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## **The European Union and the UN Convention on the Rights of Persons with Disabilities. Selected Institutional Aspects of Implementation**

**Abstract:** The European Union is a party to the United Nations Convention on the Rights of Persons with Disabilities. A broad scope of the UNCRPD provisions makes it covered by different types of EU competence – exclusive and shared. In result, the EU and its Member States may exercise their competence in Convention issues to a different extent – depending on the matter concerned. Considering that it becomes clear that a particular mechanism of cooperation between them is required. It should serve a proper implementation of the Convention.

This contribution aims at presenting the basic rules governing the cooperation between the Council, the Commission and the Member States in relation to UNCRPD's implementation as settled by the relevant Code of Conduct. The analysis starts with the status of the EU as a party to the Convention and the division of competence between EU and Member States in Convention-related matters. Then, the rules for establishment and presentation of EU and Member States positions regarding the Convention issues are described. Next, the problem of focal points and nominations to Convention organs as a part of the implementation process is referred to. The last part concerns briefly the evaluation of the institutional aspects of UNCRPD's implementation which was done by Convention bodies.

**Key words:** European Union, UNCRPD, implementation, institutions, coordination

### **1. Introduction**

According to art. 2 of the Treaty on the European Union (TEU)<sup>1</sup> the prohibition of discrimination remains one of the foundations the Union is based on. At the same time discriminatory treatment of certain categories of persons may be grounded

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1 *Treaty on the European Union* (Consolidated version 2016) (OJ C 202, 07.06.2016).

in various types of criteria. Disability is one of them<sup>2</sup>. In this light it is obvious that the Union – on different levels – aims at counteracting possible manifestations of discrimination, also in relation to persons with disabilities. It finds its reflection in a number of EU primary law provisions – Treaty on the functioning of the European Union (TFEU, art. 10, 19)<sup>3</sup> or the Charter of Fundamental Rights of the EU (ChFR, art. 21, 26)<sup>4</sup> which confirm Union's involvement in the combat against discrimination, including discrimination on grounds of disability.

Simultaneously there is no doubt that what might be an element of enhancing Union's standards of non-discrimination is the EU's participation in international agreements protecting the rights of persons who, because of their personal attributes, are exposed to discrimination. Participation of the EU in the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) of 2007 seems to be one of the examples in that context. The European Union is a party to this agreement since 2009 and considers it a relevant and efficient pillar for promoting and protecting the rights of persons with disabilities, to which the EU (and its Member States) attach the greatest importance<sup>5</sup>. In result, the EU's accession to the Convention is a measure designed to improve the protection of disabled persons with regard to the prohibition of discrimination included in EU law.

The fact that the EU is a party to the UNCRPD produces a row of problems worth analysis. The aim of this contribution is to present and assess a set of selected legal-institutional conditionings of the implementation of the UNCRPD to the Union law. The Convention is an agreement the EU and the Member States (MS) are parties to. It includes also aspects covered by exclusive EU competence and the competence shared with Member States as well<sup>6</sup>. In this light it became necessary to establish a mechanism of cooperation and coordination of EU institutions and Member States activities which would assure a correct and efficient implementation of the UNCRPD in accordance with its provisions. The hypothesis adopted in the

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2 For a definition of "disability" and "disabled person" see e.g.: C. Viale, *Lexicon of Human Rights. Les definitions des droits de l'homme*, Leiden, Boston 2008, p. 44-45.

3 *Treaty on the Functioning of the European Union* (Consolidated version 2016) (OJ C 202, 07.06.2016).

4 *Charter of Fundamental Rights of the European Union* (OJ C 202, 07.06.2016).

5 See: *Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC)* (OJ L 23, 27.1.2010), recital 4 of the preamble.

6 More about the nature of so-called mixed agreements see e.g. in: E. Neframi, *Mixed Agreements as a Source of European Union Law* [in:] E. Cannizzaro, P. Palchetti, R. A. Wessel (eds.), *International Law as Law of the European Union*, Leiden 2011, p. 325-349; M. Niedźwiedz, *Umowy międzynarodowe mieszane w świetle prawa Wspólnoty Europejskiej*, Warszawa 2004; J. Sozański, *Porozumienia międzynarodowe Wspólnot i Unii Europejskiej w świetle norm *acquis communautaire* oraz Konstytucji dla Europy, z uwzględnieniem orzecznictwa Trybunału Sprawiedliwości: studium prawnotraktatowe*, Toruń 2007, pp. 440-449.

following considerations assumes that existing mechanism seems to reflect properly the division of powers between the Union and member States and to enforce their close cooperation. In this dimension it includes arrangements which seem logical and justified with regard to the implementation of an international agreement falling within the competence of the EU and Member States.

