4. Negotiation, ratification and implementation of the CRPD and its status in the EU legal order

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1. INTRODUCTION

Following ratification by Ireland in 2018, all of the EU Member States have now ratified the UN Convention on the Rights of Persons with Disabilities (CRPD or UN Convention). In all, 22 Member States (including the United Kingdom) have also ratified the CRPD's Optional Protocol (OP-CRPD). The EU itself acceded to the UN Convention in December 2010, but it has not ratified the OP-CRPD to date. The CRPD was the very first human rights convention to which the EU acceded.[1] Given the EU's complex internal division of competences, the EU and its Member States have acceded to the CRPD jointly. For this reason, the CRPD is a so-called 'mixed' agreement, in EU law terms. The EU's accession to the CRPD concurrently with its Member States raises a number of important legal questions, notably in relation to the precise competence pursuant to which the EU has acceded to the UN Convention (which also explains why the EU has not acceded to the OP-CRPD), and the extent to which it has exercised its competence (which, concomitantly, determines the degree of exercise of competence by the Member States). Moreover, questions have arisen about the jurisdiction of the Court of Justice of the EU (CJEU) to interpret the CRPD.

This chapter is divided into five further sections. Section 2 will briefly point out the characteristics of mixed agreements in EU law, following which section 3 will discuss the reasons for the CRPD being a mixed agreement and the repercussions this has had for the negotiation, ratification and implementation of the UN Convention. Section 4 then examines the EU law obligations that flow from mixed agreements and that are imposed on EU Member States. Section 5 applies this framework to the CRPD, while section 6 concludes.

2. MIXED AGREEMENTS IN EU LAW

Before discussing the mixed nature of the CPRD itself, it is necessary to briefly introduce the concept of a 'mixed agreement' in EU law. In light of this, the specificities of the CPRD itself will be presented in section 3 below.

[1] Sacha Prechal, 'The European Union's accession to the Istanbul Convention' in Koen Lenaerts, Jean-Claude Bonichot, Heikki Kanninen, Caroline Naômé and Pekka Pohjankoski (eds), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas* (Hart Publishing 2019) 279–92.

The EU has been termed an 'open federation', in the sense that both the EU and its Member States may act simultaneously in the external sphere.[2] EU external competences are largely parallel – or complementary, as Dashwood and Heliskoski would say[3] – to the EU's internal competence. This is reflected in Article 216(1) of the Treaty on the Functioning of the European Union (TFEU), which, *inter alia*, provides that the EU has external competence when this is 'necessary to achieve […] one of the objectives referred to in the Treaties'. As a result, the EU has not been vested with plenary treaty-making power.[4] This constitutional setup has provided the conditions for the practice of 'mixity' to flourish in the EU's external relations. Mixed agreements are international agreements concluded by both the EU and (some or all of) the EU Member States, on the one hand, and one (or more) subject(s) of international law, on the other hand.[5]

In light of this, the question arises as to when an international agreement will be concluded in the form of such a mixed agreement on the part of the EU and its Member States, and when it will be concluded by the EU on its own.[6] Until very recently, the position defended by most EU Member States was that the EU could only act on its own when such an agreement came wholly within the EU's exclusive competences, as foreseen in Article 3 TFEU.[7] Since the default category of EU competence is that of shared (concurrent) competences,[8] mixed agreements would then constitute the rule, an agreement by the EU itself being possible only when it can be shown (typically by the EU Commission) that the EU has exclusive competence with regard to every element covered by the agreement.[9] Notably, however, in a recent judgment the Court confirmed that it is possible for the EU to act alone, externally, pursuant to a merely shared (concurrent) competence.[10] This, of course, complicates matters because the EU does not necessarily have to exercise the shared competences that it possesses: if the EU

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[2] Robert Schütze, *Foreign Affairs and the EU Constitution: Selected Essays* (Cambridge University Press 2014) 173.

[3] Alan Dashwood and Joni Heliskoski, 'The Classic Authorities Revisited' in Alan Dashwood and Christophe Hillion (eds), *The General Law of EC External Relations* (Sweet & Maxwell 2000) 12–13.

[4] Schütze, *Foreign Affairs and the EU Constitution* (n 2) 195–96. This is different from other 'federal' polities – in that regard, see the comparative analysis by Joseph Weiler, 'The External Legal Relations of Non-unitary Actors: Mixity and the Federal Principle' in David O'Keeffe and Henry Schermers (eds), *Mixed Agreements* (Kluwer 1983) 35–83.

[5] Stefan Kadelbach, 'Handlungsformen und Steuerungsressourcen in den EU-Außenbeziehungen' in Armin Hatje and Peter-Christian Müller-Graf (eds), *Europäische Außenbeziehungen* (Nomos 2014) 207–71 at 227.

[6] Note, however, that even in the latter case, Article 216 TFEU provides that '[a]greements concluded by the Union are binding upon […] its Member States'.

[7] The argument proposed by the Hungarian government in relation to the Marrakesh Treaty is a typical example of this. In that regard, see Opinion of Advocate General Wahl, Opinion 1/13 on the Marrakesh Treaty EU:C:2016:657, paras 118–19.

[8] Article 4(1) TFEU.

[9] Given the limited number of areas in which the EU has *a priori* exclusive competence (see Article 3(1) TFEU), the question will typically be whether the agreement comes under one of the scenarios foreseen in Article 3(2) TFEU (which codifies the notion of implied exclusive competence). On this point, the Court's established case law provides that '[i]n accordance with the principle of conferral as laid down in Article 5(1) and (2) TEU, it is […] for the party concerned to provide evidence to establish the exclusive nature of the external competence of the EU on which it seeks to rely'. See e.g. Case C-114/12 *Commission v Council* EU:C:2014:2151, para 75.

[10] Case C-600/14 *Germany v Council* EU:C:2017:935, paras 50–51.

Council decides not to exercise an EU shared competence, it leaves the necessary legal scope for the Member States to exercise their (shared) competence. As the law currently stands, the Council's choice in this respect is entirely discretionary.[11] Mixity, then, is 'facultative' if shared competences are at issue (regardless of whether these are combined with EU or Member State exclusive competences), whereas it is obligatory if an agreement covers matters within the exclusive competences of both the EU and the Member States.[12]

If an agreement is concluded as a mixed agreement rather than an EU-only agreement, a number of practical problems (with legal ramifications) are created in terms of the implementation of the agreement and the representation of the EU and its Member States in the bodies set up by the agreement, as well as in relation to the international responsibility of the EU and its Member States for the commitments entered into through the conclusion of the agreement. In Opinion 1/94 relating to the World Trade Organization (WTO) agreements, the Commission had therefore tried to convince the Court to rule in favour of concluding the WTO agreements as EU-only agreements, despite the underlying competences being shared.[13] However, the Court dismissed arguments based on the practical difficulties related to 'mixity', effectively confirming that EU-only agreements are only legally required insofar as the agreements come within exclusive competences, and affirming the position that if shared competences are at issue (and insofar as the *ERTA* doctrine does not apply), it is entirely up to the Council to decide whether or not to make use of these EU competences.[14] The Court, in Opinion 1/94, was not oblivious to the 'practical difficulties' invoked by the Commission, but its ruling on those difficulties was rather succinct. In situations of mixed action there is, according to the Court, an obligation incumbent on the EU and the Member States to ensure close cooperation, flowing from the requirement of unity in the international representation of the Union.[15]

In the subsequent *FAO* case, the Court found that internal arrangements, such as inter-institutional agreements concluded between the EU institutions, are concrete means by which to put this duty of close cooperation, ensuring unity in the international representation of the Union, into effect.[16] As the law stands, there is no obligation flowing from the requirement of unity to conclude such internal arrangements so as to ensure the proper implementation of mixed agreements, but *FAO* does make clear that if such arrangements have been concluded, they may be binding and, therefore, enforceable against the EU institutions (and the Member States).

