2520report%2520CRC.doc&id=preview)

<sup>158</sup> More specifically, Section 10 of the Act states that "the child has an equal right to receive assistance and care and to develop, regardless of his or her sex or ethnic origin, regardless of whether the child lives in a two parent family or single parent family, whether the child is adopted or under curatorship, whether the child is born in wedlock or out of wedlock, or whether the child is healthy, ill or disabled". The Estonian Act is available in English on the website of Child Rights Information Network (CRIN). See at: <http://www.crin.org/Law/instrument.asp?InstID=1292>

<sup>159</sup> Estonian Union for Child Welfare, supplementary report to Estonia's country report on the implementation of the UN Convention on the Rights of the Child. Available at: <http://www.crin.org/resources/infoDetail.asp?ID=3280>

### 3.4.3 General Recommendations for States Parties to the UN CRPD

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States Parties should ensure that **legislation** is in place to promote the right of women and girls with disabilities to enjoy all human rights and fundamental freedoms. Therefore, States Parties should recognise that women with disabilities are subject to various forms of discrimination and that it is essential to adopt legislation that works to eliminate such discrimination. Furthermore, legislation should ensure that women with disabilities are fully able to participate in society.

States Parties should ensure that **legislation** is in place to promote the right of children with disabilities to enjoy all human rights and fundamental freedoms on an equal basis with other children (e.g., access to healthcare, education, sport and recreation, family life, etc). To ensure children with disabilities can enjoy these rights on an equal basis with others, States Parties need to ensure programmes and facilities are accessible to children with disabilities.

In matters concerning children with disabilities, States Parties should consider what is in the **best interest of the child** in determining the outcome.

States Parties' legislation should also provide that children with disabilities have the right to **express their opinion** on all matters affecting them, in accordance with their age and maturity on an equal basis with other children. To realise this right, children with disabilities should be provided with age and disability-appropriate assistance to help them freely express their views.

States Parties should **promote** the full development, advancement and empowerment of women and children with disabilities.

Legislation should provide for **reasonable accommodations** for women and children with disabilities to reach their full potential.

States Parties should set up comprehensive **monitoring and evaluation mechanisms** to ensure that women and children with disabilities are being afforded their human rights and fundamental freedoms.

## 3.5 General Accessibility

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Accessibility features as a general principle in the UN CRPD in Article 3 and is also elaborated as a separate provision in Article 9. Accessibility also gives rise to specific applications in other substantive articles. Accessibility rights in the UN CRPD serve the function of facilitating access in various contexts, including generally in public and private spheres, as well as specifically, in the access to justice and political decision-making contexts.

Section 3.5 provides an overview of the core obligations derived from Article 9, and aims to give general guidelines for the implementation of the accessibility principle by States Parties to the UN CRPD.

### 3.5.1 Article 9 obligations and overview of existing practices

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Article 9 aims to **dismantle barriers** erected on account of discriminatory attitudes<sup>160</sup> by promoting different forms of accessibility in the public and private spheres, including physical, technological, economic and social accessibility, as well as information and communication accessibility. Accessibility is a guiding principle of the Convention and is relevant to all areas of implementation. Article 9 imposes a **general obligation** on States Parties to enable persons with disabilities to live independently and participate fully in all aspects of life by ensuring their access to the environment. The provision requires States Parties to identify and eliminate obstacles and barriers to accessibility (Article 9(1) UN CRPD), and specifically highlights in this regard access to public and domestic buildings; transport and transport infrastructure; information and communication technologies and systems; and public services and facilities. In addition, Article 9 requires that medical facilities, electronic services and emergency services be accessible to persons with disabilities (Article 9(1)(a) UN CRPD). Therefore, all infrastructures should be based on designs that take disability accessibility fully into account.<sup>161</sup> To this end, the use of **universal design** will be of added value, because accessibility issues will be considered from the outset.

For buildings, accessibility measures such as ramps and signage in Braille and in easy-to-read and audio formats (Article 9(2)(d) UN CRPD) should be made available for persons with disabilities. Furthermore, live assistance and intermediaries should be available (Article 9(2)(e) UN CRPD), where required, to facilitate access by persons with disabilities to buildings and other facilities open to the public.

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<sup>160</sup> Article 9 of the UN CRPD does not explicitly mention non-discrimination. However, the requirement of Article 9(1) to ensure access to persons with disabilities *on an equal basis with others* implicitly imports the principle of equal treatment to accessibility. In addition we should also recall that ultimate purpose of the Convention (as expressed in Article 1 UN CRPD) is ensure the full and *equal* enjoyment of all human rights for persons with disabilities. Given the ultimate purpose of the Convention, Article 5 (equality and non-discrimination) assumes central and indeed controlling importance. It seeks to reverse unequal treatment and discrimination on the basis of disability. It is the prism through which all other provisions are refracted. In their own way all other provisions of the Convention provide the various concrete and positive measures that need to be taken to reverse the legacy of unequal treatment and discrimination in the various fields. Article 5 therefore affects how all rights in the Convention are to be approached, understood and indeed interpreted. In a way, Article 9 outlines the extra steps needed to remove existing barriers in the context of accessibility. It sets out a series of obligations in the context of accessibility, all of which aim in their own way towards the removal of discriminatory barriers.

<sup>161</sup> See OHCHR, *“From Exclusion to Equality. Realising the rights of persons with disabilities. A Handbook for parliamentarians on the Convention on the Rights of Persons with Disabilities and Optional Protocol”*, UN publication No 14-2007, pp 79-81

Article 9 also underscores the need for States Parties to promote access for persons with disabilities to new information as well as communications technologies and systems, including the Internet (Article 9(2)(f) and (g) UN CRPD). As highlighted by the Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and Optional Protocol, the internet provides a *crucial link* to education, employment opportunities, news and health-care information, and is a channel for civic engagement and social networking.<sup>162</sup> In other words, through the use of the internet, individuals gain a certain degree of involvement in society, and therefore persons with disabilities should have equal access to the internet. Therefore, States Parties must promote the incorporation of accessibility measures into the design, development, production and distribution of accessible information and communication technologies and systems at an early stage, so that these technologies and systems become accessible at a minimum cost (Article 9(2)(h) UN CRPD).

Article 9 requires equivalent levels of accessibility to be available in both urban and rural areas. It is also important to note that the obligations imposed by the article apply to public services and facilities provided by government, and the private sector (Article 9(2)(b) UN CRPD). Finally, Article 9 clarifies that accessibility is to be achieved through a variety of implementation measures, including the development and monitoring of minimum standards and guidelines for accessibility (Article 9(2)(a) UN CRPD), and the provision of training for stakeholders in accessibility issues (Article 9(2)(c) UN CRPD). It should be noted that the OHCHR, in its Thematic study on enhancing awareness and understanding of the UN CRPD, identified the adoption of minimum standards and accessibility guidelines, as a matter of first priority to implement Article 9 of the UN CRPD.<sup>163</sup> The Thematic study further clarified that such standards and guidelines should be comprehensive, address various types of barriers faced by persons with disabilities, and include a clear timeframe for progressive conformity, and the nature of possible interventions in cases of non-compliance.<sup>164</sup>

Research for this study in the **EU Member States** has revealed that Member States have established accessibility legislation relevant to Article 9 UN CRPD. However, a number of significant **challenges** remain for the satisfactory implementation of Article 9 UN CRPD. In many identified cases, the concept of accessibility is understood in a narrow sense, encompassing access to the physical environment and/or transport, with few (or in some cases without) explicit references to access to information or

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<sup>162</sup> Ibid

<sup>163</sup> See A/HRC/10/48, supra note 41, p. 14

<sup>164</sup> Ibid

communications,<sup>165</sup> including information and communications technologies and systems (ICT).<sup>166</sup> Additionally, in many Member States, despite the existence of accessibility legislation, monitoring of implementation appears to be ineffective.<sup>167</sup> Accessibility requirements are further not adhered to and penalties for non-compliance are not strictly enforced. Further important challenges are the exemptions from compliance that some States include in their accessibility legislation. For example, on certain occasions, national legislation introducing accessibility requirements exempts old buildings from meeting these requirements; only new buildings are obliged to be made accessible.<sup>168</sup> Similarly, in some Member States, accessibility legislation only applies to public buildings, while private actors, who nonetheless provide goods and services to the public, are not required to follow accessibility requirements.<sup>169</sup> Finally, there is insufficient information on access to buildings, roads, transportation and other facilities (such as schools, hospitals, houses etc) of non-urban areas (such as villages or other areas with low population density).

Indicative practices from France, Greece and Spain are presented below aiming to illustrate some of the aforementioned challenges as well as some legislative progress.

The French policy on accessibility for persons with disabilities is covered by Law No 2005-102 of 11 February 2005.<sup>170</sup> The law addresses accessibility to public and private

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<sup>165</sup> For examples of EU Member States' practices related to information and communication, see *inter alia* International Disability Rights Monitor (IDMR) 2007, Regional Report of Europe, pp. 34-35, available at: [http://www.ideanet.org/cir/uploads/File/IDRM\\_Europe\\_2007.pdf](http://www.ideanet.org/cir/uploads/File/IDRM_Europe_2007.pdf)

<sup>166</sup> For example, in Ireland, access to information and communications technologies and systems is not explicitly mentioned in the Disability Act of 2005. However, access to public services and information is covered by Sections 26 to 28 of the Act. To this end, we may say that ICT is implicitly covered. Nevertheless, the accessibility provisions apply only to public bodies, such as Ministries, while private actors are not covered by the Act. It should be noted that information on practices in the field of ICT by the EU Member States is available by the *Study on Measuring the Progress of eAccessibility in Europe* (MeAC 2008), available at: [www.eaccessibility-progress.eu](http://www.eaccessibility-progress.eu)

<sup>167</sup> This is the case for several Member States and in several fields related to accessibility. For example, while Greek Law 3230/2004 requires all public services to operate a dedicated unit for producing, implementing and monitoring action plans on improving accessibility, the Ministry of Internal Affairs, indicated in 2008 that *only a small minority* of public services operate such units.

<sup>168</sup> For example, this is the case for Greece where Article 28 of Law 2831/2000 on General Urban Planning Regulations, sets accessibility requirements for *new* buildings hosting public services, public spaces for education, health and social welfare, trade and offices. The law defines as 'new', buildings to be built following the adoption of the Law and for which the urban planning permit will be issued under Law 2831/2000. On the other hand, Greek Law 3230/2004 obliges old and new buildings hosting public services to be accessible. See ANED Country Profile for Greece, available at <http://www.disability-europe.net/content/pdf/Greece%20-%20ANED%20country%20profile.pdf>

<sup>169</sup> See *supra* notes 167 and 168

<sup>170</sup> Loi n° 2005-102 du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées. The consolidated version of the law is available in French at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000809647>. It is worth noting that the principle of accessibility for all was already introduced by the French Accessibility Law No 91-663 of 13 July 1991 ([Loi n°91-663 du 13 juillet 1991 portant diverses mesures destinées à favoriser](#)

buildings (Article 41); transportation (Article 45); and on-line communications (Article 46). Good elements of the law include the mandatory training of architects, engineers and other professionals related to constructions as well as the conceptualisation of accessibility in a broad sense including housing, workplaces, facilities open to the public, services provided to the public, equipment for public use and on-line communications.<sup>171</sup> In addition the law allows landlords to consult with specialised services to determine and make adaptations to their housing facilities, in order to meet the needs of tenants with disabilities.<sup>172</sup> Another good element is the inclusion of a time limit (that is 2015) to comply with the accessibility provisions of the law. However, the application of the law is limited as it generally focuses on the public sphere; that is to say, for example, that all public online services (which by virtue of Article 47 of Law No 2005-102 are required to be accessible) concern online services of the French public administration and not services from private actors.

Available data from existing studies and surveys on accessibility in France, suggest that although work remains to be done, some improvement has been made in the build environment of large cities,<sup>173</sup> as well as information and communication technologies (such as websites, broadcasting etc).<sup>174</sup>

In **Greece**, Law No 2831/2000 on General Urban Planning Regulations requires horizontal and vertical accessibility to all *new* buildings hosting public services, public spaces for education, health and social welfare, trade and offices. The law applies accessibility requirements for the buildings covered, as well as their parking places. The law makes no reference to old buildings and defines as ‘*new*’, buildings to be built following the adoption of the Law and for which the urban planning permit will be issued under Law 2831/2000. In terms of practical implementation, a study conducted by the International Disability Rights Monitoring (IDRM) in 2007, indicated that there are no mechanisms in place to ensure actual and correct application of Law 2831/2000.<sup>175</sup> The IDRM Report further indicated that the law covers accessibility of

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[l'accessibilité aux personnes handicapées des locaux d'habitation, des lieux de travail et des installations recevant du public](#)). Law 2005-102 reaffirmed the accessibility principle, but includes new accessibility criteria and set a timeframe for conformity.

<sup>171</sup> For further analysis of Law 2005-102, see French ANED report on the implementation of policies supporting independent living for disabled people, available at <http://www.disability-europe.net/content/pdf/ANED%20Independent%20Living%20report%20-%20France.pdf>. For further information on the French definition of accessibility, see the ‘Guide on the Definition of Accessibility’, prepared by an inter-ministerial delegation for people with disabilities in 2007 and is available at: [http://www.srfph-aquitaine.fr/IMG/pdf/Guide\\_Accessibilite\\_DIPH.pdf](http://www.srfph-aquitaine.fr/IMG/pdf/Guide_Accessibilite_DIPH.pdf)

<sup>172</sup> Article 50 of Law 2005-102; see supra note 171.

<sup>173</sup> See, for example, survey ‘*Le baromètre APF de l’accessibilité*’ published in February 2010 by APF (Association des Paralysés de France) at <http://dd85.blogs.apf.asso.fr/media/02/01/1601839867.pdf>

<sup>174</sup> See, for example, ‘Measuring Progress of eAccessibility in Europe’ (MeAC Project), France country profile at <http://www.eaccessibility-progress.eu/country-profiles/france/levels-of-eaccessibility-in-france/>

<sup>175</sup> IDMR Regional Report of Europe 2007, supra note 166, pp. 246-247

new buildings hosting public services, but the majority of public services are seated in old buildings.<sup>176</sup> However, according to Law 3230/2004 all buildings, whether new or old, hosting public services are required to ensure accessibility for persons with disabilities. In addition, all public services are required to operate a dedicated unit for producing, implementing and monitoring action plans on improving accessibility.<sup>177</sup> Nevertheless, a report by the Ministry of Internal Affairs in 2008<sup>178</sup> highlighted that the majority of public services are partially accessible to people with disabilities, while only a small minority of public services operate dedicated units on accessibility.<sup>179</sup>

**Spain** has applied, by means of legislation, the accessibility principle in several contexts, such as access to general State administration; accessing and using public spaces and buildings; access to technologies; products and services related to the information society and social communication media and access to and use of means of transportation.<sup>180</sup> Accessibility requirements have been introduced by the Law of Equal Opportunities, Non-Discrimination and Universal Access for People with Disabilities (LIONDAU, Act nº 51/2003),<sup>181</sup> as well as a number of Royal Decrees. As regards LIONDAU, accessibility features among the principles of the law (set forth in Article 2) to mean requirements that need to be followed to ensure that persons with disabilities have access to environments (physical, social, cultural or other), goods, services, tools and others available for all people in society. In addition, the law defines that accessibility presupposed the use of ‘*design for all*’. The latter concept means that accessibility should be taken into account (whenever possible) from the outset so that environments, goods and services are usable by people with disabilities to the greatest possible extent.<sup>182</sup> LIONDAU has a universal scope and therefore applies to telecommunications and information society; urban public spaces, infrastructure and buildings; transportation; goods and services open to the public; relations with public administrations (Article 3 of the LIONDAU). The law appears to be a good legislative measure that facilitates access for people with disabilities in all aspects of life.

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<sup>176</sup> Ibid

<sup>177</sup> See also ANED Country Profile, Greece at <http://www.disability-europe.net/content/pdf/Greece%20-%20ANED%20country%20profile.pdf>

<sup>178</sup> Report ‘Accessibility of public services for people with disabilities’ by the Ministry of Internal Affairs (2008) at [http://www.gspa.gr/\(1811599934994291\)/documents/φ.3\\_2\\_6644\\_εγκυλλιος%20για%20προσβτα%202008.doc](http://www.gspa.gr/(1811599934994291)/documents/φ.3_2_6644_εγκυλλιος%20για%20προσβτα%202008.doc)

<sup>179</sup> Ibid

<sup>180</sup> High Level Group on Disability, Second Disability High Level Group Report on Implementation of the UN Convention on the Rights of Persons with Disabilities, June 2009, p.195

<sup>181</sup> Available at <http://sid.usal.es/leyes/discapacidad/13769/3-1-2/law-51-of-december-2-2003-on-equal-opportunities-non-discrimination-and-universal-access-of-people-with-disabilities.aspx>

<sup>182</sup> Unofficial translation. For the official definitions of ‘accessibility’ and ‘design for all’ see Article 2 of the LIONDAU, supra note 182.

However, LIONDAU is a national framework law,<sup>183</sup> which requires the adoption of subsidiary legislation (in the different fields covered) for its implementation. Some criticism has therefore been raised with regard to its effective implementation. For example, in the fields of urban planning, social services and housing, accessibility falls under the exclusive competence of the Autonomous Communities, which are responsible for the adoption of subsidiary legislation that will determine the specific aspects of LIONDAU implementation process in their regions. As a consequence, subsidiary accessibility measures adopted by the Communities, lead to inconsistencies between different regions.<sup>184</sup>

Available data from existing surveys and studies on accessibility in Spain,<sup>185</sup> suggest that some improvement has been made, but there is still work to be done in order for people with disabilities to enjoy full access to all environments (physical, social, cultural or other), goods and services and in both public and private spheres. For example, the International Disability Rights Monitor Report of 2007 recognised that public and private attitudes to accessibility are starting to change and efforts are being made to invest in improving in the accessibility of transportation services.<sup>186</sup> However, the report indicated that deficiencies do exist in the means of public transport. As regards access to information and communication, the MeAC study of 2008<sup>187</sup> revealed progress in improving accessibility. Specifically, the study identified that three out of the five public websites evaluated were accessible; emergency numbers were directly accessible by means of text telephones; text and video relay services were also available. In addition, the study indicates that the two main public TV channels provided subtitled programming for 75% and 90% respectively of the overall programmes, while both also provided programmes with signing for 5% and 15% respectively of their programming.<sup>188</sup>

In conclusion, examples presented above show that legislative measures adopted by governments are important towards ensuring accessibility for persons with disabilities, but are not enough to guarantee effective implementation of the accessibility principle

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<sup>183</sup> Meaning that it sets out recommendations for the Autonomous Communities on how to address, *inter alia*, accessibility and non-discrimination.

<sup>184</sup> For criticism raised on LIONDAU, see *inter alia* IDMR Regional Report of Europe 2007, supra note 166, p. 442

<sup>185</sup> See, *inter alia*, IDMR Regional Report of Europe 2007, supra note 166, pp. 453-472; and CERMI report 2008, available at: <http://www.cermi.es/NR/rdonlyres/A6D627AE-6A58-4213-884D-6C4F9BE20C5A/28913/DerechosHumanos2.pdf>

<sup>186</sup> It is worth noting that in 2006, over 80 percent of Madrid's bus lines were adapted. See IDMR Regional Report of Europe 2007, supra note 166, p. 466

<sup>187</sup> MeAC Study 2008, supra note 167, Spain Country profile at: <http://www.eaccessibility-progress.eu/country-profiles/spain/levels-of-eaccessibility-in-spain/>

<sup>188</sup> Measuring Progress of eAccessibility in Europe, Spain, Country Profile. Available at <http://www.eaccessibility-progress.eu/country-profiles/spain/levels-of-eaccessibility-in-spain/>

as set forth in Article 9 of the UN CRPD. Therefore, it would be important to include in legislation clear timeframes for conformity with accessibility requirements as well as to establish monitoring mechanisms to ensure the correct application of accessibility legislation. In addition, the use of ‘universal design’ (as defined in Article 2 of the UN CRPD) will consider accessibility from the outset and therefore will reduce, or avoid, any cost of the subsequent dismantling of barriers for people with disabilities.<sup>189</sup>

As Council Decision 2010/48/EC notes, the **European Union** has some (limited) competence with regard to accessibility in the fields of goods, services, personal mobility (e.g. transport), and information and communication technologies. This competence is shared with the Member States. With the aim of illustrating the extent of such competence, the Council listed several instruments in the Decision, which refer to accessibility. This section will only provide an overview of indicative examples from the list provided in the Decision. It should be noted that more examples are available in Annex IV of this report.

In the area of **goods and services** within the internal market, the EU instruments that have been reviewed for the purposes of this study,<sup>190</sup> and are included in the Decision 2010/48/EC, seem to be generally in line with access requirements set forth by Article 9 UN CRPD. However, as illustrative examples analysed below show, there is still room for improvement.

For example, **Directive 2004/18/EC**<sup>191</sup> aims to coordinate procedures for the awarding of public works contracts, public supply contracts and public service contracts. Article 2 of the Directive requires contracting public authorities to act in a transparent way and treat all ‘economic operators’<sup>192</sup> equally and non-discriminatorily. The Directive does not clearly set out disability accessibility requirements for national public authorities to follow when drawing up tenders or awarding contracts, but does encourage Member States to define technical specifications (for example in contracts) so as to take into account accessibility criteria for persons with disabilities.<sup>193</sup> In other words, Directive 2004/18/EC, in line with the UN CRPD, recognises that Member States should

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<sup>189</sup> For further recommendations, see at the end of this section as well as section 5 of this report.

<sup>190</sup> A list of these EC instruments is provided in Annex IV of this report. Delia Ferri, “*The European Community competence to implement the UN CRPD*”, research paper for the Study on Challenges and Good Practices in the implementation of the UN CRPD, VC/2008/1214

<sup>191</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114–240

<sup>192</sup> The Directive defines the term broadly to include any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services. See Directive 2004/18/EC, Article 1.

<sup>193</sup> Ibid, Directive 2004/18/EC Article 23: “*Whenever possible [ ... ] technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users.*”

consider disability accessibility in relation to public procurement, but it *does not oblige* Member States to do so. Therefore, with the aim of ensuring the full implementation of Article 9 UN CRPD, it is recommended that the EU research how far such disability accessibility requirements are being included in tenders and resulting contracts in practice. If such research reveals that disability accessibility is being addressed inadequately, then the EU should consider amending the Directive in order to strengthen provisions referring to persons with disabilities, and set out clear accessibility requirements that Member States should follow.

Positive elements relating to accessibility can be found in **Directive 2001/85/EC**.<sup>194</sup> The Directive aims to guarantee the safety of passengers, and has established special provisions for vehicles used for the carriage of passengers comprising more than eight seats. The Directive addressed the needs of persons with reduced mobility<sup>195</sup> through the provision of technical prescriptions to foster accessibility in accordance with EU transport and social policies. The Directive sets out *harmonising technical requirements*<sup>196</sup> for the design of vehicles comprising more than eight seats in addition to the driver's seat. Technical requirements include, for example, the height of the first step from the ground; the installation of a kneeling system and/or retractable step; a minimum number and design of seats for passengers; provisions for the installation of communication devices and pictograms; and provisions for wheelchair accommodation in the passenger compartment and others. The Directive does not establish a specific enforcement or monitoring mechanism, but as of April 2009, an enforcement mechanism for individual approvals for new vehicles, as well as monitoring is ensured through **Directive 2007/46/EC**. The latter established a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles,<sup>197</sup> which also requires compliance with the technical specifications set in Directive 2001/85/EC. Based on Directive 2007/46/EC, individual approvals for new vehicles fall under EU law. Given the provisions of Article 24 of the Directive, the competent authorities of the Member States are not allowed to grant an

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<sup>194</sup> Council Directive 2001/85/EC relating to special provisions for vehicles used for the carriage of passengers comprising more than eight seats in addition to the driver's seat, and amending Directives 1970/156/EEC and 1997/27/EC [2002] OJ L43/1

<sup>195</sup> It should be noted that the definition of '*persons with reduced mobility*', included in the Directive 2001/85/EC, is broad and includes all people who have difficulty when using public transport, such as disabled people (including people with sensory and intellectual impairments, and wheelchair users); people with limb impairments; people of small stature; people with heavy luggage; elderly people; pregnant women; people with shopping trolleys; and people with children (including children seated in pushchairs).

<sup>196</sup> See Annex VII of Directive 2001/85/EC

<sup>197</sup> Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) Text with EEA relevance, [2007] O.J. L. 263, 09/10/2007 p. 0001 - 0160

individual approval for a new vehicle if the latter does not comply with the harmonised technical requirements in force in the European Union, or with technical requirements which have been recognised as providing an equivalent level of safety.<sup>198</sup> As is evident, Directive 2001/85/EC, in conjunction with Directive 2007/46/EC, has several positive elements that are in line with obligations deriving from Article 9 UN CRPD, and in particular Article 9(1) which requires the identification and elimination of barriers to accessibility in the area of transportation.

In the area of **product safety** and consumer protection, research for this study has revealed that while EU instruments incorporate some accessibility requirements relating to persons with disabilities, these requirements do not always reflect the needs of all people with disabilities. For example, **Directive 2001/83/EC**<sup>199</sup> on medical products for human use requires that information in Braille is provided on the package. In addition, the Directive requires that the marketing authorisation holder should ensure that the package information leaflet is also available in formats appropriate for blind and partially sighted persons.<sup>200</sup> Measures laid down by the Directive have established accessibility requirements relating to persons with visual impairments. However, the Directive has not addressed accessibility requirements for persons with other disabilities, and in particular persons with intellectual disabilities, who may require different accommodations, such as, for example, a symbol or pictogram that will demonstrate the purpose of the product.

In the area of **transport**, research for this study has revealed that EU legislation is quite advanced and addresses the needs of persons with disabilities. An example of **good practice** related to transport, which is mainly aimed at ensuring personal mobility for persons with disabilities, is **Regulation 1107/2006/EC**,<sup>201</sup> which was based on Article 80(2) TEC. It should be noted that in Council Decision 2010/48/EC, the Regulation was listed as an instrument that illustrates EU competence for matters related to personal mobility (Article 20 UN CRPD). However, as accessibility is a general principle that aims to enable persons with disabilities to live independently and participate fully in all aspects of life (including transportation), Regulation 1107/2006/EC, for the purposes of this study, is considered as being relevant to illustrate EU competence and progress related to access to transportation.

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<sup>198</sup> See, European Parliament, 17 April 2008, Parliamentary question E-0959/08 on Directive 2007/46/EC, Answer given by Mr Verheugen on behalf of the Commission, available at: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2008-0959&language=NL>

<sup>199</sup> Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, [2001] O.J. L.311/67.

<sup>200</sup> See Article 56(a) of Directive 2001/83/EC.

<sup>201</sup> Regulation (EC) No 1107/2006 of the Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air OJ L 204 of 26.7.2006.

The Regulation is a disability-specific EU measure designed to protect the rights of disabled persons, and persons with reduced mobility, when travelling by air. Specifically, the basic principles of the Regulation, which are in line with the UN CRPD, are:

- a. Persons with disabilities should not be denied boarding or booking;
- b. Persons with disabilities should receive seamless assistance at no additional charge. The responsibility for the provision of the assistance lies with the managing body of the airport; and
- c. All staff dealing directly with the travelling public should receive disability-awareness and disability equality training.

The Regulation also sets out standards for assistance<sup>202</sup> and requires air companies to comply with those standards.<sup>203</sup> Another important feature of the Regulation is the obligation on Member States to designate an enforcement body responsible for the implementation of the Regulation.<sup>204</sup> Additionally, Member States are obliged to designate a body to which persons with disabilities can submit complaints about an alleged infringement of the Regulation.<sup>205</sup>

In conclusion, Regulation 1107/2006/EC is a disability specific EU instrument that reflects many requirements derived from the general principle of accessibility, and in particular Article 9(1) UN CRPD, which requires Parties to the Convention to enable persons with disabilities to live independently, participate fully in all aspects of life and have access to, *inter alia*, transportation. The Regulation is also in line with the general obligation to promote the training of professionals and staff working with persons with disabilities (Article 4(1)(i) UN CRPD), and with Article 20 UN CRPD, which requires Parties to the Convention to ensure personal mobility with the greatest possible independence for persons with disabilities. It can thus be considered as a 'good practice' of the EU in the area of transport.

Finally, research for this study in the area of **information and communications technologies (ICT)**<sup>206</sup> has revealed that relevant EU instruments (mainly based on Article 95 TEC) are, in line with Article 9 UN CRPD, designed to eliminate barriers to accessibility and promote 'universal design'. However, their practical implementation

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<sup>202</sup> Ibid, See Annex I and II of the Regulation.

<sup>203</sup> Ibid, See Article 9 of the Regulation.

<sup>204</sup> Ibid, See Article 14 of the Regulation.

<sup>205</sup> Ibid, See Article 15 of the Regulation.

<sup>206</sup> The European Community/Union supports the development of the ICT, which is a pillar of the Lisbon Strategy. European ICT policies and activities are intended to **complement** and **support** the national governments' action plans. The goals of EC initiatives are to improve quality of life, stimulate growth, competitiveness and jobs across Europe and reduce social exclusion. Accessible and Assistive ICT are very important for people with disabilities, because they can enhance disabled persons' capacities in a way that will facilitate their independent living and inclusion in society.

still needs to be improved in order to ensure full and effective access to persons with disabilities.

For example, **Directive 2002/21/EC**<sup>207</sup> has established a *harmonised framework* for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services. The Directive establishes tasks for national regulatory authorities and a set of procedures to ensure the harmonised application of the regulatory framework throughout the EU. It also refers to users with disabilities several times. For example, Recital 8 calls on regulators to encourage network operators and terminal equipment manufacturers to cooperate in order to facilitate access by users with disabilities to electronic communications services. Article 8 of the Directive further establishes policy objectives and regulatory principles and requires national regulatory authorities to promote competition by, *inter alia*, ensuring that users, including disabled users, derive maximum benefit in terms of choice, price, and quality. Article 8 of Directive 2002/21/EC (as amended by Directive 2009/140/EC)<sup>208</sup> also requires national authorities to ensure that there is no discrimination in the treatment of undertakings providing electronic communications networks and services in the internal market, and to cooperate with each other and with the Commission and the Body of European Regulators for Electronic Communications (BEREC) so as to ensure the development of consistent regulatory practice and application of the Directive. Additionally, Article 8(4) of the Directive requires regulatory authorities to promote the interests of the citizens of the European Union by, *inter alia*, addressing the needs of specific social groups, and in particular persons with disabilities, and promoting the ability of end-users to access and distribute information or run applications and services of their choice.<sup>209</sup>

The provisions of Directive 2002/21/EC appear to fulfil several accessibility requirements set forth in the UN CRPD, and promote equality of opportunity, which is one of the Convention's general principles. It can thus be characterised as **good legislative practice** in the area of ICT. Research on the implementation of Directive 2002/21/EC (before the introduction of amendments by virtue of Directive 2009/140/EC) in the Member States of the EU has revealed that national provisions do not seem to address the needs of persons with disabilities in practice. As identified by

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<sup>207</sup> Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive) [2002] OJ L108/35.

<sup>208</sup> Directive 2009/140/EC of the European Parliament of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (Text with EEA relevance), OJ L 337/37, 18.12.2009

<sup>209</sup> See Article 8(4) of Directive 2002/21/EC, as amended by Directive 2009/140/EC.

the Inclusive Communications Group (INCOM),<sup>210</sup> transposition of Directive 2002/21/EC into national legislation appears to follow the wording of the compulsory provisions of the Directive, while the potential of the non-compulsory ones have not been exploited. For example, as INCOM reported in 2006, no national measures seem to be available to assess (and promote) the interests of persons with disabilities.<sup>211</sup> Following the report by INCOM, some amendments have been introduced to Directive 2002/21/EC by Directive 2009/140/EC.<sup>212</sup> It is however advisable for the EU to continue the compilation of data on the practical implementation of the legal provisions and on the situation of users with disabilities, in order to assess their needs. Depending on findings, the EU should ensure that amendments introduced to Directive 2002/21/EC by virtue of Directive 2009/140/EC, are effectively implemented in practice. Finally, the development by the EU of indicators to measure performance of undertakings in the provision of services to disabled users may also be another action that would positively contribute to the full and effective access to persons with disabilities to electronic communications services, electronic communications networks, associated facilities and associated services.