This contribution, at the same time, does not aim at giving an exhaustive picture of the problem concerned, but rather at presentation of the basic issues linked to the cooperation between the Council (Presidency), the Commission and the Member States within the context of UNCRPD's implementation.

## **2. European Union as a party to the United Nations Convention on the Rights of Persons with Disabilities**

The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) was adopted on 13 December 2006 and it was opened for signature on 30 March 2007. It includes 50 articles and its main goal is to *promote and protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity* (art. 1). The Convention (and Optional Protocol) entered into force on 3 May 2008.

From the perspective of the EU and its participation in the Convention art. 42 – 43 of the UNCRPD are particularly important since they provide for a possibility to become a party to the Convention also for entities other than states. The Union is not a state and what remains a relevant category in case of the EU is so-called regional integration organisation (RIO). It is defined by the Convention as an *organisation constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the present Convention* (art. 44 (1)). The Convention is open for signature also to them (art. 42) and is subject to their formal confirmation (art. 43). It means that RIOs (including the EU), after signing the UNCRPD, should adopt a formal act expressing their consent to be bound by the Convention.

The Convention was signed by the European Community<sup>7</sup> on the 30 March 2007, however the European Commission was empowered to conduct negotiations concerning the UNCRPD already in 2004. The formal confirmation of the Convention – required in case of RIOs – materialized itself in November 2009 on the basis of the Council Decision (2010/48/EC) concerning the conclusion by the EU of the Convention. In relation to the Union the UNCRPD entered into force in January 2011.

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7 In this contribution, however, the references are made to the European Union as a legal successor of the European Community according to art. 1 TEU.

According to art. 216 TFEU international agreements concluded by the EU are binding upon the Union and its institutions and Member States as well. The UNCRPD is not an exception in that respect. It is, however, worth underlining that by confirming formally the Convention, the EU has made a reservation to one of the UNCRPD provisions, namely to its art. 27 (1), which means that the principle of equal treatment on the grounds of disability does not have to be applied by Member States in armed forces. Nevertheless, the Convention as an act of international law became an integral part of Union's legal order<sup>8</sup>. As such, in line with the view embedded in the judicature and the EU law doctrine, it has supremacy over Union's secondary law<sup>9</sup>. This defines its status and position in the hierarchy of EU law sources and might cause certain consequences from the perspective of interpretation and application of EU secondary law<sup>10</sup>.

And what is the status of the EU as a party to the Convention? What's important is the fact that the Convention references to "State Parties" refer also to regional integration organisations however only within the limits of their competence (art. 44 (2)). In consequence the EU (and other RIOs) – to the extent of their competence – are bound by the same obligations as State Parties to the Convention, including, inter alia, the obligation to provide effective mechanisms for the Convention's implementation or reporting duties. It means at the same time that the Union, on similar rules and with regard to its competence, benefits from rights attributed to State Parties. It may e.g. participate and exercise a right to vote in the Conference of State Parties (art. 44(4)). In this context it is, however, necessary to stress that also EU Member States are parties to the Convention. This circumstance confronted with the nature and scope of Union's competence and the competence of its MS' makes it desirable to establish relevant procedures for coordination of EU and MS activities in the area of UNCRPD implementation. It is confirmed by the preamble to the Decision concerning the conclusion of the Convention by the Union, where it is stated that the EU and the Member States as Contracting Parties to the UNCRPD should be able to fulfil the obligations laid down by it and exercise the rights invested in them in a coherent manner. The issue of EU and Member States competence in the context of the Convention deserves therefore a brief comment.

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8 CJEU Judgement of 18 March 2014 in case *Z. v A Government department and The Board of management of a community school*, C-363/12, paragraph 73. In general, see: K. Lenaerts, P. van Nuffel, *European Union Law*, London 2011, p. 861.

9 K. Lenaerts, P. van Nuffel, *ibidem*. In the context of other international agreements see e.g.: E. Passivirta, *The European Union and the United Nations Convention on the Law of the Sea*, "Fordham International Law Journal", Volume 38, Issue 4, 2015, pp. 1062-1063.

10 CJEU Judgement of 1 December 2016 in case *Mohamed Daouidi v Bootes Plus SL and Others*, C-395/15, paragraphs 40-42; see also: Commission Staff Working Document: *Report on the implementation of the UN Convention on the Rights of Persons with Disabilities*, Brussels 05.06.2014, SWD (2014) 182 final, recital 14.