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[11] For a discussion of the possibilities to somehow qualify this unfettered political choice, see Merijn Chamon, 'Constitutional Limits to the Political Choice for Mixity' in Eleftheria Neframi and Mauro Gatti (eds), *Constitutional Issues of EU External Relations Law* (Nomos 2018) 137–66.

[12] Allan Rosas, 'Mixity Past, Present and Future: Some Observations' in Merijn Chamon and Inge Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Martinus Nijhoff Brill 2020 forthcoming).

[13] Opinion 1/94 on the WTO Agreements EU:C:1994:384, para 106.

[14] Ibid para 107.

[15] Ibid para 108.

[16] Case C-25/94 *Commission v Council* EU:C:1996:114, para 49.

3. THE CRPD: A CASE OF OBLIGATORY MIXITY

Given that mixity may either be facultative or obligatory, it is useful to analyse the different provisions of the CRPD to determine whether they are all covered by either shared, supporting or exclusive EU competences. If they are, there is, in principle, an option for the Council to conclude the CRPD on behalf of the EU on its own, with the CRPD then becoming binding for the Member States by virtue of EU law. If, however, at least one provision of the CRPD comes under exclusive national competence, mixity becomes obligatory (given that there are also exclusive EU competences involved).

Although addressing the competence question requires a close and detailed analysis of the international agreement in question, it would appear at first sight that the CRPD is largely covered by the EU's supporting, shared and exclusive competences.[17] At the same time, however, some CRPD obligations arguably come under the exclusive competence of the Member States, requiring their involvement in implementation and thus making mixity obligatory. Some of the CRPD provisions which may be noted in this regard are Article 18 CRPD, which deals, *inter alia*, with the question of nationality and registration at birth;[18] Article 12 CRPD on legal capacity; and Article 23 CRPD, which affirms the right to marriage.[19] Since one such element of exclusive national competence is enough to turn the whole agreement into an obligatory mixed agreement, it appears that the CRPD represents a case of obligatory mixity.[20] Even regardless of these elements, however, concluding the CRPD as a mixed agreement rather than an EU-only agreement would appear preferable, given the broad scope and the far-reaching objectives of the UN Convention. Under the subsidiarity principle,[21] the Member States seem to be better placed than the EU to pursue several of the commitments enshrined in the CRPD.

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[17] The supporting competences at issue are, notably: culture and education (Article 6 TFEU); relevant shared competences (cf. Article 4 TFEU) are, notably: social policy, research and development, internal market, and so on. In addition, given that a series of CRPD provisions affect common rules adopted by the EU institutions (such as the Employment Equality Directive), the EU also has a supervening exclusive competence for part of the CRPD.

[18] Confirming the acquisition of nationality as a national (exclusive) competence (which, nonetheless, has to be exercised while respecting EU law). In that regard, see, among others, Case C-221/17 *Tjebbes* EU:C:2019:189, para 30.

[19] See Case C-673/16 *Coman* EU:C:2018:38, para 37.

[20] See Chamon, 'Constitutional Limits to the Political Choice for Mixity' (n 11) 141.

[21] On the relevance of this principle for the EU's external relations, see, among others, Isabelle Bosse-Platière, 'L'application du principe de subsidiarité dans le cadre de l'action extérieure de l'Union européenne' in Eleftheria Neframi and Mauro Gatti (eds), *Constitutional Issues of EU External Relations Law* (Nomos 2018) 111–36; see also Geert De Baere, 'Subsidiarity as a Structural Principle Governing the Use of EU External Competences' in Marise Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing 2018) 93–115; Isabelle Bosse-Platière and Marise Cremona, 'Facultative Mixity in the Light of the Principle of Subsidiarity' in Merijn Chamon and Inge Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Martinus Nijhoff Brill 2020 forthcoming).

3.1 Negotiation, Ratification and Implementation of the CRPD

In 2004, the Council, pursuant to current Article 218(3) TFEU, authorized the Commission to negotiate the CRPD on behalf of the EU.[22] On foot of a proposal of the Commission, the Council subsequently authorized the signature of the CRPD on behalf of the EU, in accordance with current Article 218(5) TFEU.[23]

As with any act of the Union, the decision authorizing the signature needs to identify a legal basis in the EU Treaties which confers the necessary competences on the Union to act.[24] In 2007, both the Commission, in its proposal, and the Council, in its decision, were in agreement on the legal basis, identifying the internal market legal basis (Article 114 TFEU) and Article 19 TFEU on non-discrimination, *inter alia*, on the ground of disability.[25] However, when the final decision on the conclusion of the CRPD was proposed by the Commission, it added further legal bases. Apart from the two Treaty provisions relied upon for signature of the CRPD, the Commission also proposed to rely on Articles 31 (on the Common Customs Tariff), 53(1) and 62 (on mutual recognition of qualifications), 91(1) and 100(2) (on transport), 109 (on State Aid), 113 (on tax matters) and 338 TFEU (on statistics).[26] The Council decision on the conclusion of the CRPD only refers to Articles 19 and 114 TFEU,[27] however, which may be seen as an attempt to limit the scope of the commitments entered into by the EU.[28] As noted above, most of the CRPD provisions would seem to come under the EU's supporting, shared and exclusive competences, but the identification of only Articles 19 and 114 TFEU as legal bases suggests that the EU is not exercising its supporting and shared competences to the fullest. Unless the view is taken that the EU has exercised these competences to the fullest but that issues such as transport, statistics, and so on are ancillary,[29] the choice of legal basis suggests that the EU only acts in relation to the CRPD's provisions that aim to ensure the equal

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[22] Commission, 'Proposal for a Council Decision on the signing, on behalf of the European Community, of the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol' COM (2007) 77 final, p. 2.

[23] See Council Decision on the signing, on behalf of the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, Doc. 7661/07.

[24] Emphasizing the constitutional significance of the choice of legal basis, see Opinion 2/00 on the Cartagena Protocol EU:C:2001:664, para 5.

[25] See Commission, 'Proposal for a Council Decision on the signing, on behalf of the European Community, of the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol' (n 22). See also Draft Council Decision on the signing, on behalf of the European Community, of the United Nations Convention on the Rights of Persons with Disabilities Doc. 7401/1/07.

[26] Commission, 'Proposal for a Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities – 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' COM (2008) 530 final.

[27] Council Decision 2010/48/EC concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ L23/35. The Commission made a reservation to the Council's choice of legal basis. In that regard, see Council of the European Union, 25 November 2009, Doc. 15533/09 ADD 1.

