

## **Getting a Life – Living Independently and Being Included in the Community**

**A Legal Study of the Current Use and Future Potential of the EU Structural Funds to Contribute to the Achievement of Article 19 of the United Nations Convention on the Rights of Persons with Disabilities.**

**Office of the United Nations High Commissioner for Human Rights**

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## **Dedication**

Dedicated to the memory of Jim Mansell, a great humanitarian who championed the right to live independently and be included in the community for millions of Europeans with disabilities.

It's not only other people who hold us in our identities. Familiar places and things, beloved object, pets, cherished rituals, one's own bed or favourite shirt, can and do help us maintain our sense of self. And it is no accident that much of this kind of holding goes on in the place where our families are: at home. The home...is an extension and mirror of the living body in its everyday activity and is thus a *materialization* of identity...our homes manifest who we are at the same time as they provide the physical scaffolding that *supports* who we are.

Quoted from Hilde Lindeman, '*Holding One Another*' in Eva Feder Kittay & Licia Carlson (Eds.), *Cognitive Disability and the Challenge to Moral Philosophy*, (Wiley Blackwell 2010) at 163-164.

## Executive Summary

The purpose of this Study is to explore and set out the minimum conditions necessary to achieve the positive potential of the European Union Structural Funds in enabling Member States and the European Union to implement the UN Convention on the Rights of Persons with Disabilities, particularly the right to live independently and be included in the community. Not only is this a key right in the Convention but it is also an area where the Structural Funds can generate clear added value.

Based on the analysis set out in this Study, a clear set of recommendations are proposed which seek to build on the proposals made thus far by the European Commission.

Community living for all will not be achieved overnight. It requires a deliberate process of transition. This transition from residential care to community living is not only desirable – it is now a clear legal obligation undertaken by the Member States and by the European Union under Article 19 of the UN Convention on the Rights of Persons with Disabilities. This is not rhetoric. The international legal imperative of *pacta sunt servanda* (agreements are meant to be honoured) applies. What the EU professes must be consistent with what it practices. Ratification ('confirmation') of the Convention must mean something.

Europe is now at a crossroads. The drafting of new Regulations in 2012 to govern the Structural Funds in the 2014-2020 programming period provides a unique opportunity to reflect on the positive role the Funds can and should play in easing the transition to community living for persons with disabilities. It also provides an opportunity to reflect on the role the Funds played in the past and on what needs to be clearly avoided in order for the EU to respect its international obligations under the UN CRPD in the event that the Funds were to be used to open new institutions or to refurbish existing institutions.

The UN CRPD has been ratified by a majority of EU Member States and by the European Union (technically 'confirmed' by the EU). All States Parties (and the EU is considered to be a State Party) undertake general obligations in addition to the specific obligations that attach to each of the rights specified. Among these general obligations is the obligation to mainstream the requirements of the Convention into all policies and programmes that affect persons with disabilities. This would certainly include the Structural Funds. In addition, States Parties are obliged to refrain from engaging in practices inconsistent with the Convention. This would certainly apply to any purported use of the Structural Funds to open new institutions that effectively deny a right to independent living.

The general obligation to refrain from any act or practice inconsistent with the Convention would also apply to any silence on the Regulations that could be interpreted as permissive toward the construction of new institutions. Such silence would engage international legal liability just as surely as a provision that explicitly called for new institutions. This is especially so given the well-attested history of the Structural Funds in the past to construct segregated institutions for persons with disabilities which does not give confidence for the future unless very clear conditionalities are inserted (and rigorously enforced) to ensure against any potential mis-use.

It bears emphasizing that the UN CRPD is a so-called 'mixed convention.' That is to say it engages both the legal responsibility of both Member States and the EU. There is an expectation with respect to such 'mixed conventions' that there would be stepped-up cooperation between both levels in order to minimize legal exposure. International legal liability would arise on the part of the EU even if the offending Member State in question did not ratify the Convention. In other words, the EU could still be held liable notwithstanding the failure of the Member State to ratify if silence in the underlying Regulations could be interpreted (as it surely would) as having created the occasion for non-conformity.

Another important general obligation requires States Parties to the Convention to consult with and actively involve persons with disabilities and their representative organisations in the development and implementation of legislation and policies that affect them as well as in all relevant decision-making processes. It is critical that this process of consultation and involvement be reflected in the Regulations since the absence of persons with disabilities in such processes is one of the main reasons they have not taken due account of the disability dimension.

That the strictures (rights & obligations) of the UN CRPD apply to and reach the Structural Funds is beyond doubt. The Declaration of competences that accompanied the decision of the EU to 'confirm' clearly identified the Structural Funds as an illustrative example of what lies within its sphere of competence. The net question is

not 'whether' the UN CRPD applies but how. All of the general obligations on States Parties above would apply – as well as the more specific obligations of States under Article 19.

Article 19 itself contains a very positive philosophy of independent living and being included in the community (community living). It builds on a more general trend toward restoring voice and power to the individual to determine where s/he wishes to live and with whom. In this sense it builds on Article 12 which requires a reform of traditional legal capacity laws to ensure that the wishes and preferences of the individual are predominant. It requires the development of more personalised supports to ensure that supports enable community living and are configured accordingly. It requires community supports to be made more inclusive of and accessible to persons with disabilities. Taken with other provisions in the Convention (especially Article 8 which requires Parties to 'nurture receptiveness to the rights of persons with disabilities') it embodies a strong presumption that its objectives cannot be achieved in congregated or institutional settings which, though radically downsized, might simply replicate the worst aspects of institutions. Smaller institutions are no less objectionable than larger ones particularly where the structural opportunities for real engagement in community life are absent. Congregated settings generally draw attention to the commonality of their residents (disability) rather than to their innate personhood and thereby militate against open intercourse with civil society.

The underlying logic of Article 19 has been strongly reinforced recently by the Council of Europe's former High Commissioner for Human Rights (Thomas Hammarberg) in a landmark Issues Paper on 'the right to live independently and be included in the community' (20 February 2012). Indeed the US Supreme Court has already held that unjustified institutionalisation amounts to discrimination (*Olmstead v LC*, 1999) contrary to the Americans with Disabilities Act. The legislative and policy response to that decision was very encouraging and has led recently to the establishment of a new US Federal Agency on Community Living (April 2012) which merges several bodies to ensure that 'all Americans can live at home with the supports they need, participating in communities that value their contribution, rather than in nursing homes or other institutions.' By simple analogy, what is being sought of the EU Structural Funds is an assurance that EU-level resources will not be used to inhibit the move toward community living and, more positively, a commitment to ensure that they will play their part in helping Member States move forward with a robust transition.

This Study strongly supports the logic and reasoning of the European Commission's draft *ex ante* conditionalities for the Structural Funds which take EU 'confirmation' of the UN CRPD seriously. Indeed, these conditionalities would have to be invented if they did not exist in order not merely to take the UN CRPD seriously but also to deliver on key European commitments in EU 2020 'toward a smart, sustained, inclusive economy' as well as the EU disability strategy (2012-2020). The Structural Funds could bring real added-value to this process of change. On 24 April 2012, the General Affairs Council adopted a compromise text which withdraws from the European Commission's proposal the general *ex ante* conditionalities in the areas of non-discrimination, disability and gender equality as well as the thematic conditionality on transition to community-based care. This decision demonstrates the close attention paid to these issues by the Member States. The nature of the co-decision process means that further opportunities will arise to return to the position adopted in Council. It is hoped the analysis offered in this Study will prove useful in these deliberations and especially in restoring a sense of the centrality of the obligations of the Convention to the process.

The EU is an experiment in combining principle and power. It certainly has and exercises real power. The legitimacy of that power rests ultimately on acceptance of underlying principles including democracy, the rule of law and human rights. The admixture of both ensures that the EU is – and is seen to be – a force for good. The addition of appropriate conditionalities in the operation of the Structural Funds is a key test of the seriousness of the EU in harnessing its power to principle. Obviously this affects Europe's estimated 80 million persons with disabilities. But it also places a question mark over Europe's commitment to principles. The EU was to the fore in negotiating the new UN CRPD. It needs to show that will take this convention seriously where it matters most – in re-configuring the sinews of power as exemplified by the Structural Funds. The EU has an opportunity to take a lead in developing appropriate models of community living. If this opportunity is lost then the vacuum will only be filled with cynicism about the nature of the Union and the genuineness of its commitment to international law.

Embedding a process of transition in the right direction is, if anything, more important in times of economic retrenchment. Fundamentally, the issue is not one of resources. It is one of laying down the foundations for a dynamic of change that will shift resources from institutions to the community. The temptation in times of austerity might well be to continue to manage and care for persons with disabilities almost as 'objects.' It is quite another thing to move policy toward enabling people assume control over their own lives and to be treated as equal 'subjects.' If this process does not start now using the limited tools available to the Union – which obviously include the Structural Funds – then it is hard to see how such a dynamic of change can be initiated

and maintained. The progressive achievement of human rights cannot, and need not, wait for a renewal of prosperity. A 'smart, sustainable and inclusive' society and economy cannot be built without some strong foundations. Tangible movement toward community living is needed. And the Structural Funds have a key role to play.