### 3. UNCRPD and EU's and Member States competence

Article 44(1) UNCRPD requires that regional integration organisations declared – in an instrument of formal confirmation – the extent of their competence with respect to matters governed by the Convention. The European Union fulfilled this obligation. In the Council Decision 2010/48/EC this issue is referred to in Annex II which includes the necessary Declaration of Competence. It is worth noting that this kind of declaration is essential from the point of view of relations between EU institutions and Member States and the way these relations are shaped in the context of UNCRPD implementation.

Annex II (*Declaration concerning the competence of the European Community with regard to matters governed by the United Nations Convention on the Rights of Persons with Disabilities*) lists competences transferred to the EU (primarily to the Community) by the Member States. It also points to the division into EU exclusive competence and competence shared with Member States which has been formally confirmed by the Treaty of Lisbon<sup>11</sup>.

According to Annex II the exclusive competence of the EU in Convention-relevant matters covers: the compatibility of State aid with the common market and the Common Custom Tariff. What is more, to the extent that provisions of EU law are affected by the Convention, the EU has also an exclusive competence to accept such obligations with respect to its own public administration. Consequently, it is the Union who is responsible for regulating the recruitment, conditions of service, remuneration and training of non-elected officials. In Annex II there are also listed areas where the Union shares competence with Member States. These regard mainly: action to combat discrimination on the ground of disability, free movement of goods, persons, services and capital agriculture, transport, taxation, internal market, equal pay for male and female workers, trans-European network policy and statistics.

Obviously, the nature of the EU and MS competence should be evaluated in the light of relevant provisions of TFEU which define the essence of exclusive and shared competence<sup>12</sup>. In a nutshell – in the area of EU exclusive competence, in principle, only the Union may legislate. On the other hand, in the area of shared competence the EU and the Member States may legislate, however the Member States exercise their competence in that respect to the extent that the Union has not exercised its competence or has decided to cease exercising it. In the second case the limits for

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11 *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon*, 13 December 2007 (OJ C 306, 17.12.2007). Provisions referring to that issue are now included in art. 2 – 4 TFEU.

12 For a broader study on EU and member States competence in the context of UNCRPD see: L. Waddington, *The European Union and the United Nations Convention on the Rights of Persons with Disabilities: a Story of Exclusive and Shared Competences*, "Maastricht Journal of European and Comparative Law", vol. 18, no. 4, 2011, pp. 431-453.

the Union's legislative activity are determined by the principle of subsidiarity (art. 5 TEU). At the same time competence not transferred to the Union remain by Member States. Thus, considering the substantial scope of the Convention it is clear that the range of EU and Member States competence in particular Convention matters differs. Some matters fall within the exclusive competence of the Union, some within the shared competence and some fall within competence of the Member States<sup>13</sup>. The extent of Union competence in that respect (exclusive and shared) is illustrated by the Appendix to Annex II which lists almost 50 Union acts referring to matters governed by the Convention<sup>14</sup>.

At the same time the Convention itself (art. 33(1)) requires that the Parties (including RIOs) designate one or more focal points for matters relating to the implementation of the Convention and establish a proper coordination mechanism to facilitate the implementation thereof in different sectors and at different levels. From the perspective of the Union and its Member States and considering the nature of UNCRPD as a mixed agreement such a mechanism seems to be of crucial importance.

#### **4. EU Code of Conduct setting out internal arrangements for the implementation of the UNCRPD – general remarks**

Following art. 33(1) of the Convention, in 2010 the Code of Conduct between the Council, the Member States and the Commission (the Code) has been agreed<sup>15</sup>.

The legal nature of the Code cannot of course be assessed in the light of art. 288 TFEU. It does also not seem to be a typical interinstitutional agreement as provided in art. 295 TFEU. Such agreements are concluded by the European Parliament (EP), the Council and the Commission and may – but do not have to – be of binding nature<sup>16</sup>. The Code of Conduct, on the other hand – has been concluded between Council, Commission and Member States<sup>17</sup>. And it does not include any arrangement

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13 *Ibidem*, p. 438.

14 Some of the acts originally included in the Appendix to Annex II were repealed, see: *Commission Staff Working Document: Progress Report on the implementation of the European Disability Strategy (2010 -2020)*, Brussels, 02.02.2017, SWD (2017) 29 final, Annex 1.