[28] For a similar issue in relation to the Istanbul Convention, see Prechal, 'The European Union's Accession to the Istanbul Convention' (n 1).

[29] However, for the Commission, this would be difficult to argue since it included these legal bases in its proposal, suggesting that at that time, the Commission did not consider the relevant provisions to be ancillary.

treatment of people with disabilities in matters related to the internal market. Indeed, when Ireland, in the *Mox Plant* case, argued that the EU had only acceded to the United Nations Convention on the Law of the Seas (UNCLOS) in relation to the latter's provisions on fisheries but not in relation to the environmental provision, the Court noted that the Council's Decision approving the EU accession to UNCLOS was based, *inter alia*, on the current Article 192 TFEU, suggesting that the EU had also exercised its competence in environmental matters.[30] The EU's Declaration of Competence in relation to the CRPD, as finally decided upon by the Council, and which differs significantly from the one proposed by the Commission,[31] can also be read in this light. It provides that 'when Community rules exist but are not affected [by the provisions of the CRPD], in particular in cases of Community provisions establishing only minimum standards, the Member States have competence, without prejudice to the competence of the European Community to act in this field'. While this provision may be read as indicating that the EU has only exercised its exclusive competences, the Court, again in *Mox Plant*, interpreted an identical provision in the EU's Declaration of Competence for the UNCLOS as a confirmation of the EU having also exercised its shared competences.[32]

Similarly to the Council's approach to the Istanbul Convention, the above 'suggests that the Council, having rejected the broad approach of the Commission, prefers a screening of the Convention, provision by provision, in order to establish the nature of the respective competences'.[33] As a result, for those provisions of the CRPD coming under shared competences that are not covered by Article 19 and 114 TFEU, the EU Member States would only be bound under international law, and the EU's enforcement mechanisms could not be relied upon to ensure the Member States' compliance with those provisions.

The Commission had also proposed that the EU (sign and) accede to the OP-CRPD.[34] Since Article 19(1) TFEU *iuncto* Article 218(8) TFEU prescribe unanimity voting in the Council, every single Member State has a veto on the accession of the EU to the OP-CRPD. To date, at least three Member States have objected to the EU signing and acceding to it.[35] Not coincidentally, there are also three EU Member States that have not signed the OP-CRPD in their individual capacity at the moment of writing: the Netherlands, Ireland and Poland.[36] This may be surprising given that the Committee established pursuant to the OP-CRPD, the Committee

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[30] Case C-459/03 *Commission v Ireland* EU:C:2006:345, para 97.

[31] Compare Annex 2 of Commission, 'Proposal for a Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities' (n 26), with Annex II of Council Decision 2010/48/EC concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ L23/35.

[32] See *infra* section 4.2.

[33] Prechal, 'The European Union's Accession to the Istanbul Convention' (n 1).

[34] Commission, 'Proposal for a Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities' (n 26).

[35] See Council of the European Union, 'Draft Council Decision on the signing, on behalf of the European Community, of the United Nations Convention on the Rights of Persons with Disabilities', Doc. 7401/1/07 REV 1, p. 2. It may be noted that, in their individual capacity, Ireland, Poland and the Netherlands have not signed the Optional Protocol to the CRPD, while Bulgaria, Czechia and Romania have signed but not ratified the protocol. All the other EU Member States are Parties to the Optional Protocol.

[36] In addition, Bulgaria, Czechia and Romania have signed but not ratified the protocol. All the other EU Member States are Parties to the Optional Protocol.

on the Rights of Persons with Disabilities (CRPD Committee), may only issue non-binding recommendations; but, at least for the Netherlands and Ireland, it seems that these countries will postpone accession to the OP-CRPD until they have fully implemented the CRPD itself.[37] In addition, the Dutch recalcitrance regarding accession seems to be inspired by past experience. Non-binding recommendations adopted pursuant to agreements similar to the OP-CRPD have apparently been relied upon by Dutch judges in legal proceedings.[38]

In terms of content, the Council's decision on accession to the CRPD foresees that the Commission, the Council and the Member States must agree on a code of conduct, spelling out the arrangements for the detailed functioning of the focal points (provided for in Article 33 CRPD),[39] and for the representation and voting by the EU and its Member States in the bodies set up by the CRPD.[40] The Code of Conduct was adopted in 2010, specifically for the coordination of EU and Member State action under the CRPD, and it therefore applies instead of the general arrangements for EU Statements in multilateral organizations.[41] The approach underlying both the general arrangements and the Code of Conduct is the same, however, and is premised on the identification of the precise competence that exists for every issue on the agenda, in order to determine which entity will act at the international level.[42] While the language used in the Code of Conduct could be read as implying that it is largely a non-binding document,[43] it should be noted that it actually resembles closely the language used in the FAO Arrangements that the Court held to be binding in *FAO*. This means that the coordination mechanisms foreseen in the Code could possibly be enforced *vis-à-vis* the Member States in order to ensure 'the effectiveness of the international action of the European Union, as well as its credibility and reputation on the international stage'.[44]

On the whole, the Code sets out the arrangements for the preparation of, and participation in, meetings of the bodies created by the CRPD and lays down the details of the focal points' functioning.[45] It subsequently makes clear that the division of tasks between the EU institutions and the Member States is 'based on competence'. As noted above, three main

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[37] See the reply of the Minister of State at the Department of Justice and Equality on 2 April 2019 to the Question of Róisín Shortall on the CRPD; a similar issue in Poland is apparent from the reply of the Undersecretary of State to interpellation No. 5217 on the possible ratification of the United Nations Convention on the Rights of Persons with Disabilities http://orka2.sejm.gov.pl/IZ6.nsf/main/5F8F7E7E accessed 1 February 2020.

[38] See Vaststelling van de begrotingsstaat van het Ministerie van Buitenlandse Zaken (V) voor het jaar 2019, Eerste Kamer, Vergaderjaar 2018–2019, 35 000 V, D, pp. 1–3.

[39] On the implementation of Article 33 CRPD, see Alexander Hoefmans, 'The EU Framework for Monitoring the CRPD', in this volume.

[40] See Articles 3 to 4 of Council Decision 2010/48.

[41] See Council of the European Union, EU Statements in multilateral organisations – General Arrangements Doc. 15901/11.

[42] See also the critique on this by Ramses Wessel and Bart Van Vooren, 'The EEAS's Diplomatic Dreams and the Reality of European and International Law' (2013) 20(9) *Journal of European Public Policy* 1350.

[43] Notably, on the predominant use of the term 'will' rather than 'shall', see Legal Directorate of the Foreign and Commonwealth Office, Treaties and MOUs – Guidance on Practice and Procedures, March 2014, p. 15.

[44] Case C-620/16 *Commission v Germany* EU:C:2019:256, para 98.

[45] Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ C340/11, p. 11.

Table 4.1 Modus operandi established in the Code of Conduct

Nature of the competence	*Modus operandi*
Member State competence	The Member State will aim at elaborating coordinated positions whenever it is deemed appropriate.
Exclusive EU competence	The EU will aim at elaborating Union positions.
Shared and supporting and/or supplementing competence	The Member State and the EU will aim at elaborating common positions.

competence-categories can be distinguished, and the Code of Conduct prescribes a different *modus operandi* for each of those (see Table 4.1).