# Chapter 1 – Introduction

## 1. Purpose of this Study

The purpose of this Study is to undertake a legal analysis of the implications of ratification ('confirmation') by the European Union (EU) of the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD or the Convention) for the current use and – most importantly – the future potential of the EU Structural Funds (specifically the European Regional Development Fund and the European Social Fund). Although the UN CRPD spans a broad array of rights and obligations our focus is on the right to live independently and be included in the community.

Europe is fortunate in having at its disposal the financial tools to transfer resources internally to enable all regions to develop to the point that they can benefit both economically and socially from the advantages of a truly continental market. Such solidarity is of tangible economic as well as social benefit. Naturally the question arises whether, and if so how, these financial tools can be better harnessed to enable the EU – and its Member States - to meet its legal obligations under the UN CRPD.

The EU – *qua* EU – ratified (technically 'confirmed') the Convention in December 2010. Nineteen of its Member States<sup>1</sup> have already done so with the rest to follow suit shortly. Much rides on how the EU will implement this Convention. Ratification by the EU of an international human rights treaty is unprecedented and may well have implications for future EU ratification of other such instruments. EU ratification tests the resolve of the EU to take its obligations seriously which means, *inter alia*, ensuring that all its available tools for bringing about change are brought into much closer alignment with the values and implementation of the UN CRPD.

Indeed, the UN CRPD itself envisages that international solidarity is a cornerstone in enabling all States to comply with its often demanding obligations. Unusually in a thematic treaty of its kind, it calls for all States to ensure that their development aid programmes are 'inclusive of and accessible to persons with disabilities' (article 32). The letter of Article 32 probably does not reach the Structural Funds since they are primarily internal to the EU in their application. But the spirit certainly applies. In addition, the UN CRPD contains a general obligation (Article 4) on States parties (which includes the EU) to adopt, adapt or modify existing policies and programmes to bring them into alignment with the Convention, to eradicate inconsistencies and to maximise opportunities for meaningful implementation.

The current programming period for the Structural Funds (2007-2013) is coming to an end. A window has therefore opened up to consider how these Funds can play a more direct and positive role in achieving the aims of the Convention. An invaluable opportunity therefore arises to map the obligations of the Convention onto the Structural Funds. It goes without saying that the regulations and implementation of the Funds should never contribute – directly or indirectly – to a violation of the rights and obligations in the convention. The EU – both morally and legally - must reflect on how the Funds might be used as one element among others to strengthen the enjoyment of the rights in the Convention. A draft legislative package on the next programming period was presented by the European Commission on 6 October 2011.<sup>2</sup> There are many positive elements to these proposals which, at a minimum, should be maintained. This Study will reinforce – from a legal point of view – the logic immanent in these proposals and recommend additional ways in which they might be improved.

This Study does not rove at large among the many rights of the Convention. Instead, it concentrates on one core set of obligations in the UN CRPD dealing with the crucial right to live independently and be included in the community (Article 19). In doing so it does not mean to suggest that there is some hierarchy according to which some rights are more important than others. Rather, the Study does so primarily because it is widely acknowledged that connecting people back into their community and in living arrangements and settings that reflect their own wishes and preferences is vital to personhood and human flourishing. In addition, the heightened visibility of the person that naturally occurs through inclusion plays its own part in eroding popular prejudice thus creating a virtuous circle of flourishing, inclusion and participation. Sadly, there is wide acknowledgement in Europe that securing the right to live independently and be included in the community is very far from realised especially in parts of the Union where the ethic and practice of institutional segregation seems deeply embedded. Even where institutional segregation is not practiced many persons with disabilities

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<sup>1</sup> Austria, Belgium, Cyprus, Czech Republic, Denmark, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Spain, Sweden, United Kingdom.

<sup>2</sup> The draft legislative package is available at [http://ec.europa.eu/regional\\_policy/what/future/proposals\\_2014\\_2020\\_en.cfm](http://ec.europa.eu/regional_policy/what/future/proposals_2014_2020_en.cfm) (last accessed 1 March 2012)

live disconnected and lonely lives because the infrastructure of inclusion – especially open and accessible community services as well as personalised services – is insufficiently developed.

Report after report testifies to the enduring power of segregation, especially for persons with intellectual disabilities, including those with psychosocial disabilities, into institutions or congregated settings – a fact that only exposes the residents to more human rights violations.<sup>3</sup> The numbers alone are huge, with nearly 1.2 million people in Europe living in residential establishments for people with disabilities.<sup>4</sup> The assumption (prejudice) that such persons cannot make it in the community becomes a self-fulfilling prophecy according to which they are effectively locked out from social interaction. In this sense living independently and being included in the community is a portal to the enjoyment of other rights connected with personhood and active citizenship. And, most importantly, this is where the Structural Funds have a demonstrated capacity to make a real difference.

There is a natural harmony of purpose between Article 19 of the UN CRPD and the Structural Funds. Article 19 does not mention institutions and does not speak directly of deinstitutionalisation. Instead it adopts – and unpacks – a very positive philosophy of living independently and being included in the community. It sees independence as tied to community and civic engagement. That is to say, it sees something that applies to all of us – how our independence depends on our interdependence – and makes this plain in the specific context of disability. Using this as its primary departure point it then goes onto craft obligations that are, in their own way, essential steps in making independence and community engagement a reality. This includes the development of appropriate services – especially services that respond directly to personal preferences. The UN CRPD demands that generally available community services be made available and accessible to persons with disabilities.

It bears emphasising that Article 19 does not exist in isolation. Enabling people to live the life they want and where they prefer should be seen as a support that enables persons with disabilities to exercise and develop their capacity to navigate through life for themselves. Hence, Article 19 is intimately tied to Article 12 (right to equal recognition before the law). Article 8 (on raising awareness) speaks directly to the challenge of nurturing public receptiveness to the rights of persons with disabilities. This is hardly likely to be achieved if the community at large just see ‘disability’ which is likely in congregated settings. It is much more likely to happen where people with disabilities live locally and in familiar community settings. All of which requires a transition. All of which requires a switch of resources from segregated settings and unresponsive services to a more personalised approach. All of which requires the embedding of a strong dynamic of change going in the right direction. And none of which can be achieved without the active involvement of persons with disabilities.

The Structural Funds already have a proud history of achieving inter-regional justice and enabling our societies to develop and evolve into more inclusive places where citizenship and belonging can be made tangible. The record of the Funds in the past is indeed laudable. It is because of this rich heritage that we owe it to Europe’s 80 million persons with disabilities<sup>5</sup> to ensure that the Funds play their part in enabling all of Europe live up to their obligations in the UN CRPD. There is a unique opportunity here not only to do good by our own citizens but to demonstrate through it how other regions of the world and international organisations might harness their own latent financial and other levers for change to the achievement of the UN CRPD.<sup>6</sup>

## 2. Structure of this Study

Chapter 2 will provide a general overview of the rights and obligations in the UN CRPD. Of particular significance are the general obligations in Article 4 which, *inter alia*, require States (and also now the EU) to ‘progressively achieve’ those rights that require extra economic and social resources for their satisfaction (Article 4(2)). This is of particular relevance when it comes to the implementation of Article 19 some of which

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<sup>3</sup> *The Report of the Ad Hoc Expert Group on the Transition from Institutional to Community-based Care*, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, September 2009, *Wasted Money, Wasted Time, Wasted Lives – A Wasted Opportunity? A focus report on how the current use of Structural Funds perpetuates the social exclusion of disabled people in Central and Eastern Europe by failing to support the transition from institutional care to community-based services*, European Coalition for Community Living (ECCL), 2010, Parker, *Forgotten Europeans, Forgotten Rights – The Human Rights of Persons Placed in Institutions* (2010, Office of the High Commissioner for Human Rights, Regional Office Europe).

<sup>4</sup> Mansell, J., Knapp, M., Beadle-Brown, J., & Beecham, J. *Deinstitutionalisation and community living – outcomes and costs: report of a European Study*. Volume 2: Main Report. (2007) Canterbury: Tizard Centre, University of Kent, p. 25.

<sup>5</sup> <http://www.edf-fepb.org/default.asp> (last accessed 4 April 2012).