15 *Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities* (OJ C 340, 15.12.2010).

16 About interinstitutional agreements see e.g.: K. Lenaerts, P. van Nuffel, *op. cit.*, p. 925-927; C. Mik, *Europejskie prawo wspólnotowe: zagadnienia teorii i praktyki*, Warszawa 2000, p. 521-526; W. Hummer, From 'Interinstitutional Agreements' to 'Interinstitutional Agencies/Offices?', "European Law Journal" 2007, nr 1, pp. 47-74.

17 What is interesting the Code was adopted without involvement of the EP, which this institution finds regrettable, see: *European Parliament resolution of 20 May 2015 on the List of Issues adopted*

expressly defining its nature as binding. Does it mean that it is impossible to accept its binding character?

It is worth considering that the Code became a measure of the implementation of Council Decision (as a binding act). As such it appears to be a necessary instrument of a proper implementation of the Convention. What's more the signatories of the Code have expressly stated that provisions of the Code *which deal with matters of coordination between the Council, the Member States and the Commission are to be considered as part of the coordination mechanism mentioned in Article 33.1 of the Convention*. In this way the Code becomes a part of a binding international agreement concluded by the Union – a kind of extension of UNCRPD's binding provisions. Taking into consideration the binding force of the Convention the nature of the Code seems to go beyond a purely political declaration.

What would support the above argumentation might be the will of the parties to the Code. And they have expressly stated that it (the Code) "will apply" to particular Convention-related matters. The Code, at the same time, provides for certain reporting and monitoring obligations for the Union and Member States. It might therefore be assumed that the parties to the Code treat it as a binding instrument among them. In other words – their will makes the Code binding in their mutual relations. This way of reasoning could be strengthened by visible links between the Code and the principle of close (sincere) cooperation expressed in art. 4(3) TEU and mentioned in the Code in recital 1. Additionally, regarding the consistent embedment of the Code in the Treaty-based principle of sincere cooperation its binding nature finds considerably strong arguments.

The Code of Conduct may indeed be seen as an act executing the provisions of Council Decision 2010/48/EC, in particular art. 3 and 4 thereof. It should be reminded that these provisions refer basically to the problem of focal points foreseen by the UNCRPD and the representation of the EU and Member States in bodies created by the Convention (mainly Conference of Parties). In this respect the Decision includes basic solutions with regard to the scope of Union competence in matters governed by the Convention. The Code of Conduct provides these solutions with details.

It has to be underlined that also the Code of Conduct refers to the scope of EU and Member States competence in the context of division of implementing tasks. Areas falling within the competence of MS, within the EU exclusive competence and within the shared as well as coordinating, supporting and supplementing competence (art. 6 TFEU) have been distinguished. Pursuant to the type of competence in question the scope of EU and Member States implementing actions has been determined – in particular with regard to preparation to and participation in meetings of bodies created by the Convention.

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*by the United Nations Committee on the Rights of Persons with Disabilities in relation to the initial report of the European Union, OJ C 353, 27.9.2016, p. 41-45.*

It has been agreed in the Code that in matters falling within the Member States competence these states will be responsible for elaborating so-called coordinated positions. So, one could assume that in matters in which no competence had been transferred to the EU the implementation of the Convention belongs exclusively to Member States. It should be remembered however that the activity of MS must remain in accordance with the Treaty principle of sincere cooperation (art. 4(3) TEU). This is confirmed by the Code itself (point 2).

Matters falling within the Union's exclusive competence are subject to so-called Union positions. These are elaborated by the EU and refer to: the compatibility of State aid with the internal market, the common customs tariff and to the Union's own public administration. They may refer as well to other issues, but only to the extent the provisions of the Convention affect or alter common rules established already by the Union by means of international agreements concluded in accordance with art. 3(2) TFEU.

Finally, in matters falling within the shared competence the Union and the Member States remain responsible for elaborating so-called common positions. These refer in particular to Union's legislative acts listed in the Appendix to the Declaration of Competence mentioned previously in point 3 (covering such areas as: action to combat discrimination on the ground of disability, free movement of goods, persons, services and capital, agriculture, transport, taxation, etc.). The same rule applies to the area of Union's competence defined in art. 6 TFEU.