In conclusion, examples from EU legislation show that even if legislation has been adopted or improved in some areas (e.g. transport and ICT) it is not enough to guarantee effective practical implementation of the accessibility requirements of the UN CRPD, as they are not wide enough and their enforcement capabilities are not strong enough. Therefore, the EU should assess the situation of persons with disabilities in the EU in relation to their access in the internal market, and adapt existing measures so as to ensure full and effective implementation of the accessibility principle. As national practices related to accessibility are not satisfactory, the EU should establish a better monitoring and coordination process with its Member States. It would also be advisable for the EU to stress to the Member States that any financial implications linked to the implementation of the accessibility principle should be seen as an investment in the internal market. For example, awareness raising among relevant stakeholders, for instance architects or employers, and the use of universal design (as defined in Article 2 UN CRPD) could reduce or avoid the costs of the

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<sup>210</sup> INCOM is a subgroup of the Communications Committee (COCOM) that was established to assist the Commission in carrying out its executive powers under the regulatory framework governing telecoms in the EU. For further information, see at:  
[http://ec.europa.eu/information\\_society/policy/ecomms/implementation\\_enforcement/comm\\_committee/index\\_en.htm](http://ec.europa.eu/information_society/policy/ecomms/implementation_enforcement/comm_committee/index_en.htm)

<sup>211</sup> See INCOM06-02 Final, Electronic Communications Package: implementation of the provisions related to disabled users in the Member States, available at:  
[http://ec.europa.eu/information\\_society/activities/einclusion/docs/access/incom%20reports/2006\\_cocom\\_incom.doc](http://ec.europa.eu/information_society/activities/einclusion/docs/access/incom%20reports/2006_cocom_incom.doc)

<sup>212</sup> See supra note 214

subsequent dismantling of physical barriers, as accessibility issues will be considered from the outset.<sup>213</sup>

Finally, it should be noted that the Union uses also financial instruments, with the aim to promote accessibility to, and inclusion of, persons with disabilities. Such measure can, be found in **Council Regulation 1083/2006/EC**, laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund.<sup>214</sup> Of particular relevance to the UN CRPD is Article 16 of the Regulation. The Article clearly states that both the Member States and the Commission should take all appropriate measures to prevent any discrimination on the basis of, *inter alia*, disability during the various stages of implementation of the Funds. The Article refers in particular to persons with disabilities stating that accessibility for persons with disabilities should be one of the criteria to be observed in defining operations co-financed by the Funds and should be taken into account during the various stages of implementation. It should be noted that in Council Decision 2010/48/EC on the conclusion of the UN CRPD by the EU, Regulation 1083/2006/EC was listed as an instrument that illustrates EU competence for matters related to accessibility. However, accessibility is a general principle of the UN CRPD that applies to all substantive rights recognised by the Convention. Therefore, Regulation 1083/2006/EC should be interpreted as being relevant for all fields covered by the Convention. Consequently, any funding to be awarded by the Funds covered by Regulation 1083/2006/EC should respect and promote the general principles of the Convention, which *inter alia* include the principle of accessibility. Furthermore, any funding to be awarded should mainstream all principles of general and cross-cutting application of the UN CRPD in all fields covered by it. Finally, any funding by the European Regional Development Fund, the European Social Fund and the Cohesion Fund should be subject to the condition that all supported projects will enable persons with disabilities to live independently and participate fully in all aspects of life, and be inclusive of, and accessible to, persons with disabilities. In conclusion, this EU soft law measure can play a key role in the effective implementation of the UN CRPD.

### 3.5.2 General Recommendations for States Parties to the UN CRPD

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States Parties should carry out a screening exercise to ensure that:

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<sup>213</sup> See OHCHR, Open-ended Consultation on key legal measures for the ratification and implementation of the UN CRPD, Geneva, 24 October 2008, Informal Summary Discussions, p. 14

<sup>214</sup> Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, OJ L 210/25, 31.7.2006

- existing **legislation** enables persons with disabilities to live independently and participate fully in all aspects of life; and
- **accessibility standards** and **guidelines** are in place to support the accessibility of services and facilities open to the public.

Ensuring accessibility involves providing for an **enforcement mechanism** to guarantee compliance with the set standards. Accessibility standards and guidelines should apply to both government and private entities, which provide public services and facilities.

States Parties should provide **training** on accessibility to all relevant stakeholders, tailored as appropriate, for architects, planners, engineers, and implementers of international development programmes, including infrastructure projects.

**Accessibility audits** are recommended, among other things, to assess whether signage in public buildings is available in Braille, in audio, easy to read and comprehensible formats, whether live assistance and intermediaries are available to facilitate access to public buildings and facilities, and other necessary assistance is available to persons with disability to ensure their access to information.

States Parties should take measures to ensure that persons with disabilities have access to the physical environment, transportation, to information and communications, including new **information and communications technologies** (ICT) and systems, such as the Internet, national emergency services, telephone services, mobile phone systems, and directory services. Furthermore, mechanisms should be introduced to ensure that information and communication technologies and systems are, from the outset designed, developed, produced, and distributed so as to incorporate accessibility features. To this end, **incentives** could be offered to ICT developers to make such technologies and systems accessible to persons with disabilities at minimum cost. For example, in the United States the provision of incentives to ICT developers in the fields of public procurement was of added value and has motivated manufacturers to develop ICT accessible to *all*.<sup>215</sup>

Accessibility should be viewed as an investment that will positively contribute to the inclusion of persons with disabilities in all aspects of society. Any measure that encourages the development of **universally designed** goods, services, equipment and facilities will (for example) reduce, or avoid, the costs of the subsequent

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<sup>215</sup> See for example the Rehabilitation Act of 1973 (29 U.S.C. 794d) as amended by the Workforce Investment Act of 1998 (P.L. 105 - 220), August 7, 1998 as well as the Electronic and Information Technology Accessibility Standards, Final Rule, found at 36 CFR Part 1194 published by the US Architectural and Transportation Barriers Compliance Board on December 2000.

dismantling of physical barriers, as accessibility issues will be considered from the outset.

## 4.0 Substantive Provisions

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Articles 10 to 30 UN CRPD enumerate the specific substantive rights and obligations of the UN Convention on the Rights of Persons with Disabilities. These Articles apply existing civil, political, economic, social and cultural rights within the context of disability.

Some of the substantive rights recognised in the Convention may be subject to progressive realisation. As argued by the OHCHR, progressive realisation acknowledges that it often takes time to realise some rights fully, and therefore gives some flexibility in achieving the objectives of the UN CRPD. However, progressive realisation does not absolve Parties to the Convention of the responsibility to protect those rights.<sup>216</sup> Furthermore, while some economic, social and cultural rights may be subject to progressive realisation, civil and political rights are not. In other words, Parties to the Convention should first and foremost promote these rights.<sup>217</sup>

Section 4 contains an overview of the UN CRPD substantive provisions, analyses core obligations for States Parties, and provides an overview of existing national and EU practices in the fields covered. The section aims to give general guidance for the future implementation of the UN CRPD by both the EU and its Member States.

It should be noted that not all specific substantive provisions, *i.e.* Articles 10 to 30 UN CRPD, will be analysed. As previously noted,<sup>218</sup> for the purposes of this study, priority areas were selected. Consequently, this section includes summary analyses and general recommendations relating to dignity rights (Articles 16 – 17), autonomy rights (Articles 12 and 19), specific accessibility rights (Articles 13 and 29) and solidarity rights (Articles 24 and 27). Detailed checklists contained in Annex I of this report accompany the analysis.

### 4.1 Dignity Rights

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Articles 16 (freedom from exploitation, violence and abuse) and 17 (protecting the integrity of the person) assert protections that underscore the humanity of all persons with disabilities and the human dignity to which all people are entitled, but which is too often denied to disabled people. Articles 16 and 17 relate to Article 14 (Liberty and security of the person), Article 15 (Prohibition of torture), as well as to Article 10 (Right

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<sup>216</sup> See OHCHR “*From Exclusion to Equality. Realising the rights of persons with disabilities. A Handbook for parliamentarians on the Convention on the Rights of Persons with Disabilities and Optional Protocol*”, UN publication No 14-2007, pp 19-20

<sup>217</sup> Ibid

<sup>218</sup> See Section 1.4 of this report

to life). Accordingly, they should be read within the context of this fuller framework, as well as filtered through the articles of general application (Articles 1 to 9 UN CRPD).

While there are extensive international standards pertaining to the prohibition of torture or cruel, inhuman or degrading treatment or punishment, specialised international human rights conventions have also sought to address forms of violence beyond torture and cruel, inhuman and degrading treatment or punishment. For example, the Convention on the Rights of the Child (CRC), from which the drafters of the UN CRPD sought inspiration for Article 16, protects the right of the child to be free from torture and also specifically protects the right of the child to be free from all forms of violence, abuse, exploitation or maltreatment, recognising States Parties' obligations regarding protection from sexual exploitation and abuse, economic exploitation, and to promote the recovery of child victims of such treatment. Article 16 thus closely reflects the provision set forth in CRC, which formed an important *precedent* for the drafters of the UN CRPD.

#### 4.1.1 Article 16 obligations and overview of existing practices

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Article 16 UN CRPD requires States Parties to enact **law**, establish or enhance protection services, develop policies and programmes and pursue education strategies to protect persons with disabilities from **exploitation, violence and abuse**.<sup>219</sup> In addition, States Parties are required to ensure the identification, investigation and prosecution of these harms when, and if, they occur.<sup>220</sup> Article 16 covers harms committed in both the private and public spheres, in recognition of the fact that much violence against persons with disabilities occurs in the private sphere, away from public scrutiny.

Article 16(2) UN CRPD recognises that protection of, assistance and support for persons with disabilities from violence and abuse often has a gender and age-related dimension and thus obliges States Parties to ensure that all laws, policies, programmes and services relating to the detection, investigation and prosecution of these harms are **age, gender and disability sensitive**. States Parties are also required to provide information and to **educate** persons with disabilities, their families and caregivers about the avoidance, recognition and reporting of cases of violence, exploitation and abuse.

Additionally, Article 16(3) UN CRPD introduces a further specified **monitoring** component, beyond the monitoring mechanisms required by virtue of Article 33 UN CRPD, or the international monitoring framework set forth in Articles 34 to 39 UN CRPD. It thus obliges States Parties to establish an effective **independent** monitoring

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<sup>219</sup> See UN CRPD at Article 16(1), (2) and (3).

<sup>220</sup> See UN CRPD at Article 16(5)

authority to supervise all services and programmes designed to serve persons with disabilities (e.g. institutional accommodation services).

Lastly, Article 16(4) UN CRPD requires the enactment of appropriate **measures** to ensure the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who have been victims of harm. States Parties are required to ensure that these types of services are delivered in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person.

Research for this study in the **EU Member States** has revealed that the majority of the Member States have not enacted specific laws to ensure freedom from exploitation, violence and abuse for persons with disabilities, as they are generally protected by general law. However, a few Member States<sup>221</sup> have adopted specific legislative measures. Regarding monitoring of facilities and programmes designed to serve persons with disabilities, some Member States have established monitoring bodies,<sup>222</sup> but, as identified by civil society organisations, in some cases monitoring appears not to be carried out in an effective way. Infrequent monitoring visits to the relevant facilities and poor allocation of resources to the bodies carrying out this monitoring are major challenges to the implementation of the UN CRPD.

For example, in the **Czech Republic**, the 1999 Act on the Public Defender of Rights,<sup>223</sup> as amended in 2005, legally authorises the Public Defender of Rights (PDR) to systematically visit places where there are or may be located persons whose liberty is restricted by a public authority, or as a result of their dependence on care provided, and strengthens protection of such persons against torture, or cruel, inhumane and degrading treatment, or punishment or other mistreatment. The establishment by law of a monitoring system is a measure that can enhance protection in the Czech Republic for people whose liberty is restricted. However, it appears that the enactment of law is not enough to guarantee protection as envisaged by the UN CRPD. As noted by the Mental Disability Advocacy Centre,<sup>224</sup> in the first half of 2006, only five social care institutions for adults with physical disabilities, and five institutions for people with

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<sup>221</sup> For example: Denmark, Finland and Germany

<sup>222</sup> For example: Czech Republic, Finland and Spain

<sup>223</sup> Act No 349/1999 on the Public Defender of Rights established the Czech Public Defender of Rights. The Act was approved by the Chamber of Deputies of the Parliament of the Czech Republic by a tight majority vote on 4<sup>th</sup> November 1999, and approved by the Senate on 8<sup>th</sup> November 1999. The Act is linked to the Committee of Ministers of the *Council of Europe Recommendation R/85/13* on the Institution of the Ombudsman as well as *Recommendation R/97/14* on establishment of independent national institutions for the promotion and protection of human rights, urging the Member States to consider the establishment of the ombudsman institution or an institution of similar nature especially in the countries effected by sudden social and political changes, by economic transformation or by violent events of war like nature leading to threats to human, industrial, social and cultural rights. More information is available at [www.ochrance.cz/en/ombudsman/obecne.php](http://www.ochrance.cz/en/ombudsman/obecne.php)

<sup>224</sup> See MDAC 'Report on Inspectorates of Mental health and Social Care Institutions in the European Union', 2007, available at [http://www.mdac.info/documents/122\\_Inspect.pdf](http://www.mdac.info/documents/122_Inspect.pdf)

psychosocial disabilities were visited. Furthermore, the PDR does not have the necessary legal capacity to investigate or prosecute specific complaints about social care institutions, as required by Article 16(5) UN CRPD. It should be noted though that in practice the PDR uses such complaints to plan inspections to institution,<sup>225</sup> while representatives from civil society organisations have emphasised that visits by the PDR and the publication of its reports on the internet<sup>226</sup> have proven very useful in raising awareness of the situation of people with disabilities in residential institutions.

Elements of possible **good** legislative practice can be identified in the **Finnish Penal Code**,<sup>227</sup> where if the victim of abuse is disabled, the crime will attract a more serious punishment. In this respect, Chapter 20 of the Finnish Penal Code, referring to sex offenses, states that where an act of sexual violence is committed against a person with a disability, this may constitute an aggravated form of the offence resulting in harsher punishment (e.g. increased years of imprisonment). More specifically, Chapter 20 of the Finnish Penal Code foresees harsher punishments for acts (or attempts) to take advantage of a person,

- who is younger than eighteen years of age;
- who is in school or other institution and is subject to the authority or supervision of the offender, or in a similar situation;
- who is hospitalised or institutionalised;
- who cannot defend himself/herself due to a disability; and
- who is especially dependent on the offender, where the offender blatantly takes advantage of the dependence.<sup>228</sup>

In sum, the provisions of the Finnish Penal Code seem to embrace an approach that is age, gender and disability sensitive, and therefore may positively contribute to the effective protection of persons with disabilities.

Finally, with regards to the **European Union**, the Council Decision 2010/48/EC did not explicitly refer to competence for matters related to Article 16 UN CRPD. As no instrument was listed in the Appendix of the Decision, EU practices will not be presented in this report.

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<sup>225</sup> Ibid p. 17

<sup>226</sup> PDR Reports are available at <http://www.ochrance.cz/en/cinnost/ochrana.php>

<sup>227</sup> A consolidated version of the Finnish Penal Code is available in English at: <http://www.finlex.fi/pdf/saadkaan/E8890039.PDF>

<sup>228</sup> See the Penal Code of Finland 39/1889, Chapter 20, Sex offences, as amended by Act 563/1998. See also International Disability Rights Monitor (IDRM), *Regional Report of Europe*, 2007 p.160

### 4.1.2 General Recommendations for States Parties on Article 16

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States Parties should ensure that legislation in place **protects** all persons with disabilities from all forms of exploitation, violence and abuse (including in the home; school – both privately run and State run; adult and child care institutions – both privately and State run; in the penal system; and in alternative forms of care).

States Parties should ensure that **no exceptions** or defences are available in relation to all forms of exploitation, violence and abuse against persons with disabilities (e.g., corporal punishment and abusive measures that constitute “therapy” such as withholding of food and drink). Legislation, policy and practice should be directed at protecting persons with disabilities from assaults of all kinds on their physical and/or mental integrity.

States Parties are required to take specific measures to **prevent** all forms of violence against persons with disabilities, including in education, and to adopt other measures to promote non-violence in education, health care, and rehabilitation services.

States Parties should take measures to allow effective access to **complaint mechanisms** in cases of alleged violations. Violations include abuses that occur when disabled persons are in the care of parents, or others, who are legally responsible; abuses in all forms of community based, or other, care; in all institutions including schools, the penal system, and other custodial settings. In cases where ill-treatment has occurred, the right to an effective **remedy** should be ensured, including compensation.

Legislation should require the **reporting** of all cases of violence and abuse to appropriate bodies, including by relevant professional groups and by all citizens.

Finally, States Parties should establish effective **systems** for the identification of all forms of exploitation, violence and abuse against persons with disabilities (including women and girls with disabilities and elderly persons); reporting, referral, investigation, treatment, and follow-up systems; and appropriate judicial involvement.

### 4.1.3 Article 17 obligations and overview of existing practices

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Article 17 UN CRPD refers to the **integrity of the person**, and is a general, as opposed to specific provision, which includes language that seems to essentially underscore, but adds no detail to, the more specific obligations reflected in Articles 15 and 16 UN CRPD. Article 17 should also be understood in the light of its drafting history,<sup>229</sup> which is tied to specific types of human rights violation experienced by

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<sup>229</sup> Language originally inserted into draft provision on torture was extracted and eventually housed within a new article that in time became the current language of Article 17. However, the brevity of the provision that resulted reflects the drafters’ lack of consensus on language which would have banned

persons with disabilities, particularly those often perpetuated against persons with intellectual or psycho-social disabilities.

Article 17 corresponds to the language included in the American Convention on Human Rights,<sup>230</sup> but left out of other human rights conventions, such as the International Covenant on Civil and Political Rights.<sup>231</sup> However, in view of the negotiating history of the provision in the Ad Hoc Committee, it does have important relevance, as it **aims** to provide protection for persons with psycho-social disabilities, in particular, from interventions affecting their physical and mental well-being. While the Article provides little in the way of specific guidance for States Parties on exactly when, and under what circumstances, they are obliged to refrain from interference, it was intended to **place limits** on interventions and to proscribe disability-based interference, and **promote** a standard of non-interference on the basis of equality with others.

Article 17 can also be seen as being interrelated with other provisions of the UN CRPD, such as freedom from torture or cruel, inhuman or degrading treatment or punishment (Article 15). For example, if a person with disabilities is forced to a medical treatment without his/her free and informed consent, then the person in question has been deprived of his/her rights to health, to physical and mental integrity and to be free from torture.<sup>232</sup> For the purposes of this section, the interrelation of the UN CRPD articles will be considered when domestic practices are being reviewed.

Research for this study in the **EU Member States** has revealed that a number of Member States still have in place legislation permitting forced, or involuntary, institutionalisation,<sup>233</sup> in cases where a person is considered a threat to him/herself or another. Such legislation represents a significant **challenge** to the effective implementation of the UN CRPD, which *inter alia* aims to combat involuntary institutionalisation.

For example, **Poland** established in 1994 the Mental Health Protection Act, on the basis of which a person with a mental health disorder can be *involuntarily*

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compulsory treatment. The sparse provision reads simply as a statement of broad principle, tying necessarily to Articles 15 and 16, as well Article 14 (liberty and security) and Article 10 (Right to life).

<sup>230</sup> The American Convention on Human Rights recognises within a single article (Art. 5) the right of the individual “to have his physical, mental and moral integrity respected” along with the right to be free from torture and cruel, inhuman or degrading treatment or punishment”, which formed the basis of arguments in favour of a similar formulation in the CRPD. See also Inter-American Convention on Torture, at art. 2.

<sup>231</sup> The International Covenant on Civil and Political Rights (ICCPR) includes an article prohibiting torture and other cruel, inhuman and degrading treatment or punishment but does not include provisions regarding violence and abuse or deprivations of physical or mental integrity.

<sup>232</sup> See OHCHR, *Monitoring the Convention on the Rights of Persons with Disabilities, Guidance for human rights monitors*, Professional training series No. 17, p. 28, available at: [http://www.ohchr.org/Documents/Publications/Disabilities\\_training\\_17EN.pdf](http://www.ohchr.org/Documents/Publications/Disabilities_training_17EN.pdf)

<sup>233</sup> For example: Bulgaria, Finland, Poland, Spain, and others.

institutionalised in a psychiatric hospital where his/her previous behaviour indicates that s/he may be a direct threat to his/her own life, or the life or health of others.<sup>234</sup>

In addition, research for this study has revealed that serious **challenges** to the implementation of Article 17 UN CRPD exist in Member States where involuntary sterilisation of persons with disabilities and the carrying out of clinical experiments is authorised by law for persons who are deprived by law their legal capacity.

For example, in **Spain**, Article 156.2 Criminal Code permits the sterilisation of persons with disabilities under certain circumstances.<sup>235</sup> This is the case for persons with grave psycho-social disabilities who are also considered under Spanish law (as it currently stands) to be legally incapable. The sterilisation should be authorised by a judge on the request of the person's legal guardian and should also be supported by the public guardian. The Code states that the procedure should bear in mind the 'best interest' of the incapacitated person and that the judge 'should explore'<sup>236</sup> the incapacitated person. The Spanish Committee of People with Disabilities Representatives (CERMI) has highlighted the issue of forced sterilisation as one the most important areas, which should be addressed in order for Spain to effectively implement the UN CRPD.<sup>237</sup>

Furthermore, Spanish Royal Decree 223/2004 on clinical experiments and the 2007 Law on Biomedical Investigation authorises the conduct of clinical experiments on legally incapable adults under certain circumstances.<sup>238</sup> More specifically, Royal Decree 223/2004<sup>239</sup> states that clinical trials with drugs on adults who are unable to consent may be permitted, if a number of conditions listed in the Decree are satisfied (for example, if trials are of specific interest to the populations under research). Article 20 of the 2007 Law on Biomedical Investigation<sup>240</sup> permits experimentation where a person has no capacity to consent if, of course, a number of listed conditions are satisfied (for example, if the result may produce a real benefit to the person's health). In addition, paragraph 2 of the Article 20 permits experimentation on persons unable to consent even in cases where the experimentation has no chance of improving the person's health, if, of course, a number of listed conditions are satisfied (for example, if the experimentation may contribute significantly to knowledge of the disease).

Finally, with regards to the **European Union**, the Council Decision 2010/48/EC did not explicitly referred to competences for matters related to Article 17 UN CRPD. As no

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<sup>234</sup> See International Disability Rights Monitor (IDRM), *Regional Report of Europe*, 2007, p.348

<sup>235</sup> Ibid, p. 464

<sup>236</sup> Literal translation of Spanish term

<sup>237</sup> See CERMI report "Human Rights and Disability", of 2008, p.30, available at <http://www.cermi.es/NR/rdonlyres/A6D627AE-6A58-4213-884D-6C4F9BE20C5A/28913/DerechosHumanos2.pdf>

<sup>238</sup> See International Disability Rights Monitor (IDRM), *Regional Report of Europe*, 2007, p. 464

<sup>239</sup> See Article 5 of the Royal Decree 223/2004. Available (in Spanish) at [http://noticias.juridicas.com/base\\_datos/Admin/rd223-2004.html](http://noticias.juridicas.com/base_datos/Admin/rd223-2004.html)

<sup>240</sup> Available (in Spanish) at [http://noticias.juridicas.com/base\\_datos/Admin/l14-2007.html](http://noticias.juridicas.com/base_datos/Admin/l14-2007.html)

instrument was listed in the Appendix of the Decision, EU practices will not be presented in this report. However, due to different national approaches, the Union could become the platform where EU Member States exchange experiences and good practices in the area of protection of persons with disabilities from all forms of interference with their mental and/or physical integrity in all aspects of life.

#### 4.1.4 General Recommendations for States Parties on Article 17

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States Parties should undertake a **screening** exercise to ensure that legislation protects persons with disabilities from all forms of interference with their physical and mental integrity, and that no exceptions or defences are available in relation to assaults on the physical and/or mental integrity of persons with disabilities. More specifically, domestic legislation should **protect** all persons with disabilities from assaults on their mental and/or physical integrity in all realms, including in:

- a. the home;
- b. schools – both privately run and State run;
- c. adult and child care institutions – both privately and State run;
- d. the penal system; and
- e. alternative forms of care.

States Parties should also take **measures** to ensure that policy and practice protects persons with disabilities from all forms of interference with their physical and/or mental integrity, including, for example, traditional practices involving physical or mental violence, or prejudicial to health.

## 4.2 Autonomy Rights

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Autonomy functions as a general principle of the UN CRPD (Article 3(a)) and may be regarded as giving rise to specific applications in Article 12 (equal recognition before the law), and Article 19 (independent living), both of which are rights primarily directed at maintaining and safeguarding the autonomy and independence of persons with disabilities.

### 4.2.1 Article 12 obligations and overview of existing practices

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Article 12 of the UN CRPD addresses the issue of **legal capacity**, and confirms that persons with disabilities “*enjoy legal capacity on an equal basis with others in all aspects of life*”. Historically, many persons with disabilities have been subjected to laws and practices that deprived them of their legal capacity and, consequently, of their autonomy and freedom to choose how and where to live their lives. Failure to respect

the independence, autonomy and dignity of persons with disabilities with respect to medical decision making has led to some of the most egregious human rights abuses experienced by persons with disabilities, including (as mentioned above) forced sterilisation, cruel methods used to “cure” specific behaviours in persons with psychosocial disabilities, psycho-surgery such as lobotomies, therapeutic and non-therapeutic biomedical research, and experimentation.

Article 12, as read independently from the rest of the UN CRPD, has a relative normative force. This means that Article 12 UN CRPD becomes imperative when is connected with other provisions of the UN CRPD (*i.e.* Articles 5, 14, 15, 17 and 19), or when it is read in conjunction to preambular paragraph (e), Article 1, and the definition of discrimination on the basis of disability (Article 2 UN CRPD), from which a social model of disability derives.

Article 12(1) reaffirms that all persons, including all persons with disabilities, have the right to recognition before the law, and thus should be recognised as holders of rights and possessors of duties under the law. The right to equal recognition before the law encompasses two components:

- a. **recognition of legal personality**, in the sense that persons with disabilities are holders of rights; and
- b. **recognition of the capacity to act**, in the sense that one can actually exercise legal rights and duties under the law.

Article 12(1) UN CRPD supports an interpretation *contrario sensu* of the term legal capacity (included in paragraph 2), as comprising capacity to act without displacing the person’s own decision making. Furthermore, Article 12(1) reinforces Article 10 (right to life) by according all persons with disabilities the right to be recognised as a subject of law on an equal basis with others. As a consequence, States Parties are obliged to conduct a comprehensive and systematic revision of their legislation in order to detect, and repeal, discriminatory provisions establishing any distinction on the basis of disability in the field of legal personality.

Article 12(2) recognises the right to the **equal enjoyment of legal capacity**.<sup>241</sup> For the purposes of this provision, the paradigm shift and the definition of disability in the

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<sup>241</sup> Legal capacity arose as one of the most controversial issues throughout the negotiations, while its *interpretation remains controversial* since there are some State reservations or interpretation on this issue. However, as the Office of the High Commissioner for Human Rights pointed out, the two terms ‘*recognition as a person before the law*’ and ‘*legal capacity*’ are *distinct*. The concept of *legal personality* (derived from art 12(1) CRPD) recognises the individual as a person before the law and is therefore a prerequisite for the enjoyment of any other right, while “*legal capacity*” is a broader term that includes the capacity of the individual to be subject of rights and obligations as well as the capacity to act. The ‘*capacity to act*’ is intended as the capacity and power to engage in a particular undertaking or

context of social barriers is crucial, since most domestic legal restrictions on the exercise of legal capacity by persons with disabilities still focus, and justify this restriction, on the person's impairment.<sup>242</sup> In light of Article 12 States Parties to the UN CRPD are obliged to refrain from these types of restriction on disabled persons' legal capacity.

Article 12(3) requires the adoption of **supported decision making mechanisms** (assisting the person to make a decision personally), instead of substituted decision making (someone else making a decision for the person). As suggested by Dr. Palacios,<sup>243</sup> **key elements** of a supported decision making model include:

- a. Allowing a person to continue to be entitled to exercise his/her legal capacity independently, on his/her own.<sup>244</sup> In other words, there should be no displacement of the person's will onto a third party (mentor, guardian, curator, defendant etc).
- b. States Parties should adopt a **comprehensive approach**. The implementation of supported decision making model will not only require the revision of existing legislation, but also an active governmental policy ensuring, *inter alia*, education and adequate financial resources. Therefore, the obligation for States Parties is not fulfilled merely by replacing the term "guardianship" or "curatorship" found in existing statutes with a more politically correct term, such as "support person" or "legal mentor". The UN CRPD calls for a more comprehensive approach and the full implementation of a supported decision making model that encompasses elements of accessibility and reasonable accommodation.
- c. Finally, a supported decision making mechanism should be **flexible** and adaptable to a diverse range of circumstances, in order to be tailored to different personal and social situations. For example, it may be necessary to distinguish between the 'type of support' needed for transactions which have vital consequences for the person's life or patrimony (e.g. marriage, adoption,

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transaction, to maintain a particular status or relationship with another individual, and more in general to create, modify or extinguish legal relationships

<sup>242</sup> In consistency with the definition, the base of discrimination is on social barriers and not individual impairment. Impairment (including physical, intellectual or sensorial) is only one constituent element of disability and therefore impairment can neither become the reason nor the basis of discrimination. This logical deduction becomes of great importance when analyzing domestic legislation which restrict the exercise of legal capacity to persons with disability, as most of those pieces of law, focus on the person's impairment, which is a more rudimentary form of discrimination. It could even be argued that these approaches are a "legal direct discrimination". Dr. Agustina Palacios, "Article 12 UN CRPD: Overview and Core obligations", Briefing paper for the Study VC/2008/1214

<sup>243</sup> Ibid, pp 9-10

<sup>244</sup> This cornerstone idea is also linked to the necessary safeguards set forth in paragraph 4 of art 12, which "shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person".

donation, buying or selling property), and transactions involved with daily needs (e.g. traveling, applying for membership of a society or club etc). In certain situations, the support may be given by means of a personal assistant, in other cases through peer support, in others through assistance provided by an ombudsman or public defendant, or in certain situations through the use of informal networks. Nevertheless, in all occasions decisions should be taken ‘with’ the disabled person, and not ‘for’ the person.

The establishment of the support process envisaged by Article 12 is a complex task that will need a **careful** consideration of different proposals, should be **clearly** determined in **consultation** with key actors, and should be **gradually** implemented. The freedom to make decisions through the supported decision making model envisaged in Article 12(3) is reinforced by virtue of Article 25(d) requiring health professionals to “provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent”.

Article 12(4) sets forth minimum **safeguards** against abuse that States Parties are required to implement within the supported decision framework. Safeguards are necessary to control the effective application of any supported decision making mechanism. These safeguards should include an obligation on the support provider to assist the disabled person to make decisions, and not substitute his/her will and preferences. Support providers should be obliged to respect the rights, will and preferences of the person being supported. The type of support to be provided should be proportionate to the person’s needs, individualised, and free from conflict of interest and undue influence. Finally, support arrangements should also be subject to regular review by an independent and impartial authority.

Article 12(5) addresses the specific issue of the right of persons with disabilities to own and inherit **property**, and control their own **financial affairs**. The provision makes clear that persons with disabilities cannot be deprived of their property absent lawful reason. Article 12(5) is tied to the rest of Article 12; in other words, the thrust is for persons with disabilities to be provided with the necessary support in order to exercise their right to own and inherit property and to have access to financial credit. It is thus incumbent upon States Parties to provide the support needed to enable persons with disabilities to manage their financial affairs. Article 12(5) further guards against arbitrary deprivations of property. States Parties should ensure that appropriate safeguards exist against abuse in the specific context of financial affairs management.

In sum, Article 12 explicitly recognises the legal capacity of persons with disabilities and provides measures to support their right to exercise their legal capacity. It essentially requires a continuum of support, thereby acknowledging that some disabled

people require no support in making decisions, while others may need intensive support. Whenever a person with disabilities needs support, s/he should be supported by a person of his/her own choice, while the 'support provider' should never, and under no circumstances, replace the legal capacity of the disabled person to act.<sup>245</sup> Article 12 thus affirms the position that, irrespective of the level of support needed, States Parties should ensure that this support is not abusive and does not infringe upon the human rights of the support recipient. As the EDF President has said:

"[...] Understanding the impact of the Convention on the legal capacity involves re-evaluating the concepts of dignity, integrity and equality, thorough review of legislation – both civil and criminal - improving accessibility for people with disabilities in communication and procedures and educating all relevant actors about the paradigm shift [...]"<sup>246</sup>

Considering legal capacity and the paradigm shift, research for this study in the **EU Member States** has revealed that several **challenges** to the implementation of the UN CRPD exist and almost all existing legislation might need some sort of review. While a few Member States have reformed relevant legislative measures, embracing supported decision making models,<sup>247</sup> a large number of Member States continue to operate restrictive guardianship laws and policies. Challenges also exist in Member States that are attempting to move away from guardianship. While legislative reforms provide for the appointment of assistants to support persons with intellectual disabilities in decision making, the distinction between such assistants and guardians is not clear enough.<sup>248</sup> In many cases there are insufficient safeguards in place to ensure that such assistants do not exceed their duties and substitute the legal capacity of the person they are assisting. Another challenge relates to interpretative declarations or 'explanatory memorandums' that some States<sup>249</sup> have submitted, or may consider submitting, in relation to Article 12 UN CRPD. As national approaches to legal capacity of persons

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<sup>245</sup> See Mohammed Al-Tarawneh, Chairperson of UN Committee on the rights of persons with disabilities, statement for the International Day of Persons with Disabilities, 3 December 2009, available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/InternationalDay122009.aspx>

<sup>246</sup> Yannis Vardakastanis, EDF President, *Seminar on the legal capacity of persons with disabilities (Article 12 UN CRPD)*, organised by EDF and the European Consortium of Foundations on Human Rights and Disabilities, 4 June 2009, European Economic and Social Committee. Available at <http://www.efc.be/Networking/InterestGroupsAndFora/Disability/Pages/TheEuropeanConsortiumofFoundationsonHumanRightsandDisability.aspx>

<sup>247</sup> For example: Hungary, Sweden

<sup>248</sup> For example, France that has recently amended its Civil Code by Law n° 2007/308 of March 5<sup>th</sup>, 2007. Even if the new reform aligns towards the notion of promotion of autonomy, and restricts guardianship to exceptional cases, it is still possible, by virtue of Article 433 and 440 of the Civil Code, for a person to be placed 'under the protection' of a guardian, who (in certain circumstances) may substitute the person's legal capacity. Briefing paper by Prof. A. Palacios, see supra note 248

<sup>249</sup> For example: UK which in its Explanatory Memorandum on the UN CRPD and article 12(4), noted that this provision concerns safeguards for the exercise of substituted decision-making and includes a requirement for regular review by a competent independent and impartial authority or judicial body.

with disabilities are diverse, it is deemed necessary to present several national examples.