The Code of Conduct therefore distinguishes between (i) coordinated, (ii) Union and (iii) common positions. In terms of procedure, it provides that each of the three types of positions should be duly coordinated (possibly through electronic means, in urgent cases) within the relevant Council working group, and at the initiative of either the (rotating) Presidency, at the request of the Commission or (one of) the Member States. Draft statements on coordinated positions are prepared by the Presidency, while Union and common positions are drafted by the Commission.

At the meetings concerned, coordinated positions will be expressed by the Presidency or by a Member State appointed by the Presidency or by the Commission, provided that all Member States present agree. Union positions, on the other hand, are expressed by the Commission. When competences are inextricably linked, common positions will be expressed 'on behalf of the Union and its Member States', either by the Commission or the Presidency (or a Member State). Which of the two will act thereby depends on the preponderance of the matter concerned (falling within either EU or Member State competence).

The fact that arrangements, such as those included in the Code of Conduct, focus on the competence rather than on the policy question at issue has been criticized by Wessel and Van Vooren,[46] because it leads to protracted internal discussions (between EU institutions and Member States) on competence questions which are immaterial to the other Parties to the CRPD. Rather than focusing on the substance of the position to be adopted by the EU (and its Member States), the EU actors devote considerable energy to the formalistic question of competence. While the critique by Wessel and Van Vooren is pertinent, in the current state of EU integration, the Member States' sensitivities on EU competence creep appear to be inevitable, and a focus on competences seems to be unavoidable.

3.2 The CPRD's Regional Economic Integration Organization Clause

So far, the issue of mixity has been discussed solely from an EU perspective. Of course, this is only part of the tale. Since the conferral of competences on the EU is 'imperfect', that is, that principle may be binding on the EU and its Member States but it cannot be enforced against third countries,[47] international law will have to accommodate the EU's peculiarities, in order

[46] Wessel and Van Vooren, 'The EEAS's Diplomatic Dreams and the Reality of European and International Law' (n 42) 1353–54.

[47] Inge Govaere, 'Functional and Facultative Mixity in the Light of the Principle of Partial and Imperfect Conferral' in Merijn Chamon and Inge Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Martinus Nijhoff Brill 2020 forthcoming).

for the EU and its Member States to be able to conclude agreements as mixed agreements. In the case of the CRPD, as with many multilateral conventions, this has been done through the inclusion of a regional integration organization (RIO) clause, which is included in Article 44 CRPD. That provision reads as follows:

> 1. 'Regional integration organization' shall mean an organization 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. Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the present Convention. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.
> 2. References to 'States Parties' in the present Convention shall apply to such organizations within the limits of their competence.
> 3. For the purposes of article 45, paragraph 1, and article 47, paragraphs 2 and 3, of the present Convention, any instrument deposited by a regional integration organization shall not be counted.
> 4. Regional integration organizations, in matters within their competence, may exercise their right to vote in the Conference of States Parties, with a number of votes equal to the number of their member States that are Parties to the present Convention. Such an organization shall not exercise its right to vote if any of its member States exercises its right, and vice versa.

The RIO clause in the CRPD contains a number of typical elements which are also to be found in RIO clauses contained in other conventions. In short, other Parties accept the special position of the EU and allow it to accede to the Convention jointly with its Member States, but not without securing a number of guarantees in terms of the international responsibility of the EU and in terms of voting rights. With regard to the CRPD, Article 44 provides that any international organization acceding to it must first make a declaration of competence, indicating in which areas and to which extent it has been conferred powers by its Member States. In theory, such a declaration is critically important for the other Parties to the CRPD, in order to be able to determine which Party on the EU side may be held responsible for the commitments entered into under the CRPD. The CJEU itself has held that, in the absence of a declaration of competence, the EU and the Member States are jointly responsible for fulfilling the obligations under a mixed agreement.[48] For third States, it is, of course, more interesting to be able to hold both the Member States and the EU jointly and severally liable.[49] In practice, however, the declarations of competence which the EU attaches to its instruments of ratification are of limited value to the other Parties to the Convention because of their lack of clarity.[50] Should any dispute arise, the precise delimitation of commitments and responsibility would then have to be communicated by the EU and its Member States, without a guarantee that this would be accepted as the basis upon which to solve the dispute.[51] The declarations of competence

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[48] Case C-316/91 *Parliament v Council* EU:C:1994:76, paras 24–35. See also Pieter-Jan Kuijper, 'International Responsibility for EU Mixed Agreements' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited* (Hart Publishing 2010) 208–27, pp. 209–10.

[49] Ibid 224.

[50] See Andrés Delgado Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?' (2012) 17(4) *European Foreign Affairs Review* 491.

[51] Yet the ROI clause, declaration of competence and the interpretation thereof by the EU and its Member States could constitute a special rule of international law in the sense of Article 64 of the

themselves are unhelpful, because they typically do not set out the EU's competence in respect of particular CRPD provisions; instead, they describe the EU's competences in general terms and provide a list of relevant EU secondary legislation. The latter list is of crucial importance since, pursuant to the *ERTA* doctrine, the EU acquires an exclusive external competence to enter into international agreements insofar as those agreements 'affect' secondary EU legislation. However, the application of this doctrine is a matter of eternal contestation, even between EU Member States and institutions.[52] Therefore, third countries cannot be said to be properly informed of the extent of the EU's competence as a result of the EU providing a list of legislation and informing the other Parties of the existence of the *ERTA* doctrine.

Unlike the RIO clauses in some other multilateral agreements, the clause contained in the CRPD does not explicitly put forward a condition that at least one of the international organization's State members (*in casu* EU Member States) should be Party to the CRPD before the international organization itself can accede to it. In light of the *AMP Antarctique* case,[53] this point may be of broader relevance. In that case, the Court suggested that the EU could not play an autonomous role in the implementation of the Canberra Convention,[54] because its accession to the Convention (pursuant to the latter's RIO clause) was predicated on at least one EU Member State being Party to the Convention. Although this finding was, in itself, rather questionable,[55] it could still mean, *a contrario*, that the EU, under EU law itself, can act completely autonomously from its Member States within the CRPD framework, for example by having the Commission alone (without the Member States) present common or Union positions on the CRPD.

Finally, and as Article 44(4) CRPD makes clear, an organization such as the EU may become a Party to the CRPD, but this cannot result in it acquiring more voting rights than its Member States would otherwise have.

4. REPERCUSSIONS OF THE CRPD'S MIXED NATURE FOR THE EU LAW OBLIGATIONS OF MEMBER STATES

In the seminal *Haegeman* case, the Court ruled that agreements concluded by the Council on behalf of the EU form an integral part of EU law, from the date of their entry into force.[56] Article 216(2) TFEU provides that '[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States'. However, in the case of mixed agreements (which the EU Treaties do not foresee, as such),[57] this straightforward and simple rule is

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Articles on the Responsibility of International Organizations (ARIO). See also Kuijper, 'International Responsibility for EU Mixed Agreements' (n 48) 222–23.

[52] Merijn Chamon, 'Implied Exclusive Powers in the CJEU's Post-Lisbon Jurisprudence: The Continued Development of the ERTA Doctrine' (2018) 55(4) *Common Market Law Review* 1101.