In result, while implementing the Convention, depending on the matter, the Union and Member States – in different configurations, but always in close cooperation – prepare and present coordinated positions (Member States competence), Union positions (EU exclusive competence) and common positions (shared competence and supporting, coordinating and supplementing Union's competence). This general framework for division of tasks deserves a rather positive assessment. It seems to correspond properly with the division (and essence) of EU and MS's competence as defined by the TFEU and to ensure a desired balance among them. It also induces active cooperation between the Union and its institutions and the Member States. At the level of more general assumptions the coordination mechanism created by the Code seems to provide required basis for the implementation of the Convention. The assessment of more detailed rules stemming from the Code and concerning the elaboration of the abovementioned positions will be presented in next items.

Apart from preparing the activities (establishing positions) of the Union and Member States the Code includes also rules for speaking and voting in Convention bodies in cases of particular type of position. It also refers to the question of nominations of experts to the Committee of the Rights of Persons with Disabilities (art. 34 of the Convention) and to the organisation of necessary focal points (art. 33 of the Convention). These issues also deserve a closer look and will be addressed in the subsequent paragraphs.

## **5. Rules for establishing of coordinated, Union's and common positions**

A rule resulting from the Code of Conduct is that all the positions of the EU and Member States, regardless of their particular type, have to be duly coordinated, which – once again – deserves emphasis. It is also evident, that the process of establishing these positions is similar in case of coordinated, Union and common positions. This solution excludes the multiplication of procedures depending on the position in question. The Code simply establishes a harmonised (almost uniform) mechanism which – from a practical point of view – remains important and should be assessed positively.

The coordination process is based on coordination meetings of the Member States and the Commission. In case of coordinated positions (Member States competence) such a meeting might be convened by the Presidency acting on its own initiative or at the request of the Commission or a Member State. In urgent cases such a meeting may consist of an electronic coordination. In case of Union positions (EU's exclusive competence) and common positions (shared competence and competences from art. 6 TFEU) coordination meetings are convened on the initiative of the Presidency. They may also be convened at the request of the Commission or a Member State. It is also possible that in urgent cases these meetings consist of an electronic coordination. In all three cases meetings take place before and during each meeting of Convention bodies.

It is interesting that coordination meetings of the Commission and Member States are held within a relevant (competent) Council Working Group. This rule refers to establishing coordinated positions, Union positions and common positions as well. Which Working Group is competent in relation to the Convention-relevant issues being discussed is in principle determined by the Presidency. This mechanism means that the coordination process runs on the level of the Council as one of the Union's institutions with a visible role of the Presidency. At first sight it seems therefore that a certain dominance of the Member States (or institutions representing them) was accepted in this area. The nature of Union and Member States competence doesn't change much in this regard. On the other hand, however, it seems that the location of coordination meetings within the Council (competent Working Group) is treated as a proper means of securing efficiency of the coordination process and its compatibility with requirements of sincere cooperation. And from that perspective the presented solutions seem to be justified.

Technically the positions referred to in this paragraph are established after receiving the agenda of a meeting of the Convention body. On this basis the Commission sends to the Secretariat of the Council the indication of those agenda items which need a statement. The Commission also indicates by whom – Commission or Presidency – these statements should be made. The Secretariat circulates this indication to the Member States. Draft statements concerning issues

covered by competence of Member States are prepared by the Presidency whereas draft statements relating to matters covered by exclusive Union competence and shared competence are prepared by the Commission. These drafts are forwarded to the Council's Secretariat which communicates them to the Member States and the Commission one week before the coordination meeting at latest. The Secretariat forwards immediately these drafts also to the competent Council Working Group. This is an organisational background for the coordination meetings aiming at establishing necessary positions of the EU and Member States.

There are also rules concerning representation of the EU and MSs in cases of already agreed positions. They are going to be presented in the next paragraph.

## **6. Presenting Union's and Member States positions (speaking and voting) in the Convention bodies**

Establishment of coordinated positions, Union positions and common positions, might be treated as a first phase of the coordination process. These positions – prepared as it was described in the previous paragraph – are then presented on the level of bodies created by the Convention. The Code of Conduct includes necessary rules in that respect and it seems that these rules correspond with mechanisms designed for preparation of relevant positions. In this way the Code appears to be a sufficiently coherent, consistent instrument.

In principle Union positions are expressed by the Commission. This corresponds with the nature of the Commission as envisaged by Treaty provisions. According to art. 17(1) TEU the Commission is not only responsible for ensuring the application of the Treaties and acts adopted by the EU institution pursuant to them. It also ensures the external representation of the Union. Making the Commission the Union's voice in the context of the Convention and bodies created by it seems to be an obvious solution. This construct seems to remain in logical connexion with the nature of Union's powers and those of Member States.