**Bulgaria's** legal system provides for both plenary (full incapacity) and partial (limited legal capacity) guardianship under the Law for Individuals and Family. Bulgarian law embraces a two-step process. The first step is the incapacitation process, regulated by the Civil Code,<sup>250</sup> and the second step involves appointment of a guardian, which is an administrative procedure conducted by the local guardianship authority. The law equates diagnosis of a person with legal incapacity as it stipulates that one's status as a person with a disability triggers the **guardianship** process. Depending on the disability, the Court decides about the extent and limits of the incapacitation and the type of the representation to be awarded to the incapacitated person (*i.e.* full or partial guardianship). Where adults are placed under partial guardianship, they are deemed to have similar rights and responsibilities as children aged 14 to 18. Adults placed under plenary guardianship are equated with children under the age of 14.<sup>251</sup> As is evident, Bulgarian disability policy continues to be deeply rooted in the old-fashioned guardianship system that deprives persons with disabilities of their rights and duties to act and decide for their lives. The Mental Disability Advocacy Centre underlines that guardianship is Bulgaria's only legal response to people who require assistance to make decisions. There are no alternatives available such as supported and assisted decision-making, advance directives or powers of attorney.<sup>252</sup>

The **Spanish Civil Code**<sup>253</sup> also allows for full incapacitation. Article 199 of the Civil Code states that incapacitation must be declared by a judge, who is also required to establish the extent and limits of the incapacitation in the incapacitation order, as well as the type of legal representation to be awarded to the incapacitated person.<sup>254</sup> It has been suggested however that, in reality, persons with intellectual disabilities are systematically excluded from entering into contracts without any prior legal declaration of incapacity. Spanish case law reveals that this exclusion is allowed on the basis that the intellectual disability of the contracting party may mean that the consent s/he has given is incomplete or non-existent.<sup>255</sup>

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<sup>250</sup> Section 27 (in Part 3 of the Code) rules that "a spouse, close relatives, the prosecutor or anyone else who has a legal interest" may request by petition the full or partial incapacity of a given person. The Bulgarian civil code is available in EN at <http://archive.bild.net/legislation/docs/4/ccp.html>

<sup>251</sup> Mental Disability Advocacy Centre, *Guardianship and Human Rights in Bulgaria: Analysis, Policy and Practice*, 2007, pp.19-20, available at

[http://www.mdac.info/documents/Bulgaria%20report\\_comprehensive\\_English.pdf](http://www.mdac.info/documents/Bulgaria%20report_comprehensive_English.pdf)

<sup>252</sup> *Ibid* p. 5-6

<sup>253</sup> Available (in Spanish) at <http://civil.udg.es/normacivil/estatal/CC/INDEXCC.htm>

<sup>254</sup> See Article 760 of the Spanish Procedural Code

<sup>255</sup> Memo for the Study VC/2008/1214 by Almudena Castro-Girona Martinez, Notary in Barcelona and member of the Conférence des Notariats de l'Union Européenne (CNUE).

According to Article 200 of the Spanish Civil Code, the criteria to declare a person incapacitated are consist of two complementary elements: (a) the existence of a “physical or psychic illness or deficiencies with a permanent character”; and (b) the impossibility for the person to exercise self-determination<sup>256</sup> due to that illness or impairment. The incapacitation is generally followed with the appointment of a **guardian** who substitutes the person’s decision making. In certain cases though the court, based on Article 267 of the Spanish Civil Code, may indicate actions that the incapacitated person is authorised to carry out on his/her own.

Limited guardianship is also provided for in Spain with the appointment of a **curator** to assist the incapacitated person in a series of acts expressly indicated in the judicial incapacitation order. In this case decision making is usually on a **co-decision** basis.<sup>257</sup> Curatorship is not intended to substitute, but rather complement the will of the person subject to the curatorship, who should be involved in the decision making. While curatorship is under Spanish Law a less restrictive measure in the decision making process, it should be pointed out that it is exceptionally used by the court in situations of capacity assessment of persons with intellectual or psycho-social disabilities.

In conclusion, guardianship systems can deprive persons with disabilities of their right to make decisions about their own life, and in exercising their legal capacity on an equal basis with others. Problems arising out from guardianship systems illustrate important challenges to the effective implementation of Article 12 UN CRPD. Systems like curatorship in Spain, which is based on co-decision, seem to have positive elements and allow for the establishment of a supportive decision making system for persons with disabilities. However, the pre-condition of incapacitation makes the curatorship system inconsistent with the UN CRPD requirement to recognise persons with disabilities as holders of rights.

A positive effort of legislative reform to recognise legal capacity of persons with disabilities has been taken in **Hungary**, which is in process of codification of its Civil Code. Reforms on the Civil Code aim to abolish plenary guardianship and introduce measures for supportive decision making for persons with disabilities.<sup>258</sup>

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<sup>256</sup> The literal translation of the wording used in Article 200 (*impidan a la persona gobernarse por sí misma*) would be ‘that prevents the person to governing him/herself’

<sup>257</sup> See Articles 287-289 of the Spanish Civil Code, available (in Spanish) at <http://civil.udg.es/normacivil/estatal/CC/INDEXCC.htm>

<sup>258</sup> An unofficial English translation of the articles of the Hungarian Civil Code relating to legal capacity and guardianship can be downloaded from the website of the Mental Disability Advocacy Centre, available at: [http://www.mdac.info/en/webfm\\_send/18](http://www.mdac.info/en/webfm_send/18)

The following elements of the future reforms, if entered into force,<sup>259</sup> could be considered as positive efforts to ensure legal capacity for persons with disabilities. The reforms require that the person's legal capacity remains intact and enables a **network of supporters** to assist the disabled person in making his/her own decisions, thereby enhancing his/her self-determination. According to the reforms, a person of legal age may designate one or more persons to support him/her when making decision in a given area (or areas).<sup>260</sup> The support to be given to a person will also be regulated by the new Civil Code and will include **safeguards** in order to ensure that support does not result in restrictions.<sup>261</sup> These reforms could become the vehicle for effective implementation of Article 12 UN CRPD.

Nevertheless, an issue still remains to be addressed if Hungary is to achieve full and effective implementation of Article 12 UN CRPD. This is the remaining form of partial guardianship, which should be applied by the court *"if no other provision which does not limit legal capacity would result in protecting the affected person from harm"*.<sup>262</sup> In this case, the evaluation of a person's *'discretionary ability'* serves the basis for the acknowledgment (or lack) of his/her legal capacity. The evaluation of the discretionary ability of a person should be *'decision-specific'*<sup>263</sup> and is a complex assessment. The latter includes, *inter alia*, the assessment of the person's ability to make decisions in a broad range of matters, and an analysis of the human and financial resources allocated in the social environment of the person. In such an assessment professionals from a diverse range of fields are included, for example, psychiatrists, psychologists, special educators, social workers and others. Following the necessary assessment, restrictions on a person's legal capacity will involve specific areas (e.g. financial management) of decision making. Even if in cases of partial guardianship decisions (again) need to be made *jointly* by the disabled adult and the guardian, it appears that

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<sup>259</sup> It was anticipated that the new Hungarian Civil Code would enter into force in the second quarter of 2010. However, on April 27<sup>th</sup>, 2010 the Hungarian Constitutional Court declared as unconstitutional the parliamentary Act confirming 1 May 2010 as the date on which Book 1 and 2 of the Civil Code would enter into force. Book 2 contains a wealth of reforms relevant to persons with disabilities, including the abolition of plenary guardianship and the introduction of supported decision making and advance directives. More information are available at: <http://mdac.info/en/constitutional-court-undermines-legal-status-hunga>

<sup>260</sup> See Book 2, Chapter III, Article 2:16 of the Code referring to 'the advanced directive'.

<sup>261</sup> See Book 2, Chapter III, Articles 2:18 to 2:21 of the Code.

<sup>262</sup> See Book 2, Chapter III, Article 2:22 of the Civil Code.

<sup>263</sup> The *'discretionary power'* of a person to make a decision does not only depend on the ability of the person to decide, but also on the nature of the decision, and its future implications to the person's life. Therefore, legal capacity depends on the relation between the discretionary power of the person and the abilities "demanded" by a decision to be taken. For further details see *"The experiences of the implementation of Article 12 UN CRPD in Hungary"*, by the Hungarian Association of Persons with Intellectual disabilities (EFOESZ), at [www.efoesz.hu](http://www.efoesz.hu)

the law may lack sufficient safeguards to ensure that decision making will not be substituted.<sup>264</sup>

A good legislative reform for matters related to legal capacity of persons with disabilities has been introduced in **Sweden**, which has abolished the guardianship system by replacing it with a comprehensive range of support measures. As Dr. Palacios has written, “Sweden represents perhaps the most paradigmatic case of law reform”.<sup>265</sup> In 1989, total incapacitation was abolished from the Swedish legal system, and replaced by support measures known as *godmanskap* (curatorship) and the more restrictive *forvaltarskap* (tutorship). The rules covering both types of measures are principally found in Sweden’s Family Code.<sup>266</sup>

**Curatorship** is the least restrictive form of assistance that an individual can receive. A person can decide whether s/he is in need of assistance in exercising his/her rights, or administering his/her property, or taking care of him/herself. In such cases, the court can, if necessary, with the consent of the person in question, appoint a curator. An individual assisted by a curator retains his/her legal capacity to act. In the exceptional case that the curator proceeds with an act without the consent of the supported person, then the latter is not bound by the act.

However, where a person is placed under **tutorship**, s/he has limited legal capacity to act. Where a person is unable to appreciate her/his own needs, the court can, in cases where a curator will not suffice, appoint a tutor with a specific mandate to cover a certain area of activities. Within the scope of the tutor’s mandate, the person under tutorship does not have capacity to act. The person retains the right to make decisions about other financial affairs outside of the tutor’s mandate and also retains the right to vote. Tutorship will only be applied where curatorship will not meet the needs of the person in question.

Accordingly, Sweden has, for many years now, recognised supportive legal capacity, and the curatorship system can be considered as a **good practice**. However, the imposition of tutorship though, and the consequent loss of capacity to act in certain

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<sup>264</sup> See OHCHR, Day of General Discussion on the right to equal recognition before the Law, 21 October 2009, written submission from the Mental Disability Advocacy Center and the Hungarian Association for Persons with Intellectual Disability (7/09/09), available at:

<http://www2.ohchr.org/SPdocs/CRPD/DGD21102009/MDACHungary.doc>

<sup>265</sup> Dr. Palacios Briefing paper for the Study VC/2008/1214, see supra note 248

<sup>266</sup> European Parliament, Directorate-General Internal Policies, *Comparative Study on the Legal Systems of the Protection of Adults Lacking Legal Capacity, National Rules of Private Law, of Private International Law and a Possible Legislative Initiative of the European Union*, November 2008, p.98-119

areas, may challenge the successful implementation of Article 12 UN CRPD, and in particular the requirement not to substitute a person's will and preferences.<sup>267</sup>

Finally, with regard to the **European Union**, the Council Decision 2010/48/EC did not explicitly refer to competence for matters related to Article 12 UN CRPD. As no instrument was listed in the Appendix of the Decision, EU practices will not be presented in this report. However, as is clear from the examples presented above, at the Member States level implementation of Article 12 UN CRPD poses some critical challenges that the EU may assist Member States in addressing. This could be achieved by encouraging cooperation between EU Member States, and exchange of experiences and good practices that will contribute to the development of a common understanding of the recognition of legal capacity. However, several critical issues need to be considered in this respect. Firstly, the diverse nature of legal capacity systems established in the Member States makes facilitation to establish a common understanding on the recognition of legal capacity difficult. Secondly, the establishment of effective supportive decision making measures seems challenging in a context where most Member State legislation is rooted in the substitute decision-making model. When it comes to transposing the legal obligation, deriving from Article 12 UN CRPD into domestic legal systems, the first dilemma which clearly arises is whether Parties to the Convention shall abolish incapacitation and guardianship remedies. Even if not explicitly stated in Article 12, having regard to the Convention's object and purpose, the paradigm shift, definition of disability discrimination, the general principles (Article 3 UN CRPD), and the systematic interpretation of Article 12, a review of incapacitation and guardianship remedies in existing domestic legislations is rendered necessary. As some domestic experiences have proven, it is possible to protect without restricting the individual's autonomy.

Finally, during the ratification process some Member States have issued interpretative declarations in relation to Article 12 UN CRPD. Therefore, it will be a real challenge for the EU to facilitate a common approach towards reservations on the UN CRPD in this area. When addressing the issue of reservations EU Member States should consider that:

“The limitations that persons with disabilities may face in relation to their legal capacity will impact directly in the exercise and enjoyment of all human rights enshrined in the UN CRPD. Furthermore, peremptory norms in a treaty shall not be subject of reservation. In

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<sup>267</sup> The published results of the Swedish national screening exercise note that the Disability Movement stated that some of the provisions in Chapter 11 of the Parental Code may need to be revised so that it is clear that an order of tutorship is replaced by curatorship or other less restrictive interventions when the individual no longer needs a tutor. The investigator concludes however that Swedish law meets the requirements of the Convention in this area. Available at <http://www.regeringen.se/content/1/c6/10/19/18/516a2b36.pdf>

relation to article 16 of the ICCPR the Human Rights Committee has declared that *'reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant'*.<sup>268</sup>

#### 4.2.2 General Recommendations for States Parties on Article 12

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States Parties should undertake a **screening exercise** to assess whether all persons with disabilities are recognised at all times and in all situations as persons with legal rights and duties, including recognition as a matter of law, as well as practice. For such purposes it will be necessary to adopt some measures such as:

- Reviewing existing legislation, repealing those discriminatory provisions containing references to disabilities, or to impairments, as a precondition for incapacitation (e.g. persons with dementia, deaf-blind etc), and placement under plenary (full) guardianship.
- Reviewing existing legislation, repealing those provisions which, while not making a direct reference to a disability, or to impairments, have the intention or the effect of applying to persons with disabilities (e.g. grounds of incapacitation due to disabilities, or impairments, that will deprive a person of his/her right to making decisions).
- Reviewing existing legislation in order to abolish incapacitation procedures. This may require the creation of a new institution which could be named "procedure for the support on the exercise of legal capacity".

In the review processes it will be necessary to take into account:

- The development of proposals in order to abolish incapacitation and establish supportive decision making models meeting the requirements enshrined in the UN CRPD. In this respect, the establishment of the support process as envisaged by Article 12 is a complex task that: (i) will need a careful consideration of different proposals; (ii) should be clearly determined, in consultation with the relevant key actors; and (iii) will need to be gradually implemented.
- Proposals to develop new institutions in order to replace incapacitation and guardianship.

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<sup>268</sup> General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 04/11/94. CCPR/C/21/Rev.1/Add.6, General Comment No. 24. (General Comments). Paragraph 8

- Consultation with key actors, especially with civil society representing persons with disabilities.
- The need to arrange adequate financial and human resources. Training for judicial authorities, civil servants, persons with disabilities, persons supporting persons with disabilities, and any other relevant actor should also be arranged.

The implementation of Article 12 UN CRPD requires the recognition of the principle of equality and non-discrimination in the context of legal capacity. Specifically, ensuring the right to exercise legal capacity **requires** explicit legal recognition of the presumption of legal capacity on an equal basis with others, and recognition of the presumption of legal capacity for children and young persons with disabilities equivalent to that accorded to other children and young persons.

States Parties' legislation should **ensure** that persons with disabilities (all types of disabilities) have the same right as others in the exercise of their individual autonomy, and therefore should be recognised as competent to perform legally significant acts.

**Supported decision making**, where required, should be understood as a supportive measure and should not give rise to a lesser degree of legal capacity.<sup>269</sup> Therefore, States Parties should ensure the provision of appropriate support measures for persons with disabilities to exercise legal capacity on an equal basis with others, and directed at personal decision-making, as opposed to decision-making by a third party.

States Parties should also ensure the availability of **effective safeguards** against abuse of supported decision-making arrangements, including measures to ensure that such arrangements:

- a. respect rights of persons with disabilities and their will and preferences;
- b. are free from conflict of interest and undue influence;
- c. are proportionate to the person's need for assistance, and are the least restrictive necessary, and tailored to the circumstances and needs of the specific individual to whom they relate;
- d. are limited and last only for the period they are required; and
- e. are subject to regular review by an independent and impartial authority.

States Parties are required to ensure that persons with disabilities are able to own and inherit **property**. Therefore, States Parties should adopt legal provisions to allow

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<sup>269</sup> See Dr. William Rowland, Chair of the International Disability Alliance, statement at the Open-ended consultation on key legal measures for the ratification and implementation of the Convention on the Rights of Persons with Disabilities, Geneva, 24 October 2008.

persons with disabilities to acquire, hold, dispose, and inherit property on an equal basis with others. For this purpose, States Parties should also ensure that there are no situations in which persons with disabilities are deprived of their property without proper lawful reason.

States Parties should adopt legal provisions and practices to protect the inheritance rights of persons with disabilities, and ensure access to **credit** on an equal basis with others. Screening measures should determine whether any of the terms and conditions upon which credit is provided constitutes discrimination on the ground of disability.

States Parties should ensure that persons with disabilities are able to control their own **financial affairs** on an equal basis with others, including recognition of the presumption of capacity to control their financial affairs on an equal basis with others, and recognition of the presumption of capacity for children and young persons with disabilities to control their financial affairs equivalent to that accorded to other children and young persons.

States Parties should provide **support** to facilitate the exercise of capacity to control financial affairs on an equal basis with others.

Finally, States Parties should ensure that there are **effective safeguards** against abuse of supported financial management arrangements, including the types of measures referenced above in relation to supported decision-making.

#### 4.2.3 Article 19 obligations and overview of existing practices

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Article 19 UN CRPD recognises the right of persons with disabilities to **live independently** and be included in the community. Article 19 can be seen as a logical extension of Article 12 UN CRPD, in the sense that recognition of legal capacity restores the ‘power’ of persons with disabilities to decide about their own lives, while the right to independent living paves the way for persons with disabilities to choose how to live their lives. Article 19 also connects to the right to liberty and security of person (Article 14 UN CRPD).

Article 19 contextualizes that right for the specific situation of persons with disabilities and their living arrangements. Of particular concern to the drafters during the negotiation of the UN CRPD was the elimination of living arrangements that segregated and isolated persons with disabilities (e.g. institutionalisation), and that all too often represented the choices of others. Article 19 thus requires States Parties to ensure that persons with disabilities are able to live in the community with accommodation options equal to others, and that these options support the inclusion and participation of persons with disabilities in the life of the community. Article 19

emphasises that persons with disabilities should be able to **choose** with whom they live on an equal basis with others. In order to realize these freedoms, States Parties are obliged to ensure that persons with disabilities have **access** to the **support services** they require in order to live freely in the community, and avoid isolation and segregation from the community. These support services include in-home support, residential and community support services, and personal care. Finally, Article 19 requires that **mainstream community services** and facilities are available and responsive to the needs of persons with disabilities so as to facilitate their freedom to live in and be a part of the community.

Research for this study in the **EU Member States** has revealed that many **challenges** to the successful implementation of Article 19 UN CRPD exist. First of all, institutionalisation is a practice that still exists in many Member States and hampers the social inclusion of persons with disabilities. National policies to improve institutional care, instead of moving residents of such institutions in the community, are inconsistent with the UN CRPD requirements.<sup>270</sup> In cases where national policies promote disabled persons' independent living, the frequent absence of direct payments, or individualised funding schemes, to allow persons with disabilities to manage their own affairs is a significant challenge to effective implementation of the right to independent living. In cases where direct payment options are provided by the State, persons with physical disabilities are more likely to avail of this option than those with intellectual disabilities. Therefore, it appears that national practices relevant to Article 19 UN CRPD are not fully inclusive of all persons with disabilities, as required by the Convention. The lack of community-based services, due to insufficient funding, is yet another challenge to the implementation of Article 19 UN CRPD. The inadequate allocation of resources for the provision of the required hours of personal assistance to support living and inclusion in the community, as envisaged by Article 19 UN CRPD, is a common problem. Considering the requirements of Article 19 UN CRPD, illustrative case studies from Slovenia and Finland are provided below with the aim to demonstrate some of the challenges identified by this study, and some good practices that may contribute to the effective implementation of Article 19 UN CRPD.

In **Slovenia**, the institutionalisation of persons with disabilities is a significant problem. As the HLGD noted in its second report on the UN CRPD, 2,375 adults with special needs in Slovenia (psycho-social disabilities, sensory disturbances and physically

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<sup>270</sup> This is the case for Bulgaria, for example, where, as ANED comments, national debate is focused on improving the quality of institutional care, rather than creating conditions for children and adults to live in their own communities. It should be noted though that some small steps towards independent living are currently taken. See ANED, Report on the implementation of policies supporting independent living for disabled people – Bulgaria. Available at [http://www.disability-europe.net/content/pdf/BG-6-Request-07%20ANED\\_2009\\_Task\\_5\\_template\\_Bulgaria\\_to%20publish\\_to%20EC.pdf](http://www.disability-europe.net/content/pdf/BG-6-Request-07%20ANED_2009_Task_5_template_Bulgaria_to%20publish_to%20EC.pdf)

impaired persons) live in institutional care, while 505 children and young persons with psycho-social disabilities and physical impairments are also institutionalised. Regarding de-institutionalisation, the High Level Group on Disability has noted that a pilot project called “individualised financing” is currently in operation. Under this project, beneficiaries receive money and can pay for services directly. However, it is also noted that currently only fifteen persons benefit from this project.<sup>271</sup> In 2009, the European Coalition for Community Living published a Focus Report on Article 19 UN CRPD, including an interview with Elena Pecaric, the Chair of the Association for the Theory and Culture of Handicap (YHD) in Slovenia. Ms. Pecaric emphasized that Slovenia’s major problem is that funds are tied into institutions, arguing that:

If a disabled person lives in a long stay residential institution, living expenses are covered by the State, with funds given directly to the institution. Disabled people who choose to live alone or by themselves lose this financial support. This means that disabled people who want to live independently need to have a source of income, or be financially supported by their families.<sup>272</sup>

As is evident, State funding for institutional care and the lack of efficient individualised funding schemes discourage independent living and social inclusion for persons with disabilities.

In **Finland**, however, some **good legislative measures** have been established to promote independent living; however practical implementation seems to be insufficient. In 1987 the Finnish government adopted the Services and Assistance for the Disabled Act, with the aim to promote independent living and equal opportunities. The Act is, however, subsidiary, which means that municipalities, primarily on the basis of general legislation, should provide the necessary services and supportive measures.<sup>273</sup> Specifically, the Act requires municipalities “to ensure that services and assistance for people with disabilities are provided in the form and on the scale needed in the local community”. Therefore a municipality may reimburse in full or partially a disabled person for costs incurred by the employment of a personal assistant and/or the purchase of devices, machines and equipment needed. Amendments to this legislation, which entered into force in September 2009, introduced rights to assistance

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<sup>271</sup> See Second High Level Group Report on Disability, p. 192

<sup>272</sup> European Coalition for Community Living, Focus on Article 19 of the UN Convention on the Rights of Persons with Disabilities, “We Want Equal, Not Special Treatment!” p.34. Available at <http://www.community-living.info/index.php?page=308&news=423>

<sup>273</sup> Details on Finnish Disability Services can be found in English on the website of the Ministry of Social Affairs and Health at <http://pre20031103.stm.fi/english/pao/publicat/disabili/disabili.htm>

for domestic, social, educational and employment purposes, as well as a right to 30 hours per month of personal assistance to support recreation and social interaction.<sup>274</sup>

The aforementioned legislative measures seem to be in line with requirements set forth in the UN CRPD, as they provide financial support to persons with disabilities, and take into account not only support for living arrangements, but also for educational, employment and social inclusion purposes, which are necessary for independent living. Nonetheless, the Finnish ANED report on the implementation of policies supporting independent living for persons with disabilities identified some problems that illustrate possible challenges to the implementation of Article 19 UN CRPD, such as the existence within the current system of limitations, such as lack of resources, assistants, and training to meet personal needs in some areas.<sup>275</sup> Furthermore, resistance from some municipalities to the move from traditional services to the use of community support services is also noted as a problem. This reluctance arises from concerns among municipalities about the possible expansion of demand for personal assistants and the associated challenges of costs and recruitments.<sup>276</sup> The European Regional Report in the International Disability Rights Monitor of 2007 stated that there are major differences in availability of services based on both region of the country and type of disability.<sup>277</sup> Shortages are noted regarding available interpretation, transportation and personal assistance services. It is further noted that the minimum amounts of services provided for in the Decree (759/1987) on Services and Assistance for the Disabled have in reality become the maximum amounts allocated.<sup>278</sup> Consequently, even if Finland has introduced support services that could contribute to the positive implementation of the right of persons with disabilities to live independently in the community, practical implementation should probably be monitored and reinforced. Support services should be responsive to the needs of persons with disabilities, and should receive adequate funding. Funding management and distribution may also need to be regulated, in order to ensure that financial support will be provided to all persons with disabilities.

With regards to the **European Union**, the Council Decision 2010/48/EC stated that competence in the field of independent living is shared with Member States. With the aim of illustrating the extent of such competence, the Council listed several instruments

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<sup>274</sup> ANED Independent Living Report: Finland. Available at [http://www.disability-europe.net/content/pdf/FI-11-Request-07%20ANED%202009%20Task%205%20request%20template%20\(2\)\\_approved%20by%20author\\_to%20publish\\_reference%20check\\_to%20EC.pdf](http://www.disability-europe.net/content/pdf/FI-11-Request-07%20ANED%202009%20Task%205%20request%20template%20(2)_approved%20by%20author_to%20publish_reference%20check_to%20EC.pdf)

<sup>275</sup> Ibid p. 7

<sup>276</sup> Ibid

<sup>277</sup> IDRM Report 2007, supra note 166, p. 139

<sup>278</sup> Ibid

related to the functioning of the internal market (in particular indirect taxation and state aid), which are relevant to Article 19 UN CRPD. Instruments of such nature could eliminate barriers to the right of persons with disabilities to independent living (for example, inaccessible, or insufficient, goods and services). For example, instruments related to the internal market could provide incentives (mainly economic) to increase the accessibility of accessible goods and services, which are of great importance for persons with disabilities; encourage the provision of goods and services that are responsive to disabled persons needs; promote research on new and innovative technologies, and universal design; promote training for professionals working with, or for, persons with disabilities; and in other fields. More importantly, EU measures (of either hard or soft law nature) in this field could discourage the tendency of States to fund institutional care that restricts the autonomy and independence of persons with disabilities. Therefore, considering EU competence in the field of independent living, a selection of EU instruments included in the Council Decision on the conclusion of the UN CRPD by the European Union are outlined below.

**Commission Regulation No 800/2008/EC** (General Block Exemption Regulation, hereinafter referred to as GBER)<sup>279</sup> simplified EU State aid control rules.<sup>280</sup> To this purpose, State support measures in areas listed in the GBER benefit from an exemption from the ‘notification requirement’. If the conditions set forth in the GBER are met, such support does not constitute State aid, and therefore Member States are free to award it to companies without entering into any administrative procedure, *i.e.* without having to notify it to the Commission.<sup>281</sup>

The GBER has established a framework to allow Member States to grant aid targeted at job creation, boosting competitiveness and improving the environment. Aid should be aimed at a well-defined objective of a common interest. In view of the UN CRPD implementation, such a common interest should be, for example, the promotion of the design of accessible goods, or enhancing employment of workers with disabilities, or encouraging training for professionals working with, or for, persons with disabilities, or

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<sup>279</sup> Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty - General block exemption Regulation, [2008] OJ L 214.

<sup>280</sup> See Article 87(1) TEC. This article provides that State aid is, in principle, incompatible with the common market. Under Article 88 TEC, the Commission is given the task to control State aid. This article also requires Member States to inform the Commission in advance of any plan to grant State aid (“notification requirement”). See also previous Regulations, such as Regulation (EC) No 994/98 referring to certain categories of horizontal State aid, Regulation (EC) No 68/2001 addressing training aid, Regulation (EC) No 2204/2002 addressing employment aid, and others.

<sup>281</sup> Member States are instead required to submit to the Commission a summary description of the aid measure within 20 working days following the implementation of the measure. For measures exempted from notification under the GBER, Member States also have an obligation to publish on the internet the full text of the measure, and to keep it posted as long as it is in effect.

supporting research for the development of innovative solutions that will enhance independent living and social inclusion of persons with disabilities. The Regulation authorises aid in favour of small and medium enterprises (SMEs), research, innovation, regional development, training, employment, aid in the form risk capital, and aid to benefit disadvantaged or disabled workers. The latter covers aid which is granted to cover additional costs incurred by a company for the recruitment and employment of persons with disabilities in the form of wage subsidies.<sup>282</sup> In 2009, the European Commission underlined the necessary positive effects of such aid, stating that:

State aid for the employment of disabled workers must result in the aid beneficiary changing its behaviour so that the aid results in a net increase in the number of disabled employees in the undertaking concerned.<sup>283</sup>

Besides employment, the GBER provides economic incentives for SMEs to invest in innovation, universally designed and accessible goods and services. Furthermore, the Regulation provides for aid for research on development and innovative design (or improvement) of products, services, processes, facilities and others. Even if disability is not explicitly mentioned in the GBER in the context of research, in view of the UN CRPD implementation by the EU, aid in this field should encourage research on universal design and innovative technologies that would be responsive to disabled persons' needs, and enhance their accessibility and independent living. Finally, another important element of the GBER is the provision of aid related to employees' training. Again, disability is not explicitly mention in this section, though in view of the UN CRPD, any support measure in relation to training should be inclusive of, and accessible to, persons with disabilities, and bear in mind the general purpose and principles of the Convention.

Consequently, the GBER recognises the positive effects of aid, and allows Member States to promote (by means of, *inter alia*, tax reliefs) independent living for persons with disabilities, through their inclusion in employment, and the development of innovative technologies. The GBER appears to contain several **good elements** and can contribute to the effective implementation of the Convention. However, as a party to the UN CRPD, the Union should clarify that any type of aid to be given should not defeat the purpose, and general principles of the UN CRPD. Finally, State aid should further enhance the right of persons with disabilities to independent living, and be inclusive of persons with disabilities.

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<sup>282</sup> See Articles 41 – 42 GBER

<sup>283</sup> Communication from the Commission - Criteria for the analysis of the compatibility of State aid for the employment of disadvantaged and disabled workers subject to individual notification, 2009/C 188/02, in OJ C/188 of 11.8.2009. Aiming to avoid 'abuse' of State aid, the Commission further clarified in its Communication, that "aid cannot be used to replace workers in respect of whom the undertaking no longer receives a subsidy and who have consequently been dismissed".

Another instrument related to independent living is **Council Directive 83/181/EEC** which determines the scope of Article 14(1)(d) of Directive 77/388/EEC regarding exemption from value added tax (VAT) on the final importation of certain goods.<sup>284</sup> Many providers of goods and services for persons with disabilities are benefit Directives 83/181/EEC and 77/388/EEC. Specifically Article 13(A)(1) of Directive 77/388/EEC requires Member States to exempt from VAT "certain activities in the public interest". These activities include, *inter alia*, hospital and medical care, goods and services closely linked to welfare and social security, education and training, and others. To benefit from an exemption, providers should obtain prior authorisation from the Member State in which they are established. This means that such providers of goods and service are exempt from the need to file VAT returns or to charge VAT taxes to their clients. In addition to exemptions set forth in Directive 77/388/EEC, Chapter II of Directive 83/181/EEC clarifies that in some circumstances, the importation of goods which are for the exclusive use of persons with disabilities are also VAT exempt. Specifically, Article 46 of the Directive provides that:

(1) Articles specially designed for the education, employment or social advancement of blind or other physically or mentally handicapped persons shall be exempt on admission where: (a) they are imported by institutions or organisations that are principally engaged in the education of or the provision of assistance to handicapped persons and are authorised by the competent Authorities of the Member States to receive such articles exempt from VAT; and (b) they are donated to such institutions or organisations free of charge and with no commercial intent on the part of the donor.

(2) Exemption shall apply to specific spare parts, components or accessories specifically for the articles in question and to the tools to be used for the maintenance, checking, calibration and repair of the said articles, provided that such spare parts, components, accessories or tools are imported at the same time as the said articles or, if imported subsequently, that they can be identified as being intended for articles previously exempt on admission or which would be eligible to be so exempt at the time when such entry is requested for the specific spare parts, components or accessories and tools in question. Articles exempt on admission may not be used for purposes other than the education, employment and social advancement of blind or other handicapped persons

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<sup>284</sup> Council Directive 83/181/EEC of 28 March 1983 determining the scope of Article 14(1)(d) of Directive 77/388/EEC as regards exemption from value added tax on the final importation of certain goods, OJ L 105, 23/04/1983, pp 38-58. See also, Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment, O.J L 145, 13/06/1977, pp 0001 - 0040

Similar VAT exemptions are also included in **Council Directive 2006/112/EC** establishing a common system of value added tax,<sup>285</sup> as amended by Council Directive 2009/47/EC<sup>286</sup> on reduced rates of value added tax.