<sup>6</sup> This opportunity has already been highlighted in a number of previous reports, most notably in *The Report of the Ad Hoc Expert Group on the Transition from Institutional to Community-based Care*, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, September 2009 and *Wasted Money, Wasted Time, Wasted Lives – A Wasted Opportunity? A focus report on how the current use of Structural Funds perpetuates the social exclusion of disabled people in Central and Eastern Europe by failing to support the transition from institutional care to community-based services*, European Coalition for Community Living (ECCL), 2010.

can be implemented immediately but more of which requires sustained effort. Furthermore, a sustained effort requires active deliberation on how all available tools can be utilised to maximum effect. From a narrow legal point of view if the EU – through the Structural Funds – does not embed and fertilise this dynamic of change then it may very well be exposed to international legal liability under the convention. Also of crucial significance are the process-oriented obligations of States parties (including the EU). One of the main reasons inappropriate laws and policies were adopted in the past and throughout the world was because of the relative absence of the voice of persons with disabilities in the policy making process. The UN CRPD is alive to this deficiency and seeks to correct it by embedding an obligation (Article 4(3)) on the part of States parties to actively involve -and not just consult with - persons with disabilities and their representative organisations. This proves quite important when it comes to assessing the adequacy of the European Commission's proposed new Regulations for the Structural Funds.

Chapter 3 will unpack the various rights and corresponding State (and EU) obligations contained more specifically in Article 19 on the right to live independently and be included in the community. While much work has already been done to clarify the nature of the relevant bundle of rights and obligations it is worthwhile spending some time detailing and clarifying them. Of special consideration is the need to end certain practices and the need to set in motion a process or dynamic of change – one where the Structural Funds can have a powerful catalytic role. As will be seen, the philosophy and tone of Article 19 is a positive one. The focus is on a home of one's own where home is not just bricks and mortar but also a platform for genuine independence and community connectedness. The focus is also on the preconditions for living independently which entails a step change in how services are imagined, delivered and personalised. It also entails making sure that existing community services are made more fully accessible to persons with disabilities.

Chapter 4 will step sideways at least momentarily to recount the general evolution of EU Disability Law & Policy and highlight its positive resonance with the UN CRPD generally and Article 19 specifically. This will include an analysis of the EU Charter of Fundamental Rights<sup>7</sup>, the EU 2020 strategic priorities toward a 'smart, sustainable and inclusive economy'<sup>8</sup>, the EU Disability Strategy (2010-2020)<sup>9</sup> and the potential synergy between a revised set of Structural Funds with the mooted 'European Accessibility Act'. The EU 2020 strategy in particular calls for social innovation. In a sense, chapter 4 goes to the natural fit that exists between the normative trajectory of existing EU law and policy with a positive revision of the Structural Funds – all working toward effective implementation of the UN CRPD. In a sense, a positive use of the Structural Funds would fit with these normative trends within the EU even if the UN CRPD were never concluded.

Chapter 5 reflects on the significance of the legal basis put forward for EU 'confirmation' of the Convention. It will then clarify the legal implications of the EU's confirmation of the UN CRPD and particularly the complex spread of EU and Member State competences with respect to the implementation of the convention and specifically Article 19. The EU Declaration of competences which was lodged with its instrument of 'confirmation' as required under Article 42 of the UN CRPD makes it abundantly clear that the Structural Funds are covered. Even if a narrow view were taken that the UN CRPD only becomes a reckonable issue when there is a live dossier, that is certainly the case here with the negotiations for a new programming period underway in 2012. As will be seen the interaction of EU and Member State competences makes it imperative that the EU play its full part through the revised Structural Funds and otherwise to embed a positive dynamic of change toward independent living and indeed kick-start it.

Chapter 6 will then provide a general overview of European Structural Funds as they have developed, including their underlying philosophy, the legal instruments that govern their operation and the *modus operandi* for implementation, monitoring and evaluation. It is important to grasp the sinews of the programme in order to be able to identify how and where they might be changed with optimum effect. This chapter will include an analysis of the operation of the existing regulations which have applied during the current programming period and particularly some of the critiques that have surfaced on the (mis)application of the Funds by disability civil society groups and others. This chapter will also – briefly – touch on how or whether EU Development Aid and the EU Instrument for Pre-Accession Assistance (IPA) have been made more inclusive of disability issues. Although not the focus of this Study it will be important to ensure a high level of symmetry between whatever is done to make the Structural Funds more inclusive and what is done with respect to these more external instruments of the EU.

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<sup>7</sup> Charter of Fundamental Rights of the European Union [2000] OJ C364/1.

<sup>8</sup> *Europe 2020 - A European strategy for smart, sustainable and inclusive growth*, (2010, European Commission, Brussels) [http://ec.europa.eu/europe2020/index\\_en.htm](http://ec.europa.eu/europe2020/index_en.htm) (last accessed 4 April 2012), hereinafter « EU 2020 Strategy ».

<sup>9</sup> Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe*, 15 November 2010, COM 2010(636).

Chapter 7 will undertake an analysis of the European Commissions' draft regulations for the programming period 2013-2020. This analysis will be done by reflecting on the adequacy of the proposals against the legal requirements of the UN CRPD. This will be done by looking at the proposed General Regulation, the proposed Regulation on the European Social Fund and the proposed Regulation on the European Regional Development Fund. As will be seen there is indeed much to commend in the draft regulations. Indeed, the proposals are innovative in many key respects. Overall, the analysis will focus on the proposals in as much as they go to substance (e.g., making access to funds conditional on having in place a system to enforce the UN CRPD) as well as process (e.g., how and whether civil society groups will have a role to play in the design, monitoring and evaluation of the funds). The purpose of this part is to explore how and whether these proposals might be built on to ensure the optimum use of the Funds to embed a positive dynamic of change.

The final chapter of the Study will then arrive at conclusions and recommendations for the forthcoming programming period. We will summarise our conceptual and normative understanding of the UN CRPD and especially Article 19. We will summarise our analysis of the European Commission's proposals, and we will make a set of recommendations aimed at retaining the many positive elements in the Commission's proposals as well as clarifying and amplifying them with respect to both substance and process.

Our overall focus will be on the negative obligations of the UN CRPD (what not to do) and positive obligations (what can and should be done) as they apply to the EU regarding the regulation and management of Structural Funds into the future. We will reflect on the moral and legal imperative for a continent-wide transition from institutional based services to services and supports based in the community. We will focus on the moral and legal imperative for appropriate conditionality to be included in the new regulations to enable the EU to be – and to be seen to be – a key enabler in embedding and facilitating a transition. Our recommendations will reflect the absolute imperative for ensuring that any new departure – any new dynamic of change – should actively involve those most affected. As we will see, one of the hallmarks of the UN CRPD is not just a set of rights and obligations that States parties must conform to. Rather, it also sets out more fundamentally to change the nature of the processes that produce bad laws, policies and programmes in the first place. This applies to both policy formulation as well as implementation and monitoring. And we will also reflect on the old Russian adage, 'trust but verify,' and point to the need for measurable performance indicators with clear timelines for both the EU as a legal entity and individual Member States.

Last but not least, the analysis and recommendations in this Study operate within a broader context. For one thing, the EU has set for itself the commendable task of imagining and then innovating to create a 'smart, sustainable and inclusive' society and economy. It does so against the backdrop of an ageing society where, if anything, the cultural prejudice against older people is as much ingrained in the popular imagination and in practices. The moral and legal imperative of living independently and being included in the community has just as much force in the context of ageing as elsewhere and especially as Europe may feel tempted to expand institutionalisation (or mini-institutionalisation) as a response. So the logic of this Study has a wider remit. We are conscious that some of the challenges set out in this Study are becoming more manageable as Europe nudges in the direction of creating more personalised social services. This trend in favour of the personalisation of services and our felt need to refresh the European social model, if anything, gives confidence that the demanding obligations of the UN CRPD are indeed achievable if the right dynamic is put in place; all of which points to the crucial positive role of the Structural Funds into the future.

## Chapter 2

# General Overview of the Rights & Obligations in the UN CRPD

### 1. Philosophy – the paradigm shift of the UN CRPD

This Study is more particularly concerned with Article 19 of the UN CRPD and its implications for the EU and its Member States. This will be canvassed in detail and will be unpacked in Chapter Three. However, before such an examination can be carried out, it is first necessary to provide an analysis of the central provisions of the UN CRPD and especially the nature, spread and significance of States parties' general obligations (which includes the EU).

It bears mentioning at the outset that the Vienna Convention on the Law of Treaties (1969)<sup>10</sup> governs general international treaty law as well as treaty interpretation. It applies mainly to treaty law as it applies to States. It is complemented by the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations (1986)<sup>11</sup> which extends the same core principles to international organisations when they themselves are Parties to conventions. This latter treaty would appear to be the dominant instrument as applied to EU ratification ('confirmation') of the UN CRPD. For example, it introduces the notion of 'confirmation' by an international organisation of a treaty as against 'ratification.' To all intents and purposes the import of both treaties is the same particularly with respect to treaty interpretation. When in doubt the 1986 treaty is controlling. Since both the 1968 and 1986 treaties are considered to be consolidations of customary international law their norms apply.