Coordinated positions are on the other hand expressed by the Presidency or – if necessary – by a Member State appointed by it. This mechanism is quite understandable considering the fact that coordinated positions refer to matters covered by Member States competence. It is however interesting that such positions might be expressed by the Commission as well. In this case the agreement of all present Member States is required. This option might be technically comfortable and useful.

In case of common positions (shared competence, competence from art. 6 TFEU) it should be decided during a coordination meeting of the Commission and Member States who should express statements on their behalf. This rule refers to cases where particular competences are *inextricably linked* (point 6 c). In matters which are

predominantly covered by Union competence it is the Commission who expresses common position. However, when the preponderance of the matter concerned falls within the competence of the Member States, common position will be expressed by the Presidency or by the Member State.

Rules for voting correspond with the above mechanisms. There are two cases when the Commission exercises Union's right to vote. First, the Commission votes on behalf of the EU on the basis of Union position. Second, the Commission exercises this right on the basis of common position but only when the issue concerned is predominantly covered by Union competence. In both cases the Commission should exercise the right to vote with regard to the results of the coordination process that clearly emphasises the significance of the coordination process. What also needs to be noted here is the significance of art. 44(4) of the Convention, according to which the EU (as RIO) exercises its right to vote in the Conference of States Parties with a number of votes equal to the number of its Member States that are Parties to the Convention. On the other hand, the Member States exercise their right to vote in issues covered by their competence (coordinated positions) and in matters covered by shared competence (common positions) when a matter concerned falls mostly within their competence.

It is also possible that during a coordination meeting within a competent Working Group the Commission and the Member States will fail to achieve a compromise. In effect no position is agreed. In such a case the Code of Conduct provides for a Commission's right to speak and vote but only in matters evidently belonging to Union's competence. What's more – the Commission may exercise this right only to the extent which is necessary to protect Union's *acquis*. In the same case of a lack of an agreement between Member States and the Commission these states may exercise their right to speak and vote in relation to issues covered clearly by their competence. An important condition in this respect is that Member States' position is coherent with Union's policies and in conformity with EU law which – once again – confirms the importance of the treaty-based principle of sincere cooperation.

## **7. Focal points and nominations**

Two more issues concerning the Convention's implementation deserve a brief comment.

According to art. 33(1), Parties to the Convention are obliged to organise one or more focal points responsible for its implementation. Following that the Code of Conduct states (point 11) that in matters falling within Union competence (issues covered by EU exclusive competence and certain area of shared competence) the Commission is the focal point for matters related to implementation of the Convention. Member States on the other hand designate their own focal points and

notify it to the Commission. It is also possible that coordination meeting take place on the level of Union and Member States focal points. Such meetings are convened by the Commission on its own initiative or at the request of a Members State's focal point.

At first sight these rules do not cause serious doubts. In case of the EU the Commission seems to be the proper body to fulfil the role of a focal point as an entity responsible for UNCRPD's implementation at different levels. On the other hand, the structure of art. 33 of the Convention suggests that focal points (area of implementation, art. 33(1)) should be "separated" from independent frameworks responsible for the promotion, protection and monitoring of the Convention's implementation (art. 33(2)). And the Commission seems to be located in both areas which may cause certain controversies. This issue will be addressed one of the subsequent items.

Finally, the EU has a right to nominate a candidate for an expert in the Committee on the Rights of Persons with Disabilities. The Committee is a Convention body consisting of maximum 18 members (art. 34(2) of the Convention). The Committee exercises mainly controlling and reporting functions. According to art. 35(1) of the Convention each State Party submits to the Committee a report on measures taken to implement the Convention and to fulfil its obligations in that respect. The Committee considers such reports and may forward appropriate suggestions and general recommendations to the State Party concerned (art. 36(1)). The Committee also reports every two years to the General Assembly of the UN and to the Economic and Social Council on its activities. Additionally, basing on the information received through States' reports, the Committee may make suggestions and recommendations in this regard (art. 39).

The Union has a right to nominate a candidate for an expert in the Committee, which is stated directly in the Code of Conduct (point 10). This right does not, of course, undermine the analogous right of the Member States. The Union nominates a candidate on the basis of the Commission's proposal. What is however interesting is the fact that this proposal has to be accepted by consensus of the Member States within a competent Council Working Group. In this way the Member States get a visible influence on the nomination of Union's candidate to the Committee.