[53] Joined Cases C-626/15 & C-659/16 *AMP Antarctique* EU:C:2018:362.

[54] Convention on the conservation of Antarctic marine living resources, UNTS Vol. 1329, I-22301.

[55] Merijn Chamon, 'Verplicht gemengd optreden van de Unie en de lidstaten binnen de Canberra Conventie ondanks het bestaan van een gedeelde bevoegdheid' (2019) 67(5) *Tijdschrift voor Europees en Economisch Recht* 250.

[56] Case 181/73 *Haegeman* EU:C:1974:41, para 5.

[57] The only recognition of mixity in the EU Treaties is the requirement of ratification by the EU and the Member States of the agreement on the EU's accession to the ECHR in Article 218(8) TFEU.

complicated. After all, the fact that an agreement is concluded as a mixed agreement implies, by definition, that for some provisions of the agreement, the EU does not commit itself and its Member States, those provisions not being an integral part of EU law.[58] Under those provisions, the Member States are nonetheless bound, not as Member States of the EU, but as independent subjects of international law. Concretely, this means that in relation to the provisions by which the EU is bound, an obligation under EU law is also created for the Member States.[59] Only for those commitments entered into as independent subjects of international law are the Member States not bound under EU law.

The concrete result of this is that the enforcement mechanisms which exist under EU law, and which are much more effective than those under international law, cannot be relied upon for those latter commitments. Thus, the Commission would not be able to bring proceedings under Article 258 TFEU against Member States that fail to respect those provisions and neither would the CJEU be competent to interpret those provisions, even if they form part of an agreement concluded by the EU.

While this is straightforward in itself, the situation becomes problematic since, as noted above, it is not made entirely clear in the declaration of competences for which specific provisions the EU or the Member States exercise competence. Doing so would undermine one of the advantages of 'mixity', that is, the fact that it allows the precise delimitation of competences between the EU and the Member States to be left in abeyance.[60] One view is that, in a mixed agreement, the EU will only commit itself (and its Member States) with regard to the provisions that fall within exclusive EU competence.[61] This is in line with the traditional Member State view that the EU can only conclude an agreement on its own if the whole agreement comes under EU exclusive competence. However, as noted above, the assumption that the EU cannot act independently pursuant to shared competences is legally ill-conceived, as recently confirmed by the Court.[62] It is also contradicted by the Member States' own practice in the Council.[63] Determining which provisions of a mixed agreement the EU has committed itself to is, therefore, even less straightforward than determining the provisions for which the EU is exclusively competent (which in itself is already problematic).

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[58] See Erich Vranes, 'Gemischte Abkommen und die Zuständigkeit des EuGH – Grundfragen und neuere Entwicklungen in den Außenbeziehungen' (2009) 44(1) *Europarecht* 44; see further Joni Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and Its Member States* (Kluwer Law International 2001) 62.

[59] Case 104/81 *Kupferberg* EU:C:1982:362, para 13; Case C-459/03 *Commission v Ireland* EU:C:2006:345, para 85.

[60] Guillaume Van der Loo and Ramses Wessel, 'The Non-ratification of Mixed Agreements: Legal Consequences and Solutions' (2017) 54(3) *Common Market Law Review* 735, pp. 752–58.

[61] As noted by Marise Cremona, 'Defending the Community Interest: The Duties of Cooperation and Compliance' in Marise Cremona and Bruno de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing 2008) 125–69, p. 147.

[62] Case C-600/14 *Germany v Council* EU:C:2017:935.

[63] For instance, association agreements (foreseen in Article 217 TFEU) are typically concluded as mixed agreements, but the association agreement with Kosovo was concluded by the EU on its own. Even if the Council Decision notes that this does not set a precedent, it is clear that all Member States in the Council assume that it is legally possible for the EU to conclude a broad and comprehensive agreement, such as an association agreement, on its own. See recital 5 of the preamble to Council Decision 2016/342 on the conclusion, on behalf of the Union, of the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo [2016] OJ L71/1.

4.1 Determining the Court's Jurisdiction in Relation to Mixed Agreements

The Court appears to take a lenient approach in terms of its jurisdiction to interpret the provisions of mixed agreements. As will be discussed further below, the Court takes into account the Union interest when it determines first whether the EU enjoys competence and,[64] subsequently, whether it has elected to exercise that competence.

In relation to the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, which was concluded as a mixed agreement as a result of Opinion 1/94,[65] the Court noted in *Hermès* that the EU and its Member States had not adopted a declaration of competence, that is, they had not clarified the 'allocation between them of their respective obligations towards the other contracting parties'.[66] This meant that it was left to the CJEU to determine the matter of the sharing of competences between the EU and the Member States, since this question requires a uniform answer that only the Court is capable of giving.[67] The test which the Court subsequently uses to determine whether it is up to itself or, instead, the national courts to interpret a specific provision of a mixed agreement ties in with the question as to whether the EU has already exercised its competence internally. If this is not the case, EU Member States will be deemed to have retained their competence and the provision in the TRIPS agreement will be deemed not to come within the scope of EU authority.[68] In *Hermès*, the Court noted that the EU had already exercised its competence and therefore there was an EU interest in answering the preliminary question referred to it by the Dutch judge, even if the specific dispute at issue was not covered by EU law itself.[69]

Hermès, and the other cases in relation to TRIPS, all reached the Court following a preliminary reference under the current Article 267 TFEU, but another avenue that is open to the Court is the infringement procedure contained in Article 258 TFEU. The first infringement case in relation to a mixed agreement was *Commission v Ireland*, whereby Ireland had failed to adhere to the Berne Convention for the Protection of Literary and Artistic Works, as prescribed by the Agreement on the European Economic Area (EEA) (which was the mixed agreement *in casu*).[70] The Court in that case suggested again that the test to determine its jurisdiction depended on whether there is an EU interest to ensure that the commitment is honoured.[71] The Court tied this question to the EU having previously exercised its competences, and found that 'the subject-matter of the Berne Convention […] is to a very great extent governed by [EU]

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[64] The concept of 'Union interest' may, of course, be used quite flexibly. While Cremona argues that it should be tied to the question of whether specific EU law (either primary or secondary) exists, she recognizes that one could also argue that it is in the Union's interest for the Court to interpret provisions of a mixed agreement from the moment they come under the EU's competences (regardless of whether they have already been exercised or not). See Cremona, 'Defending the Community Interest: The Duties of Cooperation and Compliance' (n 61) 152–54.

[65] Opinion 1/94 on the WTO Agreements EU:C:1994:384.

[66] Case C-53/96 *Hermès* EU:C:1998:292, para 24.

[67] Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior* EU:C:2000:688, para 38; Case C-431/05 *Merck Genéricos* EU:C:2007:496, para 37.

[68] Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior* EU:C:2000:688, para 48; Case C-431/05 *Merck Genéricos* EU:C:2007:496, paras 34–35.

[69] Case C-53/96 *Hermès* EU:C:1998:292, para 32.

[70] Case C-13/00 *Commission v Ireland* EU:C:2002:184.