It is well known that the UN CRPD effectuates a paradigm shift in the context of disability. It entails a decisive move away from viewing and treating persons with disabilities as 'objects' to be managed, controlled or taken care of towards viewing and treating them as human 'subjects' with equal rights and deserving equal respect.<sup>12</sup> This is indeed a profound shift and it certainly challenges some ingrained assumptions in the European social model which have tended in the past to uncouple an ethic of caring from the goal of ensuring human flourishing and an active life. Indeed, notions such as personhood and human flourishing are deeply embedded in the logic of the UN CRPD. This is reflected primarily in Article 12 which, effectively, restores to persons with disabilities the right to determine their own future, to express their own wishes and preferences and – most crucially – to have those wishes and preferences respected by others. Instead of displacing persons as decision-makers on sight of the first sign of decision-making frailty the Convention calls for supports to be put in place to augment capacity and to spark their will and preference. Interestingly, this probably calls more for enhancing social connectedness of the person than it calls for new public services (while acknowledging that there will always be those for whom specific services will have to be designed in order to enable their inclusion). Its logic calls for broadening one's social circles in the hope that this social embeddedness will itself form an essential support to enabling human flourishing – something that is highly unlikely to occur within an institutional setting.

The preamble to the UN CRPD contains an important paragraph (paragraph (e)) to the effect that disability itself is an evolving concept and that it 'results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.' In essence this embodies the 'social model of disability' whereby people are not problems – but the external environment problematises people largely because it remains insensitive to human difference.<sup>13</sup> Note that paragraph (e) focuses on the effect of disability which is to render social participation difficult if not impossible. Article 1 follows through by asserting that persons with disabilities include:

those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

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<sup>10</sup> U.N. Doc. A/Conf.39/27 (1969).

<sup>11</sup> U.N. Doc. A/Conf.129/15 (1986).

<sup>12</sup> See generally Don McKay, *The United Nations Convention on the Rights of Persons with Disabilities*, 34, no 2, *Syracuse Journal of International Law & Commerce*, 232. Ambassador McKay chaired the UN Ad Hoc Committee which drafted the UN CRPD.

<sup>13</sup> For more detailed analyses of the social model of disability see, generally Oliver, *Understanding Disability: From Theory to Practice* (Basingstoke: McMillan, 1996), Thomas, *Female Forms: Experiencing and Understanding Disability* (Buckingham: Open University Press, 1999), Shakespeare, *Disability Rights and Wrongs* (London: Routledge, 2006) and Corker and French (eds), *Disability Discourse* (Buckingham: Open University Press, 1999).

It should be noted that no distinction is drawn in the UN CRPD between different impairments or different types of disability or their severity. That is to say, the conventions' rights and obligations apply equally to all persons with disabilities. There is no hierarchy by which a State can say 'we accept the convention generally but the right to live independently and be included in the community cannot be achieved for persons with intellectual disabilities or persons who have behavioral problems.' By definition, the rights in the Convention inure to the benefit of all persons with disabilities.

Article 3 is a central provision within the UN CRPD in that it outlines the general principles upon which the Convention is based: dignity, autonomy including the freedom to make one's own choices, non-discrimination, accessibility and the full and effective participation and inclusion in society. When in doubt these principles are controlling.

Article 1 of the Convention states that the objective of the treaty is "to promote, 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." It is clear that that concept of equality lies at the heart of the mission of the UN CRPD.

Article 5 sets out the general obligations of States parties with respect to the achievement of equality and non-discrimination. It assures to all persons with disabilities the 'equal protection and equal benefit of the law' – a point that surely reinforces Article 12 on the right to exercise legal capacity to make one's own choices in life (Article 5(1)). It obligates States parties to prohibit all forms of discrimination on the basis of disability and guarantees a right to equal and effective legal protection against discrimination (Article 5(2)). Discrimination on the ground of disability is defined as:

any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>14</sup>

It obliges States parties to provide 'reasonable accommodation' toward persons with disabilities (Article 5(3)). Reasonable accommodation is defined as

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.<sup>15</sup>

Crucially, the definition of discrimination includes denial of 'reasonable accommodation'. This is to be contrasted with the definition of discrimination under EU law which is quite vague.

So the underlying philosophy of the UN CRPD is to move decisively away from treating persons with disabilities as 'objects' to be managed or otherwise 'cared' for towards treating them as equal human 'subjects' capable of directing their own lives. It operationalizes a broad equality strategy in order to enable this to happen. It isn't just a non-discrimination convention. It blends deep ideas about equality and non-discrimination with a web of substantive rights. One of the more striking things about the UN CRPD is that the concept of 'best interests' is banished to the margins. Indeed, it only occurs once and in the context of children's rights. This sends a powerful signal that the only measure of the man is himself or herself and that wellbeing is to be determined subjectively.

## **2. Rights – honouring personhood and creating the conditions for human flourishing**

The rest of the Convention makes perfect sense once the underlying paradigm shift outlined above is understood. Several tranches of rights might be understood as following in the wake of this shift.<sup>16</sup>

One tranche of rights protects persons with disabilities in their person – against torture (Article 15), against violence, exploitation and abuse (Article 16) and against invasions of their bodily and psychic integrity (Article 17). The strong signal sent is that the rule of law applies to all persons and there shall be no impunity. Interestingly, although one of the rationales for institutions was the need to 'protect' people, there is ample

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<sup>14</sup> Article 2.

<sup>15</sup> Article 2.

<sup>16</sup> See Chapter 8.

evidence that segregation exposed many people to abuse in the past and continues to be a source of abuse into the present.<sup>17</sup> It is said that the best protection of all is for people to have a wide circle of friends and acquaintances – something that it unlikely to grow in an institutional environment.

It bears emphasising in this context that the duty to protect vulnerable people with disabilities is not eliminated in the UN CRPD. However, it is radically re-framed in Article 16 to the effect that States parties have an obligation to protect people with disabilities against violence, exploitation and abuse 'on an equal basis with others.' The net effect is to blow away the cobwebs of paternalism which, far from protecting people, end up exposing them to institutional violence or smothering them with so much protection that they find it hard to live a normal life. Article 16 calls for a radical re-balancing of the liberty of the individual with the States' general duty to protect thus putting the paternalist genie back in its bottle. More to the point, it embodies the notion that persons with disabilities – like all others in society – have a certain dignity of risk to make their own mistakes and build their own lives accordingly.<sup>18</sup> What this means for our purposes is that States parties cannot fall back on the 'need to protect' as a pretext for maintaining institutions – even mini-institutions.

Though necessary, this set of rights that protect people is not enough. Rather, it is perhaps enough for most people who, one assured of security, can build on a general right to liberty to create their own lives for themselves. Something more is needed to achieve the same result for at least some persons with disabilities. That is why Article 12 on 'equal recognition before the law' was added to honour personhood and recognize the right of people to make their own decisions. Article 12 assures persons with disabilities a right to exercise their legal capacity to plot their own lifecourse and make their own decisions (big and small) in all spheres of their lives. The first sign of decision-making frailty should not be the occasion to remove decision-making capacity through, for instance, guardianship. Rather it should initiate a process of reflecting on what kinds of supports could augment residual capacity and spark the will and preference of the person. The interesting thing about these 'supports' is that the State may not need to create them (or fund them directly). Rather they may occur naturally in community and can be formalised (if that be the right word) into circles of social support. In a way, the cure to perceived lack of legal capacity is enhanced social connectedness – which is part of the overall theme of the UN CRPD.

And it is why Article 19 on the right to live independently and be included in the community was added. The drafters of the convention set themselves a self-forbearing ordinance – no new rights were to be added. So much so, that there are no 'disability rights' – only human rights as applied for the benefit of persons with disabilities. Ostensibly, Article 19 has no exact analogue in general human rights conventions (leaving to one side the much neglected and quite admirable Revised European Social Charter of the Council of Europe – cf: Article 15 thereto<sup>19</sup>). Yet it fits perfectly since it only makes plain in the context of disability what is accepted or assumed for everyone else. Again, the same underlying logic of Article 12 is present in Article 19 – human flourishing happens best when we share and grow our personhood in community with others where the ethic of mutual respect applies towards each other's wishes and preferences.

Reinforcing the positive tenor of Article 19 is Article 8 on 'awareness raising.' The philosophy of Article 8 is simple. No amount of positive law reform will fully work unless general attitudinal barriers are also removed. Among other things, Article 8 calls on States parties to 'nurture receptiveness to the rights of persons with disabilities.' To a large extent that will depend on getting ordinary people to see other ordinary people behind the mask of disability. This is highly unlikely to happen when people with disabilities are kept in institutions or other congregated settings that share the same characteristics of institutions (only smaller). In such contexts the public are apt to see the disability before the person. The auguries for a good chemistry of human interaction – social inclusion – are simply not present in such environments. So, although the logic and language of Articles 19 and 8 are positive, it is plain that institutions (even mini-institutions) are inimical to their full realisation. That is not to say that these Articles combined simply amount to a de-institutionalisation agenda or can be summed up in the slogan of deinstitutionalisation. Far from it – they articulate a much deeper philosophy of community engagement and spell out the necessary pre-conditions to make this a reality.