Directive 2006/112/EC is listed in the Appendix of Decision 2010/48/EC as an instrument that illustrates EU competence in the fields of work, employment, social inclusion and independent living, and explicitly refers to disability in its Articles 98 and 106. Article 98 establishes that Member States may apply either one or two reduced rates to supplies of goods or services in the categories set out in Annex III. The latter includes, *inter alia*, medical equipment, aids and other appliances normally intended to “alleviate or treat disability to the exclusive personal use of the disabled”, including the repair of such goods, and (following the 2009 amendment) domestic care services, such as home help and care.<sup>287</sup> In addition, Article 106 of Directive 2006/112/EC provides that:

the Council may, acting unanimously on a proposal from the Commission, allow Member States to apply until 31 December 2010, at the latest, reduced rates provided for in Article 98.

Furthermore, Annex X of the Directive establishes that transactions carried out by blind persons, or by workshops for the blind, can be VAT exempt, provided that those exemptions do not cause significant distortions of competition. Finally, with the amendment in 2009, the application of a reduced rate in the field of care for the persons with disabilities was no longer a temporary provision (*i.e.* until 31 December 2010, as mentioned in Article 106 of Directive 2006/112/EC), but became permanent. Therefore, today reduced VAT rates on labour-intensive local services, including domestic care services (e.g. home help and care) can be applied on a permanent basis.

In conclusion, indirect tax reliefs for goods and services, which are covered by the aforementioned Directives, and are necessary for persons with disabilities, lowers their cost, and thus make them more affordable for persons with disabilities. In this respect,

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<sup>285</sup> Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11.12.2006, p. 1-118

<sup>286</sup> Council Directive 2009/47/EC of 5 May 2009 amending Directive 2006/112/EC as regards reduced rates of value added tax, OJ L 116, 9.5.2009, p. 18

<sup>287</sup> It should be noted that the Commission had also proposed the inclusion in Annex III of a list of goods and services with reduced rates of “medical equipment, aids and other appliances normally intended to alleviate or treat disability, for the exclusive personal benefit of the disabled, and apparatus and electrical, electronic or other equipment and means of transport, specially designed or adapted for the disabled as well as the leasing or hiring and the repair of such goods; supply of domestic care services, such as home help and care of the young, elderly, sick or disabled”. However, the proposal was not approved by the Council. See COM(2009)21, Commission proposal for amending Directive 2006/112/EC on the common system of value added tax as regards the rules on invoicing.

the Directives appear to encourage and promote independent living for persons with disabilities, and could positively affect the implementation of the UN CRPD. However, the European Union as a signatory and future party to the Convention, when reviewing its legislation, could reflect on possible adaptation to certain parts of the aforementioned Directives 83/181/EEC and 2006/112/EC,<sup>288</sup> and include a clarification that any VAT exemption to be awarded by the Member States should not defeat the object and purpose of the UN CRPD. That is to say, for example, that institutions (or organisations) that would benefit from such exemptions should not include residential, or medical care, or other institutions that restrict the autonomy of persons with disabilities. Furthermore, terms used in the Directives to refer to persons with disabilities (e.g. physically or mentally handicapped, the disabled, or other), and terms referring to specific types of disabilities (e.g. the blind) should also be reviewed. Any terminology used to refer to persons with disabilities should be consistent with the social model of disability, and be inclusive of *all* persons with disabilities.

#### 4.2.4 General Recommendations for States Parties on Article 19

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States Parties should take measures to ensure that persons with disabilities are able to live in the community with **choices** equal to others, in particular, by enabling a variety of living arrangements to be available to persons with disabilities and providing the same choice of living arrangements as are available to others.

A **screening exercise** should be undertaken to determine the most appropriate measures required to remove existing barriers to persons with disabilities living in the community, and to provide a choice of accommodation, including in public and private housing.

Housing access **audits** are recommended to support implementation of Article 19 UN CRPD.

**Focus groups**, among other measures, could be helpful in assessing whether persons with disabilities are included in community life, and what barriers inhibit the participation of persons with disabilities in community life, including barriers related to the accessibility of generic community services and facilities.

An **assessment** should be made to determine whether persons with disabilities are compelled, or obliged, to live in any particular living arrangement. A core part of this assessment requires the examination of: (a) whether **support services** are available to persons with disabilities to enable them to exercise their freedom to live in, and be a part of, the community; and (b) whether there is **effective access** to any in-home

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<sup>288</sup> Based on Article 106 of Directive 2006/112/EC, the Council should review the Directives, upon a proposal by the Commission.

support necessary for them to live in, and be a part of, the community. The assessment should also determine whether persons with disabilities have access to residential support necessary for community living and community services. Finally, the assessment should evaluate whether measures to **safeguard** persons with disabilities from isolation and segregation from the community are effective.

## 4.3 Specific Accessibility Rights

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Accessibility features as a general principle of the UN CRPD in Article 3, and is elaborated in Article 9 (an article of general application). It is therefore applicable across the text of the Convention. However, accessibility requires specific applications in certain fields, including *inter alia* access to justice (Article 13 UN CRPD) and political participation (Article 29 UN CRPD). Accessibility rights in the UN CRPD serve the function of facilitating access in various contexts, including generally in the public and private spheres, and in the case of Articles 13 and 29, in access to justice and political decision-making contexts.

### 4.3.1 Article 13 obligations and overview of existing practices

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Article 13 UN CRPD confirms the right of persons with disabilities to **access justice** in order to vindicate their rights. The right to access to justice is firmly established in international law, particularly within the context of equality of people before the law, the right to equal protection under the law, and the right to be treated fairly by a tribunal or court. However, the Convention goes beyond formal justice notions of equality, and requires States Parties to ensure that persons with disabilities enjoy effective access to justice on an equal basis with others, which means that States Parties should provide reasonable accommodation for persons with disabilities. The latter concept is defined in Article 2 UN CRPD as:

“[Any] necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment, or exercise, on an equal basis with others of all human rights and fundamental freedoms”.

Article 13(1) requires **procedural and age-appropriate accommodations** in the context of access to justice. It further requires such accommodations to facilitate participation in judicial proceedings, whether direct or indirect (including as witnesses). Such access should cover all legal proceedings, and should likewise include investigative or other preliminary stages of legal proceedings. For example, accommodations may include adaptations to investigation methods or interview

techniques, adaptations to the physical environment (e.g. accessible police stations), provision of documentation in accessible formats, and others.

Article 13(2) requires States Parties to provide **training** to those working in the administration of justice (including prison and police staff) in order to ensure effective access to justice by persons with disabilities. It should be noted that the provision of disability-related training is only one example of the type of action required of States Parties by Article 13 to “fulfil” the right to access to justice. When read in conjunction with Article 9 UN CRPD, measures implementing Article 13 should include disability-specific standards to be met by judicial authorities. In this respect, consultation with persons with disabilities, and their representative organisations, on the elimination of barriers posed by existing practices in relation to access to justice is deemed necessary.

Research for this study in the **EU Member States** has revealed that legislation with aims to ensure effective access to justice generally exists, but mainly targets access for deaf people, through the provision of sign language interpretation. However, sign language is only one mode of alternative communication, and therefore significant **challenges** remain for persons with other disabilities, such as blind or visually impaired persons, and in particular persons with intellectual disabilities, who will require other types of accommodation. Nonetheless, it should be noted that while legislation addressing accessibility for persons with disabilities to justice, on an equal basis with others, was identified in a number of Member States, there is little information available on how this legislation is implemented in practice. This is the case for the indicative examples of Latvia and Italy, which are presented below. Nonetheless, as indicated by the study on the situation of women with disabilities in light of the UN CRPD, a few good examples exist in Austria, Croatia, and France.<sup>289</sup> In this respect the French example will be outlined.

In **Latvia**, Article 11, Paragraph 2 of the Criminal Procedure Law provides that:

If a person who has a right to a defense, a victim and his or her representative, a witness, specialist, expert, auditor, as well as other persons who a person directing the proceedings has involved in criminal proceedings does not speak the official language, such persons have the right to use the language that such persons understand during the performance of procedural actions, and to utilize the assistance of an interpreter free of charge, whose participation shall be ensured by the person directing the proceedings. In pre-trial proceedings, the investigating judge or court shall provide for the participation of

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<sup>289</sup> See Study on the situation of women with disabilities in light of the UN CRPD, VC/2007/0317 Final Report for the European Commission, pp 86-87

an interpreter in the hearing of issues that fall within the jurisdiction of the investigating judge or court.<sup>290</sup>

Even though translation into sign language is not explicitly quoted in the Law, the HLGD indicated that sign language is covered by it. Sign language was used for the first time in legal proceeding in 2005, and since then its use has been increased. Nevertheless, in view of the UN CRPD full and effective implementation, access should be provided for all persons with disabilities and not only for specific groups of persons.

In **Italy**, the Civil and Penal Code provides for sign language interpretation, when persons with hearing impairments participate in a trial. Additionally, Law n° 67/2006 provides for special measures of legal assistance in court cases involving alleged discrimination on the grounds of disability, through the intervention of organisations representative of persons with disabilities.<sup>291</sup> Article 1 of the Law declares that the aim of the law is to promote full implementation of the principle of equal treatment and equal opportunities for persons with disabilities in order to ensure their full enjoyment of civil, political, economic and social rights. In addition, Article 4 of the Law ensures *legitimation ad causam* and *locus standi* are available to persons with disabilities, as well as to their respective organisations, or associations, which are identified by Ministerial Decrees. Regarding application, Law n° 67/2006 applies to persons with disabilities as defined in Article 3 of Law 104/2003. The latter states that person with disabilities include those with a physical, mental or sensory impairment (permanent or progressive), which may hinder the person's participation in education, relationships, or in a professional environment, and which implies social disadvantages or social exclusion of the person.

Consequently, the Italian Law n° 67/2006 appears to have **positive** elements for the implementation of Article 13 UN CRPD. These positive elements include (to some extent) the definition of disability and the provision of support measures through the intervention of organisations representative of persons with disabilities. However, the explicit reference in the definition of disability (even if within a social context) to relationships and educational or professional environment may (if strictly interpreted) result in excluding persons with disabilities from some sectors of the society. Additionally, the requirement that the civil society organisations have to be recognised by Ministerial Decrees before they assist individual disabled people in court cases may challenge the practical implementation of the Law. Finally, the lack of specific standards to be met by judicial authorities, may also prove challenging for the practical implementation of the Law.

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<sup>290</sup> Second High Level Group on Disability Report, p. 121

<sup>291</sup> Second High Level Group on Disability Report, p.109

It should further be noted that in Italy, in terms of legislative measures to remove physical barriers for persons with disabilities and accessibility laws derive also from the regional level (*i.e.* Italian Regions). For example, Veneto Law 16/2007 promotes initiatives and actions to ensure the accessibility of public and private buildings and spaces open to the public. The law aims to ensure that persons with disabilities can participate in social and productive activities. This regional law, however, has a limited territorial application; it only applies within the Veneto region, and concerns only buildings within the territory of the region.

In **France**, the principle of generalised accessibility to all spheres of social life<sup>292</sup> (employment, transport, justice etc) has been established by the Law on the Equality of Rights and Opportunities, Participations and Citizenship of Persons with Disabilities (hereinafter referred to as Law on Disability).<sup>293</sup> The Law on Disability articulates the rights of persons with disabilities based on the principles of non-discrimination, access to the built and urban environment and integration in society. More importantly, it sets a clear timeframe for the implementation of accessibility requirements to, *inter alia*, public buildings (such as courts), transport, the work environment and others. Furthermore, the law requires provision of sign language interpretation, and information in Braille, for persons with disabilities before the civil and penal courts.<sup>294</sup> Consequently, it appears that the French Law on Disability may contribute to the positive implementation of the general principle of accessibility and the specific accessibility provisions of the UN CRPD. It can thus be seen as a **good practice** in this field. The inclusion of a clear timeframe for compliance is of great importance for the effective implementation of Articles 9 and 13 UN CRPD. Timeframes within legislation should oblige actors (to whom legislation applies) to ensure that necessary adjustments to the environment are actually made. In this respect, accessibility audits, and legal actions in case of non-compliance, would also be of added value to the practical implementation of the accessibility principle. It should also be noted that, for the full implementation of the accessibility principle, the French Law on Disability should ensure that appropriate accommodations are provided for all persons with disabilities, and in particular persons with intellectual disabilities.

Finally, with regard to the **European Union**, Council Decision 2010/48/EC did not explicitly refer to competence for matters related to Article 13 UN CRPD. As no

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<sup>292</sup> Detailed information on French practices related to disability is available in the Study VC/2007/0317, available at:

<http://ec.europa.eu/social/main.jsp?catId=429&langId=en&moreDocuments=yes>

<sup>293</sup> Loi No. 2005-102 du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées, JORF no. 36 du 12 février 2005, pp. 2353, texte no.1

<sup>294</sup> For further information see Study VC/2007/0317 Final Report for the European Commission, p. 87 and Annex IV, pp 199-202

instrument was listed in the Appendix of the Decision, EU practices will not be presented in this report. However, as mentioned in section 3.5 of this report, the EU has expertise in the fields of accessibility. Therefore, the EU could become the platform for the **exchange of experiences** by the Member States, and facilitate the adoption of effective approaches. Furthermore, experts on accessibility from the EU could (at the request of the EU Member States) participate (in an advisory capacity) in Member States meetings related to the implementation of Article 13 UN CRPD. More importantly, the Union through the use of, for example, funding instruments could (and as a party to the Convention is obliged to do so by Article 4(1)(i) UN CRPD) encourage the conduct of **training** related to the UN CRPD, including training for personnel working in the EU and national judicial authorities.<sup>295</sup>

#### 4.3.2 General Recommendations for States Parties on Article 13

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States Parties should take measures to ensure that persons with disabilities enjoy **effective access to justice** at all stages of the legal process, and whatever their role may be (as victims, suspects, defendants, convicted offenders, claimants or respondents).

Accessibility **audits** within the justice system should include an inquiry into (a) whether the in-court legal process, and all administrative processes associated with the justice system (including court forms, out-of court communication etc.), are accessible to persons with disabilities; (b) whether age-related accommodations to the legal process are made to facilitate the effective participation of children and young persons with disabilities, including adaptations to ensure that laws of evidence are flexible and adapted to their needs.

Measures that should be taken to facilitate the implementation of Article 13 include, but are not limited to:

- a. the provision of accommodations and other measures to ensure accessibility to the justice system (including communications with justice system officers and administrative personnel);
- b. ensuring procedural accommodations, such as investigation methods and interview techniques;
- c. provision to make the laws of evidence sufficiently flexible and adapted to the needs of persons with disabilities; and
- d. measures to ensure that the premises of justice agencies (including police stations, courts and administrative tribunals) are physically accessible (including

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<sup>295</sup> See supra note 4

access measures for persons who use mobility devices, way-finding for persons who are blind or have cognitive impairment, hearing augmentation for persons who are hearing impaired).

**Training** is an essential component of Article 13, and should be provided to all justice agency personnel so as to facilitate access to justice for persons with disabilities. Therefore, training should be provided to the police, court administrators, prison officers, legal practitioners, magistrates and judges, and should cover human rights and access to justice for persons with disabilities. Additionally, training for justice agency personnel should include the identification of persons with disabilities involved in the legal process, adjustments required to ensure access, and training in communication skills for work with persons with disabilities. Finally, Article 13 also requires police training in investigation methods and interview techniques appropriate for work with persons with disabilities, including work with children and young persons with disabilities.

#### 4.3.3 Article 29 obligations and overview of existing practices

Article 29 UN CRPD confirms the right of persons with disabilities to **participate in political and public life**. It requires States Parties to guarantee political rights for persons with disabilities on an equal basis with others, and provides specific guidance for implementation.

**Political participation** is addressed in Article 29(a), and extends beyond voting. It encompasses the right of persons with disabilities to participate in all aspects of the political decision-making process. More concretely, Article 29 guarantees the right of people with disabilities to:

- vote in elections on a non-discriminatory basis;
- stand for election as a candidate for public office;
- access an effective impartial and non-discriminatory procedure for the registration of voters;
- have equal and effective access to voting procedures and facilities;
- cast their ballot in secret;
- have, if needed, assistance to vote; in this case, persons with disabilities should have the right to be assisted by a person of their own choice;
- ensure that political parties, and public authorities, provide accessible information to voters;

- participate in the conduct of public administration, including the administration of political parties and civil society;
- participate in the work of international organisations, including serving as a representative of government in international organisations; and
- form and join disabled peoples' organisations (DPOs) at all levels.

States Parties are required to ensure and provide, by means of **positive governmental action**, that citizens with disabilities actually have the opportunity to exercise their political rights. To this purpose, States Parties should do more than simply proclaim equality in political participation. Accordingly, States Parties have a duty to provide **reasonable accommodation** to voters with disabilities to enable them to exercise their right to vote. For example, physical barriers to voting centres and booths should be removed; communication should be facilitated; and voting information should be provided in accessible formats. Furthermore, States Parties should also **ensure** the full realisation by persons with disabilities of other rights to participate in political and public life, such as to stand for election as candidates for a public office, or to be consulted on legislative or policy matters that may affect their lives.

Finally, Article 29 is reinforced by the fundamental principle of “full and effective participation and inclusion in society”, provided for in Article 3(c) UN CRPD, and by the general obligation “to closely consult with and actively involve persons with disabilities” in all aspects of decision-making, provided for in Article 4(3) UN CRPD. Read in conjunction with Articles 3 and 4, Article 29 provides one of the clearest expressions in international human rights law of the right to participate in decision-making.

Research for this study in the **EU Member States** has revealed that the majority of States have adopted (or adapted) legislative provisions in order to ensure that persons with disabilities can effectively and fully participate in voting procedures. These types of legislative measures require that facilities and materials are accessible to persons with disabilities. However, particular **challenges** to the implementation of Article 29 UN CRPD arise in relation to ensuring the right of persons with disabilities to vote by secret ballot in elections and public referendums, and in some cases persons with disabilities are not sufficiently informed of their voting entitlements. Considering accessibility to voting procedures, indicative examples of practices from Greece and Finland will be outlined.

In **Greece**, Section 3 of the Hellenic Constitution includes, *inter alia*, the main provisions related to voting procedures. Specifically, Article 55 establishes that every

Greek citizen, who has the right to vote,<sup>296</sup> and has reached, on the day of elections, twenty-five years of age, has the right to stand as a candidate for a public office. Article 55 of the Hellenic Constitution does not exempt any citizen, and therefore all Greek citizens, including citizens with disabilities, have the right to stand for election and perform public functions at all levels of government.

Article 51(3) of the Hellenic Constitution guarantees an equal vote to every adult citizen. In addition, Presidential Decree 351/2003 on the codification of the election procedures<sup>297</sup> sets forth in Article 83 the process of voting, and guarantees the right to vote by secret ballot.<sup>298</sup> As regards to disability, Article 83, paragraph 3, provides that:

voters who due to physical disability are not able to follow the legal procedure of accessing the polling station and voting, have the right to request from the representative of the judicial authority, or a member of the polling station committee, or election officials to help him/her to vote, and these persons are obliged to help them.

This provision, even if it seeks to ensure accessibility for persons with disabilities, it strictly applies to persons with physical disabilities, and does not take into account that persons with other disabilities (e.g. persons with intellectual disabilities) may also require some form of assistance. Furthermore, the choice of assistance between the representative of the judicial authority, or a member of the polling station committee, or election officials may potentially challenge the right of persons with disabilities to cast their ballot in secret. Therefore, problems arising from Article 83 illustrate challenges to the effective implementation of Article 29 UN CRPD.

**Finland**, in its Election Act No. 714 of 1998, includes several provisions with regard to assistance for persons with disabilities. Specifically, Section 46 of the Act states, *inter alia*, that:

A person who is in hospital, or in a facility with round-the-clock treatment care or in any other operational unit of social services, designated by the municipal executive board as an advance polling station may vote in advance in the said institution. [...] Persons whose ability to move or function is limited to the degree that they are unable to come to the polling or advance polling station without undue hardship, may vote in advance at home in the Finnish municipality which has been registered as their municipality of residence in the voting register.<sup>299</sup>

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<sup>296</sup> With regard to the right to vote, Presidential Decree 351/2003 on the codification of the election procedures establishes that every Greek citizen who completed his/her eighteenth year of age has the right to vote in election procedures. See Article 4 of Decree 351/2003.

<sup>297</sup> Presidential Decree 351/2003 on the codification of the election procedures is available in Greek at [http://www.ypes.gr/UserFiles/f0ff9297-f516-40ff-a70e-eca84e2ec9b9/96\\_2007.DOC](http://www.ypes.gr/UserFiles/f0ff9297-f516-40ff-a70e-eca84e2ec9b9/96_2007.DOC)

<sup>298</sup> See Article 83 paragraph 2 of Presidential Decree 351/2003.

<sup>299</sup> Unofficial translation. Election Act No. 714 is available in Finnish at: [www.finlex.fi/pdf/saadkaan/E9980714.PDF](http://www.finlex.fi/pdf/saadkaan/E9980714.PDF)

Additionally, Section 190 of the Act provides for transportation services to polling and advance polling stations for disabled people.<sup>300</sup>

The aforementioned provisions of the Finnish Act aim to guarantee that all citizens can exercise their right to vote on an equal basis. It can thus be considered that the Act has **positive elements** that can contribute to the effective implementation of Article 29 UN CRPD. Moreover, even though the Act does include many specifications on the removal of barriers, the IDRМ Report of 2007 has noted that an estimate by the Director of Election Processes at the Ministry of the Interior revealed that 80 to 100 per cent of polling places are physically accessible, but information related to voting is not provided in accessible formats, and this is a major barrier, especially for persons with learning, visual or communication disabilities.<sup>301</sup>

For matters related to participation of persons with disabilities in decision making, research for this study has revealed that the majority of the EU Member States have created consultative disability forums to ensure the participation of persons with disabilities in public life. A number of **challenges** to the effective implementation of Article 29 UN CRPD though remain. For example, while many Member States provide for disability councils, the extent of the State's obligation to take the opinion of these councils into account is often unclear. In addition, it is unclear whether such councils are independent of the State. In this respect, research for this study could not identify how members of the identified disability councils are selected, and whether or not disability councils are dependent on State funding. Finally, it should be noted that little information is available in relation to the effectiveness of these national disability councils. Considering the right to participate in the decision making, indicative examples of practices from Luxembourg and Romania will be outlined.

In **Luxembourg**, the Grand Ducal Regulation of January 25<sup>th</sup>, 2006 established the Supreme Council of Disabled Persons. Based on the Regulation, the Supreme Council is composed of persons with disabilities, professionals and members of the government, and has the following tasks:

- a. To assist and advise the Minister who is responsible for national disability policies, and coordination of such governmental actions.
- b. To advise on any draft governmental legislation or regulation related to disability issues.

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<sup>300</sup> Section 190 refers to the Act on Services and Assistance for the Disabled, No.380/1987

<sup>301</sup> See International Disability Rights Monitor Report of 2007, p. 140

- c. To consider all matters addressed by the Minister in charge of disability policies, and all subjects that the Minister considers useful.<sup>302</sup>

Similarly, in **Romania**, Law No 448/2006 regarding the Protection and Promotion of the Rights of Disabled Persons has established the National Authority for Disabled Persons. The Law *obliges* local and central public administration authorities to establish dialogue, collaboration and partnership relationships with the disabled peoples' organisations, or organisations that represent the interests of persons with disabilities. Moreover, Article 92 of the Law *requires* the government's consultation with the National Authority for Disabled Persons *before* the adoption of any legislative measure that aim to protect persons with disabilities.<sup>303</sup>

Concluding, it appears that the establishment by law an obligation to consult with, and actively include of, persons with disabilities in decision making processes may **positively** contribute to the implementation of the right of persons with disabilities to participate in the conduct of public affairs (Article 29(b) UN CRPD).

Finally, with regard to the **European Union**, Council Decision 2010/48/EC did not explicitly refer to competences for matters related to Article 29 UN CRPD. As no instrument was listed in the Appendix of the Decision, EU practices will not be presented in this report.

#### 4.3.4 General Recommendations for States Parties on Article 29

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States Parties should take measures to **remove barriers** that may hinder the full and effective participation of persons with disabilities in political and public life. Barriers may involve, but are not limited to:

- inaccessible voting and registration venues;
- inaccessible voting information;
- lack of assistance for persons with disabilities (such as sign language interpreters) at voting venues;
- lack of civic education programmes related to elections and voting;
- insufficient legal measures to ensure the right to vote and stand to elections; and others.

States Parties should ensure that **public authorities** are inclusive of, and accessible to, persons with disabilities.

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<sup>302</sup> Luxembourg: response to the Study's questionnaire on National Institutional and Policy Apparatus (unofficial translation from French)

<sup>303</sup> Romania: response to the Study's questionnaire on National Institutional and Policy Apparatus

States Parties should provide **training** for all public servants involved in the political decision making (including voting procedures), so as to ensure the full realisation of persons with disabilities political rights, through the provision of, *inter alia*, reasonable accommodation.

States Parties should ensure that **voting procedures** are accessible. To this purpose, all information (e.g. programmes of political parties, ballots, etc) should be provided in accessible formats (e.g. Braille, Large Print and Plain-Language).

States Parties should ensure that persons with disabilities, if necessary, have **assistance** in voting. In this respect States Parties should ensure that disabled peoples' right to cast their ballot in secret is respected.

States Parties should ensure that persons with disabilities are included in all aspects of **decision making**. This means that States Parties should actively involve, and consult with, persons with disabilities and their representative organisations before adopting or modifying laws.

States Parties should also ensure that persons with disabilities have the **right to stand for election** and perform public functions at all levels of government.

States Parties should ensure the right of persons with disabilities to **participate** in NGOs, Unions, or any other association concerned with public and political life of the country.

States Parties should ensure that persons with disabilities have the right to **establish** their own NGOs, or any other association concerned with public and political life.

## 4.5 Solidarity Rights

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Solidarity rights cover those rights whose recognition and enjoyment is a trigger for solidarity, social cohesion and meaningful inclusion in the society. Solidarity rights are key enablers to facilitate freedom and choice for persons with disabilities. They are typically labelled as 'economic, social and cultural rights'. The UN CRPD is unique in that it harnesses these social rights to ensure real choice, to prime people for a life of participation and to ensure a certain minimum material quality of life.

It should be recalled that economic, social and cultural rights may be subject to progressive realisation, which gives some flexibility to Parties to the UN CRPD in

achieving its objectives. However, progressive realisation does not absolve Parties to the Convention of the responsibility to protect those rights.<sup>304</sup>

Section 4.5 provides an overview and general recommendations on the implementation of Articles 24 (Education) and 27 (Employment) of the UN CRPD.

#### 4.5.1 Article 24 obligations and overview of existing practices

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Article 24 UN CRPD confirms the right of persons with disabilities to an inclusive education without discrimination and on the basis of equal opportunity. To this end, Article 24 poses an obligation to States Parties to ensure (by law) an **inclusive education system** at all levels, including lifelong learning. Core elements of the article are the establishment (by law) of the principle of non-discrimination, and the emphasis on achieving a common learning environment that guarantees the presence, participation and development for persons with disabilities.<sup>305</sup>

Accordingly, States Parties should move towards an **inclusive education system** in a common learning environment. It should be noted that UNESCO defines 'inclusive education' as follows:

A process of addressing and responding to the diversity of needs of all learners through increasing participation in learning, cultures and communities, and reducing exclusion within and from education. It involves changes and modifications in content, approaches, structures and strategies, with a common vision which covers all children of the appropriate age range and a conviction that it is the responsibility of the regular system to educate all children.<sup>306</sup>

Key element of an inclusive education system is the provision of reasonable accommodation to learners with disabilities. Therefore, Parties to the Convention are further required to ensure that **reasonable accommodation** to children and adults with disabilities is provided at all levels (e.g. primary, secondary, tertiary, academic, as well as lifelong learning) and all spheres (public and private) of the education system.<sup>307</sup>

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<sup>304</sup> See OHCHR "From Exclusion to Equality. Realising the rights of persons with disabilities. A Handbook for parliamentarians on the Convention on the Rights of Persons with Disabilities and Optional Protocol", UN publication No 14-2007, pp 19-20

<sup>305</sup> UN CRPD Article 24(1)

<sup>306</sup> UNESCO, Guidelines for Inclusion: Ensuring Access to Education for All. Published in 2005 and are available at <http://unesdoc.unesco.org/images/0014/001402/140224e.pdf>

<sup>307</sup> UN CRPD Article 24(2)(c). This provision should be read in conjunction with Article 5 UN CRPD which poses a general obligation to States Parties to eliminate (by law) discrimination on the basis of disability.

Article 24 UN CRPD also requires States Parties to establish a number of **standards** to ensure the full and effective realisation of the right to an inclusive education by persons with disabilities. These standards should, *inter alia*, cover:

- the development of human personality and potential;
- a sense of dignity and self-worth of the human being;
- respect for human rights, fundamental freedom and human diversity;
- full and effective participation in a free society;
- the development by persons with disabilities of their talents and creativity;
- the provision of peer support;
- the provision of reasonable accommodation to meet individual's requirements, *i.e.* the provision of **individually-tailored services**, such as individualised educational plans, and supports necessary to facilitate inclusion; and others.

Moreover, Article 24(3) UN CRPD addresses the learning and social development needs of persons with disabilities. In this context, States Parties are required to teach alternative forms of **communications** (e.g. Braille or alternative script mode, sign language or other modes of communication, support systems etc) in order to facilitate full and effective inclusion of learners with disabilities in education and as members of the society. Therefore, education should be delivered in the most appropriate languages, modes and means of communication for all persons with disabilities (children and youth in particular), and in environments that maximize their academic and social development. To realise these rights, Article 24(4) UN CRPD, requires States Parties to ensure that appropriately qualified teachers (e.g. qualified in the use of sign language and/or Braille) and teachers with disabilities are employed. It is further required to provide disability specific **training** to all staff working in the education system, so as to be sensitive to the needs of persons with disabilities, and ensure that they are able to effectively use augmentative and alternative communication, or adapt and use educational techniques and materials appropriate for persons with disabilities.

For matters related to inclusive education for persons with disabilities, research for this study in the **EU Member States** has revealed that efforts to move towards the provision of inclusive education exist in few States. A number of **challenges** to the effective implementation of Article 24 UN CRPD though remain. In most Member States, while education for persons with special educational needs can take place in ordinary establishments, the option of sending children with disabilities to special educational facilities is permissible and in most cases favoured.<sup>308</sup> This is a challenge

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<sup>308</sup> For example Bulgaria, Greece, Lithuania, Spain, UK

to the effective implementation of Article 24 UN CRPD, because as long as the option of sending children with disabilities to special educational facilities remains available, their full and effective integration in an inclusive education system may not be realised.<sup>309</sup> Furthermore, most Member States legislation refers to inclusion of persons with disabilities in 'mainstream' schools. However, it is in most case unclear how a 'mainstream school' is defined, and therefore it is not possible to identify whether (or not) such a school fulfils the requirements set forth in Article 24 UN CRPD, and aims to achieve a common learning environment for all learners with disabilities. In addition, the frequent lack of resources for the provision of individualised services and support to learners with disabilities,<sup>310</sup> as well as the lack of specialised training for teachers in supporting learners with disabilities, are also major challenges to the full and effective inclusion of persons with disabilities in the education system. Sometimes opposition from teachers and parents<sup>311</sup> to inclusive education is an issue that also needs to be addressed by Member States. Finally, disparities between access to schools in rural and urban areas is another significant challenge to the effective implementation of Article 29 UN CRPD.

Considering the requirements of Article 24 UN CRPD, indicative examples from the UK, Lithuania and Cyprus will be outlined, in order to illustrate some of the aforementioned challenges, but also positive steps towards inclusion in education for persons with disabilities.

The **United Kingdom** introduced provisions for education for persons with disabilities with the Education Act of 1996,<sup>312</sup> as amended by the Special Educational Needs and Disability Act of 2001.<sup>313</sup> The latter has established an obligation to educate children with special educational needs in 'mainstream schools'. For the purposes of the Act, 'mainstream school' is defined to mean 'any school other than a special school or an independent school, which is not a city technology college, a city college for the technology of the arts, or a city academy'.<sup>314</sup>

Chapter 1 of Part IV of the Education Act (dedicated to special educational needs) has established that children with special educational needs should be educated in 'mainstream schools', unless that is incompatible with the wishes of the parent. Besides the need for parental consent, the Act further includes several **limitations** to the right to receive education in a 'mainstream school'. Specifically, the Act requires a

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<sup>309</sup> This is the case, for example, in Bulgaria

<sup>310</sup> For example Czech Republic, Estonia, Germany, Lithuania

<sup>311</sup> For example Lithuania, Bulgaria, Estonia

<sup>312</sup> Available at: [http://www.opsi.gov.uk/acts/acts1996/ukpga\\_19960056\\_en\\_1](http://www.opsi.gov.uk/acts/acts1996/ukpga_19960056_en_1)

<sup>313</sup> Available at: [http://www.opsi.gov.uk/acts/acts2001/ukpga\\_20010010\\_en\\_1](http://www.opsi.gov.uk/acts/acts2001/ukpga_20010010_en_1)

<sup>314</sup> See Part 1, Section 1 of the Special Educational Needs and Disability Act (2001)

statutory assessment and compatibility of a person's educational needs with the 'provision of efficient education for other children'. Furthermore, the Explanatory Note accompanying the Special Educational Needs and Disability Act of 2001 clarified that Special Needs Education only applies to persons under the age of nineteen who are registered as pupils at a school. The Note further explained that:

[...] about 20% of children will have some form of Special Educational Needs at some time. Most of these children will have their needs met by their school, but around 3% of children which have severe or complex needs, will require the Local Education Authority to determine and arrange for the special educational provision for the child by means of a statutory statement of special educational needs.<sup>315</sup>

Furthermore, the UK accompanied its UN CRPD ratification with a declaration, stating that the government is committed to continuing to develop an inclusive system, but

the General Education System in the United Kingdom includes mainstream and special schools, which the UK Government understands is allowed under the Convention. Furthermore, the government reserved the right for disabled children to be educated outside their local community where more appropriate education provision is available elsewhere. Nevertheless, parents of disabled children have the same opportunity as other parents to state a preference for the school at which they wish their child to be educated.<sup>316</sup>

The example of the UK practice related to Article 24 UN CRPD reveals that even if the right of persons with disabilities in education is (by law) reaffirmed, challenges to the effective implementation of the right to receive education in an inclusive and common learning environment may arise from limitations placed on that right, which may diminish the scope of inclusion afforded. Therefore, EU Member States should carefully consider any limitation to, or interpretation of, the right of persons with disabilities to receive education on an equal basis with others, as envisaged by Article 24 UN CRPD.