[71] Ibid para 19.

legislation'.[72] Despite objections from the UK, which intervened in the proceedings, the Court then confirmed its jurisdiction to rule on Ireland's responsibility in relation to the relevant provision of the mixed EEA agreement.

Similarly, in *Commission v France*, the Commission claimed that France had taken insufficient action to comply with the requirements imposed by the Protocol to the Barcelona Convention (a mixed agreement) for the protection of the Mediterranean Sea against pollution from land-based sources.[73] While the specific infringement committed by France (the discharge of fresh water and alluvia into a saltwater marsh) was not covered by EU legislation, the Court found that it had jurisdiction: 'Since the Convention and the Protocol […] create rights and obligations in a field covered in large measure by [EU] legislation, there is a[n] [EU] interest'[74] in ensuring Member States' compliance with the obligations imposed by the mixed agreement. The reasoning elaborated by the Court in *Commission v France*, invoking the notion of a 'field covered in large measure', might suggest that the jurisdiction of the Court under Articles 258 and 267 TFEU, respectively, is not perfectly mirrored. However, as will be discussed later in this chapter, in *Lesoochranárske zoskupenie* the Court subsequently also referred to this test in a preliminary ruling procedure.[75]

In his Opinion in *Mox Plant*, Advocate General (AG) Poiares Maduro argued that the threshold for the CJEU to accept jurisdiction could be further lowered, suggesting that the Commission could even bring infringement proceedings against a Member State for violations of those provisions of a mixed agreement falling outside EU competence, if such violations would also jeopardize the attainment of the EU's objectives (given that the agreement is a mixed one).[76] This proposition remains to be tested by the CJEU itself.

4.2 The Relevance of the Declaration of Competence for the Court's Jurisdiction

It is important to note that the case law outlined above starts from the premise that the EU parties have not clarified the allocation of competences between themselves. In the TRIPS cases, as in *Commission v Ireland* and *Commission v France*, there was no declaration of competence which the Court could rely upon in its assessment. Would the same reasoning hold in those cases where there is a declaration explicitly specifying that the EU has only exercised competence in so far as there is relevant EU legislation, as is the case for the CRPD?

When the EU and its Member States have given an indication of the delimitation of competences through a declaration of competences, the Court has confirmed, in the *Mox Plant* case, that such a declaration is also relevant for internal purposes. It can therefore be relied upon to determine whether, within the EU legal order, Member States are under an EU law obligation to respect a provision of a mixed agreement (regardless of their international responsibility).[77] In *Mox Plant*, Ireland argued that the EU had only exercised competence in relation to

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[72] Ibid para 17.

[73] Case C-239/03 *Commission v France* EU:C:2004:598.

[74] Ibid para 29.

[75] Case C-240/09 *Lesoochranárske zoskupenie* EU:C:2011:125, para 36.

[76] See the Opinion of AG Poiares Maduro in Case C-459/03 *Commission v Ireland* EU:C:2006:42, para 33, at fn 37. As the AG notes: in such a case, the EU obligation infringed would not be the provision of the agreement but a Member State's duty of loyal cooperation under Article 4 TEU.

[77] Case C-459/03 *Commission v Ireland* EU:C:2006:345, paras 104–11.

UNCLOS insofar as the EU enjoyed exclusive competence pursuant to the *ERTA* doctrine.[78] The Court noted, however, that the declaration of competences provided that '[w]hen [EU] rules exist but are not affected, in particular in cases of [EU] provisions establishing only minimum standards, the Member States have competence, without prejudice to the competence of the [EU] to act in this field'.[79]

It relied on this to hold that the EU had exercised competence for those UNCLOS provisions pursuant to which common EU rules had been adopted, regardless of whether an *ERTA* effect could be shown.[80] Of course, as the Court itself implies in *Mox Plant*, this outcome cannot be generalized for all multilateral mixed agreements, since it depends on the precise wording of the declaration of competence in question.[81] However, an identical provision also features in the declaration of competence which the EU has made pursuant to Article 44 CRPD.[82] Even if the Court's reasoning in *Mox Plant* may be criticized,[83] it would follow from that case that it may be assumed that, under the CRPD, the EU has committed itself (and its Member States) when common rules have been adopted by the EU (regardless of whether those rules are 'affected' in the sense of *ERTA* and, thus, give rise to an exclusive EU competence).

In *Lesoochranárske zoskupenie*, the Court had to decide whether it had competence to interpret Article 9(3) of the Aarhus Convention, which is a mixed agreement. That provision prescribes that members of the public should have access to administrative or judicial proceedings in environmental cases. The NGO Lesoochranárske zoskupenie wanted to be involved in national administrative proceedings related to the granting of licences to hunt, *inter alia*, brown bears in Slovakia. The EU's declaration of competence for the Aarhus Convention provided that the internal EU legal instruments in force did not fully cover the commitment under Article 9(3) of the Convention insofar as decisions by national authorities are challenged. Unless the EU were to adopt further measures, the declaration provided that the Member States remained competent in this area.[84] The EU had, in fact, adopted the Aarhus Regulation,[85] which regulates proceedings at EU level but does not harmonize proceedings at national level. The AG in the case concluded that the CJEU therefore had no competence to interpret Article 9(3) of the Convention, since the EU had not exercised its competence in relation to

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[78] Case C-459/03 *Commission v Ireland* EU:C:2006:345, para 100, citing Article 4(3) of Annex I of the United Nations Convention on the Law of the Sea, UNTS Vol. 1833, I-31363.

[79] Ibid para 104.

[80] Under the *ERTA* doctrine, the existence of common rules is not sufficient for the EU to enjoy exclusive competence, since those common rules also need to be affected by the (provisions of the) international agreement.

[81] Case C-459/03 *Commission v Ireland* EU:C:2006:345, para 108.

[82] See Annex II to Council Decision 2010/48/EC concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ L23/35.

[83] As Cremona rightly notes, there was no real evidence of the extent to which the EU had exercised its shared competence. The Council Decision was indeed based on the EU's environmental competence (a shared competence), but this does not tell us anything about the extent to which that competence was exercised. The declaration of competence on which the Court relied was, in fact, interpretable in multiple ways. Cremona, 'Defending the Community Interest: The Duties of Cooperation and Compliance' (n 61) 150–51.

[84] See the declaration of competence annexed to Council Decision 2005/370 [2005] OJ L124/1.

[85] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, UNTS Vol. 2161, I-37770.

this issue.[86] The Court, however, controversially found that Article 9(3) did come within the scope of EU law,[87] since the EU had adopted the Habitats Directive,[88] which lists the brown bear in one of its annexes. In line with *Commission v France*,[89] the Court thus held that the issue was covered 'to a large extent' by EU law.[90] In addition, the Court applied a *Hermès*-type reasoning, noting that Article 9(3) of the Convention could apply to both proceedings at EU and national level, thus warranting a uniform interpretation by the Court.[91]

5. THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AS AN INTEGRAL PART OF EU LAW BINDING ON THE MEMBER STATES

It follows from the previous section that those provisions of the CRPD for which the EU has exercised competence form an integral part of EU law in the sense of *Haegeman*, meaning that they are binding on both EU institutions and the Member States, and fall under the jurisdiction of the CJEU.