Other rights in the convention take the inner logic of human flourishing through social connectedness a step further. It is necessary to get beyond protection and empowerment to break down barriers into the mainstream.

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<sup>17</sup> *Abandoned & Disappeared: Mexico's Segregation and Abuse of Children and Adults with Disabilities* (Disability Rights International and the Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, November 2010) and *Out of Sight: Human Rights in Psychiatric Hospitals and Social Care Institutions in Croatia* (Mental Disability Advocacy Centre and the Association for Social Affirmation of People with Mental Disabilities (SHINE), October 2011).

<sup>18</sup> See Bagenstos, *Law and the Contradictions of the Disability Rights Movement*, (Yale University Press, 2009), p. 90-91.

<sup>19</sup> Quinn, G. 'The European Social Charter and EU Anti-discrimination Law – Two Force Fields with one Purpose' in *The Protection of Social Rights in Europe: Changes and Challenges*, edited by Gráinne de Búrca, Bruno de Witte and Larissa Ogertschnig (Oxford University Press, 2006).

What is the point of making your own decisions and living the life you want to lead if so much social space is foreclosed. Accessibility, in its broadest sense, means dealing with the legacy of exclusion and laying the foundation for a genuinely inclusive environment (Article 9). The convention innovates by crafting various accessibility and participation rights in a variety of spheres including the economic, social, cultural and indeed political. These rights play their part in giving business efficacy to a general right to live independently and be included in the community. It goes without saying that the right to be included in the community cannot fully be achieved unless access and other barriers to and in the community are removed.

Furthermore the Convention innovates by tying economic, social and cultural rights closely to personhood and human flourishing. It is often plainly not enough to allow people to decide how to live, to break down barriers unless the material means to exercise these rights are afforded. The interesting thing about these 'solidarity' rights is that key elements of them are interspersed throughout the Convention and not set apart as they are in other general or thematic conventions. On the one hand this is conceptually exciting since it aligns solidarity rights with the individual's own goals and aspirations. On the other hand it does complicate matters since the relevant obligations cannot usually be met immediately but require time, planning and resources. In the argot of international law, these obligations are to be progressively achieved' rather than immediately realised. It is unusual to have a convention that deliberately intersperses these more programmatic rights with more achievable civil rights.

Underpinning the convention is an overarching concept of equality – of the equal inherent worth of and respect due to persons with disabilities. Based as it is on a profound commitment to personhood and human flourishing the notion of equality in the convention is quite broad. One State even mooted a 'non-paper' on equality and non-discrimination during the negotiations that would have seen the Convention reduced to one or two provisions simply prohibiting discrimination on the ground of disability. That was rejected as wholly insufficient. Instead what emerged was an innovative concept of equality. It innovates by making a decent stab at intersectionality – the notion that our identities overlap and that a human being does not come labelled and pre-packed with any one identity like disability. Among other things, this allows for the possibility of recognising multiple discrimination on overlapping grounds like gender, disability and childhood (Articles 6 and 7). And it innovates by acknowledging accumulated disadvantage through time.<sup>20</sup> The individual comes with a history, a life story which may reveal many other disadvantages that have cumulatively impacted his/her life chances. And it innovates by obliging States parties to afford 'reasonable accommodation' to the individual circumstances of persons with disabilities. Recall, if this is not afforded then discrimination is deemed to have occurred. This is not the same as a 'positive action measure' or affirmative action measure as this obligation is much more tailored to individual circumstances in frank acknowledgement that general rules won't do unless sensitised to individual circumstances.

So the rights are part of a deeper liberation agenda – one that concedes that personhood and flourishing were denied to persons with disabilities in the past and partly due to insufficient social inclusion. The rights represent an interesting dialectic between individual freedom and social inter-dependence. They bring home the truth for all of us which is that freedom depends in no small measure on the quality of our social connectedness.

### **3. Obligations – Taking rights seriously**

Professor Wesley Hohfeld famously posited that there are no rights without obligations.<sup>21</sup> The UN CRPD is certainly frank and explicit about the range, nature and depth of State Party obligations. Without them the rights would simply hang in abeyance – perhaps inviting cynicism about the very possibility of doing justice through law. These obligations extend to both the EU and those Member States that have ratified.

The relevant obligations are to be found in the interaction between Article 4 on 'general obligations' and in the various substantive obligations that tailor the general obligations to the context of very specific rights. For our purposes it is the interaction between Article 4 and Article 19 that matter.

Article 4 is lengthy. But it does have an inner logic which is relatively easy to unpack. Article 4(1)(a) calls on States parties (which term again includes the EU) to adopt "all appropriate legislative, administrative and other measures" for the implementation of the rights. In other words, if fresh legislation or other measures are necessary and appropriate then they should be adopted. Among other things, this strongly implies some sort of deliberative process whereby States parties reflect on the adequacy of existing laws and policies measured

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<sup>20</sup> See Oddný Mjöll Arnardóttir, 'A Future of Multidimensional Disadvantage Equality' in *The United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, edited by Quinn, G., & Arnardóttir, O (Nijhof, Brill, 2009).

<sup>21</sup> Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, 1946).

against their obligations under the UN CRPD.<sup>22</sup> It is not possible to say whether new law is needed unless some such process is in place. Indeed, one function of such a process is a commitment to eliminate laws and policies that are inconsistent with the obligations of the convention. Article 4(1)(b) therefore proceeds to require exactly this. It extends to repealing inconsistent ‘laws, regulations, customs and practices’ that constitute discrimination against persons with disabilities.” One might be tempted to read this narrowly to require the repeal of laws, etc., that constitute discrimination. In other words, one might be tempted to say that Article 4 (1)(b) only calls for a repeal of such laws if they amount to discrimination and not if they fail to meet the rights of the convention in a broader sense. However, this would be a distinction without meaning. It bears emphasising that in a unanimous 1999 opinion the US Supreme Court held that unjustified institutionalisation is itself a form of discrimination.<sup>23</sup>

Article 4(1)(c) requires States parties to take into account the protection and promotion of the rights “in all policies and programmes.” Widely understood as a mainstreaming clause this would reach the issue of the reform of the Structural Funds even if the preceding clauses didn’t. Article 4(1)(d) requires States parties to refrain from any act “or practice” that are inconsistent with the convention and to ensure that public authorities act in compliance. Again, if the Structural Funds were implemented in a manner that made them complicit in the violation of the convention by a Member State then it is hard to see the EU avoiding vicarious legal liability.

The remaining parts of Article 4(1) focus on the need for research into the design of goods, services, equipment and facilities which can be important in enabling one to live independently (4(1)(f)); to undertake or promote research into new technology including information and communications technology which can likewise play a part in making independent living a reality in the 21<sup>st</sup> century (4(1)(g)); to provide accessible information as well as services (4(1)(h)); to promote the training of professionals and staff working with persons with disabilities to ensure that their services assist in implementing the convention. All these obligations help play their own part in making independent living and being included in the community a reality.

Article 4(2) speaks directly to the obligations of States parties with respect to the implementation of those rights in the convention that could be described as ‘economic, social and cultural.’ With respect to those rights, the core obligation of a State is to “take measures to the maximum of available resources, and where needed, in the framework of international cooperation, with a view to achieving progressively [their full realisation].” This maps over a similar general provision on the International Covenant on Economic, Social and Cultural Rights. And in the result it factors in the relevant jurisprudence under that Covenant and similar instruments. With respect to this core obligation, the Committee on Economic, Social and Cultural Rights has stated:

“The ‘availability of resources’, although an important qualifier to the obligation to take steps, does not alter the immediacy of the obligation, nor can resource constraints alone justify inaction. Where the available resources are demonstrably inadequate, the obligation remains for a State party to ensure the widest possible enjoyment of economic, social and cultural rights under the prevailing circumstances.

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The undertaking by a State party to use “the maximum” of its available resources towards fully realizing the provisions of the Covenant entitles it to receive resources offered by the international community. In this regard, the phrase “to the maximum of its available resources” refers to both the resources existing within a State as well as those available from the international community through international cooperation and assistance.”<sup>24</sup>

In a sense the notion of ‘progressive achievement’ is a necessary genuflection to the reality that some obligations take greater effort, time, planning and resources than others – although in truth the distinction is probably more one of quantum than kind. Importantly, principles have emerged to ensure that that this necessary genuflection to reality does not rob the obligation of all autonomous substance. For one thing, each right is said to have an inner core beneath which no State is allowed to go.<sup>25</sup> It therefore becomes a matter of some importance to identify what the inner irreducible core of Article 19 is (see chapter 3). Furthermore, obligations of ‘progressive achievement’ assume some dynamic of change. It follows that the complete absence of such a dynamic – and the deliberative process that it assumes – would not be in conformity with the convention. Put more positively, this assumes that States – even impoverished States – have an obligation to reflect on where they are, where they ought to be as envisaged by the convention and to plan a responsible transition that moves in the right direction over time. Curiously enough, impoverished States tend to do well

<sup>22</sup> See Flynn, E., *From Rhetoric to Action : Implementing the UN Convention on the Rights of Persons with Disabilities* (Cambridge University Press, 2011).