**Lithuania** has established, by the Law on Special Education of 1998, that a person (child or adult) is defined as having special educational needs, due to congenital or acquired impairments, which may hinder his/her participation in the educational process and social life. In addition, in 2003, the Law on Education of the Republic of Lithuania has established that "a student with special educational needs is the student whose possibilities to participate in education and societal life are restricted because of

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<sup>315</sup> See Explanatory Notes to Special Educational Needs And Disability Act 2001, point 19, available at [http://www.opsi.gov.uk/acts/acts2001/en/ukpgaen\\_20010010\\_en\\_1](http://www.opsi.gov.uk/acts/acts2001/en/ukpgaen_20010010_en_1)

<sup>316</sup> UK Declarations and Reservations are available at <http://www.un.org/disabilities/default.asp?id=475>

his/her congenital or acquired impairment”.<sup>317</sup> Regarding access to education, Article 34 of the Law on Education of 2003, has established that a person with educational needs, upon consent of his/her parents (or guardians), can be taught in a ‘mainstream class’, or ‘special class’, or attend a school that offers a special education programme.<sup>318</sup> Article 34 further foresees adaptations to the school's environment, through the provision of psychological, special-pedagogical assistance, assistive education technology, and special teaching aids. The Law on Education of 2003 further clarifies that the educational needs of a person should be assessed by specialists (special education teacher, speech therapist, psychologist, or other). These assessments, together with recommendations regarding modification of a person’s educational programme, are presented to the Special Education Commissions and the Pedagogical Psychological Services. These bodies are then responsible for recommending to parents of the person in question the type of supports, or assistance that the person may require.

Regarding practical implementation of the Law, a report from the Open Society Institute (OSI) in 2005,<sup>319</sup> acknowledged that the Law of 2003 has contributed to an increased inclusion of children and young people with intellectual disabilities in ‘mainstream schools’. However, the report highlighted that most parents of children with intellectual disabilities in Lithuania tend to perceive integration as a ‘favour’ rather than the right of their children. In addition, the parent’s choice of schools is often limited due to insufficient social and education services, especially in small towns. Finally, the OSI report stated that barriers to full integration of learners with disabilities are also posed by the lack of suitably qualified teachers.<sup>320</sup>

As is evident, the Lithuanian Law on Education of 2003 has some positive elements which have helped to increase access for children with disabilities to education. However, it appears that the establishment of legislation is not enough to guarantee practical and full implementation of Article 24 UN CRPD. Furthermore, the way a ‘mainstream school’ is defined and whether (or not) such school fulfils the requirements to achieve a common learning environment for all learners with disabilities seems to be unclear. Last but not least, the example of the Lithuanian

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<sup>317</sup> See at European Agency for Development in Special needs Education, Country Information for Lithuania, available from <http://www.european-agency.org/country-information/lithuania/national-overview/complete-national-overview>

<sup>318</sup> The 2003 Law is available in EN at [http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc\\_l?p\\_id=281043](http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc_l?p_id=281043)

<sup>319</sup> See Open Society Institute EU Monitoring and Advocacy Program in cooperation with the Open Society Mental Health Initiative, “*Rights of People with Intellectual Disabilities: Access to Education and Employment – Lithuania*”. Available at [http://www.soros.org/initiatives/health/focus/mhi/articles\\_publications/publications/romania\\_20050902/lithuania\\_2006.pdf](http://www.soros.org/initiatives/health/focus/mhi/articles_publications/publications/romania_20050902/lithuania_2006.pdf)

<sup>320</sup> Ibid, pp 14 - 16

practice reveals that the discretion of the parent to choose whether or not a child will be included in an ordinary school may pose **challenges** to the possibility of receiving an inclusive education.

Finally, progress on the integration of children with disabilities in a common learning environment has been identified in **Cyprus**. The Law for the Training and Education of Children with Special Needs 113(1)/1999<sup>321</sup> has established a legislative framework, which regulates the identification of, and support for, children with educational needs. Based on Law N<sup>o</sup> 113(1)/1999, the State is responsible for safeguarding the right of children with disabilities to an inclusive education at all levels of the education system. The Law foresees an early identification of children with educational needs, stating that it is the duty of the parent, the director, or any other member of the education staff (teacher, doctor, psychologist or other) of a school (nursery, kindergarten, or elementary, or secondary or higher) to notify the District Committee for Special Education and Training that it has come to his/her attention that a child may have special educational needs. Upon identification, the District Committee undertakes the responsibility to conduct a full multidisciplinary team assessment, and to provide all necessary measures in terms of curriculum adaptation, technical and staffing support, or other for the effective education of the child in an ordinary school.<sup>322</sup> Based on the provisions of the Law, all children with educational needs should be accepted into the regular school system, and if necessary receive extra afterschool education with specially trained teachers assigned to the school.<sup>323</sup> Specifically, Section 4(1) of the Law states that the attendance of a child with special educational needs to a special unit of an ordinary school, or a school for special education and training, or anywhere else, shall be prohibited, 'except to the extent and for the period the training in such places is determined under the Law'.<sup>324</sup> Finally, the Law requires for evaluation of the child's progress at least once a year.

Consequently, the Cypriot practice reveals positive ways of implementing Article 24 UN CRPD, and can thus be considered as a **good practice** in this area.

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<sup>321</sup> Law 113(1)/1999 is available in EN at [http://www.moec.gov.cy/eidiki/nomothesia/Number\\_113\(I\)\\_1999.pdf](http://www.moec.gov.cy/eidiki/nomothesia/Number_113(I)_1999.pdf)

<sup>322</sup> [Ibid, Part II, Section 3\(1\) of the Law](#) 113(1)/1999.

<sup>323</sup> With regard to children with hearing impairments and autistic children, the law also foresees pre-primary schools with special facilities where they may attend on a part-time basis.

<sup>324</sup> It should be noted that there are few 'special schools' in Cyprus, such as a school for persons with hearing impairments in Nicosia, a school for persons with visual impairments in Nicosia, and the 'New Hope' schools (one tutorial, one special, and one summer school), for children with learning difficulties who may require an individualised and intensive education programme. It should further be noted that the functions of such 'special schools' are also regulated by the State. See Part II, Section 4(5) of the Law 113(1)/1999.

Finally, with regard to the **European Union**, Council Decision 2010/48/EC states that the Union will contribute to the development of quality education by encouraging cooperation between the EU Member States and, if necessary, by supporting and supplementing their actions. To demonstrate such competence, Regulation 918/83/EEC<sup>325</sup> was listed in the Appendix of the Decision. Articles 70 to 72 of the Regulation have established that ‘articles’ (*i.e.* any good or technology or other) specifically designed for the educational, scientific or cultural advancement of persons with disabilities shall be admitted free of ‘import duties’ (*i.e.* customs tariffs and charges having equivalent effect).

Furthermore, Council Decision 2010/48/EC listed Regulation No 1083/2006/EC, laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund, among the instruments that illustrate the European Union’s competence in the fields of accessibility. The Regulation covers, *inter alia*, the improvement of human capital through co-funding of national actions related to education, vocational training, and lifelong learning opportunities, with a view to improving the labour market. Therefore, in view of the UN CRPD conclusion by the EU, any funds to be awarded by the European Regional Development Fund, the European Social Fund and the Cohesion Fund should promote the full realisation of the Convention objectives, including objectives set forth in Article 24 UN CRPD.

Education is among the fields where the European Union encourages cooperation between the EU Member States and, if necessary, supports and supplements their actions. Therefore, the EU could facilitate the achievement of the objectives set forth in the Convention, and in Article 24 UN CRPD. Specifically, the Union could, *inter alia*:

- promote policy cooperation and coordination to foster the right of persons with disabilities to receive education in an inclusive and common learning environment;
- encourage the development, by the Member States, of benchmarks with regard to achieving the objectives set forth in Article 24 UN CRPD;
- assist the Member States in monitoring progress; and
- support the Member States’ capacity building through, for example, exchange and sharing experiences and good practices, on issues related to education.

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<sup>325</sup> Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty, OJ L 105 , 23.04.1983 pp 1 - 37

## 4.5.2 General Recommendations for States Parties on Article 24

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States Parties should carry out a **screening exercise** to ensure that legislation is in place to promote the right to education for persons with disabilities of all ages, and is directed at providing equal educational opportunities at all levels of education (primary, secondary, general tertiary education, academic, vocational training, adult education, lifelong learning, or other).

States Parties' legislation should advance **inclusive education systems** that allow for children with disabilities to learn alongside their peers in inclusive schools (at the primary and secondary school levels), for example through individual educational plans.

States Parties should adopt **specific measures** to ensure persons with disabilities are not excluded from the general education system. Specific measures may include, *inter alia*, the specific development or strengthening of laws and policies enabling persons with disabilities to reach their fullest potential in mainstream educational settings.

States Parties' legislation should provide that persons with disabilities should benefit from **reasonable accommodation** to facilitate their ability to learn in general education settings. Legislation should also provide for provisions of individual support for persons with disabilities to reach their fullest potential in the classroom. Legislation should further require that persons with disabilities have the right to receive education in a manner that is accessible to them (e.g., Braille, sign language, or other appropriate means).

States Parties should employ teachers who are qualified to teach persons with disabilities. To best promote inclusive education, States Parties should ensure that all teachers are well trained in teaching methods for persons with disabilities and that teacher training schools are encouraged, and provided incentives, to provide quality inclusive education training. Furthermore, States Parties should provide disability specific **training** to all staff working in the education system.

## 4.5.3 Article 27 obligations and overview of existing practices

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Article 27 UN CRPD confirms the right of persons with disabilities to **employment** on an equal basis with others. The article requires States Parties to recognise the equal right of persons with disabilities to the opportunity to gain living by work freely chosen or accepted in an open and inclusive labour market, and under just and fair conditions.

Article 27(1) UN CRPD enumerates a range of measures to be taken by States Parties in order to give effect to the right to work. First and foremost, Article 27(1)(a) reiterates the general **prohibition of discrimination** on the ground of disability in all forms,

sectors and levels of employment. The provision should be read in conjunction with Article 5, which explicitly addresses non-discrimination, and sets forth the requirements that need to be fulfilled by States Parties to the UN CRPD. Article 27(1)(a) specifically refers, but is not limited to, the prohibition of discrimination in conditions of recruitment, hiring, continuity of employment, career advancement and occupational health and safety.

In addition to the prohibition of discrimination, Article 27(1)(i) requires States Parties to establish, by means of legislation, the duty to provide **reasonable accommodation** in the workplace for persons with disabilities. In this respect, States Parties legislation should clarify the elements of such conduct, and the factors upon which to assess the reasonableness of an accommodation.<sup>326</sup> States Parties are also required to ensure that persons with disabilities are **protected from harassment** in the workplace, and have effective avenues for the redress of work-related grievances.<sup>327</sup>

Article 27(1)(c) confirms the right of persons with disabilities to exercise their labour and trade union rights on an equal basis with others. Therefore, States Parties should ensure that labour and trade unions, or associations, are accessible to, and inclusive of, employees with disabilities.

Moreover, States Parties should ensure that persons with disabilities have access to comprehensive employment-related **support services** (e.g. jobseeker and placement services, placement support and job retention services, professional rehabilitation, and others), **education** and **training** (e.g. technical or vocational training, vocational guidance programmes, and others).

Other measures set forth in Article 27(1) UN CRPD, relate to the promotion of self-employment, entrepreneurship, and personal business opportunities for persons with disabilities, and positive action programmes, or incentives that will encourage the employment of persons with disabilities in the private sector. Such positive measures may include, *inter alia*, tax reliefs, provision of financial subsidies to employers, or the establishment of employment quotas for the recruitment of persons with disabilities, or others.

Finally, Article 27(2) UN CRPD requires States Parties to ensure that persons with disabilities are effectively protected from slavery servitude, and forced and compulsory labour.

Research for this study in the **EU Member States** has revealed that national legislation related to employment has been highly influenced by European anti-discrimination

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<sup>326</sup> See UN Doc A/HRC/10/48, supra note 41, pp 17-18

<sup>327</sup> See UN CRPD at Article 27(1)(b)

legislation in this field, and in particular the Employment Equality Directive 2000/78. Therefore, it is deemed necessary to initially provide an overview of the relevant EU legislation, and then present indicative examples of national legislation.

The **Employment Equality Directive 2000/78**,<sup>328</sup> adopted in 2000, has established a common general framework for the application of the principle of equal treatment in the context of employment. Therefore, the aim of the Directive is to prohibit and combat discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment, occupation and vocational training. Article 2 of the Directive sets out the concept of discrimination, and states that, for the purposes of the Directive, the *'principle of equal treatment'* shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds covered by the Directive, including disability. An important element of the Directive is Article 5, which obliges employers to provide **reasonable accommodation** for persons with disabilities. Article 5 obliges Member States to ensure that employers take appropriate measures to enable persons with disabilities to have access to, and participate in, or advance in employment. The goal of Article 5 is to enable persons with disabilities, who are qualified to do a job, to access the labour market. The provision of reasonable accommodation, set forth in Article 5 of the Directive, requires an individual analysis that takes account of the situation of the individual and the employment or training at issue.<sup>329</sup> Therefore, an appropriate accommodation should always be an **individually tailored solution**.

The aforementioned elements of the Directive seem to be in line with the UN CRPD obligation to prohibit discrimination and ensure that the duty to provide reasonable accommodation is respected.<sup>330</sup> However, a **challenge** to the effective implementation of Article 27 UN CRPD may arise. The Directive does not explicitly provide that an unjustified failure to provide reasonable accommodation constitutes discrimination, while the UN CRPD does define an unjustified denial of reasonable accommodation in this way (Article 2 UN CRPD). It should be mentioned, however, that the Directive does

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<sup>328</sup> Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for Equal Treatment in Employment and Occupation, OJ L 303/16; available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:303:0016:0022:EN:PDF>

<sup>329</sup> See Prof. Lisa Waddington, *When it is Reasonable for Europeans to be Confused: Understanding when a Disability Accommodation is "Reasonable" from a Comparative Perspective*, 29 Comparative Labor Law & Policy Journal 3, April 2008, pp. 101-124.

<sup>330</sup> It is also worth noting that the Employment Equality Directive refer to international treaties, such as the Universal Declaration of Human Rights, the UN Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories.

recognise that the provision of reasonable accommodation plays an important role in combating discrimination on grounds of disability.<sup>331</sup>

Furthermore, Article 7 of the Directive allows for Member States to establish or provide for positive action measures,<sup>332</sup> designed to promote equality for persons with disabilities. In addition, Article 19 of the Directive requires the Member States to communicate all the information necessary to the Commission to enable it to report to the European Parliament and the Council on the application of this Directive in the Member States of the EU. The article further requires that information on the Directive's application from relevant non-governmental organisations should be taken into account in the Commission's report, which is in line with the UN CRPD requirement to include persons with disabilities and their representative organisations in the monitoring process (Article 33(3) UN CRPD). However, it should be noted that the Member State reporting obligations, and the consequent Commission report, only take place every five years, and therefore may hamper the effectiveness of such monitoring.

All EU equal treatment directives, including Directive 2000/78, have a *horizontal character* in the sense that they require Member States to apply their provisions both to the public and private sectors. Thus, the principle of equal treatment is transposed into national legislation and becomes binding on private entities.<sup>333</sup> However, it should be recalled that as Directives do not produce horizontal direct effect, they do not confer rights on individuals directly, at least not in case of relationships between private parties. Individuals may make claims against other private persons or entities on the basis of norms of national law, which transposes EU Directives.<sup>334</sup> Finally, the Employment Equality Directive embraces a "*minimalist approach*",<sup>335</sup> meaning that it only imposes minimum requirements on Member States, and allow Member States to adopt and apply provisions which are more favourable to the protection of equal treatment.

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<sup>331</sup> See Preamble paragraph 16 of Directive 2000/78: "The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability."

<sup>332</sup> Directive 2000/78, Article 7 Positive Action: "(1) With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1. (2) With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment".

Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>

<sup>333</sup> T. Tridimas, *The General Principles of EU Law*, Oxford University Press, 2000, p. 69.

<sup>334</sup> ECJ, 14 July 1994, *Paola Faccini Dori v Recreb Srl*, Case C-91/92, [1994] ECR I-3325.

<sup>335</sup> T. TRIDIMAS, *The General Principles of EU Law*, Oxford University Press, 2000, p. 69.

Following the adoption of the Employment Equality Directive 2000/78, all **Member States** adopted national legislation with the aim to transpose Directive 2000/78. Accordingly, all EU Member States have prohibited, by law, discrimination on the basis of disability within the context of employment, and most Member States have established provisions for reasonable accommodations for persons with disabilities. Many Member States have also established positive action measures to promote the employment of persons with disabilities, such as requiring employers to employ a certain number of persons with disabilities (quota). Nonetheless, several **challenges** to the effective implementation of Article 27 UN CRPD remain. Not all Member States which have transposed Directive 2000/78/EC into national law have adequately incorporated provisions on reasonable accommodation for persons with disabilities in the workplace. Another challenge is the poor implementation of employment quotas, while continually low participation rates in the labour market for persons with disabilities suggest that existing legislation may not be effective in practice. Therefore, considering the requirements of Directive 2000/78 in conjunction with the UN CRPD requirements set forth in Article 27, some indicative examples of national legislation are outlined below.

**Greece** adopted Law No 3304/2005<sup>336</sup> in 2005, with the aim to transpose into national law the Employment Equality Directive 2000/78/EC, and the Racial Discrimination Directive 2000/43/EC. The Law obliges employers to provide reasonable accommodation for employees with disabilities,<sup>337</sup> and therefore incorporated the duty of reasonable accommodation set forth by Article 5 of Directive 2000/78/EC. Specifically, Article 10 of Law 3304/2005 states that:

In order to guarantee compliance with the principle of equal treatment towards persons with disabilities, the employers shall take all appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy.<sup>338</sup>

As is evident, the wording used in Law 3304/2005 follows the exact wording of Article 5 of Directive 2000/78/EC. In addition, the Law does not explicitly provide that an unjustified failure to provide reasonable accommodation constitutes discrimination.

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<sup>336</sup> A summary of the Law is available in Greek at: <http://www.ypakp.gr/uploads/files/3466.pdf>

<sup>337</sup> ANED, Report on the employment of disabled people in European countries – Greece, available at <http://www.disability-europe.net/content/pdf/EL%20Employment%20report.pdf>

<sup>338</sup> See at European network of Legal Experts in the Non Discrimination Field, Greek Country Report on measures to combat discrimination. Available at <http://www.non-discrimination.net/content/media/2007-EL-Summary%20Final.pdf>

Furthermore, Article 16 of the Law have established that whoever discriminates against persons on the basis of, *inter alia*, disability will be sanctioned with imprisonment from 6-months to 3-years, and a fine from 1.000 to 5.000 Euros.

Greece has also adopted positive measures in order to encourage the inclusion of persons with disabilities in the workplace. An indicative example of such measures is Law 2643/98, which has established a quota scheme for the employment of persons with disabilities in the private and the public sector. According to Law 2643/68, enterprises, within the Greek private sector, which have more than 50 employees, are obliged to ensure 8 percent of their workforce is made up of people with disabilities and other people from socially sensitive groups. In the public sector the corresponding percentage is 5 percent.<sup>339</sup>

The aforementioned elements of the Law seem to be in line with the requirements set forth in Directive 2000/78/EC. However, a Labour Force Survey carried out by the National Statistical Service of Greece in 2002, revealed that in practice 84% of the Greek population with a disability is economically inactive, compared to 58% of the non-disabled population.<sup>340</sup> Concluding, the indicative example of Greece shows that the adoption of legislative measures may facilitate the inclusion of people with disabilities in the labour market, but is not enough to guarantee practical implementation of the principle of equality of opportunity.

**Malta** adopted the Equal Opportunities (Persons with a Disability) Act<sup>341</sup> in 2000, which prohibits discrimination on the basis of disability in the field of employment. Section 7(1) of the Act clearly prohibits employers to discriminate against persons with disabilities. The Act also obliges employers to provide reasonable accommodation for persons with disabilities, and provides that an unjustified failure to provide reasonable accommodation constitutes discrimination.<sup>342</sup> However, it appears that the definitions of 'disability' and 'accommodation', limit significantly the scope of employers' obligations. Specifically, the Act defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities of a person".<sup>343</sup> The latter definition, even if within a social context, may potentially hamper the full and effective inclusion of *all* people with disabilities in the labour market, and in particular persons with intellectual or sensory impairments.

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<sup>339</sup> ANED Employment Report - Greece

<sup>340</sup> ANED, Country Profile – Greece. Available at <http://www.disability-europe.net/content/pdf/Greece%20-%20ANED%20country%20profile.pdf>

<sup>341</sup> Equal Opportunities (Persons with a Disability) Act of 2000, as amended by Legal Notice 426 of 2007, available at [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_13/chapt413.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt413.pdf)

<sup>342</sup> Ibid, Section 7(2)(d) of the Equal Opportunities (Persons with a Disability) Act.

<sup>343</sup> Ibid, Section 2 of the Equal Opportunities (Persons with a Disability) Act.

In addition, the obligation to accommodate refers to “residential or business accommodation, and structural adaptation or modifications to existing buildings”,<sup>344</sup> and does not take into account that the provision of reasonable accommodation requires an individual analysis that takes account of the situation of the individual and the employment at issue, which is required by Article 5 of Directive 2000/78/EC.

Finally, a Census of Population carried out by the National Statistics Office in 2005, revealed that the rate of people with disabilities employed was considerably lower than that of non-disabled people: 14.6% (3,295) of people with disabilities were employed compared with 48% (150,188) of the non-disabled population.

In **Poland**, amendments to the Labour Code in 2004 and 2008 attempted to bring Poland in line with the Employment Equality Directive 2000/78/EC and the Racial Discrimination Directive 2000/43/EC. In this respect, Article 94(2)(b) of the Labour Code states that an employer should not discriminate against employees (or candidates for employees) in a number of grounds, including disability. However, the amendments that were introduced did not clearly establish the duty for employers to provide reasonable accommodation for persons with disabilities, and therefore challenges to the principle of equal treatment may arise.<sup>345</sup>

In addition to Directive 2000/78, Council Decision 2010/48/EC lists among the instruments that illustrate competence of the Union in the fields of employment, the Recast Gender Directive 2006/54/EC,<sup>346</sup> which addresses discrimination on the basis of gender in the fields of employment.

The **Recast Gender Directive 2006/54/EC** implements the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. The Directive calls, *inter alia*, for balanced participation in employment, equal pay and benefits, access to vocational training, equal occupational social security schemes, and union rights. Directive 2006/54/EC also recognises harassment as a form of discrimination,<sup>347</sup> and makes an explicit reference to disability in Article 6, which lays down the personal scope of the directive. Furthermore, Article 20 of Directive 2006/54/EC requires for Member States to designate equality bodies, which will monitor implementation and assist victims of discrimination in pursuit of their complaints. However, Directive 2006/54/EC does not refer to the aggravated situation

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<sup>344</sup> Ibid

<sup>345</sup> See European network of Legal Experts in the Non Discrimination Field, Polish Report on measures to combat discrimination. Available at:

<http://www.non-discrimination.net/content/media/2008-PL-Country%20Report%20final.pdf>

<sup>346</sup> The Directive consolidates previous Directives in this area, notably, the Directive 76/207/EEC, which was amended by Directive 2002/73/EC.

<sup>347</sup> Recital 6 of the Directive 2006/54/EC further states that harassment should be prohibited and should be subject to effective, proportionate and dissuasive penalties.

of women with disabilities, nor does it extend to any form of multiple-discrimination. Therefore, the Recast Gender Directive, even if it applies the principle of non-discrimination, it does not combat multiple-discrimination, as required by Article 6 and the general principles of the UN CRPD. It is thus advisable for the EU to review the provisions of the Recast Gender Directive 2006/54/EC.

In conclusion, indicative examples of EU non-discrimination directives appear to be in line with the some of the relevant requirements of the UN CRPD. However, the lack of addressing multiple-discrimination and the lack of an explicit reference that an unjustified failure to provide reasonable accommodation constitutes discrimination may challenge the effective implementation of Article 27 UN CRPD. As is evident from the above analysis, EU Directives address disability and gender issues separately, and never in combination. Multiple-discrimination has only recently begun to be recognised in the preambles of some directives (e.g. Employment Equality Directive 2000/78/EC), but measures to prohibit and combat multiple-discrimination have not been introduced.<sup>348</sup> To this end, the EU should carefully review the directives in field of non-discrimination and consider the introduction of amendments, with the aim to address multiple-discrimination, and to include an explicit reference that unjustified denial of reasonable accommodation constitutes discrimination.

Importantly, as argued in Section 2.1 of this report, even though EU law does not include a clear definition of disability, it appears that is implicitly based on a rights-based approach of disability, as is also required by the UN CRPD. Therefore, Member States of the EU, when transposing EU law into their national systems, should ensure fulfilment of the obligation to implement a rights-based approach to disability. However, the overview of indicative examples of national practices, presented in this section, has shown that EU Member States are making use of nationally developed definitions of disability, which are usually closer to a medical approach of disability, which hampers the full and effective implementation of the paradigm shift. Therefore, it is advisable for the EU to consider the inclusion of definitions for concepts such as 'disability', 'reasonable accommodation' and 'multiple-discrimination' with the aim to ensure their consistent interpretation by the Member States. Any definition of such concepts should follow the relevant definitions found in the UN CRPD.

Furthermore, as a party to the Convention, the EU should ensure that all EU institutions, including the ECJ, apply EU law in manner consistent with the Convention.

It is also advisable for the EU to **adopt new soft law instruments** (in particular in the form of Recommendations or Communications) that specifically address non-

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<sup>348</sup> For further information on UN CRPD obligations related to multiple-discrimination, see Section 3.4 of this report.

discrimination on the ground of disability, and stress the necessity to foster action in line with the UN CRPD. Last but not least, the inclusion of persons with disabilities in employment should be seen, and promoted by the EU, as a positive investment in the Union's internal market, as effective inclusion of persons with disabilities may result in, *inter alia*, increasing the number of tax payers and reduction of benefit recipients.<sup>349</sup>

Finally, as employment is a field of shared competence, the EU and the Member States are required to work in close cooperation.

#### 4.5.4 General Recommendations for States Parties on Article 27

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States Parties should undertake a **screening exercise** to ensure that legislation prohibits discrimination against persons with disabilities in employment (e.g., recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions) and provide for the duty to make reasonable accommodation.

States Parties' legislation should **promote** the full and equal rights of persons with disabilities to just employment conditions (including equal pay for equal work, equal opportunities to advance, safe and healthy environment, and a workplace free from harassment).

States Parties should ensure that persons with disabilities are able to assert their **labour and trade union rights** on an equal basis with others.

States Parties should ensure a **free and open labour market** that is inclusive of, and accessible to, persons with disabilities.

States Parties should ensure the right to work for all persons with disabilities, including those who become disabled whilst in employment.

States Parties should promote employment opportunities for persons with disabilities. To this purpose, States Parties should provide persons with disabilities with **assistance** in finding work, as well as maintaining a job, and should promote **self-employment opportunities** for persons with disabilities who wish to run their own business.

States Parties should ensure that persons with disabilities are employed in both the **public**<sup>350</sup> **and private sector** on an equal basis with others.

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<sup>349</sup> See OHCHR, Open-ended Consultation on key legal measures for the ratification and implementation of the UN CRPD, Geneva, 24 October 2008, Informal Summary Discussions, p. 14

<sup>350</sup> See UN CRPD at Article 27(1)(g)

Employment strategies should be advanced to encourage the employment of persons with disabilities in the private sector (such as positive action programmes or incentives). In order to ensure that persons with disabilities are receiving appropriate accommodations that will enable them to work to the fullest extent possible, **funding** should be made available to employers in order to cover costs of providing an accommodation. Moreover, mechanisms need to be in place to **train** persons with disabilities for employment, such as vocational and professional rehabilitation programmes.

Finally, States Parties should also **protect** persons with disabilities from situations of forced slavery or compulsory labour and legislation should provide that persons with disabilities are protected on an equal basis with others from such forced employment.

## 5.0 The Dynamic of Reform

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Unlike other international treaties, the UN Convention on the Rights of Persons with Disabilities outlines practical steps that are necessary to support reform. Specifically, Articles 31 to 33 UN CRPD outline these steps, and require the collection of disability-related data, international cooperation, the designation of a 'focal point' within governments, active consultation with persons with disabilities through their respective organisations, and ongoing domestic monitoring of implementation.

Section 5 contains an overview of Articles 31 (statistics and data collection), 32 (international cooperation), and 33 (national implementation and monitoring), and analyses the core obligations for States Parties to the UN CRPD in these fields. The section also provides an overview of existing national and EU practices in these fields, and gives general guidance for implementation by both the EU and its Member States.

Detailed checklists contained in Annex I of this report accompany the analysis.

### 5.1 Article 31 obligations and overview of existing practices

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Article 31 of the UN CRPD introduces a new element to human rights treaties. It requires States Parties to specifically **collect disability data and statistics** to facilitate UN CRPD implementation.

Statistics are an invaluable policy tool, and can significantly contribute to the effective implementation of the UN CRPD. Collection of data and statistics, if done properly, can contribute to the design of policies and legislation which promote and protect the rights of persons with disabilities.<sup>351</sup>

Article 31(1) UN CRPD identifies the **purpose** of data and statistics collection and outlines the standards to be used for the collection, maintenance and use of this information. More specifically, collection of disability statistics and data should enable States Parties to formulate, implement, monitor and evaluate policies and programmes in order to give effect to the UN CRPD. At the same time, collection of information should comply with legally established safeguards and internationally accepted norms. Collection instruments should thus be suitable for the purpose of implementing the UN CRPD.

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<sup>351</sup> See *inter alia* EDF statement during the UN CRPD negotiations in 2003 at the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities

Article 31(2) UN CRPD requires disability data to be **disaggregated** so that it can be used for **monitoring** purposes. To this purpose, States Parties should develop domain-specific indicators of progress. In other words, collected disability data should be broken down in various ways (e.g. on the basis gender, age, geographical location; or on the basis of a policy sector, such as employment, health etc; or other) so as to be used to assess the effectiveness of implementation efforts in any particular area, or with respect to a particular factor (mentioned earlier). Finally, Article 31(3) UN CRPD requires States Parties to ensure that all information compiled, is disseminated to persons with disabilities in accessible formats and to other interested parties.

Consequently, the first step for States Parties towards the implementation of Article 31 UN CRPD is to **assess** the adequacy of existing disability data collection techniques. Currently, data on the participation of persons with disabilities in the labour market, education, family and life within a community, is often unavailable because general population surveys are not sufficiently disaggregated. Similarly, data sources for indicators relating to the physical and social environment are unavailable as there is an absence of relevant longitudinal studies.

A good tool for future use in implementing Article 31 UN CRPD is the International Classification of Functioning, Disability and Health (ICF), endorsed in 2001 by the World Health Assembly.<sup>352</sup> The ICF conceptualises functioning and disability in a context characterised by personal and environmental factors: physical, social and attitudinal. It classifies (and thereby codifies) as “environment” not merely the physical and human-built environment, but all products and resources, attitudes and beliefs, social, economic and cultural institutions and structures, including social policies and laws. The ICF facilitates the collection of consistent and comparable data on the positive, or negative impact of the physical, social and attitudinal environment on disabled peoples’ participation in all aspects of life.

Considering the obligations set forth in Article 31 UN CRPD, this study identified in the **EU Member States** several national statistical surveys that cover, among others, disability, but no adequate information was identified regarding practices related to collection of disability specific data based on the social model of disability. However, it was established that **Ireland** recently carried out a survey to collect disability specific data. This Irish survey builds on to the ICF, and appears to fulfil several of the requirements set forth in Article 31 UN CRPD. Therefore, the example of the Irish survey could be of added value for the rest of the Member States and the EU.