In a number of cases, the Court has also been invited to interpret the CPRD, in order to determine the obligations which it imposes on EU Member States. Procedurally, such cases may typically be brought before the Court in two ways: indirectly, through preliminary references by national judges; and directly, when the Commission brings infringement actions against the Member States for failure to comply with EU law. Procedurally, and as follows from the above, before the Court can answer such questions it needs to ascertain whether the EU has committed itself (and its Member States) in relation to the CPRD provisions invoked.

5.1 Preliminary References Related to the CRPD

In *HK Danmark*, the first case before the Court of Justice in which the CPRD featured, the Court referred to its general jurisprudence on the hierarchy between international agreements concluded by the EU and EU ordinary secondary legislation,[92] noting that the EU's declaration of competence refers explicitly to the Employment Equality Directive as one of the internal

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[86] Opinion of AG Sharpston in Case C-240/09 *Lesoochranárske zoskupenie* EU:C:2010:436, paras 75–80.

[87] The Court's decision was criticized by several authors: see, *inter alia*, Laurent Coutron, 'Chronique Droit du contentieux de l'Union européenne – Sur une apparente lapalissade: les associations de protection de l'environnement doivent pouvoir protéger l'environnement' [2011] *Revue Trimestrielle de Droit Européen* 819; see also Marcus Klamert, 'Dark Matter: Competence, Jurisdiction and the Area Largely Covered by EU Law – Comment on Lesoochranárske' (2012) 3 *European Law Review* 340. For a more congenial comment on the Court's findings, see Catherine Flaesch-Mougin, 'Chronique action extérieure de l'Union européenne – Union européenne et système institutionnel de l'action extérieure' [2011] *Revue Trimestrielle de Droit Européen* 662.

[88] Council Directive (EEC) 92/43 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.

[89] Case C-239/03 *Commission v France* EU:C:2004:598.

[90] Case C-240/09 *Lesoochranárske zoskupenie* EU:C:2011:125, paras 36–38.

[91] Ibid paras 42–43.

[92] Joined Cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk*

measures that fall within the remit of the CRPD's obligations.[93] Substantively, as will be further discussed in Part II of this *Research Handbook*,[94] this resulted in the Court adapting the EU definition of 'disability', which the Court itself had given earlier in *Chacón Navas*,[95] so as to be in line with the conceptualization of disability provided in recital (e) of the CPRD's preamble.[96]

The *Z* and *HK Danmark* cases are illustrations of how, because of the hierarchy of norms, the EU is required to follow the CPRD's definition of 'disability' 'in so far as possible'.[97] 'In so far as possible' means that provisions of internal EU law cannot be interpreted *contra legem*. If an internal provision cannot be interpreted or applied in a way that is compatible with the international provision, the internal provision may be set aside, but only insofar as the provision in the international agreement has direct effect.[98] The problematic nature of the 'in so far as possible' requirement is further illustrated in the *Z* and *Glatzel* cases.[99] In *Z,* the Court found that the Employment Equality Directive, unlike the CPRD, does not *generally* target discrimination on the ground of disability, and that it does so only insofar as it results in compromising an individual's participation in his or her professional life.[100] Given the objective of the Employment Equality Directive, the general definition of disability in the CPRD could not be relied upon to broaden the scope of the Directive beyond discrimination with regard to employment and occupation.[101] In *Glatzel*, the 'in so far as possible' requirement was a stumbling block because the EU provision was unequivocal. As the CJEU stated:

> point 6.4 of Annex III to Directive 2006/126 provides unequivocally that drivers of motor vehicles in categories C1 and C1E must have minimum visual acuity of 0,1 for the worse eye. In those circumstances, it does not appear possible to give that provision of secondary law an interpretation which would enable it to circumvent the clear rule laying down that minimum value.[102]

Arbejdsgiverforening, acting on behalf of Pro Display A/S (Ring and Skouboe Werge) (*HK Danmark*) EU:C:2013:222, para 28.

[93] Council Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive) [2000] OJ L303/16.

[94] See *infra* Andrea Broderick and Philippa Watson, 'Disability in EU Non-discrimination Law', in this volume.

[95] Case C-13/05 *Sonia Chacón Navas v Eurest Colectividades SA* EU:C:2006:456, para 43.

[96] See Joined Cases C-335/11 and C-337/11 *HK Danmark* EU:C:2013:222, para 38.

[97] Case C-363/12 *Z. v A Government department and The Board of management of a community school* (*Z.*) EU:C:2014:159, para 74; Joined Cases C-335/11 and C-337/11 *HK Danmark* EU:C:2013:222, para 31.

[98] AG Jääskinen recently suggested to the Court to decouple the issue of the invocability of a provision of an international agreement to review the legality of EU acts from the question of that provision's direct effect, but the Court maintained its traditional case law. See Opinion of Advocate General Jääskinen, Joined Cases C-401/12 P to C-403/12 P *Council and others v Vereniging Milieudefensie* EU:C:2014:310, paras 58–84.

[99] Case C-356/12 *Wolfgang Glatzel v Freistaat Bayer* EU:C:2014:350, para 71.

[100] See Case C-363/12 *Z.* EU:C:2014:159, para 80; Opinion of Advocate General Wahl, Case C-363/12 *Z.* EU:C:2013:604, para 90.

[101] Indeed, in light of the principle of conferred powers, the EU arguably lacks competence to generally prohibit discrimination on the ground of disability.

[102] Case C-356/12 *Wolfgang Glatzel v Freistaat Bayer* EU:C:2014:350, para 71.

In both *Z* and *Glatzel*, the Court then ascertained whether the validity of the Employment Equality Directive and Directive 2006/126,[103] respectively, could be reviewed in light of the CPRD; but the Court held that this was impossible in those cases. Given the programmatic nature of the CPRD's provisions, they were not worded in a sufficiently precise and unconditional manner so as to have direct effect.[104] The Court therefore did not have to address the question as to whether the CPRD's nature allows for direct effect.[105] With regard to the *Z* case, however, it could be questioned whether it was at all possible to assess the validity of the Employment Equality Directive in light of the CRPD. According to the declaration of competences, the CRPD is only binding on the EU insofar as it has exercised its competence by adopting common rules. Insofar as the scope of the Directive only covers discrimination on the ground of disability in employment and occupation, and no other relevant common EU rules exist, the EU would not be bound by Articles 5, 6, 27(1)(b) and 28(2)(b) CPRD; instead, the Member States alone have assumed responsibility for these commitments.[106] As a result, it would not be possible to assess the legality of EU secondary legislation in light of these provisions unless they codify customary rules of general international law,[107] which arguably was not the case in *Z*.

A final decision illustrating the complex manner in which the CRPD (as a mixed agreement) interacts with EU law and has effects *vis-à-vis* private parties is *Milkova*, where the unequal treatment of private employees and civil servants with disabilities was at issue. Again, the Court (and the AG) noted that the issue did not come under the scope of the Employment Equality Directive, because the Directive only prohibits discrimination on the ground of disability, whereas the problem at issue related to discrimination on the ground of an individual being employed as a civil servant rather than under a private employment contract. For the AG, this was the end of the story, since the prohibited grounds of discrimination are listed exhaustively in the Directive,[108] and, as a result, the dispute did not even come within the scope of the Directive.[109] In contrast, the Court took a different approach based on Article 7(2) of the Directive, which allows for positive action, and provides that 'the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt […] facilities for safeguarding or promoting [disabled persons'] integration into the working environment'. The AG read this provision as confirming the sovereignty of Member States to adopt positive

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[103] Directive 2006/126/EC on driving licences (Recast) [2006] OJ L403/18.