<sup>23</sup> *Olmstead v L.C.* 527 U.S. 581 (1999). See Chapter 4 for analysis of this decision.

<sup>24</sup> <http://www2.ohchr.org/english/bodies/cescr/docs/statements/Obligationtotakesteps-2007.pdf>

<sup>25</sup> See General Comment No. 3 of the Committee on Economic, Social and Cultural Rights, para. 10.

once they start down this road. Developed States should be at an advantage. Article 4(2) also envisages a transition or a dynamic of change that stands some chance of implementation. Implicitly if not otherwise this requires a timeline with clearly identifiable milestones, some set of indicators by which to measure achievement and adjust as inevitable setbacks occur (a sort of learning built into the process) and some sort of independent mechanism that can adjudge whether sufficient progress has been made.

The flipside to 'progressive achievement' is regression. Indeed, there is a substantial body of jurisprudence developed under the International Covenant on Economic Social and Cultural Rights which deal with retrenchment or rather with the limiting principles that circumscribe State behaviour during periodic periods of retrenchment that follow hard on the heel of periodic downturns in the economy. The temptation in such periods is to simply cut where the groups affected are unlikely to shout loud or exert most political pressure. What this jurisprudence does is to put in place a corrective by requiring State authorities to consciously reflect on the disparate (and sometimes desperate) impact of their cutbacks on the most vulnerable. The Committee on Economic, Social and Cultural Rights has stated:

"The Committee has already emphasized that, even in times of severe resource constraints, States parties must protect the most disadvantaged and marginalized members or groups of society by adopting relatively low-cost targeted programmes."<sup>26</sup>

In a sense all the foregoing are variants on common themes under existing international law. What makes Article 4 truly stand out is an added obligation on States parties to "closely consult and actively involve" persons with disabilities through their representative organisations in both the "development and implementation of legislation and policies to implement the convention" and to other 'decision-making' processes that affect them. Again, it is important to complement our normal lawyer's view of the UN CRPD which is to see it as providing a set of inert legal norms with which to challenge bad State laws and policies. In addition, it is important to reverse the processes that produce these laws and policies in the first place. The only way to do that is to ensure the presence of the people who really matter at the negotiating table – something conspicuous by its absence in the past throughout the world. Indeed the convention itself is living proof of the advantages of such a posture. As is well known, disability NGOs play a very prominent role in the negotiations. Or, to be more accurate, State delegations benefited enormously from the practical perspectives brought to the negotiations by the active involvement of the NGOs. It is to be noticed that the relevant provision - Article 4(3) - extends beyond mere consultation to include 'active involvement.' This proves quite important when reflecting on the future of the Structural Funds. Civil society involvement in crafting responsible transition plans and embedding – and monitoring – a new dynamic in favour of independent living and being included in the community – will be the key to success and is legally required in any event. Thankfully, there are many positive elements in this regard in the draft proposals of the European Commission (see chapter 7).

#### **4. *Trust but Verify* - Monitoring and evaluation & active involvement of persons with disabilities**

International human rights treaties generally have a 'treaty monitoring body' which is generally tasked to monitor compliance.

Typically, such treaty monitoring bodies work by reviewing periodic State reports to adjudge compliance and enter into a constructive dialogue with the State party.<sup>27</sup> One problem is that many States parties tend to be late with their reports and indeed there is generally insufficient time (and resources including linguistic resources) in the treaty monitoring bodies to give them the detailed attention they deserve. Another problem is that the jurisprudence generated at the international level tends to have little traction where it matters most – in the domestic processes of implementation and reform. The negotiators of the UN CRPD were challenged not to repeat the mistakes of the past to try to ensure that the new convention would in fact spark reform.<sup>28</sup> Indeed, many produced remarkably innovative blueprints. However, at the end of the day the negotiating States settled on a classic treaty monitoring body arrangement. The relevant body is the UN Committee on the Rights of Persons with Disabilities.

<sup>26</sup> <http://www2.ohchr.org/english/bodies/cescr/docs/statements/Obligationtotakesteps-2007.pdf>

<sup>27</sup> See, for example, Human Rights Committee (CCPR), Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Elimination of Discrimination against Women (CEDAW), Committee against Torture (CAT), Subcommittee on Prevention of Torture (SPT), Committee on the Rights of the Child (CRC).

<sup>28</sup> See Quinn, G, 'Resisting the 'Temptation of Elegance': Can the Convention on the Rights of Persons with Disabilities Socialise the States to Right Behaviour?' in *The United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, edited by Quinn, G., & Arnardottir, O (Nijhof, Brill, 2009).

All States parties to the UN CRPD – which includes the EU – are required to submit periodic reports, and at the time of writing, the Committee had already issued its conclusions with respect to two States: Tunisia and Spain. Importantly, the process of deliberation is quite open. The Committee appoints a rapporteur among its members on a State report. It agrees on a set of questions to be put to the State, and it issues its own conclusions with respect to compliance. Certainly civil society groups can provide input into the process by crafting their own parallel or shadow reports on which the Committee might draw. Indeed Hungarian civil society groups lodged their own shadow report before the Government report was submitted! Further, it is predictable that many European civil society disability groups will lodge shadow reports on the occasion of the submission of the first EU State party report. Pursuant to Article 35 of the UN CRPD, States must report initially within two years after the entry into force of the present Convention for the State party concerned and thereafter every four years. The EU's first report is therefore due to be submitted to the Committee on the Rights of Persons with Disabilities by January 2013.

Civil society groups can have considerable influence in shaping the questions to be put to States and help frame the discussion by drawing it back to reality. It is entirely reasonable to expect European civil society groups to input to the Committee when it comes to the first EU Report on issues including Article 19 and the Structural Funds. It would be wise to anticipate that.

If a State opts to ratify the Optional Protocol to the UN CRPD then individuals and groups can – under certain circumstances – lodge a complaint with the Committee. The EU as such has not ratified the Protocol. But if a Member State in receipt of Structural Funds ratifies the Protocol then it is open to an individual or group to lodge a complaint concerning implementation at national level. The thrust of such a complaint could well take the form that the EU General Regulations or the more fund-specific Regulations do not allow the State in question to respect the rights of persons with disabilities. In other words it is possible that EU legal liability could be indirectly engaged in such proceedings.

Under Article 6 of the Optional Protocol, the Committee may, upon receipt of “reliable information indicating grave or systematic violations”<sup>29</sup> by a State Party to the UN CRPD, initiate a process of inquiry which may include a visit to the territory by one or more members of the Committee.<sup>30</sup> It would certainly be open to frame a request for such an inquiry based on inadequate EU Regulations governing the Structural Funds.

The Convention does make one important stab at moving away from the traditional treaty monitoring body mechanism. In acknowledgement that the real action is at home in the national context the convention also focuses on national processes for change. It requires the existence of a national ‘focal point’ on disability within Government, giving due consideration for the establishment or designation of a ‘coordination mechanism’ within Government, and on the need for a framework comprised of one more independent mechanisms for the protection, monitoring and promotion of the convention (Article 33). The general obligation of Article 4(3) to actively involve and consult with people with disabilities applies to all these mechanisms. The EU has designated the European Commission as the focal point under Article 33(1).<sup>31</sup> It is widely assumed that the independent mechanisms ought ideally to be a national human rights commission – one that complies with the Paris Principles on setting up such bodies. Article 33(3) explicitly requires that civil society groups should be involved in the monitoring process. It remains to be seen which monitoring process the EU will designate under Article 33.<sup>32</sup> Whichever process it chooses it must make the relevant process open to civil society – which inevitably means that the Structural Funds will be in the frame.

## **5. The competence of the EU as an International Organization to ratify**

We do not here examine the specific legal basis put forward by the EU when ratifying the UN CRPD and the Declaration which accompanied its instrument of confirmation outlining the competences of the Union. That will be more directly canvassed in chapter 5. Rather, we recap here the general legal competence of the EU to become party to international agreements and treaties.

In an early decision of the European Court of Justice (*ERTA*)<sup>33</sup> it was established that not only was the Community competent to enter into international agreements, it could do so in cases where this was not

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<sup>29</sup> Article 6(1), UN CRPD Optional Protocol.

<sup>30</sup> Article 6(2), UN CRPD Optional Protocol.

<sup>31</sup> Article 3, 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).

<sup>32</sup> 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, p. 35.