## **8. Code of conduct for the implementation of UNCRPD and other EU codes of conduct referring to international agreements**

The UNCRPD is said to be the first human rights convention to which the Union became a party<sup>18</sup>. In this sense the Convention and its location in the legal *acquis*

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18 L. Waddington, *op. cit.*, p. 432.

of the EU is a certain novelty. Consequently – the Code as a kind of extension of the Convention’s provisions becomes a novelty as well and the whole mechanism for UNCRPD’s implementation, as designed by the Code, strictly corresponds with relevant requirements of implementation provided for by the Convention itself. In other words – the nature, construct, content of the Convention together with the shape of obligations imposed on parties thereto determines to a large extent the construct of the Code in question. It does not however mean that the Code analysed in this contribution is the only one instrument called “code of conduct” which appears in the EU legal order in the context of Union’s participation in international agreements.

In the area of the implementation of agreements the EU has become a party to (or has accessed) it is possible to find other codes of conduct than the one analysed in this contribution. The *Revised Code of Conduct for the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises*<sup>19</sup> could be an example in that respect. It is however necessary to emphasise that the nature, scope and internal structure of the Revised Code is considerably different to that of UNCRPD’s implementation Code. And this seems to be caused by the aim, nature and scope of the so-called Arbitration Convention<sup>20</sup> which differs from UNCRPD in that respect. What’s additionally interesting is the fact that in the Revised Code it is expressly stated that it has the character of a political declaration. It may be assumed therefore that – depending on the nature and scope of a particular agreement – arrangements for its implementation at Union’s level may differ case by case.

There are also situations where relevant codes of conduct refer to areas other than pure implementation of an international agreement concluded by the Union. What might be an example in that respect is, inter alia, the Code of conduct between the Council, the Member States and the Commission on the UNESCO negotiations on the Draft Convention on the protection of the diversity of cultural contents and artistic expressions<sup>21</sup>. This Code refers to the process of negotiations of a particular agreement so to a different stage than the Code analysed in the context of the UNCRPD. Nevertheless, the Code from 2005 includes e.g. rules for negotiations which correspond with the division of powers between the Community (today the Union) and the Member States. And in this dimension these rules resemble those

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19 Revised Code of Conduct for the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, *OJ C 322, 30.12.2009, p. 1-10.*

20 Convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, *OJ L 225, 20.8.1990, p. 10-24.*

21 Code of conduct between the Council, the Member States and the Commission on the UNESCO negotiations on the Draft Convention on the protection of the diversity of cultural contents and artistic expressions, Brussels, 31 January 2005 (02.02), 5768/05.

from the Code for implementation of the UNCRPD which refer to the division of tasks between the EU and Member States in the area of preparation of relevant positions and presentation thereof at the level of Convention bodies.

In light of the above considerations it is possible to assume that international agreements the Union becomes a party to or accesses may require an instrument of their implementation at the EU level. These instruments, which are often called codes of conduct, differ however depending on the nature of the agreement in question. In that context the Code for implementation of the UNCRPD becomes an instrument adjusted in its character to the specific nature of this Convention.

## **9. Evaluation of Union's implementation mechanism by the UNCRPD bodies**

It is clear that the process of implementation of the UNCRPD, as an international agreement binding in its entirety on the Union's institutions, is subject to a kind of evaluation by Convention bodies. Due to art. 35 of the Convention, as mentioned in the previous item State Parties are obliged to submit a comprehensive report on measures taken to implement the UNCRPD. In 2014 the Commission had presented a relevant report including an extensive description of the Union's activities aimed at giving the effect to its obligation under the Convention<sup>22</sup>.

The report was reviewed by the Committee on the Rights of Persons with Disabilities and the first recommendations were made. The Commission replied to them in June 2015<sup>23</sup> which started a dialogue between EU and the Committee on UNCRPD's implementation matters<sup>24</sup>. In October 2015, the Committee has published its concluding observations on the Union's initial report<sup>25</sup>. It referred, inter alia, to the institutional aspects of the implementation mechanism previously described.

One of the main concerns of the Committee in this regard was the shape of the Commission's involvement in the UNCRPD implementation process. The Committee stressed that Commission plays a double role here. On one hand it is designated as

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22 Commission Staff Working Document: *Report on the implementation of the UN Convention on the Rights of Persons with Disabilities*, Brussels 05.06.2014, SWD(2014) 182 final.

23 Commission Staff Working Document *Reply of the European Union to the list of issues in relation to the initial report of the European Union on the implementation of the UN Convention on the Rights of Persons with Disabilities*, Brussels, 19.06.2015, SWD (2015) 127 final.