[104] See Case C-363/12 *Z.* EU:C:2014:159, para 90; Case C-356/12 *Wolfgang Glatzel v Freistaat Bayer* EU:C:2014:350, para 69. Only in *Glatzel* did the Court suggest that not a single provision of the CRPD lends itself to direct effect, but of course this should be tested and determined for each single relevant provision.

[105] Under the Court's established jurisprudence, a provision of an international agreement concluded by the EU may only have direct effect (insofar as the agreement itself does not settle the question of direct effect): (i) when that agreement's nature, structure and broad logic allows this and (ii) when the specific provisions relied upon are worded in a sufficiently precise and unconditional manner.

[106] See also the argument of the Commission to this effect in Opinion of AG Saugmandsgaard Øe in Case C-406/15 *Milkova v Izpalnitelen director na Agentsiata za privatizatsia I sledprivatizatsionen control (Milkova)* EU:C:2017:198, para 80.

[107] See Case C-308/06 *Intertanko* EU:C:2008:312, paras 43–51.

[108] Opinion of Advocate General Saugmandsgaard Øe, Case C-406/15 *Milkova* EU:C:2016:824, para 58.

[109] Ibid para 85.

action, such measures falling outside the scope of EU law.[110] The Court, however, noted that Article 7(2) of the Directive also had to be read in light of the CPRD, which allows for positive action and which lays down a right to equal protection, and equal benefit of the law.[111] The Court then found that, if Member States pursue positive action (as permitted under Article 7(2) of the Directive), they still have to respect the principle of equal treatment. While ultimately leaving the assessment to the national judge, the Court noted that 'the distinction made by [the national] legislation between employees with a particular disability and civil servants with the same disability does not appear to be sufficient in the light of the aim pursued by that legislation'.[112]

5.2 Infringement Proceedings Based on the CRPD

To date, the EU Commission has not brought any infringement proceedings against a Member State for failure to implement or respect a provision of the CRPD. However, a case was brought against Italy for failure to implement Article 5 of the Employment Equality Directive, which lays down the obligation for employers to provide reasonable accommodation. Although the Court read the notions of 'disability' and 'reasonable accommodation' in light of the CRPD, the UN Convention did not play a key role in the case, since what was in dispute was whether the lack of a clear and explicit obligation for all employers to provide reasonable accommodation amounted to an infringement of Article 5 of the Directive.[113]

Interestingly, following the amendment of the Italian law in question, in order to comply with the Court's ruling, Member of Parliament (MEP) Forenza queried the Commission on whether it believed that the amendment, allowing prospective employers greater discretion in choosing which disabled persons they would employ, was in line with Articles 26 and 27 CRPD.[114] In its reply, the Commission defended the view that the Italian law did not violate the EU Directive or the Charter of Fundamental Rights of the EU (CFR) and noted, equally, that it does 'not have the competence to assess whether there is a violation of the UN Convention on the Rights of Persons with Disabilities'. This seems to be an erroneous statement, since the Commission does have such competence insofar as the matter at hand relates to an issue on which the EU has legislated or on an issue which is largely covered by EU rules (or if the standard would be further lowered as per the suggestion of AG Poiares Maduro, where there is a Union interest, pursuant to the duty of loyal cooperation, in assuring that the Member States honour the commitment in question).

Indeed, even without the Court's clarification in *Milkova*, Article 5 of the Employment Equality Directive needs to be interpreted in line with Article 26 and 27 CRPD, which further set out what reasonable accommodation in accessing employment should mean. This would

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[110] Ibid para 72.

[111] Case C-406/15 *Milkova* EU:C:2017:198, para 52. This type of peculiar reasoning is not uncommon in the Court's jurisprudence. In Opinion 3/15 on the Marrakesh Treaty, the Court interpreted a provision of an EU directive, which *prima facie* left the Member States the freedom to restrict (or not) copyright protection, to the benefit of disabled people, not as confirming a 'reserved domain' for the Member States but as confirmation of the EU legislature's intent to define an exhaustive framework on that issue. See Opinion 3/15 on the Marrakesh Treaty EU:C:2017:114, para 119.

[112] Case C-406/15 *Milkova* EU:C:2017:198, para 61.

[113] See Case C-312/11 *Commission v Italy* EU:C:2013:446.

[114] See Question for written answer E-005813-16 by MEP Eleonora Forenza.

allow the Commission (and the Court) the opportunity to exercise greater scrutiny over the Member States' policies on reasonable accommodation in infringement proceedings.

6. CONCLUDING REMARKS

In general, and from an EU law perspective, mixed agreements, at least facultative mixed agreements, are viewed sceptically. With regard to such agreements, the formal involvement of the Member States creates a plethora of legal and practical challenges, without much evident added value. In the case of the CRPD, however, its mixed nature appears to be obligatory, because the CRPD touches on issues that come under the Member States' reserved competences. Indeed, the mixed nature of the UN Convention is reflected in the broad scope and objectives of the CRPD. Having said this, the CRPD's mixity is a double-edged sword, since it undoubtedly results in a legally more complex situation; but at the same time, the UN Convention being mixed means that the possibilities for effective enforcement of the CRPD by private parties *vis-à-vis* EU Member States are enhanced (compared to the situation where only the Member States would be Parties to the CRPD). In this regard, it should also be noted that the CRPD's mixity is not a factor in the EU's inability to accede to the OP-CRPD; instead, this is the result of the applicable voting threshold in the Council (i.e. unanimity), which is difficult to reach.

Still, before EU mechanisms may be relied upon to ensure the enforcement of specific provisions of the CRPD *vis-à-vis* the Member States, it must first be determined whether the EU has in fact committed itself in relation to those provisions. When the provisions come under the EU's exclusive competence, this issue is in principle clear, since only the EU will have the competence to undertake commitments. This question is more complicated than that, however, since the Court's test for supervening exclusivity has evolved in recent case law and its future development is difficult to predict. For shared competences, the question is even more problematic, since the Court's test here is whether the issue regulated by the international agreement is covered in large measure by EU legislation (*France v Commission*) unless a declaration of competences exists for the mixed agreement. For the CRPD, this is the case, and the declaration of competences is worded similarly to that which applies in respect of the UNCLOS (interpreted by the Court in *Mox Plant*). This suggests that EU mechanisms of enforcement are available for those provisions of the CRPD on which there is relevant EU legislation, regardless of whether that legislation is affected in the *ERTA* sense. The threshold for having recourse to the EU's powerful enforcement mechanisms (the preliminary ruling and infringement procedures) thus seems rather low. While the Court has already developed some jurisprudence in relation to the CRPD through the preliminary ruling procedure, no infringement procedures have been brought yet in relation to the CRPD. For the latter to be the case, a bolder and more ambitious approach of the Commission seems both required and legally feasible.