<sup>33</sup> *Commission v. Council (ERTA)* Case 22/70 [1971] ECR 263.

specifically provided in any explicit provision in the of the underlying treaties founding the Union. The Court held that:

Such authority arises not only from an express conferment by the Treaty but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions. regard must be had to the whole scheme of the Treaty no less than to its substantive provisions.<sup>34</sup>

The *ERTA* case therefore stands for the proposition that the competence of the Union (in reality the Community) to ratify international agreements depends on whether an express treaty provision allows for it or whether such a posture is fairly implicit in the structure and logic of the treaties. This gives rise to a sort of parallelism whereby the clear internal competences of the Union are more or less closely mirrored by a parallel set of external competences.

Although the competence of the EU to enter into international agreements had been well established, it was not until the entry into force of the Treaty of Lisbon (2007) in 2009 that the international legal personality of the European Union was firmly established. Prior to this, a distinction had existed between the European Union and the European Community based on the Maastricht Treaty. This demarcation was removed by Article 1 of the consolidated Treaty on the European Union by way of the Treaty of Lisbon which now states that:

“The Union shall replace and succeed the European Community.”

In addition, the Treaty of Lisbon abolished the Pillar structure which had previously existed and which had purported to separate the European Community from its policies and methods of cooperation.

More fundamentally, the Treaty of Lisbon inserted Article 47 into the Treaty of European Union which states that “The Union shall have legal personality.” The legal right of the EU to enter into international agreements has therefore been firmly established.

Rather unusually in an international human rights treaty, Article 44 of the UN CRPD itself creates express space for ‘regional integration organisations’ to ‘confirm.’ Such organisations are characterised by the fact that its Member States have transferred competence to it in respect of matters (or at least some matters) covered by the UN CRPD. This would principally include the EU and was indeed consciously drafted with the EU in mind. It would probably exclude bodies such as the Council of Europe which rest on more traditional understandings of international organisations as purely or mainly inter-Governmental.

A related issue arises as to the reach of such international treaties into internal EU law and policy and percolating further down into its Member States (even those that have not ratified the relevant international legal instrument). The issue of the direct effect of international agreements concluded by the EU was addressed in the case of *Demirel*<sup>35</sup> where Advocate General Darmon concluded that such an agreement would have direct effect when, due regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a “clear and precise obligation” which is not subject, in its implementation or effects, to the adoption of any subsequent measure.<sup>36</sup> Establishing direct effect has the practical implication of affording a right for a private party to rely on a legal provision of an agreement before a national court. Since Article 19 of the UN CRPD contains a mix of obligations which are both broad and narrow it is unlikely that it can have direct effect in the sense understood in *Demirel*. It is always possible that a claim of direct effect might be made with respect to Article 19.

In sum, the UN CRPD both embodies and substantially advances new thinking on disability – the much vaunted paradigm shift. This entails a de-problematisation of the person and a strategy aimed at removing barriers to full inclusion and participation. The rights all cumulatively aim at this. Article 19 in particular expresses the paradigm shift by outlining a series of tangible obligations to achieve independent living (something assumed for most people) and inclusion in the community. The obligations of States parties go to both substance and to process. The process-based obligations are just as important and focus on giving voice and power back to people with disabilities and placing them at the heart of all policy-making processes and decision-making processes that affect them. The international monitoring mechanism makes it predictable that the EU will be called to answer for whether and how the Structural Funds are used to inhibit or advance the right to live independently and be included in the Community. Unusually the UN CRPD itself creates the possibility for the

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<sup>34</sup> *Ibid*, paras. 15-16.

<sup>35</sup> *Meryem Demirel v. Stadt Schwäbisch Gmünd* ECR [1987] 3719.

<sup>36</sup> *Ibid*, para. 14.

EU – as a regional integration organisation - to ‘confirm.’ Arguably it has this competence in any event. But Article 44 put the matter well beyond doubt. And famously the EU has indeed ‘confirmed.’<sup>37</sup>

Before looking at the background evolution of EU disability law and policy and the implications for EU ‘confirmation’ of the UN CRPD we will first deal with the more specific obligations falling on States parties under Article 19 of the convention. These more specific obligations complement the general obligations of Article 4.

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<sup>37</sup> Council Decision (EC) 2010/48 of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities OJ L 23/35.

## Chapter 3

# The Legal Analysis of State Party Obligations under Article 19 – the Right to Live Independently and be Included in the Community

### 1. Context: the overall philosophy of social inclusion in the UN CRPD

Even if the Convention did not contain an express right to live independently and be included in the community, such a right can be fairly inferred from the rich filigree of other provisions. Cumulatively, these provisions point to a theory of human flourishing that sees persons with disabilities take charge of their own personal destinies and develop their own distinctive personhood.

As Article 12 on ‘equal recognition before the law’ makes plain, we rely on a myriad of formal and informal social supports to enable us to do so. The dialectic between individuality (so often denied to persons with disabilities) and community is plain – one that builds on and respects individual wishes and preferences but one that sees personhood flourishing in close association with others.

Article 19 is probably best seen as crystallising and drawing out this deep logic. It is not merely the sum of the various parts of the convention but adds to these underlying ideas in interesting and innovative respects. It contains a web of interacting legal obligations – some of which have immediate effect and others which are subject to ‘progressive achievement’ over time.

The text of Article 19 reads as follows:

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.”

Quinn and Stein argue that given that one of the central motivations for the adoption of the UN CRPD was the removal of the ‘invisibility’ of persons with disabilities from both international law and their communities, the achievement of independent living is critically important to the intellectual and political structure of the UN CRPD and forms a crucible through which to judge what effect the treaty has on the daily lives of persons with disabilities.<sup>38</sup>

The bundle of rights and obligations in Article 19 are both a means and an end. The end – or ends – are always of the persons’ own choosing. The means focus on the steps that need to be taken to allow for real choice.

### 2. The legal obligations contained in Article 19

The UN Committee on the Rights of Persons with Disabilities has taken the opportunity at an early stage in its conclusions of the periodic reports of States parties to outline its core concerns in relation to Article 19 and what it deems to be the basic requirements of that provision. In its Concluding Observations on the report submitted by Spain, it stated, for example:

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<sup>38</sup> Focus on Article 19 of the UN Convention on the Rights of Persons with Disabilities, ECCL (I. Bulic, J. Evans, C. Parker, G. Quinn, M. Stein), 2009, 27.

The Committee is concerned at the lack of resources and services to guarantee the right to live independently and to be included in the community, in particular in rural areas. It is further concerned that the choice of residence of persons with disabilities is limited by the availability of the necessary services, and that those living in residential institutions are reported to have no alternative to institutionalization. Finally the Committee is concerned about linking eligibility of social services to a specific grade of disability.

The Committee encourages the State party to ensure that an adequate level of funding is made available to effectively enable persons with disabilities to: enjoy the freedom to choose their residence on an equal basis with others; access a full range of in-home, residential and other community services for daily life, including personal assistance; and so enjoy reasonable accommodation so as to better integrate into their communities.

The Committee is concerned that the law for the promotion of autonomy limits the resources to hire personal assistants only to those persons who have level 3 disabilities and only for education and work.

The Committee encourages the State party to expand resources for personal assistants for all persons with disabilities in accordance with their requirements.<sup>39</sup>

It is therefore clear that the Committee has interpreted article 19 as placing choice and autonomy at the centre of the right to live independently and be included in the community. It is important to note the statement by the Committee on the requirement for adequate funding to be provided in order for the right to be effectively vindicated. This is of clear relevance when considering the role of the European Social Fund and the European Regional Development Fund in the transition process towards full achievement of the right contained in Article 19.

The former Council of Europe Commissioner for Human Rights, Thomas Hammarberg, published an Issue Paper entitled '*The Right Of People With Disabilities To Live Independently And Be Included In The Community*'<sup>40</sup> in March 2012. Commissioner Hammarberg summarises the core elements of the right as follows:

Article 19 of the CRPD embodies a positive philosophy, which is about enabling people to live their lives to their fullest, within society. The core of the right, which is not covered by the sum of the other rights, is about neutralising the devastating isolation and loss of control over one's life, wrought on people with disabilities because of their need for support against the background of an inaccessible society. 'Neutralising' is understood as both removing the barriers to community access in housing and other domains, and providing access to individualised disability-related supports on which enjoyment of this right depends for many individuals.<sup>41</sup>

In his view, article 19 requires States parties to the UN CRPD to not only cease placing persons with disabilities in an institutional environment but also to actively ensure the vindication of the rights of persons with disabilities to live independently and be included in the community. In particular, the Commissioner has warned of the dangers of replacing one form of institution with another:

An incorrect understanding of the right to live in the community risks replacing one type of exclusion with another. Though governments increasingly recognise the inevitability of deinstitutionalisation, there is less clarity with regard to the mechanisms that replace institutionalisation and what would constitute a human rights-based response.