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<sup>352</sup> More information are available at: <http://www.who.int/classifications/icf/en/>

The Central Statistics Office (hereinafter referred to as CSO),<sup>353</sup> following a request by the Irish Government, carried out in 2006 a **National Disability Survey** (NDS). The National Disability Authority (hereinafter referred to as NDA)<sup>354</sup> had begun the process a year before, by commissioning research to develop and pilot a *‘prevalence and impact’ instrument* that was firmly grounded in the social model of disability. For the purpose of this action, **disability** was defined within a social context. Specifically, disability was characterised as *“an outcome of the interaction between persons with impairment and the environmental and attitudinal barriers s/he face”*.

The result of the research conducted by the NDA steered the CSO towards the ICF, which was used both as a coding system for international data comparability, and more significantly, as a conceptual model to guide the development of questions for the survey itself. The Survey was composed of two questionnaires. The first was based on the ICF notion of impairment which looks at issues of type of disability, severity, age of onset, aids used or need, cause and frequency of occurrence. The second questionnaire used the Activity and Participation component of ICF to gather information about education, employment, transportation and the impact of the built environment on mobility and other problems. The Survey compiled information from a 370.500 individuals<sup>355</sup> with regard their lives overall, and in their usual residence of private household, or a communal establishment, such as a nursing home, hospital or children’s home. The Survey has not yet been fully completed; however, the first set of results from NDS focused on the prevalence of the nine disability types<sup>356</sup> examined in the Survey. The initial report that was published, outlined the overall estimated prevalence of disability, and profiled different people with disabilities by severity and demographic variables such as age, sex and region.<sup>357</sup> In the future, NDS reports will present participation data on education, work, transport, the built environment and social participation of people with disabilities. Consequently, in the assumption that appropriate indicators, and a supporting methodology, will be based on the NDS, any

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<sup>353</sup> Website [www.cso.ie](http://www.cso.ie)

<sup>354</sup> Website [www.nda.ie](http://www.nda.ie)

<sup>355</sup> This sample size was believed to be rich enough to derive, not only basic prevalence data, but social information about the actual lived experience of disability in Ireland.

<sup>356</sup> A range of impairments and health problems were covered by the survey: visual, hearing and speech impairments; mobility and dexterity; memory and concentration loss; intellectual and learning disabilities; emotional, psychological, and mental health; pain and breathing. The inclusion of pain is of particular significance as it is a salient, etiologically neutral indicator of a health problem with an obvious impact on a person’s capacity to perform activities.

<sup>357</sup> National Disability Survey 2006, First Results (Full Report, PDF 2.96MB), available at: [http://www.cso.ie/releasespublications/documents/other\\_releases/nationaldisability/National%20Disability%20Survey%202006%20First%20Results%20full%20report.pdf](http://www.cso.ie/releasespublications/documents/other_releases/nationaldisability/National%20Disability%20Survey%202006%20First%20Results%20full%20report.pdf)

statistics and data to be compiled will significantly contribute to monitoring Ireland's implementation of the UN CRPD.<sup>358</sup>

Finally, with regard to the European Union, the Council Decision 2010/48/EC has listed several instruments that illustrate EU competence in this field.

For example, **Regulation 1177/2003/EC**<sup>359</sup> has established a common framework for the systematic production of EU statistics on income and living conditions (EU-SILC). The Regulation encompasses comparable and timely cross-sectional and longitudinal data on income and on the level and composition of poverty and social exclusion at national and EU levels. Specifically, Article 3 of the Regulation, the EU-SILC covers cross-sectional data on income, poverty, social exclusion and other living conditions, as well as longitudinal data restricted to income, labour and a limited number of non-monetary indicators of social exclusion. EU-SILC is carried out on an annual basis and includes three questions on people with disabilities and their living condition.

Furthermore, the **European Labour Force Survey** (EU LFS), established by Council Regulation No. 577/98/EC,<sup>360</sup> is the main source of data at the EU level for matters related to employment and unemployment. The European Labour Force Survey is a quarterly sample survey that is conducted by the Member States and is covering labour participation of persons aged from 15-years old as well as persons outside the labour force. Regulation 577/98/EC has been implemented *inter alia* by Commission Regulation No 1566/2001/EC concerning the collection of data on matters related to employment of persons with disabilities.<sup>361</sup> The latter regulation shows the Commission's commitment on compiling comprehensive and comparable data on the labour situation of people with disabilities.

In addition, **Regulation No 458/2007/EC**<sup>362</sup> has established a system of integrated social protection statistics (ESSPROS). The main objective of the Regulation is to set up a *methodological framework* based on common standards, definitions, classifications, and accounting rules to be used for compiling statistics on a comparable basis. According to Article 3(1) of the Regulation, statistics relating to the

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<sup>358</sup> See Jerome E. Bickenbach, Statistics and data collection (Article 31 UN CRPD) Disability Data Issues for Europe, Briefing Paper for the Study VC/2008/1214.

<sup>359</sup> Regulation (EC) No. 1177/2003 of the European Parliament and of the Council of 16 June 2003 concerning Community statistics on income and living conditions (EU-SILC)

<sup>360</sup> Council Regulation (EC) No 577/98 of 9 March 1998 on the organisation of the Labour Force Sample Survey in the Community, OJ L 77, 14.3.1998, p. 3

<sup>361</sup> Commission Regulation 1566/2001 of 12 July 2001 implementing Council Regulation (EC) No 577/98 on the organisation of a labour force sample survey in the Community concerning the specification of the 2002 ad hoc module on employment of disabled people, OJ No L 208/16

<sup>362</sup> Regulation (EC) No. 458/2007 of the European Parliament and of the Council of 25 April 2007 on the European system of integrated social protection statistics (ESSPROS) (Text with European Economic Area relevance), OJ L113, 30.04.2007, p. 3

ESSPROS core system are required to cover the financial flows on social protection expenditure and receipts. It should be noted that social protection referred to in ESSPROS covers all interventions from public, or private, bodies intended to relieve households and individuals of the burden of a defined set of risks or needs, provided that neither a simultaneous reciprocal arrangement, nor an individual arrangement, is involved. The list of risks, or needs, that may give rise to social protection are, according to the Regulation, the following: sickness and/or health care; disability; old age; survivorship; family/children; unemployment; housing; and social exclusion not elsewhere classified.

In conclusion, the creation of a system for establishing reliable and comparable data on social protection of persons with disabilities, and on their integration into social life is an essential element for the formulation of disability law and policy. Information on the living, and working conditions, of persons with disabilities in EU countries should be collected, creating the basis for new policy recommendations. Therefore, it is suggested for the EU to consider the establishment of an Expert Group on Indicator Development for the UN CRPD. Such a group could be mandated to collect existing indicator data on the UN CRPD, reach consensus on potential indicators, pilot existing data sources across the EU, and provide technical assistance to Member States on indicator issues.

In addition, it is advisable for the EU to launch a comprehensive review of existing instruments for the collection of disability data within the EU, in order to evaluate whether (or not) such instruments are relevant to the monitoring of the rights recognised by the UN CRPD. It would also be advisable for research supported by the EU to develop and use statistical techniques with the aim to gain from existing databases the most relevant information for UN CRPD monitoring purposes. Finally, EU research and statistical capacity should be developed for the compilation, testing and use of instruments for the collection of disability data relevant to monitoring the implementation of the UN CRPD by the EU and its Member States.

## **5.2 General Recommendations for States Parties on Article 31**

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States Parties should perform a **screening exercise** to assess whether appropriate information, including statistical and research data, gathered by census bureaus is currently being collected.

Data collection should **facilitate** the formulation and implementation of policies to give effect to the UN CRPD. The process of collecting and maintaining disability statistics and data should:

- comply with legally established **safeguards**, including legislation on data protection;
- ensure **confidentiality**, and respect the privacy of persons with disabilities; and
- comply with internationally accepted norms to protect human rights, and fundamental freedoms, and ethical principles in the collection and use of statistics;

States Parties should, also ensure that:

- disability data is **disaggregated** appropriately;
- utilised to assess the implementation of obligations set forth in the UN CRPD; and
- identify, and address, barriers faced by persons with disabilities in exercising their rights.

States Parties should also establish a process to ensure the appropriate **dissemination** of accessible data to persons with disabilities, organisations that represent their rights and decision-makers.

### **5.3 Article 32 obligations and overview of existing practices**

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The UN CRPD expressly recognises that **international cooperation** and disability inclusive development can play an important role in support of national implementation efforts. States Parties to the Convention should, therefore, cooperate internationally through partnerships with other States, with relevant international and regional organisations, and civil society (in particular organisations of persons with disabilities) in support of national measures to give effect to the UN CRPD. Article 32 UN CRPD identifies a range of measures that States Parties can undertake within the framework of international cooperation. These measures include, but are not limited to:

- capacity building, through, for example, the conduct (or support) of training programmes, exchange and sharing of information, experiences, and good practices;
- research programmes and the facilitation of access to scientific knowledge; and
- technical and economic assistance, including the facilitation of access to accessible and assistive technologies.

Importantly, Article 32 UN CRPD requires that all international cooperation efforts, including international development programmes, should be fully **accessible to, and inclusive of, persons with disabilities**.

**Disability inclusive development** refers to a continuum of approaches designed to incorporate a disability dimension into development activities, ranging from disability-specific initiatives, the addition of disability-specific components to development programmes and fully inclusive programming, designed to include disability concerns into all development processes as a central element.<sup>363</sup>

Specifically, all States Parties are required to make every aspect of their aid programmes, from design to implementation and evaluation, completely accessible for persons with disabilities. This obligation can be satisfied through legislation, or through specific policy pronouncements, or both. Given the historic marginalisation of disability issues across development sectors, the inclusive development obligation set forth in the UN CRPD has the potential to open up development programming to persons with disabilities and their representative organisations. The inclusive development mandate established in Article 32 UN CRPD should be read through the lens of Article 3 UN CRPD (General principles). Accordingly, it follows that in implementing the obligation to make development programmes inclusive of persons with disabilities, States Parties should ensure that laws and policies applied in respect of Article 32 UN CRPD are consistent with the principles of non-discrimination, participation, accessibility, and all the other general principles of the UN CRPD. In addition, disability prevention programming (e.g. road safety measures or blindness prevention measures), which is not encompassed within the UN CRPD, and which the drafters explicitly chose not to address, falls outside of disability inclusive development, but within the public health development sector.

Despite some available information on mainstreaming disability in development cooperation,<sup>364</sup> this study could not indicate clear challenges to the implementation of Article 32 UN CRPD as relevant practices that have been identified in the Member States of the EU are fairly new. However, this section will present practices from Germany and Italy, which are relevant to Article 32 UN CRPD and include elements that may lead to positive outcomes. These practices illustrate **positive steps** towards inclusive and accessible development of international actions. It should though been taken into account that practices presented hereinafter are very recent, and therefore it is not possible to assess whether or not their practical implementation is in line with the goals set forth in Article 32 UN CRPD.

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<sup>363</sup> Janet E. Lord, *International Cooperation and the Inclusive Development Obligation under the UN CRPD*, Briefing Paper for the Study on Challenges and Good Practices in the Implementation of the UN CRPD, VC/2008/1214

<sup>364</sup> See, for example, Project 'Make development inclusive', which was conducted by the International Disability and Development Consortium (IDDC) and financed by the European Commission. For further information, see at: <http://www.make-development-inclusive.org>

In **Germany**, the German Federal Ministry for Economic Cooperation and Development has recently launched *the Development Policy Action Plan on Human Rights 2008-2010*. The action plan aims to integrate a human-rights approach into the German development policy.<sup>365</sup> To advance this purpose, it includes a list of measures designed to support (within the scope of German development policy) global, regional, and national frame conditions and processes that will contribute to the realisation of human rights, and hence to sustainable development. Indicative examples of such measures are:

- Strengthening the rights of disadvantaged groups, such as people with disabilities, children, indigenous and ethnic minorities; and
- Promotion of the active participation of disadvantaged groups in the communities.

Similar to Germany, **Italy** has established within the Ministry of Foreign Affairs, an entity named *Development Cooperation*. This new entity is responsible for cooperation with developing countries, and aid to be granted to such countries.<sup>366</sup> In 2009, the Italian Development Cooperation published its Programming Guidelines and Directions for 2009-2011,<sup>367</sup> and declared its continued commitment to crosscutting issues, such as assisting vulnerable groups, including persons with disabilities. The Guidelines established employment, health, environment, health, education, and micro, small and medium sized enterprises as priority sectors for funding. Furthermore, the Guidelines clarified that any funding to be awarded will aim to promote initiatives which, in line with the UN CRPD, are based on the principle of social inclusion, embrace an approach of community based rehabilitation, and promote social legislation on disability.

With regard to **EU practices** in the field of international cooperation, the Council Decision 2010/48/EC listed three instruments that illustrate the competence of the EU in this field. These instruments are: Regulation 1905/2006 establishing a financing instrument for development cooperation; Regulation 1889/2006 establishing a financing instrument for the promotion of democracy; and Regulation 718/2007, implementing Council Regulation 185/2006 establishing an instrument for Pre-Accession Assistance. Therefore, for the purposes of this study, it is deemed necessary to outline the provisions of the aforementioned Regulations which are relevant for matters related to the implementation of Article 32 UN CRPD.

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<sup>365</sup> Available at <http://www.bmz.de/en/service/infothek/fach/konzepte/konzept167.pdf>

<sup>366</sup> Website at <http://www.cooperazioneallosviluppo.esteri.it/pdgcs/>

<sup>367</sup> The Programming Guidelines and Directions for 2009-2011 are available at [http://www.cooperazioneallosviluppo.esteri.it/pdgcs/italiano/LineeGuida/pdf/Linee\\_guida\\_Ingl.pdf](http://www.cooperazioneallosviluppo.esteri.it/pdgcs/italiano/LineeGuida/pdf/Linee_guida_Ingl.pdf)

**European Commission Regulation 718/2007/EC**<sup>368</sup> has established an Instrument for Pre-Accession (IPA), offering rationalised assistance to countries aspiring to join the European Union. The Regulation includes a reference to non-discrimination on the basis of disability, and an obligation to beneficiary States to report on the Commission about actions taken, including information on actions that strengthen the employment and social inclusion of persons with disabilities.<sup>369</sup> Specifically, Article 3 of Regulation 718/2007/EC (Principles of assistance) states that:

the Commission shall ensure that the following principles apply in relation to assistance under the IPA Regulation: [...] Any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation shall be prevented during the various stages of the implementation of assistance.

Additionally, the Regulation sets forth in Article 169<sup>370</sup> a specific reference to actions aimed at strengthening social inclusion, and integration in employment of disadvantaged groups, including people with disabilities.

Based on the Regulation, assistance is granted by the EU to support:

- transition, and institution and capacity building (Article 8 Regulation 718/2007/EC);
- cross-border cooperation with the aim to promote good neighbourly relations, fostering stability, security and prosperity in the mutual interest of all countries concerned, and of encouraging their harmonious, balanced and sustainable development (Article 9 Regulation 718/2007/EC);
- regional development, aimed at supporting the countries' preparations for the implementation of the Union's cohesion policy (Article 10 Regulation 718/2007/EC);
- human resources development, including the support of education programmes and lifelong learning opportunities (Article 11 Regulation 718/2007/EC); and
- rural development, which concerns preparation for the common agricultural policy and related policies and for the European Agricultural Fund for Rural Development (Article 12 Regulation 718/2007/EC).

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<sup>368</sup> European Commission Regulation 718/2007/EC, implementing Council Regulation 185/2006 establishing an instrument for Pre-Accession Assistance, OJ L 210 , 31/07/2006, pp 82 – 93, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:210:0082:01:EN:HTML>

<sup>369</sup> Stefan Tromel, ANED Working Group on the Future of EC Disability Law/ Policy, Topic paper on: External relations (with a focus on poverty, education and lifelong learning, support for independent living, and social inclusion of specific groups).

<sup>370</sup> Art. 169 Regulation 718/2007 refers to sectoral and final reports by beneficiary countries related to implementation.

Candidate countries are therefore prepared for full implementation of the Union *acquis* at the time of accession.

As is evident, Regulation 718/2007/EC is of particular relevance to the implementation of Article 32 UN CRPD by the Union. The Regulation has several positive elements that seem to be in line with the UN CRPD, and covers a broad range of fields that are relevant to the inclusion of persons with disabilities (e.g. employment, development, non-discrimination, and others). Nonetheless, with the aim to achieve full and effective implementation, the EU should review the provisions of the Regulation, and include a clarification that any funding to be awarded to candidate States, should respect and promote the general principles of the UN CRPD to which the EU is a party. Finally, any funding to be awarded should be inclusive of, and accessible to, persons with disabilities.

**Regulation No 1905/2006/EC** has established a financing instrument for Development Cooperation (DCI).<sup>371</sup> The primary objective of cooperation under this Regulation is the eradication of poverty in developing countries and regions,<sup>372</sup> sustainable development, and the achievement of the Millennium Development Goals (MDGs), in particular the MDGs related to promotion of democracy, good governance, and respect for human rights and the rule of law.

Recital 11 of the Regulation states that the EU, and its Members States, should pay particular attention to the right to decent work and the rights of persons with disabilities. However, no specificities are given later in the text.

Article 3(3) of the Regulation requires all programmes to be established under the Regulation to mainstream certain 'cross-cutting' issues.<sup>373</sup> Inclusion of, and accessibility to, persons with disabilities are not part of the 'cross-cutting' issues set forth in Regulation 1905/2006. Additionally, Article 5 of the Regulation introduces certain intervention areas<sup>374</sup> which the EU will focus on. In these areas, the EU sets

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<sup>371</sup> Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 has established a financing instrument for Development Cooperation, OJ L 378/41 of 27/12/2006, pp 41–71. The legal basis of the Regulation is Article 179 TEC, acting in accordance with the procedure laid down in Article 251 TEC. The full text of the Regulation is available at: <http://eur-lex.europa.eu/lex/LexUriServ/LexUriServ.do?uri=OJ:L:2006:378:0041:0071:EN:PDF>

<sup>372</sup> For the purposes of Regulation No 1905/2006, a region is defined as a geographical entity comprising more than one developing country. It should further be noted that countries and regions under this Regulation refer to non EC Member States and States that are not eligible for Community aid under Regulation (EC) No 1085/2006 (providing for assistance to candidate or potentially candidate countries) or Regulation (EC) No 1638/2006 (providing for direct support for the EU's European Neighboring countries).

<sup>373</sup> These are: democracy, good governance, human rights, the rights of children and indigenous peoples; gender equality; environmental sustainability; and fight against HIV/AIDS.

<sup>374</sup> These areas are Education; Health; Social Cohesion and Employment; Trade and regional integration; Governance, democracy, human rights and support for institutional reforms; Environment

some objectives that beneficiary countries should meet. Similar to Article 3, the objectives set forth in Article 5 do not take into account the disability dimension, as required by Article 32 UN CRPD. It should be noted though that under the area of health, the Regulation calls on beneficiary countries to provide access to, and provision of, health services for, *inter alia*, persons with disabilities.

Consequently, the EU, as a Party to the UN CRPD and with the aim to fully meet the requirements set forth in Articles 3 and 32 of the Convention, should review Articles 3(3) and 5 of the Regulation, so as to include accessibility and inclusion of people with disabilities as a cross-cutting issue, and ensure that the rights of persons with disabilities are protected and mainstreamed in all projects or programmes financed under Regulation No 1905/2006/EC.

Finally, **Regulation No 1889/2006/EC**, has established a financing instrument for the promotion of democracy and human rights worldwide (European Instrument for Democracy and Human Rights).<sup>375</sup> The Regulation includes an explicit reference to disability. EU assistance under this Regulation is placed within the framework of the EU's policy on development cooperation, and economic, financial and technical cooperation with third countries. The primary EU objective of partnerships with third countries is to contribute to the development and consolidation of democracy and the rule of law, and respect for all human rights and fundamental freedoms. To this purpose, Article 2 of the Regulation lists specific fields, which are the priorities of the EU for partnerships with third countries. Specifically, Article 2 states, *inter alia*, that the promotion and respect of the rights of persons with disabilities and the fight against discrimination on the basis of disability are priority areas for EU assistance under this Regulation. To date, there are a number of projects focused on the rights of persons with disabilities which have been financed under this financial instrument.<sup>376</sup> Consequently, Regulation No 1889/2006/EC seems to be in line with several requirements set forth in the general principles, and Article 32 of the UN CRPD. It can thus be considered as a **good EU practice** in the field of international cooperation and aid.

Concluding, the EU, within the framework of its mandate, has managed over the years to establish partnerships and development programmes with many developing countries around the world (for example, Caribbean and sub-Saharan African countries). EU development policies in the developing countries focus on areas, which

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and sustainable development of natural resources; Water and energy; Infrastructure, communication and transport; and Post-crisis situations and fragile States.

<sup>375</sup> Council Regulation (EC) No 1889/2006 of 20 December 2006 establishing a financing instrument for the promotion of democracy and human rights worldwide (EIDHR), OJ L 386, 29/12/2006, pp 1–11

<sup>376</sup> See supra note 377

are of particular importance to the UN CRPD; for example the support to programmes which promote equitable access to social services, or link trade with development, or build institutional capacity. In addition, the Union can (and as a Party to the UN CRPD should) influence and support third, or candidate, countries to ensure the realisation of the UN CRPD objectives within their territory. This goal can be achieved through, for example, the use of the so called ‘**human rights clauses**’.

The human rights clauses in EU mixed agreements generally refer to “appropriate measures” being taken by the Union in the event of human rights abuses (abuses made by the other contracting party, or parties). This does not necessarily involve suspension, or termination, of the whole agreement. It could involve applying sanctions, such as changing the terms of cooperation programmes; or reducing cultural, scientific and technical cooperation; or postponing, or suspending, bilateral contacts, or new projects, or trade embargoes; or suspending the cooperation as a whole. In view of the UN CRPD implementation by the EU, existing human rights clauses should be interpreted as encompassing the rights of persons with disabilities, in order to sanction persistent and serious breaches of such rights. Furthermore, new human rights clauses should include a specific reference to the UN CRPD, or to the rights of persons with disabilities. Human rights clauses could thus be a useful means to force “undisciplined” third countries that have ratified the Convention to comply with the UN CRPD standards. It should be noted though that a **challenge** to the effective implementation of the ‘human rights clauses’ arises from the current lack of an effective mechanism to make the clauses operational, and ensure that States comply with their human rights obligations.

In addition there are other forms of ongoing cooperation that could also contribute to the effective implementation of the Convention at the EU level. For example, the EU has established a form of Dialogue with the United States (US). This Transatlantic Dialogue is taking place for the last decade or so, and a good working relationship has already been established between the participating parties; especially between the European Commission, which is also the focal point of the EU for all matters related to the UN CRPD, and the US authorities.<sup>377</sup> The Transatlantic Dialogue has covered so far areas related to trade; employment, social affairs, and equal opportunities; accessibility; promotion of peace, stability, democracy and development around the world; and others. In view of the implementation of the UN CRPD by the European Union, this channel of communication with the US could enhance the effective implementation of the UN CRPD by the European Union. Specifically, the inclusion of a

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<sup>377</sup> For detailed information on the Transatlantic Agenda, see Briefing Paper “Taking the US/EU Dialogue to a New Level”, written by researcher Aisling de Paor and Prof. Gerard Quinn of the Centre for Disability Law and Policy, National University of Ireland, Galway, for the Study VC/2008/1214.

disability dimension in the fields covered by the Transatlantic Agenda and the Convention would facilitate the exchange of experiences, and possible good practices for matters related to the practical implementation of the UN CRPD. To date, such dialogue has been beneficial in the field of information and communication technologies, which is of great importance for the right of persons with disabilities to independent living. Lastly, the Transatlantic Dialogue could serve as a role model for the establishment by the EU of similar communication forums with other parties to the UN CRPD, and with the aim to enhance learning on different approaches related to the implementation of the Convention.

## **5.4 General Recommendations for States Parties on Article 32**

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States Parties should perform a **screening exercise** to assess the inclusivity of their development aid policies and programmes. To this purpose, screening exercises should, *inter alia*, include an assessment of whether:

- any laws, policies or practices exclude persons with disabilities from international cooperation programmes, either as beneficiaries or as implementers;
- domestic disability laws apply extraterritorially to development assistance;
- existing disability non-discrimination laws apply to the recruitment and training of people with disabilities for international development or foreign assistance assignments;
- international cooperation programmes are directed at inclusion and autonomy and applied without discrimination and in relation to all persons with disabilities, including women and children with disabilities; and
- persons with disabilities and their representative organisation are involved in development planning, implementation and evaluation.

Following the results of screening exercises, all the aforementioned issues should be mainstreamed to all previously established, or upcoming, international cooperation programmes.

States Parties as donor (or beneficiary) countries should take measures to **guarantee** that international cooperation mainstreams the general principles of the UN CRPD, and is inclusive of, and accessible to, persons with disabilities.<sup>378</sup>

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<sup>378</sup> UN CRPD Committee, CRPD/C/2/3 of 18 November 2009, Guidelines on treaty specific document to be submitted by States Parties under Article 35(1) UN CRPD

States Parties should, in their international cooperation programmes and/or projects, **ensure** participation by persons with disabilities in the design, development, and evaluation of the programme and project.<sup>379</sup>

States Parties should ensure that their international cooperation programmes and projects **mainstream** actions towards persons with disabilities.<sup>380</sup>

States Parties as donors should, in their international cooperation programmes and projects, include actions that support the beneficiaries' **capacity building** on issues related to the UN CRPD implementation. These actions should include, but are not limited to, training, exchange and sharing experiences and good practices.

States Parties as donor (or beneficiary) countries should ensure that programmes, and/or projects, targeting the achievement of Millennium Development Goals (MDGs), take into account the rights of persons with disabilities.<sup>381</sup>

## 5.5 Article 33 obligations and overview of existing practices

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The UN Convention on the Rights of Persons with Disabilities is the first human rights treaty that contains detailed provisions on the establishment and functioning of **national monitoring and implementation frameworks**.

The initial core obligation deriving from Article 33(1) UN CRPD is the designation of one, or more, **focal points** within States Parties governmental structures, for all matters relating to the implementation of the UN CRPD. With the aim to ensure optimal effectiveness, these focal points should be located at the government level, and ideally at the highest level of government (i.e. executive authority, Ministry level). A focal point at the highest executive level will **guarantee** the mainstream impact of the focal point's work, and the status of its recommendations, while also serving as a permanent reminder that the rights of persons with disabilities need to be respected in all areas of the executive power.<sup>382</sup> Furthermore, as the UN OHCHR has highlighted:

[..] the establishment of a focal point and its mandate should take place through **legal measures**. The mandate should clearly address the need for coherent and coordinated government activity in the fields of disability, and adequate human and financial resources shall be allocated to it.<sup>383</sup> Focal point(s) should be adequately resourced in

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<sup>379</sup> Ibid, CRPD/C/2/3

<sup>380</sup> Ibid, CRPD/C/2/3

<sup>381</sup> Ibid, CRPD/C/2/3

<sup>382</sup> See OHCHR Study on National Frameworks for the Promotion and Protection of the Human Rights of Persons with Disabilities, available at <http://www2.ohchr.org/english/issues/disability/documents.htm>

<sup>383</sup> In this regard the **Cypriot focal point** can be seen as an example of good practice. The Cypriot focal point was established in 2008 within the Ministry of Labour and Social Insurance, and is the Department of Social Inclusion of Persons with Disabilities. The later includes in its mandate the monitoring and

order to positively contribute to the implementation of national strategies and plans adopted to give effect to the Convention.<sup>384</sup>

In addition, Article 33(1) urges States Parties to consider creating or designating a **coordination mechanism** (again within government) to further support implementation of UN CRPD across all sectors of the government. This is an implicit acknowledgement that disability is an issue that cuts across numerous governmental ministries and agencies, and thus full and effective implementation of the UN CRPD cannot occur absent coordination. A coordination mechanism may take, for example, the shape of an inter-ministerial group, tasked with coordinating implementation of the Convention across respective departments/sectors, or levels of government, and could prove particularly beneficial in systems of devolved administration, such as the European Union, or federal States.

The second major obligation, deriving from Article 33(2) UN CRPD, requires States Parties to establish a **national monitoring framework** separate from government, with the aim to “*promote, protect and monitor*” the implementation of the UN CRPD. As part of such a ‘framework’, Article 33(2) requires States Parties to include one or more **independent mechanisms**. The provision leaves States Parties the choice of whether to institute specific disability mechanisms, or assign the monitoring function to existing entities. However, whatever the preferred choice, these monitoring mechanisms must take into account the *Principles relating to the status and functioning of national institutions for the promotion and protection of human rights* (also known as the **Paris Principles**),<sup>385</sup> so as to ensure their independence. This does not mean that only entities complying with the Paris Principles should be included in the framework, but that at least one mechanism that is established and functions on the basis of the Paris Principles must be part of the framework.<sup>386</sup> It should be noted though that the Paris Principles are not expressly referred to in Article 33 UN CRPD.

The framework established or designated must be adequately mandated to promote, protect and monitor the implementation of the Convention. This means that the

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coordination of the national UN CRPD implementation. More information is available at (in EL): [http://www.mlsi.gov.cy/mlsi/dsid/dsid.nsf/dsid02\\_gr/dsid02\\_gr?OpenDocument](http://www.mlsi.gov.cy/mlsi/dsid/dsid.nsf/dsid02_gr/dsid02_gr?OpenDocument)

<sup>384</sup> Silvia Lavagnoli, Human Rights Officer, United Nations Office of the High Commissioner for Human Rights (OHCHR-UNOG). Keynote Speech in the *Seminar on the National Implementing and Monitoring Bodies described in Article 33 UN CRPD*, held in Brussels on October 29<sup>th</sup>, 2009 and jointly organised by the European Consortium of Foundations on Human Rights and Disability and the European Disability Forum. More information is available at: [http://www.edf-feph.org/Page\\_Generale.asp?DocID=13855&thebloc=22905](http://www.edf-feph.org/Page_Generale.asp?DocID=13855&thebloc=22905)

<sup>385</sup> United Nations General Assembly A/RES/48/134, 85<sup>th</sup> plenary meeting, held on 20 December 1993.

<sup>386</sup> See Thematic Study by the Office of the United Nations High Commissioner for Human Rights on the structure and role of national mechanisms for the implementation and monitoring of the Convention on the Rights of Persons with Disabilities, A/HRC/13/29, 22 December 2009, para 41

framework needs to be given an adequate mandate and the institutional capacity required to effectively perform its functions.<sup>387</sup> The activities of the designated framework may vary depending on national systems and structures. Nevertheless, activities to “promote, protect and monitor” include, but are not limited to, the following:

- conducting of public inquiries;
- providing complaints mechanisms;
- awareness-raising and public education campaigns;
- reporting to government, in an advisory function, on human rights and disability matters;
- contributing to reports which States Parties are required to submit to UN bodies and committees;
- the preparation of assessment reports identifying the extent to which there has been compliance;
- providing mediation, undertaking ‘strategic litigation’.<sup>388</sup>

Finally, Article 33(3) UN CRPD requires **civil society**,<sup>389</sup> in particular persons with disabilities and their respective organisations, to be fully involved in, and enabled to, participate in the monitoring process. This requirement further specifies the general principle of participation of people with disabilities (Article 3(c) UNCRPD) as well as the general obligation to consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations in the development and implementation of legislation and policies to implement the Convention and in all decision-making processes concerning issues relating to persons with disabilities (Article 4(3) UN CRPD).<sup>390</sup> ‘*Involvement*’ applies to all parts of Article 33 and therefore implies that civil society organisations may form part of the national framework under Article 33(2) UN CRPD, or, ideally, be included within the focal point set up under Article 33(1) UN CRPD.<sup>391</sup> The language ‘*participate fully*’ used in Article 33(3), as regards to monitoring may also imply opportunities for persons with disabilities and their representative organisations to have a role in the monitoring that occurs both at the government level, and at the level of independent monitoring,

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<sup>387</sup> Ibid

<sup>388</sup> Ibid, para 62 – 68. See also A/HRC/10/48, supra note 41, para 66

<sup>389</sup> Civil society organisations include two types of organisations: (a) those ‘of’ disabled persons, and (b) those ‘for’ disabled persons. In some cases the interests and expectations of these two types of organizations is not necessarily the same. See F. Fleischmann, ‘The Role of Civil Society in the Monitoring of the Human Rights of Persons with Disabilities’, in *National Monitoring Mechanisms of the Convention on the Rights of Persons With Disabilities*, pp.141-152, p.141

<sup>390</sup> A/HRC/13/29, supra note 394, para 69

<sup>391</sup> Briefing paper on obligations deriving from Article 33 UN CRPD, written by Academic Panel Member Prof. Rachel Murray of the University of the Bristol University, for the Study VC/2008/1214.

pursuant to Article 33(2) UN CRPD.<sup>392</sup> In this sense, any consultation on the establishment of the monitoring framework should involve people with disabilities and their representative organisations.<sup>393</sup> As mentioned above, the participation of persons with disabilities and their representative organisations is further reinforced by the general obligations of the Convention (Article 4(3) UN CRPD), and therefore States Parties to the UN CRPD should outline a specific framework and modality for such participation in national implementation and monitoring in order to fully comply with the requirements set forth in Article 33 of the UN CRPD.

Considering implementation of Article 33 of the UN CRPD by the **EU Member States**, research for this study has revealed that the majority of the designated focal points have, as required, been established at a high level of government (*i.e.* Ministry level). It should be noted though that some States have not designated yet their focal points.<sup>394</sup> National information regarding the establishment, or designation, of a coordination mechanism is generally poor, which implies that EU Member States have yet to designate a coordination mechanism.<sup>395</sup> In some cases it is clear that the possibility of establishing such a mechanism will be reviewed by the government of a Member State upon official ratification of the UN CRPD. Similarly, many States have yet to nominate a framework as envisaged by Article 33(2) UN CRPD, and do not intend to do so until after the Convention is officially ratified. Some Member States have, however, carried out the appointment of such a body.<sup>396</sup> This is for example the case in Austria, which will be outlined below as an indicative example.