24 For the summary of this dialogue see a document prepared by Inclusion Europe, which is available on the official webpage of the European Commission: <http://ec.europa.eu/social/main.jsp?catId=1138&langId=en> (access 29.08.2018).

25 *Concluding observations on the initial report of the European Union*. Adopted by the Committee at its fourteenth session (17 August-4 September 2015), CRPD/C/EU/CO/1, source: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/226/55/PDF/G1522655.pdf?OpenElement> (access 28.08.2018).

a focal point, while on the other – it is a part of the mechanism for monitoring the implementation of the UNCRPD. Indeed, the Commission became a part of EU Framework on the Implementation of the UNCRPD<sup>26</sup> which existence should be seen in the light of art. 33(2) of the Convention. This provision requires that the State Parties establish a framework including one or more independent mechanisms for promotion, protection and monitoring of the implementation of the Convention<sup>27</sup>. Installing the Commission within implementing and monitoring mechanisms – according to the Committee’s view – did not correspond with the so-called Paris Principles adopted at the beginning of the 1990s<sup>28</sup>.

The Committee recommended the removal of the Commission from the independent EU monitoring Framework. This would allow to “decouple” the roles of the Commission in the implementation and the monitoring of UNCRPD’s implementation and so assure compliance with the Principles aforementioned. The Commission referred to this recommendation in its document from February 2017<sup>29</sup> by confirming its withdrawal from the Framework. In other words – the Commission is not participating in the Framework’s meetings which is a visible consequence of the Committee’s recommendation.

In its observations the Committee also suggested that the EU considered the designation of focal points in each institution, agency and body. In the opinion of the Committee this would help enhance the interinstitutional coordination mechanism in relation to the UNCRPD implementation. In its report from 2017, however, the Commission did not refer to this suggestion<sup>30</sup>.

## 10. Closing remarks

Considering the broad scope of the UNCRPD it becomes clear that the Convention is a field where competences of both – the European Union and its

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26 The relevant arrangement was ready in October 2012. The Framework consisted of: European Parliament representatives, the European Ombudsman, the EU Agency for Fundamental Rights, the European Disability Forum and the Commission. The first meeting of the Framework took place in January 2013.

27 See also: L. Waddington, Reflections on the Establishment of a Framework to Promote, Protect and Monitor Implementation of the UN Convention on the Rights of Persons with Disabilities (Article 33(2) CRPD) by the European Union, Maastricht Faculty of Law Working Paper no. 2011-3.

28 See: UN General Assembly Resolution 48/134, *National institutions for the promotion and protection of human rights*, 20 December 1993, A/RES/48/134, <http://www.un.org/documents/ga/res/48/a48r134.htm> (access 28.08.2018).

29 *Commission Staff Working Document: Progress Report on the implementation of the European Disability Strategy (2010 -2020)*, Brussels, 02.02.2017, SWD(2017) 29 final, p. 118, 148.

30 For more comments on the implementation of the UNCRPD by the EU see: L. Waddington, *The European Union ...*, *op. cit.*, pp. 449-452.

Member States – are exercised. Basing on the essence of exclusive, shared and supporting, coordinating and supplementing competences, which is defined in TFEU provisions, it has to be accepted that particular matters covered by the Convention fall – to a different extent – within the powers and activity of the EU and Member States as parties to the Convention bounded with its provisions. This circumstance affects the model of coordination of the UNCRPD implementation process in the EU law.

One of the key elements in that respect is the Code of Conduct governing the relations between the Council, the Commission and the Member States in the area of the Convention's implementation. The Code seems to reflect basic assumptions concerning the division of competence between the EU and MSs and respects the evident need for coordination of their actions. In the area of establishing the positions of the EU and Member States as well as in the area of presentation of such positions at the UNCRPD bodies, the Code visibly combines the nature of competence in question (e.g. exclusive and shared) with the mechanism assuring the coordination of steps taken by the EU and its members. Such a model should contribute towards an efficient implementation of the Convention in accordance with its provisions. And a correct and proper implementation is of crucial importance considering the place of the Convention in the hierarchy of EU law and its binding character for the EU and its Member States.

To sum up it should be said that the UNCRPD, as an integral element of EU legal order, has been endowed with a relevant mechanism for its implementation. From the legal-institutional point of view this mechanism seems to tie the respect for particular EU and Member States competence with the requirement of coordination of their actions. It may be hoped that it will contribute to an effective implementation of the UNCRPD as the first human rights treaty the EU has become a party to.

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