It should be noted that within this study, a separate research was conducted aiming to identify national, as well as EU key actors, related to the implementation of the UN CRPD.<sup>397</sup> As regards information from Member States, findings of this research are

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<sup>392</sup> As indicated by the OHCHR in the Thematic Study on the structure and role of national mechanisms for the implementation and monitoring of the UN CRPD, Article 33(3) seems to include both *direct* participation of persons with disabilities in the monitoring process, as well as *indirect* participation, through representative organisations. Direct participation of persons with disabilities in the monitoring process can take place for example by having experts who are persons with disabilities to participate in the work of the monitoring framework. At the same time, indirect participation in the monitoring process can take place for example by having an open discussion with organisations representing persons with disabilities in order to identify the criteria on which organisations could be considered to be representative of such constituencies (meaning constituencies established to implement Article 33). See A/HRC/13/29, see supra note 394, para 71-73

<sup>393</sup> A/HRC/13/29, see supra note 394, para 70

<sup>394</sup> This is the case for Finland, France, Greece, Lithuania and Portugal

<sup>395</sup> This is the case for Bulgaria, Czech Republic, Finland, France, Greece, Hungary, Italy, Ireland, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain.

<sup>396</sup> A 'framework' has been established in Austria, Cyprus, Germany, Italy, Latvia, Sweden and the UK

<sup>397</sup> Research for this study on the identification of national key actors was conducted by researcher Karen Walsh of the Centre for Disability Law and Policy, National University of Ireland, Galway; see Annex II of this report. Additionally, research for this study on the identification of European key actors

presented in Annex II of this report. Annex II, where possible, identifies the appointed by the government focal point(s) and/or coordination or monitoring mechanisms.

**Austria** ratified the UN CRPD on September 26<sup>th</sup>, 2008. Following ratification, the government introduced an amendment to the Federal Disability Act (FDA), with the aim to align the Act with the requirements set forth in the UN CRPD.

For the purposes of Article 33(1) UN CRPD, Austria designated the **Federal Disability Advisory Board**, located within the Federal Ministry of Labour, Social Affairs and Consumer Protection, (hereinafter referred to as BMASK) as the national focal point for all matters relating to the implementation of the UN CRPD. The appointment of the BMASK as the Austrian focal point seems to fulfil the main requirement of the Article 33 UN CRPD to locate the focal point at a government level. However, one could claim that the BMASK does not fully reflect the paradigm shift of the Convention, as the scope of the BMASK activities do not cover all policy fields, but mainly addresses issues of employment and social affairs.

The Austrian government has also established a coordination mechanism, within government, in order to facilitate actions and ensure consistency in actions related to the implementation of the UN CRPD. This is the **Federal Disability Advisory Board**, located at the BMASK, with representatives from the Federal Government, the regional state authorities (Länder), the Social Insurance Institutions, other Stakeholders, Social Partners and the Disability Ombudsman. Based on the amended FDA, the Federal Minister of Labour, Social Affairs and Consumer Protection should take into account opinions of the aforementioned bodies on when taking important decisions concerning the affairs of people with disabilities.

Finally, the amended FDA has established the **Independent Monitoring Committee** for the purposes of Article 33(2) UN CRPD.<sup>398</sup> The Austrian Independent Monitoring Committee consists of seven members and their substitutes. All members are nominated by organisations representing the rights of persons with disabilities, and appointed by the Federal Minister of Labour, Social Affairs and Consumer Protection for four years. Four of the members represent disabled persons organisations, one represents human rights organisations, one represents organisations related to development cooperation, and one represents academic institutions. Delegates from

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was conducted by researcher Dr. Delia Ferri; see Dr. Ferri's research paper on "The European Community competences to implement the UN CRPD", written for the Study VC/2008/1214.

<sup>398</sup> For detailed information on the establishment and mandate of the Austrian Independent Monitoring mechanism, see Austrian contribution, in response to a Request by the Office of the High Commissioner, 10 July 2009, based on Human Rights Council Resolution 10/7, "*Human Rights of Persons with Disabilities: National Frameworks for the Promotion and Protection of the Human Rights of Persons with Disabilities*". The Austrian contribution is available at:

<http://www2.ohchr.org/english/issues/disability/docs/AustrianMonitoringBody.pdf>

the Federal Ministry of Labour, Social Affairs and Consumer Protection Bureau are non-voting members. In addition, representatives from other ministries may be involved (as non-voting members) for the monitoring of a specific area, which may be outside of the scope of the activities of the Federal Ministry of Labour, Social Affairs and Consumer Protection. With regard to the Committee's mandate, as required by Article 33(2) UN CRPD for the national framework, the Committee has assumed the following tasks:

- Receive and follow-up on individual complaints;
- Make recommendations to public authorities based on both individual complaints as well as general observations; and
- Support awareness raising actions on the meaningful inclusion and participation of persons with disabilities, by offering support (within its available means) to interested public bodies, implementing the Convention.

Finally, the Independent Monitoring Committee intends to launch a special website ([www.monitoringausschuss.at](http://www.monitoringausschuss.at)) where all relevant information will be published for the public.<sup>399</sup> As is evident, the designated Austrian framework appears to be in line with many requirements set forth in Article 33(2) UN CRPD. It can thus be considered as a possible **good practice** in this field.

As regards to the establishment, or designation, of bodies and mechanisms by the European Union for all matters related to the implementation and monitoring of the UN CRPD, due to the complex structures of the Union, several issues need to be considered. Therefore, the following sections 5.5.1, 5.5.2 and 5.5.3 will aim to clarify the following questions:

- a. Which specific body within the Commission, which is designated as the overall focal point for all matters related to the UN CRPD, should be tasked with the responsibilities of the focal point?
- b. Which body could perform the tasks of coordination at the EU level, on the basis of Article 33(1) UN CRPD?
- c. Which body could act as the framework to promote, protect and monitor the implementation of the UN CRPD, on the basis of Article 33(2) UN CRPD?
- d. Given that the 'tasks' of Article 33(2) UN CRPD could be spread among a mix of EU bodies, then which bodies could be involved in 'promoting, protecting and monitoring' the implementation of the Convention?

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<sup>399</sup> Austria Response to Study's questionnaire on "National Institutional and Policy Apparatus"

- e. How can Article 33(3) UN CRPD be implemented at the EU level; what is the role that civil society, and in particular persons with disabilities through their representative organisation, can play?

### 5.5.1 A focal point within the European Union

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At the EU level, based on Article 3 of the Council Decision 2010/48/EC concerning the UN CRPD conclusion, the **European Commission** (hereinafter referred to as the Commission) is the focal point for all matters related to the implementation of the Convention. However, the Decision states that the details of the Commission's functions as the focal point will be clarified in a Code of Conduct, which will be negotiated and agreed upon between the EU and the Member States.

The Commission is the executive body of the European Union. The mission of the Commission is to promote the general interest of the European Union. It does so by participating in the decision-making process (in particular by presenting proposals for EU law), by overseeing the correct implementation of the Treaties and EU law, and by carrying out common policies and managing EU funds.<sup>400</sup> The designation of an overall EU focal point within the Commission fulfils the main "structural" requirement set forth in the Convention. However, the Commission has a unique and quite complex structure of governance, which results from the Treaty establishing the European Community. In this respect, this section considers which body within the Commission could perform the tasks of the focal point of the EU.

The Commission works under the political guidance of its President, who decides on its internal organisation,<sup>401</sup> with the aim to ensure that the Commission acts consistently, efficiently and on the basis of collegiality.<sup>402</sup> The **President of the Commission** (hereinafter referred to as the President) is appointed by the governments of the EU Member States, and then approved by the European Parliament. This dual legitimacy gives the President political authority, which s/he exercises in a variety of ways.

As the highest member of the EU's executive body and with political authority, the President could (ideally) become the *overall internal focal point of the European Union* for all matters relating to the UN CRPD. In this case, the President would ensure that

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<sup>400</sup> More information about the European Commission and its work is available at: <http://ec.europa.eu>

<sup>401</sup> The President appoints the College of Commissioners in agreement with Member States' governments. S/He entrusts each of the Commissioners with particular policy responsibilities. Members of the college are chosen on the grounds of their general competence. After a series of individual hearings before Parliamentary committees, the candidate-Commissioners are subject as a body to a vote of approval by the European Parliament. The President and the other Members of the Commission are then appointed by the Council.

<sup>402</sup> The principle of collegiality, which governs all the Commission's work, means that all Commission members are jointly responsible for decisions and actions taken.

all Commissioners include disability in their portfolios. The President would also ensure horizontal supervision of the work of all EU institutions, EU legislation and policies, and (when needed) provision of guidance on new EU policy and/or legislative initiatives aimed at ensuring full compliance with the UN CRPD. Finally, as a political figure, the President could also influence national (and EU) policy-makers, and achieve attitudinal changes with regard to how Member State (and EU institutions, such as DGs, the Parliament, etc) should, on the basis of the UN CRPD, address disability issues in their legislation, policies and programmes.

However, it should be taken into account that the broad mandate of the President may become a **barrier** that will potentially hamper his/her optimal effectiveness as the EU's focal point for matters relating to the UN CRPD. To this purpose, the Union should consider the option of placing its focal point within the Secretariat-General, which can be considered as the equivalent of a 'Ministry'. The **Secretariat-General**<sup>403</sup> is the President's department and one of the central services of the European Commission. The Secretariat-General is at the service of the President, the College of Commissioners and the Commission Directorate-Generals (DGs). It reports directly to the President. Within an organisation as diverse as the Commission, the Secretariat-General has a special role. It manages the collegial decision making process and ensures the alignment of EU policies with the political priorities of the Commission. More specifically, the Secretariat-General, *inter alia*:

- Defines and designs the Commission's strategic *objectives and priorities* and *shapes cross cutting policies*;
- Coordinates, facilitates, advises and arbitrates *legislation* and operations across policy areas and Commission departments, aiming to ensure coherence; and
- Acts as the Commission's interface with other EU institutions (e.g. Parliament), national parliaments, and civil society organisations.

Consequently, the Secretariat-General, has the adequate institutional mandate which is needed to serve as the EU's focal point. Based on its mandate, the Secretariat-General could fulfil the following EU obligations, deriving from Article 33 UN CRPD:

- promote awareness of the UN CRPD objectives and obligations within all EU's institutional (e.g. Directorate-Generals, EP and others) and political (e.g. President, College of Commissioners, national policy-makers etc.) actors;
- serve as a reference point for national focal points, and promote compliance with the UN CRPD by the EU Member States;

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<sup>403</sup> For detailed information on the Secretariat-General, see at: [http://ec.europa.eu/dgs/secretariat\\_general/index\\_en.htm](http://ec.europa.eu/dgs/secretariat_general/index_en.htm)

- as the Secretariat-General has the mandate to act as the Commission's interface with *inter alia* civil society organisations, it can establish and maintain contact with representatives of organisations representing the rights of persons with disabilities, and proactively involve them in the UN CRPD implementation by the EU;
- develop a EU plan for the implementation of the UN CRPD by the EU institutions and EU decision-makers, setting clear goals and objectives to be met and (possibly) specific actions to be taken;
- ensure (through a regular review) horizontal supervision of all EU legislation, policies and programmes (internal monitoring); and
- coordinate disability-related reporting of all EU institutions with the view of preparing the overall EU report to be submitted to the UN CRPD Committee (Article 36 UN CRPD).

Nonetheless, it should again be considered that as the current mandate of the Secretariat-General is already very wide, this could possibly hamper its effectiveness as the focal point of the EU. Therefore, another option for the focal point of the EU is the **Commissioner for Justice, Fundamental Rights and Citizenship** (vice-president of the Commission). The Commissioner may not be at the highest level of the executive level, but is placed at a level similar to a Ministry. Furthermore, following the entry into force of the Lisbon Treaty, respect for fundamental rights (especially rights set forth in the EU Charter of Fundamental Rights) is one of the core priorities of the Commissioner's work. Accordingly, the Commissioner could be tasked with the responsibilities of the focal point for all matters related to the UN CRPD. To this purpose, and with the aim to ensure optimal effectiveness of horizontal monitoring of all EU legislation, policies and programmes, the Commissioner could benefit from the *methodology for systematic and rigorous monitoring of the Charter of Fundamental Rights*, set forth by the Commission in Communications COM(2005) 172 final, of April 25<sup>th</sup>, 2009,<sup>404</sup> and COM(2009) 205 final of April 29<sup>th</sup>, 2009.<sup>405</sup> Positive components of the methodology set forth by the Commission that could be of added value to the monitoring of the implementation of the UN CRPD by the European Union, are the following:

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<sup>404</sup> See COM(2005) 172 final, of 27/04/2005, Communication from the Commission, Compliance with the Charter of Fundamental Rights in Commission legislative proposals - Methodology for systematic and rigorous monitoring, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0172:FIN:EN:PDF>

<sup>405</sup> See COM(2009) 205 final, of 29/04/2009, Report on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the Charter of Fundamental Rights, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0205:FIN:EN:PDF>

- **Systematic departmental monitoring** of legislative proposals, with the aim to ensure respect for the general principles of the UN CRPD, and inclusion of the rights of persons with disabilities in all legislative acts. In line with the methodology set out in COM(2005) 172, these checks should be reinforced by an explanatory memorandum, and an **impact assessment**. The latter should include a full and precise overview of how the rights of persons with disabilities will be affected by EU legislation. These types of assessments should be conducted on the basis of a set of impact assessment guidelines. In this respect, the *“Guidelines for UN CRPD implementation: a tool to measure progress”*, produced by this study, and which are available in Annex I of this report, could be of assistance. The **explanatory memorandum** should outline the legal basis upon which any EU legislation should be based, in order to address the rights of persons with disabilities.
- **Follow-up of the departmental monitoring by the College of Commissioners**. As outlined in COM(2005) 172, it is very important that all Members of the Commission are fully updated on the practical implementation of fundamental rights, and in particular the implementation of the principles of equality and anti-discrimination. Therefore, the Legal Service of the Commission, in cooperation with DG Justice, Freedom and Security, and the Secretariat-General, should draft a **general evaluation** of EU legislation (based on the finding of the departmental monitoring process) that would also identify challenges posed by existing legislation and may hamper the full and effective implementation of the UN CRPD. Finally, the evaluation should be accompanied by concrete proposals and **recommendations** with regard to possible amendments, and/or supplementary actions that need to be taken by the EU, in order to ensure full and effective implementation of EU legislation, and aimed at achieving the objectives of the Convention.
- Finally, the results of the internal monitoring should be **published** in accessible formats, with the aim to raise awareness about the implementation of the UN CRPD, and inform all stakeholders about the actions of the EU.

Based on the OHCHR guidelines concerning the implementation of Article 33 UN CRPD, State Parties’ focal point should also have technical knowledge on implementing the Convention. At the current stage, neither the President nor the Secretariat-General (as a possible ‘focal point’) fulfil this requirement. However, the Commission has established, within the Directorate-General Employment, Social Affairs and Equal Opportunities (DG EMPL), which is now under the supervision of the Commissioner for Justice, Fundamental Rights and Citizenship, a **Unit for the Integration of People with Disabilities** (hereinafter referred to as the Unit). The Unit

is responsible for the overall management and coordination of EU disability policies, including the European Disability Action Plan (DAP) and issues related to the UN CRPD. The Unit's role is wide-ranging and includes aspects relating to the overall management and implementation of the DAP and monitoring activities and impact of the Commission's policies related to disability. The Unit is also in charge of specific activities mentioned in the DAP, and works on a horizontal basis to ensure effective coordination between DGs with regard to the inclusion, or mainstreaming, of the disability dimension in relevant EU policies and legislation. Furthermore, the Unit has established (at the end of 2007), and supports, the *Academic Network of European Disability experts* (ANED).<sup>406</sup> This Network was established with the aim to support policy development in collaboration with the Unit. As mentioned in the Mid-term Evaluation of the Disability Action Plan,<sup>407</sup> the Unit for the Integration of People with Disabilities has played a significant role in contributing to, and driving forward, disability mainstreaming activities.

In sum, the Unit for the Integration of People with disabilities has the background knowledge on the EU's overall disability legislation/policies, and the means and expertise needed to support the implementation of the UN CRPD. Consequently, the Unit for the Integration of People with Disabilities should provide an overall support to the EU's focal point for all matters related to the UN CRPD. In this case, the Unit's institutional mandate should be reviewed. Finally, to optimise effectiveness, it would be advisable for the Unit to be reinforced in terms of human resources and funding.

### 5.5.2 Coordination Mechanisms at the EU level

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To date, the EU has established several 'platforms' to facilitate coordination of disability policies. Section 5.5.2 considers how these existing 'platforms' could be used for the coordination of the UN CRPD implementation among the EU institutions (internal coordination), and between the EU institutions and the Member States (external coordination).

The operational implementation of the Commission's work is delegated to Directorate-Generals (DGs). Additionally, the Commission may also delegate the implementation of specific programmes to Executive Agencies. Considering the need for **internal coordination** (and monitoring), it is advisable for every DG and executive agency of the Commission to establish an '*internal focal point*' for matters related to the implementation of the UN CRPD by the DG or Agency. This 'internal focal point' should, on the basis of the OHCHR guidelines, be placed at the highest level of the

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<sup>406</sup> The website of ANED is <http://www.disability-europe.net>

<sup>407</sup> See at <http://ec.europa.eu/social/main.jsp?catId=429&langId=en&moreDocuments=yes>

DGs and Agency's organisational structure, and should be responsible for mainstreaming disability into the work of the DGs or Agency. In terms of coordination, the 'internal focal point' should coordinate actions with the Union's overall focal point. To this purpose, the **Inter-service Group on Disability** could be appointed as the 'internal coordination mechanism' of the European Commission Services.

Currently, the Inter-service Group on Disability (chaired by the Unit for the Inclusion of Persons with Disabilities) meets every two months and provides a 'forum' where representatives from the various DGs and Commission Services exchange information, and develop proposals for better cross-sector co-operation. The purpose of the group is to raise awareness of disability issues, and encourage inter-sectoral co-operation within the Commission in this field. Today, 21 DGs and Commission Services are represented within the Inter-Service Group.<sup>408</sup> According to the DAP Mid-term evaluation,<sup>409</sup> the Inter-Service Group on Disability has played a valuable role in facilitating joint coordination on disability issues between different DGs. However, the evaluation report underlines that the effectiveness of the Inter-service Group (including its oversight role in monitoring the EU DAP's implementation) could be improved if there was a **stronger high-level political commitment** to disability within the Commission.

Consequently, in view of the effective implementation of the UN CRPD by the EU, the Inter-Service Group on Disability (ISGD) should strengthen cooperation between DGs of the European Commission, and be re-structured with the aim to ensure a stronger high-level political commitment. Therefore, it would be advisable for the ISGD to be chaired by the overall focal point within the Commission, and be composed of the 'internal focal points' of the different Commissions DGs. These 'internal focal points' should be placed at the highest level of their internal structures (*i.e.* Heads or Directors). Last but not least, the ISGD should meet on a regular basis in order to discuss, develop and follow-up internal policy objectives; exchange information, experiences and good practice; discuss possible internal challenges and develop solutions.

Considering **coordination with (and among) the EU Member States**, the EU should ensure the consistent implementation of EU legislation/policy to implement the UN CRPD. Assuming that the EU Member States will designate their national focal points at the highest level of government, the **High Level Group on Disability** could become

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<sup>408</sup> See at: [http://ec.europa.eu/employment\\_social/soc-prot/disable/strategy\\_en.htm](http://ec.europa.eu/employment_social/soc-prot/disable/strategy_en.htm)

<sup>409</sup> CSES, *Mid-term Evaluation of the European Action Plan 2003-2010 on Equal Opportunities for People with Disabilities*, Final Report, June 2009, published at: <http://ec.europa.eu/social/main.jsp?catId=429&langId=en&moreDocuments=yes>

the ‘coordination mechanism’ between the EU and the Member States, and among the Member States.

Currently, the High Level Group on Disability (HLGD)<sup>410</sup> provides a ‘forum’ for representatives from the EU Member States, working on disability (mainly at governmental level), and from civil society organisations, including organisation that represent the interest of persons with disabilities. The work of the HLGD is overseen by the Unit for the Integration of People with Disabilities. According to the DAP Mid-term evaluation, the HLGD appears to have worked well, but *“there is scope for improved partnership working in the future, given that national authorities were not that closely involved in the preparation of the 2003 DAP and in determining its thematic priorities”*.<sup>411</sup> Consequently, in view of the effective implementation of the UN CRPD, the HLGD should:

- Strengthen cooperation between the ‘focal point’ of the EU and the ‘focal points’ of the EU Member States, and among Member States’ ‘focal points’.
- Be re-structured and ensure stronger and high-level political representation. To this purpose, Members of the HLGD should be appointed from the ‘focal points’ of the EU Member States on the one hand, and on the other from representatives of organisations of persons with disabilities that operate at the EU level (e.g. EDF), human rights NGOs, social NGOs and other relevant stakeholders.<sup>412</sup> In addition, internal focal points from the DGs of the Commission could also be members, or be invited to meetings, where a relevant issue is on the agenda.
- Meet on a regular basis in order to exchange information, experiences and good practice; discuss, develop and follow-up common policy objectives; discuss possible challenges and develop solutions.

Besides the use of the HLGD, coordination between the EU and its Member States could also be fostered through the use of other soft coordination tools, such the use of **the “open method of coordination”** (OMC). The OMC is a form of collective action which fosters compatibility, consistency or convergence between Member States’

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<sup>410</sup> Information related to the HLGD is available at: [http://ec.europa.eu/employment\\_social/soc-prot/disable/hlg\\_en.htm](http://ec.europa.eu/employment_social/soc-prot/disable/hlg_en.htm)

<sup>411</sup> CSES, *Mid-term Evaluation of the European Action Plan 2003-2010 on Equal Opportunities for People with Disabilities*, Final Report, June 2009

<sup>412</sup> It should be noted that the DPA Mid-term Evaluation report highlighted that the composition of the HLGD could be extended to include a small number of additional organisations, such as the European Agency for Special Needs Education, in order to ensure adequate technical expertise in specific thematic areas of the DAP not already well-represented.

public policies. Covering a variety of arrangements, it stands half way between pure legislative integration and straightforward cooperation.

In addition, the European Disability Forum has suggested the development of a **European Pact on Equal Rights of Persons with Disabilities**<sup>413</sup> with the aim to provide “clear long term direction to disability policy at EU level” and outline ways to achieve this general goal. Specifically, the Pact will aim at mainstreaming of disability in EU policies and institutions; ensuring clear commitments from EU policy-makers and close involvement of organisations of persons with disabilities. To achieve these goals, the Pact foresees enhanced coordination between EU and national levels; the definition of progress indicators; and systematic follow-up.

### 5.5.3 A framework to promote, protect and monitor

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Considering the establishment of a framework within the EU, research for this study has revealed that, at the current stage, there is no single EU body with the adequate mandate to effectively perform all the tasks set forth in Article 33(2) UN CRPD. As mentioned above, the EU can delegate to Executive Agencies (having their own legal personality) specific functions or powers. To date, agencies have been created on a case-by-case basis and followed the evolution of the growth of EU policy competencies. Additionally, delegation of functions to Executive Agencies is limited to the operational implementation of the EU’s policies or programmes, and clearly defined and closely supervised by the delegating institution on the basis of specific and objective criteria.<sup>414</sup> Moreover, such delegation cannot concern discretionary powers involving a margin of political judgement, as this would jeopardise the balance of powers between the institutions. Therefore, even if an Agency is appointed as the ‘framework’, many requirements set forth in the UN CRPD, such as independence, will not be met. However, there are at the current stage certain bodies that could perform some relevant tasks and therefore could become part of the framework. The EU Fundamental Rights Agency, for example, may perform some of the ‘framework’ tasks. It is thus necessary to outline the Agency’s mandate and identify which of the tasks the Agency could assume, with the aim to implement Article 33(2) UN CRPD.

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<sup>413</sup> See European Disability Forum, Proposal for a European Pact on Disability, p.3. Available at: [http://cms.horus.be/files/99909/MediaArchive/library/EDF\\_proposal\\_for\\_a\\_European\\_Disability\\_Pact.doc](http://cms.horus.be/files/99909/MediaArchive/library/EDF_proposal_for_a_European_Disability_Pact.doc)

<sup>414</sup> It is worth recalling that the only provision concerning with delegation is current Art. 211 TEC. This provision states that the Commission can “exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter”. The interpretation of this provision by the ECJ led to consider that wide discretionary powers can be delegated to the Commission (see *inter alia* ECJ, 15 July 1970, *ACF Chemiefarma NV v Commission*, Case 41-69, [1970] ECR 00661. The leading case on delegation of powers to bodies other than the community institution is the *Meroni* Case (ECJ, 13 June 1958, *Meroni v. High Authority*, Case 9/56, [1957/1958] ECR, 133).

The EU **Fundamental Rights Agency** (FRA) was established in 2007,<sup>415</sup> with the aim to provide assistance and expertise on fundamental rights to the EU institutions and the Member States. To this purpose, FRA supports the EU institutions and Member States when they take measures, or formulate courses of action within their respective spheres of competence to fully respect fundamental rights. The FRA works with the EU institutions advisory bodies, and other agencies covering areas which cut across the various fields of fundamental rights. It also works with EU Member States and their national and local governments, National Human Rights Institutions (NHRIs), equality bodies, civil society and other relevant stakeholders, which influence the human rights agenda within countries and at the EU level.

The tasks of the Agency are “constrained” by the Multi-Annual Framework (MAF); its main powers are primarily information-based.<sup>416</sup> The areas of the Agency’s activities are generally grouped around the fight against racism, xenophobia and related intolerance (Article 5 MAF). Discrimination on the basis of disability is included among the Agency’s thematic areas of activity. To this end, FRA could possibly assume the tasks of *‘promoting and monitoring’* of the implementation of the UN CRPD. The Agency does not have competence to ‘protect’ (e.g. cannot receive complaints, or petitions, concerning individual situations, nor can it intervene as a third party before the ECJ). However, the tasks of ‘promoting and monitoring’ will again be limited to the development of reports, information support and possibly awareness-raising campaigns. In addition, the Agency cannot challenge the legality of EU, or national acts, and cannot submit recommendations on any proposed EU instruments, nor can it propose amendments to existing EU instruments.

Consequently, the Fundamental Rights Agency with its current mandate is not a powerful body, and it does not fulfil the necessary requirements to become the ‘framework’ as such. The Agency could possibly assume the tasks of ‘promoting and monitoring’ the UN CRPD. However, in order to ensure effectiveness in this respect, the Multi-Annual Framework (MAF) for the period 2007-2012, which was adopted in 2008 and which is currently in force, should be amended. In this case, the Commission should prepare a proposal for a new Council decision amending the previous one in order to include the ‘monitoring and promotion of the UN CRPD implementation’ among the Agency’s tasks. To this purpose, a list of specific actions that the Agency should undertake (following the UN CRPD requirements) should be included in the MAF. Considering the length of time necessary to adopt a new Council Decision, new

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<sup>415</sup> FRA was established by Council Regulation (EC) No 168/2007 of 15 February 2007 (based on Art. 308 TEC). The website of FRA is available at: [http://fra.europa.eu/fraWebsite/home/home\\_en.htm](http://fra.europa.eu/fraWebsite/home/home_en.htm)

<sup>416</sup> Article 2 of the Council Regulation (EC) No 168/2007, states that the Agency should collect, record, analyse and disseminate relevant, objective, reliable and comparable information and data, including results from research and monitoring communicated to it by various European and national actors.

actions/activities to promote the implementation of the Convention could be set out in the future Annual Work Programmes (2010 and subsequent years), adopted by the Management Board in accordance with the Multiannual Framework, on the basis of the draft submitted by the Agency's Director after the Commission and the Scientific Committee have delivered an opinion.

Considering the requirement of '**protection**' set forth in Article 33(2) UN CRPD, existing protection mechanisms (Ombudsman and courts) are also not adequate to effectively 'protect' persons with disabilities. The **European Ombudsman**<sup>417</sup> could possibly serve as a 'complaint mechanism', but it can only provide a means of recourse in relation to administrative failings of the EU institutions and bodies. With this limitation, the European Ombudsman could provide a 'complain mechanism' for persons with disabilities, for matters related to unfairness and discrimination on the basis of disability by the EU institutions and bodies. However, the Ombudsman cannot fully ensure protection of persons with disabilities, as envisaged by the UN CRPD for various reasons. First of all, the Ombudsman cannot investigate complaints against national, regional or local authorities in the Member States,<sup>418</sup> even if the complaints concern EU matters (e.g. state agencies); or the activities of national courts or ombudsmen;<sup>419</sup> or complaints against businesses or private individuals. In addition, the Ombudsman cannot launch inquiries on its own initiative; inquiries always need to be based on an individual complaint. The Ombudsman cannot represent complainants before courts and tribunals, nor can it undertake 'strategic litigation'. Consequently, the European Ombudsman could, under the UN CRPD, only provide limited protection.

Considering judicial protection, the **European Court of Justice** (ECJ), the **General Court** (formerly called European Court of First Instance - CFI) and the **European Civil Service Tribunal** (ECST) could possibly enhance disability rights protection at the EU level; though several 'structural' limitations may pose significant challenges to this. The first **challenge** arises from the probable lack of direct effect of the UN CRPD provisions. It is worth recalling that none of the provisions of the UN CRPD seem to be 'sufficiently clear, precise and unconditional', as required by the ECJ for a provision to have direct effect. In this respect, UN CRPD principles cannot be invoked in national or EU Courts. However, a national court could still request a preliminary ruling from the ECJ under Article 234 TEC (now Article 267 TFEU) in order to obtain guidance as to

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<sup>417</sup> Website: [www.ombudsman.europa.eu](http://www.ombudsman.europa.eu)

<sup>418</sup> If the Ombudsman is not able to investigate the complaint, he can transfer the case to a member of the European Network of Ombudsmen, or he can advise enquiring persons to contact a member of the Network. Established in 1996, the Network comprises all national and regional ombudsmen in the EU Member States, as well as those of the applicant countries for EU membership, Norway and Iceland, and committees on petitions in the EU.

<sup>419</sup> The European Ombudsman is not an appeal body for decisions taken by these entities.

whether a provision in the UN CRPD has direct effect, *i.e.* whether it confers rights on individuals which national courts are bound to protect.

The second **challenge** arises from the limitations inherent to indirect access to the Court of Justice, and from the expressly limited direct access of individuals to the General Court (formerly called European Court of First Instance).<sup>420</sup> However, with the Treaty of Lisbon in force, individuals and private parties, such as civil society organisations and organisations representing the rights of persons with disabilities, may potentially be able to rely on Article 263 TFEU<sup>421</sup> to challenge the validity of some EU legislation, such as directives and regulations that are directly applicable, and bring cases directly before the EU courts (and specifically the General Court). Based on Article 263 TFEU, individuals and private parties could be able to challenge EU legislation if they can prove that it is of ‘direct concern’ to them. This means that individuals and private entities should prove that the measure they wish to challenge produces direct legal effects on them. Under the Treaty establishing the European Community a second complicated requirement had to be met before a private party could bring a challenge, related to the need to show ‘individual concern’. This requirement was very difficult to satisfy and has now been dropped from the new Article 263 TFEU. Nevertheless, Article 263 TFEU should still be interpreted by the EU courts, and it is not yet clear how easy it will be for individuals, and private parties, to gain direct access to the courts in practice.

Consequently, findings of this study suggest that the current bodies of the European Union do not offer the possibility to create an effective ‘mix’ of institutions to ensure that all three core tasks of the ‘framework’ (‘protect, promote and monitor’) will be effectively implemented. A critical challenge arises from the fact none of the current EU bodies meet the requirement of ‘independence’. Even if the mandate of the FRA changes, major gaps to the effective ‘protection’ of persons with disabilities will remain. The table below aims to illustrate the tasks that the FRA and the EU courts could assume under Article 33(2) UN CRPD and the areas where challenges remain.

*Figure 3 A ‘framework’ within the European Union*

Obligations under Article 33(2) UN CRPD	Body which could be responsible at the EU level
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<sup>420</sup> Dr. D. Ferri, Research paper on “Article 33 UN CRPD implementation within the EC” for the Study VC/2008/1214

<sup>421</sup> Article 263 TFEU amends Article 230 TEC. Article 263 TFEU reads as follows: “Any natural or legal person may institute proceedings [...] against an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures.’ Acts that can be reviewed include acts of the European Council and of bodies, offices or agencies of the Union. The Committee of the Regions is added to the list of semi-privileged applicants.”

Promote the implementation of the UN CRPD	FRA within the limit of ‘supporting’ EU and national actions by providing information and expertise, when needed. The MAF should be amended in order to give FRA a mandate to ‘promote the UN CRPD’ and be able to develop and submit recommendations on the adoption or adaption of EU / national instruments
Monitor the implementation of the UN CRPD	FRA within its limits (drafting/publish report) The MAF should be amended in order to give FRA a mandate to ‘monitor the UN CRPD’ and include a clear task list for this purpose
Protect the implementation of the UN CRPD	Ombudsman within the scope of its activity (EU maladministration) National courts (at Member States level) the Court of Justice, the General Court and the Civil Service Tribunal (at EU level but within limits; no direct access of individuals)

As is evident from the table above, even if available EU entities are adapted, and are designated as the EU’s ‘framework’ under Article 33(2) UN CRPD, the EU will not manage to meet the requirement of having at least one independent mechanism as part of its ‘framework’. Therefore, at the current stage, the *ideal solution* for the EU would be to create a **new Ad hoc Body** (but not an agency), to perform the tasks of the ‘framework’ to promote, monitor, and protect (within limits).<sup>422</sup> This new body could be named “EU disability rights monitoring body”.

The **Decision** to create this body will need to be taken by the Council, following a proposal from the European Commission and after consultation with the European Parliament. The Decision will need to reflect the mandate, responsibilities, financing, composition and other main characteristics of this body.

The **mandate** of the Ad hoc EU Disability Rights Monitoring Body should be to promote, protect (within limits), and monitor the implementation of the UN CRPD in the European Union, and on the basis of the competences reflected in the Council decision for the conclusion of the UN CRPD, by the Union.

The **responsibilities** of the Body will be those that will allow it to fulfil the given mandate, and should include (on the basis of the Article 33(2) UN CRPD and the Paris Principles) the following:

- Provide recommendations on any proposed EU legislation, soft law, establishment of new EU agency or body, in order to ensure that it adequately

<sup>422</sup> Even if a new body is created, the task of ‘protection’ should be shared with the courts of the EU.

takes into account the rights of persons with disabilities as foreseen in the UN CRPD

- Advise on the need for amendments to existing EU legislation, soft law, mandates of existing EU agencies and other bodies in order to align them with the provisions of the UN CRPD.
- Present an annual (bi-annual) report to the European Parliament on the implementation of the UN CRPD at the EU level
- Meet regularly with the Council working group on human rights (COHOM) to discuss the human rights of persons with disabilities
- Contribute to the annual EU report on human rights by ensuring that the rights of persons with disabilities are adequately taken into account
- Participate in the reporting process of the UN CRPD by presenting its own independent report to the UN Committee on the Rights of Persons with Disabilities
- Follow up on the recommendations adopted by the UN Committee on the Rights of Persons with Disabilities directed at the European Union
- Cooperate with the United Nations and other organisation in the UN system, the regional institutions and the national human rights institutions.
- Establish communication with all national bodies established by EU Member States that have been allocated the functions foreseen under Article 33(2) UN CRPD, by, among others, organising an annual meeting of all these bodies.
- Receive individual complaints that would not fall under the competence of the European ombudsman and the European Civil Service Tribunal.
- Undertake awareness raising measures on the UN CRPD within the EU institutions, EU country offices, agencies and bodies and ensure that in all relevant EU awareness raising campaigns and actions, in particular any human rights education programmes, the rights of persons with disabilities are adequately reflected
- Provide information to EU wide media on the rights of persons with disabilities

Additionally, the EU should adequately **fund** the Monitoring Body, in order to be enabled it to exercise its functions, providing an adequate number of paid staff members and its own premises. This funding will need to be specifically earmarked in the EU budget, and it will be the responsibility of the European Parliament to ensure

that the funding provisions will not undermine the independence of the EU disability rights monitoring body.

Regarding **composition**, the Body should be wide enough to cover the expertise needed and composed by an odd number of members so as to ensure effective voting and decision-making processes. The *nomination process* for the members shall be defined in the decision establishing this body and should include, among others, the following elements:

- Establishment of a selection committee of renowned independent human rights experts that will make a recommendation based on the quality of the nominated individuals;
- Defined set of criteria for the members which will include: independence, proven experience in the area of human rights and disability, knowledge of the functioning of the European Union; and
- Defined set of criteria for the group which reflect the Paris Principles: gender balance, diversity of disability, representation of different EU countries, mixed professional competences (legal, sociological, communication, etc.) and origin (NGOs, human rights institutions, academia, social partners).

Governments, European Parliament, organisation representing the interests of persons with disabilities, and the European Commission should nominate members for the Ad hoc EU Disability Rights Monitoring Body.

The proposal made by the selection committee should be endorsed by the College of Commissioners.

The mandate of the members of this body should be five years, renewable once.

Members of the Body will need to devote a minimum of days per year to this work, for which they would perceive a *per diem compensation*.

The members would elect among themselves a Chair, Vice-Chair and Rapporteur.

In relation to the body's **functions**, the members of the body should define its own way of functioning to allow the adequate exercise of its responsibilities, which *inter alia* should include:

- Regular meetings of the body;
- Adequately publicizing its work through the adequate media and especially through electronic media;
- Establishment of working groups;

- Regular communication with EU bodies in charge of protecting the rights of EU citizens, including the European Ombudsman, the Court of Justice, the General Court and the Civil Service Tribunal; and
- Regular communication with the EU Fundamental Rights Agency.

Considering that the creation of a new ad hoc body requires a decision from the Council, the main **challenge** lies to whether or not the Members of the Council (representatives of the EU Member States) will have the political will to establish a new ad hoc body for the UN CRPD. In case the EU Member States reject the Commission's proposal for the establishment of such body (possibly for political reasons), the option of **sharing** the tasks to 'promote, protect and monitor' among different (existing) entities should be considered carefully.

## 5.6 General Recommendations for States Parties on Article 33

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States Parties should undertake an **assessment** of existing institutions that can be mandated with the tasks set forth in Article 33 UN CRPD.

States Parties should appoint an overall **focal point** for matters related to the UN CRPD. This focal point should be placed at the highest executive level of the State Party. According to the Office of the United Nations High Commissioner for Human Rights (OHCHR)<sup>423</sup> the **tasks** the focal point should include:

- Promoting awareness of the UN CRPD within the staff of the public authority;
- Producing a UN CRPD implementation action plan for the relevant public authority, covering both internal elements (staff, accessibility provisions) as well as external elements (policy area);
- Establishing contact with representative organisations of persons with disabilities to proactively involve them in the work of the public authority;
- Providing technical guidance to other staff members at the executive level on how to fully respect the provisions of the UN CRPD
- Producing annual reports to be sent to the Head of the public authority and to any body in charge of overseeing the work of the public authority;
- Promoting specific actions to support the human rights approach, such as research, studies and seminars, involving experts, universities, public agencies and authorities, civil society;

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<sup>423</sup> See OHCHR Study on National Frameworks for the Promotion and Protection of the Human Rights of Persons with Disabilities, available at <http://www2.ohchr.org/english/issues/disability/documents.htm>

- Reviewing regularly any reservations or declarations on the UN CRPD and make recommendations as to whether they should be removed, and also consider whether the state should ratify the Optional Protocol and make recommendations to that effect;
- Promoting compliance with the UN CRPD by sub-national entities in federal states.
- Co-ordinating disability-related aspects of periodic Party reports submitted to all Treaty monitoring bodies.

States Parties should, within their system of organisation, designate departmental focal points within every governmental department or agency. Every departmental focal point should be placed at the highest level of the governmental department, or agency. The tasks of the departmental focal point should reflect the task of the overall focal point, but their scope should be limited to the department or agency that they are placed in. Departmental focal points should coordinate their work with the overall focal point of the State Party.

A **coordination mechanism** within government is also deemed necessary to ensure coherent implementation across ministries and agencies.

States Parties should ensure that all governmental departments, or agencies, have integrated into their agenda (portfolio) respect, and inclusion, of the rights of persons with disabilities.

States Parties should ensure that all governmental departments or agencies are equally aware of disability rights (as embedded in the UNCRPD).<sup>424</sup>

Finally, an **independent mechanism** (or mechanisms), compatible with the Paris Principles, should also be designated (and if not existing, established) and mandated to '*promote, protect and monitor*' implementation, as described in section 5.5 of this report.

For the purposes of Article 33 UN CRPD implementation, States Parties should promptly initiate **consultation** with civil society organisations and national human rights institutions regarding their role in monitoring and promoting the implementation of the Convention.

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<sup>424</sup> See CRPD/C/2/3, supra note 386

## 6.0 Final recommendations for policy makers

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Based on obligations deriving from the UN Convention on the Rights of Persons with Disabilities, and the core findings of the study, Section 6 aims at providing recommendations on how policy-makers should implement the UN Convention on the Rights of Persons with Disabilities (at national and EU levels), and effectively achieve its objectives. To this end, this section suggests good practices for matters related to the initial implementation phase of the Convention, the implementation of Article 33 UN CRPD as well as the implementation of specific issues covered by the Convention.

It is worth recalling that every section of the present report included general as well as specific recommendations on changes that need to be made by the EU (as appropriate)<sup>425</sup> and/or the Member States with the aim to fully achieve the objectives of the Convention. This section compiles important recommendations and provides help and long term guidance to the EU, its Member States and various stakeholders for matters related to the implementation of the UN CRPD.

### 6.1 Suggested Practices for the Initial Implementation Phase

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1. The ratification and implementation of any human rights treaty, including the UN CRPD, should be considered an important endeavour. The process of ratification of the UN CRPD, and planning for its implementation, should be treated with the same level of seriousness accorded to other major national and supranational activities.
2. The EU and its Member States, as Parties to the UN CRPD, should **avoid**, where at all possible, **the use of reservations, interpretative declarations or 'explanatory memorandums'**.

The Office of the High Commissioner for Human Rights has recommended that “Parties to the UN CRPD should carefully evaluate the opportunity to lodge reservations, or interpretative declarations, to the Convention. Human rights treaty bodies have consistently expressed the view that reservations might have the effect of diminishing the scope of protection afforded by treaties.”<sup>426</sup>

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<sup>425</sup> For the particular situation of the EU on issues related to 'international responsibility', please see sections 1.2 and 3.2 of this report. For recommendations on changes that may need to be made in EU instruments for matters covered by the Convention, see Annex IV of this report.

<sup>426</sup> Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities. Available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.48.pdf>

Where Member States, or the EU, determine that a reservation to the UN CRPD is unavoidable, it should endeavour to *withdraw the reservation at the earliest possible opportunity*.

3. The process of ratification (or conclusion) offers a great opportunity for **awareness-raising** and promoting understanding of the UN CRPD. Therefore, it is advisable for the EU and its Member States to launch awareness-raising campaigns at European and national levels, in order to inform all people about the rights of persons with disabilities, and obligations deriving from the ratification (or conclusion) of the UN CRPD.

As highlighted by the OHCHR Thematic study on enhancing awareness and understanding of the UN CRPD (A/HRC/10/48),<sup>427</sup> where States Parties have engaged in adequate consultation<sup>428</sup> with non-governmental stakeholders, civil society and in particular DPOs, prior to the UN CRPD ratification, this appears to result in a positive impact on the UN CRPD implementation. In addition, the study underlines the beneficial impact of officially translating and widely disseminating the UN CRPD in national languages prior to the ratification.

4. The EU and Member States, as Parties to the UN CRPD, should widely **disseminate** the text of the Convention, any relevant information related to ratification (or conclusion), and any other general information about the UN CRPD (e.g. obligations deriving from the UN CRPD), within all relevant departments (or agencies) of government, as well as to major interest groups, including persons with disabilities and their representative organisations, NGOs, political parties, the judiciary and academia, and other educational institutions. The text of the UN CRPD and all relevant information should be provided in accessible formats, as required by the Article 9 UN CRPD.
5. The Member States of the EU should **translate** the text of the UN CRPD into national languages, as well as minority languages, in order to ensure that all people in their communities, and in particular people with disabilities, are adequately

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<sup>427</sup> See Study of the High Commissioner for Human Rights on key legal measures for the ratification and implementation of the Convention on the Rights of Persons with Disabilities (A/HRC/10/48), available at: <http://www2.ohchr.org/english/issues/disability/documents.htm>

<sup>428</sup> Ibid, The Study defines as 'adequate', a consultation process that takes place at the level of government departments and agencies and (where applicable) State and territory level, with the active involvement of non-governmental stakeholders, civil society and in particular DPOs. Such consultation should enhance understanding of the CRPD, contribute to ascertaining compliance of laws, policies and programmes with the CRPD and identify areas for improvement.

informed. Translation should be a high priority and should take place as soon as possible.<sup>429</sup>

6. Effective **use of the media** should be made to obtain the views of members of the public on the implementation of the UN CRPD. This is particularly important in large and geographically dispersed countries. The internet, radio and television should be used to disseminate information about the UN CRPD and processes of ratification (or conclusion), as well as implementation, and to obtain input from the public. Particular attention should be given to **accessibility**, to ensure that all sectors of the disability community have the opportunity to receive information, and provide inputs on implementation, in line with Article 9 UN CRPD.
7. As part of the UN CRPD implementation process, and as a matter of first priority, the EU and Member States should undertake a **screening** of EU and national legislation and policy, in order to identify any areas in which legislation or policy fails to meet the obligations under the Convention.
  - The EU and the Member States should ensure that persons with disabilities are fully involved in this process, and that the meaningful contribution of persons with disabilities and their representative organisations is sought and facilitated. The results of the screening process should be made publicly available and disseminated in accessible formats.
  - Given the cross-cutting nature of disability, the screening should be **horizontal** in order to ensure that all legislation, policies and programmes are reviewed and evaluated.
  - Such screening should consider the UN CRPD “not only article by article, but also **holistically**, recognising the interdependence and indivisibility of human rights.”<sup>430</sup>
8. Given the cross-cutting nature of disability, and the diverse number of organisations and individuals with an interest in the implementation of the UN CRPD, the EU and Member States should consider the establishment of a **Steering Committee** with a mandate to review legislation, and recommend on reforms needed in law and policy (such as adoption of disability specific legislation), in order to fully meet the requirements set forth in the UN CRPD. The Committee should be comprised of representatives of relevant government departments, the disability community, civil society and other stakeholders. The Committee should be **chaired at a senior**

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<sup>429</sup> It should be recalled that as the text of the UN CRPD was annexed in Council Decision 2010/48/EC (see supra note 13) it has been translated into all EU languages by the Commission and is available at: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2010:023:SOM:EN:HTML>

<sup>430</sup> See A/HRC/10/48, supra note 436, p. 10, para. 30

**level** and oversee screening and implementation processes, especially where law and policy reform is being undertaken. The Committee should also have the responsibility of establishing a **coordinating mechanism** to support the review of existing law and policy in terms of its conformity to the UN CRPD, and manage consultations with stakeholders, making logistic arrangements, coordinating resources and disseminating information.

9. Following ratification (or conclusion), the Member States and the EU, working through the designated focal point, should organise initial **consultations** on implementation of the UN CRPD, within government departments, and between government departments and civil society.
10. The EU and Member States, working through their focal point, should arrange **public meetings** to provide opportunities for persons with disabilities, their representative organisations, other non-governmental organisations, and members of the public to express their views on the UN CRPD implementation by the EU and Member States. Where appropriate, for example in the context of parliamentary human rights committees, **public hearings** should be held.
11. The EU and Member States should allocate sufficient resources to ensure that an effective consultation process concerning the implementation of the UN CRPD can take place.
12. An initial consultative meeting or series of meetings, at EU and national levels should be organised before the screening process, with the aim to obtain the views of various interest groups regarding implementation and necessary law and policy reforms. This meeting (or meetings) should address the process of screening and implementation by the EU and Member states.
13. **Consultation processes** on the implementation of the UN CRPD should address (but are not limited to) the following:
  - the situation of persons with disabilities within the EU or Member States;
  - the existing legal framework for ensuring the rights of persons with disabilities, whether by constitution (or Treaty), or by legislation;
  - the need for law and policy reform in the light of the full and effective implementation of the UN CRPD;
  - current mechanisms within, and independent of, EU or Member States governments to investigate allegations of human rights violations against persons with disabilities, provide education and disability rights promotion;

- the existence of national bodies and mechanisms with the mandate to monitor the rights of persons with disabilities; and
  - the adequacy of resources to ensure implementation of the UN CRPD and compliance with monitoring procedures.
14. The consultation process relating to all aspects of implementation should **ensure effective participation** by persons with disabilities, who may often be subjected to multiple or aggravated forms of discrimination, and those who require more intensive support, in keeping in line with the UN CRPD, Preamble (j) & (p).
15. In the light of the overall consultation process, and throughout the course of implementation, the EU and Member States' governments should prepare **recommendations** regarding the need for law and policy change in order to implement (or to align laws with) the UN CRPD.
16. Based on the results of the screening process, the EU and Member States should **adopt** appropriate legislative, administrative and other measures necessary to ensure implementation of all rights recognised in the UN CRPD. In taking these measures, the EU and Member States should take into account the general principles and obligations laid down in Articles 3, 4 and 5, as well as Articles 6 and 7 of the UN CRPD (on inter-sectionality).
17. EU and Member States governments, in consultation with persons with disabilities and their representative organisations, should proceed to **amend** expeditiously legislation in order to bring EU and national legal frameworks into alignment with the UN CRPD.
18. If the wording of EU or national legislation is open to more than one interpretation, the EU and Member States should adhere, as far as possible, to the **interpretation** that renders the provision most consistent with the UN CRPD.<sup>431</sup> Therefore, all EU and national governmental institutions, including the judiciary (EU and national Courts), should apply EU and national law in a manner that is most consistent with the UN CRPD. To this purpose, both the EU and Member States should organise and provide appropriate training of public servants, including judiciary staff, on the rights recognised in the Convention and obligations deriving from it.<sup>432</sup>
19. Any draft legislation, amendments to existing legislation, or administrative regulations designed to bring laws into alignment with the UN CRPD should be the subject of further consultation with persons with disabilities and their representative

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<sup>431</sup> See also A/HRC/10/48, supra note 436, p. 18, para. 58

<sup>432</sup> It is worth recalling that the Commission committed to fund under PROGRESS training seminars for legal and policy practitioners on the UN CRPD. See supra note 4

organisations and other interested parties (e.g. employers, teachers, legal operators, engineers or others). To this end, the EU and Member States should follow **participatory decision-making** processes.

20. Where proposals for legal reforms are made, the EU and Member States should take into account Article 4(4) UN CRPD, which makes clear that the Convention does not undermine or replace higher standards of protection that might be provided for in EU or national legislation.<sup>433</sup>

21. The **implementation** of the UN CRPD should be understood as an ongoing process. Implementation of the UN CRPD may be done by EU or national government structures, civil society, or as a result of international cooperation. Whatever the initial stimulus, and in respect of any component of implementation, the process should be accessible to, and inclusive of, persons with disabilities and their representative organisations from the outset, in keeping in line with Article 4(3) and the principle of participation as reflected in Article 3 of the UN CRPD.

22. The EU and Member States, as Parties to the UN CRPD, should include in all phases of the implementation process, the following stakeholders:

- Persons with disabilities and their representative organisations, in line with Article 4(3) UN CRPD;
- Key figures of government, including Heads of government, and responsible ministers (or Commissioners);
- Representatives of major political parties;
- Parliamentarians, in particular where parliamentary Human Rights Committees exist;
- Relevant executive agencies;
- Independent national human rights institutions, whether of a general (e.g. national human rights commission) or disability-specific (e.g. disability ombudsman or council) nature;
- Human rights NGOs, including specialised organisations, such as NGOs focusing on the rights of women and children, and on social issues, such as health, housing, education, or other;
- Members of the judiciary and jurists;
- Professional groups, including associations of teachers, lawyers, and journalists;
- Disability rights/human rights experts and academics.

23. At the request of a Member State, representatives from the European Union, the United Nations, or other international organisations, or thematic experts might

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<sup>433</sup> See A/HRC/10/48, supra note 436, p. 11 para. 34

participate in the national implementation process, in an advisory capacity. This may occur within the framework of, for example, a **technical cooperation programme**.

## 6.2 Suggested practices for the implementation of Article 33 UN CRPD: Institutional Apparatus

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24. The EU and Member States should designate one (or more) **focal point(s)** within the governments for all matters relating to the implementation of the UN CRPD, and in pursuance of implementing Article 33(1). The focal point should be placed at the **highest level** of the executive power to **guarantee** the mainstream impact of its work, and the status of its recommendations, while also serving as a permanent reminder that the rights of persons with disabilities need to be respected in all areas of the government. The focal point should support the Steering Committee (see recommendation N° 8) on specific initiatives, such as the development of proposals for new disability law and policy. The **mandate** and responsibilities of the focal point should include the following:

- Promoting awareness of the UN CRPD within the staff of the EU or Member State (government departments, or DGs; agencies; and others);
- Producing a UN CRPD implementation action plan for the relevant authority (national or European), covering both internal elements (e.g. staff training, accessibility provisions) as well as external elements (specific policy areas);
- Establishing contact with representative organisations of persons with disabilities to proactively involve them in the work of the EU or Member State;
- Providing technical guidance to fellow staff members on how to fully respect and implement the provisions of the UN CRPD;
- Monitor the implementation of the UN CRPD and producing annual reports to be sent to Heads of the EU or Member State, and to any responsible body in charge of overseeing the work of the EU or Member State;
- Promoting specific actions to support the human rights approach, such as research, studies and seminars, involving experts, universities, public agencies and authorities, civil society;
- Reviewing regularly any reservations or declarations on the UN CRPD and make recommendations as to whether they should be removed. The focal point should also consider whether the EU or Member State should (conclude or) ratify the Optional Protocol, and make recommendations to that effect;

- Promoting compliance with the UN CRPD by sub-entities within the EU of Member State;
- Co-ordinating disability-related aspects of periodic reports submitted to all Treaty monitoring bodies.

25. The EU and Member States should consider the establishment or designation of a **coordination mechanism** within government level to facilitate consistency of related actions in different sectors and at different levels, in accordance with Article 33(1) UN CRPD.

- The **EU** should, in particular, consider the establishment of different types of coordination mechanisms in order to ensure coordination among the DGs; between the DGs and other institution of the EU (e.g. Parliament, Council, or other); between the EU and the Member States; and the facilitation of coordination among the Member States. At the current stage, several coordination mechanisms exist within the EU system that could facilitate coordination at all previously mentioned levels (see details at section 5.5.2 of this report). However, existing mechanisms may need some sort of adjustments in order to ensure effective coordination at all levels. Therefore, before any official designation is made, it is recommended that the EU launches a public consultation process with the aim to identify the most appropriate mechanisms that would ensure effective coordination at all levels.
- **EU Member States** should also ensure the establishment of effective coordination mechanisms with the European Union. Close coordination and consultation with the EU is especially important where Member States and the EU share competence. In areas where Member States are facing great challenges (e.g. implementation of Article 12 UN CRPD), the EU could become the platform to exchange views and experiences, and facilitate actions. From the EU law perspective, as the UN CRPD is a mixed agreement, Member States do not act as entirely autonomous subjects of international law when implementing the UN CRPD. Member States are subject to a **duty of loyal cooperation** between themselves and the EU.<sup>434</sup> This duty extends to all implementation phases of the UN CRPD. It is therefore essential for the EU and the Member States to closely cooperate in order to ensure unity at the international representation of the Union, as well as that legislation and policy stemming from the Convention is implemented in a coherent manner.

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<sup>434</sup> See Article 4(3) TEU

26. The EU and Member States should, in accordance with their legal and administrative systems, designate or establish a **'framework'** (such as a disability rights council or human rights commission) for all matters related to the UN CRPD. The framework's mandate should be to 'promote, protect and monitor' implementation of the UN CRPD. Such a framework should include one or more independent mechanisms, which must take into account the **Paris Principles**; for example, the 'framework' should have adequate expertise on disability rights (experts with disabilities should also be included in framework's team) and be adequately funded to fulfil its mandate.

As regards the **EU**, findings of this study suggest that at the current stage there is no EU body that could adequately fulfil the requirements set forth in Article 33(2) UN CRPD. Therefore, the EU should carefully consider the available options for designating a 'creative matrix' of existing bodies to perform the tasks of the 'framework', and the option of establishing a new Ad hoc Disability Monitoring Body (for details see section 5.5.3 of this report). Finally, it is recommended that the EU launches a public consultation process with the aim to identify the most appropriate 'framework' for the EU system.

27. One of the earliest actions of an entity responsible for coordinating work on disability issues within government levels should be to **develop a national disability strategy**, in order to ensure comprehensive coverage of disability rights in human rights action plan (at EU or Member States level).

28. The EU and Member States should provide **adequate resources** to designated bodies (or institutions) for monitoring the implementation of the UN CRPD, pursuant to Article 33 UN CRPD.

29. The EU and Member States should ensure that persons with disabilities and their respective organisations are **involved** in and participating fully in the monitoring process of the UN CRPD implementation, and in accordance with Article 33(3) of the UN CRPD. In particular, there should be sufficient resources to enable the government to undertake a comprehensive public information and education programme to ensure broad knowledge and understanding of the rights of persons with disabilities.

## 6.3 Suggested practices for the implementation of specific issues

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30. The EU and Member States should ensure that all legislation and policy springs from the social model of disability, and should thus be reflected in the overall statement of guiding principles for law and policy reform or development.
31. The EU and Member States should ensure that national **definitions of disability** conform with the understanding of disability as a social phenomenon (Article 1 UN CRPD). Disability legislation (and legislation that applies *inter alia* to persons with disabilities) should unequivocally protect *all* persons with disabilities, including those with severe intellectual or psycho-social disabilities.<sup>435</sup>

As EU legislation is implicitly based on a rights-based approach to disability, it is suggested for the EU to lead by example or use soft law measures (such as communications, guidelines etc) in order provide **guidance** for the Member States on how to achieve a rights-based approach to disability, with the aim to ensure consistency at Member States level, which will contribute to the effective implementation of, among others, the principle of equal treatment.

32. The EU and Member States should ensure that legislation (EU or national) does not limit the scope of the duty to provide **reasonable accommodation**. The duty to provide reasonable accommodation should not only be applied in employment, but in other fields as well (e.g. education, legal capacity etc). The provision of reasonable accommodation is a necessary measure to promote equality, and should thus be extended to all areas of social, political, civil and economic life covered by the prohibition of discrimination.<sup>436</sup>

**Definitions** of reasonable accommodation (EU or national) should follow the UN CRPD definition set forth in Article 2 UN CRPD. Furthermore, the EU and Member States should (by means of measures of hard or soft law nature) set out standards of reasonable accommodation for private and public entities to meet.

Importantly, both national as well as EU non-discrimination legislation should clearly provide that the **unjustified denial of reasonable accommodation** is a form of discrimination.

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<sup>435</sup> See A/HRC/10/48, supra note 436, p. 11 para. 36

<sup>436</sup> See for reference background conference document prepared by the UN Department for Economic and Social Affairs (A/AC.265/2006/CRP.1), "The Concept of Reasonable Accommodation in Selected National Disability Legislation", available at: <http://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm>

33. Equality legislation should foresee the adoption of **positive measures** (such as positive action programmes, or education at all levels on non-discrimination, or others) required to promote *de facto* equality of persons with disabilities, in conformity with Article 5(4) UN CRPD.
34. The EU and Member States should explicitly address the issue of **multiple-discrimination**, including discrimination against women and children with disabilities, in all types of legislation, and in conformity with the general principles and Articles 6 and 7 of the UN CRPD.
35. EU Member States should, in line with Article 16 UN CRPD, take measures directed towards protecting the rights of persons with disabilities to **freedom from exploitation, violence and abuse**. In addition, Member States should ensure that there are mechanisms in place to monitor facilities and programmes designed to serve persons with disabilities. Such monitoring mechanisms should be effective and adequately resourced so as frequent monitoring visits are carried out.
36. EU Member States should reform legislation in order to **abolish restrictive guardianship laws and policies**, in compliance with Article 12 UN CRPD. To this purpose, Member States should also take measures to ensure access for persons with disabilities to **supported decision-making**. In addition, Member States which, in line with Article 12 UN CRPD, provide for the appointment of assistants to support persons with disabilities in decision-making, should establish effective **safeguards** to ensure that such assistants do not exceed their duties and displace the legal capacity of the person they are assisting.
37. EU Member States should implement **direct payment or individualised funding schemes** to allow persons with disabilities to manage their own lives, as required by Article 19 UN CRPD. Such schemes should be accessible to *all* persons with disabilities. Furthermore, Member States should establish **community based services**, which should be adequately funded and sufficiently resourced for the provision of the required hours of personal assistance to support the living and inclusion of persons with disabilities in all aspect of the society. Importantly, Member States should **shift** their focus from improving institutional care to relocating the residents of such institutions in the community.
38. The EU should continue to adopt **legislation**, and **fund** national policies or programmes that facilitate, and ensure for, persons with disabilities independent living, and inclusion in the society. However, secondary legislation should ensure that any indirect tax reliefs for goods and services, or any funding to be awarded, should encourage and promote persons with disabilities independent living, and

should not support any residential, or medical care, or other institution that restricts the autonomy of persons with disabilities.

In addition, EU legislation (of hard or soft law nature) should provide incentives, and promote, to Member States in ensuring the independent living of persons with disabilities. To this purpose, the EU could fund further **research** in order to indentify, and provide, to Member States **cost-effective measures** that facilitate, and ensure, persons with disabilities independent living and inclusion in the society.

39. For matters related to **employment**, and besides the application of the equality principle, it is suggested for the EU and its Member States to develop a common strategy to promote equal opportunities and combat unemployment of persons with disabilities. Additionally, the EU should ensure (through for example coordination) that workers and citizens with disabilities, when moving within the EU, enjoy similar levels of social protection.
40. For matters related to education, EU Member States should ensure that legislation and policy respect the rights of persons with disabilities to be educated in an **inclusive education system**, which guarantees a **common learning environment** for all persons with disabilities. An inclusive education system should be sufficiently funded, while disability-specific training should be provided to all teachers working with pupils with disabilities.
41. For matters related to **general accessibility**, as set forth in the general principles and Article 9 of the UN CRPD, EU Member States should:
  - approach the issue of accessibility from a **broad perspective**, acknowledging that it encompasses not only access to the physical environment, but also access to transportation, information and communications, including information and communication technologies systems, and to other facilities and services open or provided to the public;
  - take measures to ensure that accessibility legislation is implemented effectively in both **urban and rural**<sup>437</sup> **areas**;
  - ensure that the implementation of accessibility legislation is **monitored** effectively and that required standards are adhered to;
  - set out accessibility requirements and standards that would include a clear timeframe for conformity, and indicate the nature of interventions in cases of non-compliance (e.g. financial sanction).

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<sup>437</sup> By 'rural' we refer to non-urban areas, such as villages or other areas with low population density.

Finally, Member States legislation should not place limits on the accessibility principle (e.g. old building should not be exempted from the application of the accessibility obligation).

42. The EU should ensure that the principle of accessibility is respected to all areas falling within the scope of its competence (exclusive, shared or supporting). Therefore, the EU should assess the situation of persons with disabilities in the EU in relation to their access to the internal market, and adapt existing measures so as to ensure full and effective implementation of the accessibility principle wherever possible. The development by the EU of indicators to measure performance of undertakings in the provision of services to disabled users is also another measure that will positively contribute to the full and effective access of persons with disabilities to the internal market.
43. The **European Funds** (such as the European Regional Development Fund, the European Social Fund and the Cohesion Fund) should support all rights protected by the UN CRPD. As accessibility is a general principle of the UN CRPD, and thus applied across all fields covered by the Convention, the EU should allocate financial resources to promote and encourage implementation of the UN CRPD as a whole, and not limit funds to projects or programmes that are mainly focused on accessibility to the physical environment. Finally, EU funding should be subject to the condition that all supported projects (disability-specific or general) are inclusive of, and accessible to, persons with disabilities, and enable persons with disabilities to live independently and participate fully in all aspects of life.
44. EU Member States, should, in line with Article 29 UN CRPD, take measures to ensure that the right of persons with disabilities to participate in political decision-making (including stand as candidates in national election processes) is effectively implemented. Member States should ensure the right of persons with disabilities to **vote by secret ballot** is respected. Finally, Member States should also take measures to ensure that persons with disabilities are informed of their voting entitlements and **assistive measures** are provided to facilitate their voting.
45. EU Member States should, in line with Article 24 UN CRPD, ensure that:
  - adequate resources are available to provide **individualised services and supports** to children and adults with special educational needs;
  - the duty to provide reasonable accommodation is extended to the fields of education;
  - teachers are provided with specialised **training** in supporting children with disabilities; and

- students with disabilities in both urban and rural areas have equal access to education.
46. The EU and Member States should ensure that their **international development** programmes respect the principles set forth in the UN CRPD, and promote the rights of all persons with disabilities, as required by Article 32 UN CRPD.
47. The **EU as a world donor** should, in particular, influence and support third countries to ensure the progressive realisation of the UN CRPD objectives within their territory. To this purpose the EU could apply disability-specific “human rights clauses” to all international partnership agreements that it establishes with third countries.
48. For the effective formulation, implementation and monitoring of policies that give effect to rights recognised in the UN CRPD, the **collection of reliable data**, disaggregated as appropriate to identify barriers faced by persons with disabilities, is necessary, in line with Article 31 UN CRPD. Specifically, it is recommended that the EU together with the Member States, develop an Expert Group on UN CRPD Indicator Development. Such a Group should be composed of individuals with the relevant scientific expertise, representatives of NGOs and DPOs, representatives of European statistical offices, EUROSTAT, and other statistical organisations, and representatives from UN specialty agencies (WHO, ILO, UNESCO), OECD and CoE, and others. This Group should be mandated to collect existing UN CRPD relevant indicator data, reach consensus on potential indicators, pilot existing data sources across the EU, and provide technical assistance to all parties (EU and Member States) on indicator issues. Finally, the EU and Member States should make a creative use of currently available disability data collection instruments.