This is not merely a theoretical concern. Countries which have already closed down large-scale institutions are showing worrying trends of grouping apartments into residential compounds, comprised of dozens of units targeted exclusively to people with disabilities. Such a solution compromises the individual's ability to choose or to interact with and be included in the community.<sup>42</sup>

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<sup>39</sup> *Consideration of reports submitted by States parties under article 35 of the Convention, Concluding observations of the Committee on the Rights of Persons with Disabilities, Spain Committee on the Rights of Persons with Disabilities, Sixth session 19-23 September 2011, CRPD/C/ESP/CO/1, para. 39-42.*

<sup>40</sup> *The Right of People with Disabilities to Live Independently and be Included in the Community* Comm DH/Issue Paper (2012)3 (Strasbourg, 13 March 2012).

<sup>41</sup> *Ibid*, p. 8.

<sup>42</sup> *Ibid*, p. 9.

There is therefore, in his view, a need for States parties to the UN CRPD, including the EU and its Member States, to ensure that institutionalisation is not simply continued in another guise. As a general guide, he has suggested that where home-sharing with other people with a disability is the housing option chosen by the individual, the home-sharing arrangement should be confined to no more than four residents in total and that those sharing accommodation have, as far as possible, chosen to live with the other three people. In this regard Hammarberg refers to a 2011 report in Ireland suggesting ending congregated settings and the need for a transition.<sup>43</sup> It is to be noted that a similar Study done for the Israeli Government came to much the same conclusion in 2011.<sup>44</sup>

It is anticipated that the European Union Agency for Fundamental Rights (FRA) will launch a major report on choice and control and the right to live independently on the 7<sup>th</sup> of June 2012. This will contain a detailed socio-legal analysis of the actual situation with respect to independent living in Europe and will be a landmark in its own right.

### **(a) The opening narrative of Article 19: an equal right to live in the community**

The opening narrative of article 19 is to the effect that States parties 'recognize' the equal right of all persons with disabilities to live in the community with choices 'equal; to others.' It does not qualify this by confining the right to high-functioning persons with disabilities or by excluding sub-groups such as those with intellectual or psychosocial disabilities, those with high dependency needs or those who exhibit disruptive behaviour. It will be more convenient for States to extend this right first to those who are high functioning. But the point is that Article 19 does not pick off the 'low hanging fruit' – its normative reach extends to all without exception.

And the opening narrative calls on States to take 'effective and appropriate' measures to facilitate 'full enjoyment' of the right. Effectiveness goes very much to the subjective experience of the individual. Moving people from large institutions to smaller ones will not necessarily do since many of the characteristics of larger institutions may well be replicated in smaller ones. So closing down large institutions in favour of group homes may not qualify as 'effective and appropriate' particularly when the barriers to connecting the individual – *qua* individual – to the community are not addressed. Similarly, appropriateness is established by assessing the quality of the measures taken and particularly whether they accord with the genuinely expressed wishes and preferences of the individual.

Equally worthy of note is that, despite the title of the Article which talks about living independently, the opening narrative speaks almost exclusively in terms of a right to full inclusion and being included in the community. There is no real tension between the two (living independently on the one hand and being included in the community on the other) since community engagement is seen as vital to independence and support.

So the chapeau of Article 19 stresses the community or civic engagement dimension to the right – a factor that colours how the remaining and more specific obligations in the remainder of the Article are to be parsed and understood.

### **(b) Precondition for inclusion: A home of one's own – Article 19(a)**

A home of one's own is critically important from many points of view. It has been described as the 'materialisation of identity' – a physical space that radiates one's personhood, reflects it back and provides a conducive and safe environment for the growth of personhood and flourishing.<sup>45</sup> Further, home provides a place of repose where the individual can withdraw from the world and, in interaction with family and friends and other intimate acquaintances, develop one's identity and how one projects into the world. It is also a zone of personal privacy. Indeed, privacy (or the reasonable expectation of privacy) seems to be at its greatest when one is within the confines of one's own home.

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<sup>43</sup> Health Service Executive, Ireland, "Time to Move on from Congregated Settings: A Strategy for Community Inclusion, Report of the Working Group on Congregated Settings", June 2011, p. 16.

<sup>44</sup> Integrated Community Living for People with Intellectual Disabilities in Israel: Final Report of an International Committee of Experts submitted to the Israeli Ministry of Social Affairs and Social Services (2011).

<sup>45</sup> Iris M. Young, 'House and Home: Feminist Variations on a Theme', in (Dorothea Olkowski ed.) *Resistance, Flight, Creation: Feminist Enactments of French Philosophy* (Cornell University Press, 2000), 63.

All of this is taken for granted by most people. Yet it remains an elusive dream for many Europeans with disabilities. This makes it plain that a home is not the same as a house – i.e., it is not the same as bricks and mortar. Unless and until a house has the characteristics of a home then it is hard to see how it can facilitate self-growth and inclusion. For example, if one doesn't have the choice about where to live or with whom to live then the living arrangement cannot be described as a home. Most people take this for granted. But persons with disabilities are congregated with other persons with disabilities because of convenience. Among other things, this tends to reinforce popular prejudice which adverts first to the disability in such group settings and latterly (if at all) to the person behind the disability.

This is why Article 19(a) grants to persons with disabilities the opportunity to choose their place of residence and where and with whom they live. The resonances with Article 12 and 8 are plain. In a way, Article 19(a) affords one the legal capacity to choose how to live. But in another way, a State does not have to wait until legal capacity is acknowledged under Article 12. Enabling a person to have a home can be understood as a necessary support to help develop the will and preference and legal capacity of the individual as is required under Article 12.3. Commissioner Hammarberg has endorsed this link between Article 12 and Article 19 and has emphasised that:

Curtailing the overall ability of individuals to make choices or have them respected naturally compromises opportunities to make more specific choices about where to live and how one's life will look in relation to the community. At the same time, exclusion from life within the community increases the risk of legal capacity being denied. Little opportunity exists in the strictly controlled lifestyle, and lack of choice, inherent to institutional life, for an individual to voice his or her will.<sup>46</sup>

One eminent commentator, Oliver Lewis of Mental Disability Advocacy Centre, points to the 'intimate relationship between legal incapacity and institutionalisation.' He asserts:

Incapacity and institutionalisation are the two main mechanisms which have resulted in the segregation and isolation of persons with disabilities from society. In many European jurisdictions the vast majority of residents in long-term institutions have been deprived of legal capacity, with some managers of residential institutions going so far as to make deprivation of legal capacity a prerequisite for admission.<sup>47</sup>

To be sure, Article 19(a) tempers the general right to choose by insisting that it is to be made available 'on an equal basis with others.' Those 'others' will often encounter general financial as well as other limitations, which naturally limits their ability to move into rich neighbourhoods. The point of Article 19, however, is not to increase legal standards to some notional ideal of where we would all like to live if life were perfect. The point of Article 19 is to enable persons with disabilities to have a realistic prospect of flourishing in the community by affording a home that reflects one's own personal choices and allows for the development of personhood.

An interesting conundrum arises under Article 19(1)(a). What if a person genuinely chooses to live in a large institution or even a smaller one that effectively precludes genuine community engagement and inclusion? At one level there seems to be a contradiction between the right to live independently (and one might choose to live as a hermit on an island) and the right to be included in the community. Surely we must give pride of place to individual preferences? What of the argument that the only way to genuinely respect the right to choose (which may entail choosing to remain in an institution or to go into one) is to ensure the continued existence of such institutions and a reasonable spread of them throughout the jurisdiction? **This might be another way of saying that institutions should continue to exist and have a role – only this time the role is directly referable back to the wishes and preferences of the individual.**

There would appear to be at least **three strong countervailing arguments**. The first is that the autonomy to choose is set against the context of a right to inclusion and community engagement. This is apparent on its face in the opening narrative of Article 19 and is immanent in the general logic of the convention.

The second is that Article 19 has to be viewed against Article 8 (awareness raising) and especially the obligations of States parties to 'nurture receptiveness' to the rights of persons with disabilities. As stated earlier in this Study, that is highly unlikely to happen if popular prejudice about disability is reinforced by the continued existence of institutions. In a sense, the short term preference of the individual has to be set against the long

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<sup>46</sup> *The Right of People with Disabilities to Live Independently and be Included in the Community* CommDH/Issue Paper (2012)3 (Strasbourg, 13 March 2012), p. 12.

<sup>47</sup> Oliver Lewis, *Advancing Legal Capacity Jurisprudence*, (2011) E.H.R.L.R., 700 at 706.

term goals of reform which is to prise open the popular imagination to the capabilities of persons with disabilities. Again, this is highly unlikely to happen in congregated settings.

The third argument is that if this opening were allowed for institutions to continue (not on the grounds of cost but more on the basis, ostensibly, to respect individual preferences) then this would undermine the very possibility of a transition taking place from institutional to more personalised arrangements. This is primarily the case since budgets that are tied up in institutions are unlikely to be moved sufficiently over a reasonable period of time to enable more personalised arrangements to happen. The exception (institutions) could and probably would swallow up the rule. No dynamic of reform, no matter how well intentioned, could then gain traction over time. It would be much preferable to set a goal of securing personalised living arrangements that allow for the optimum possibility of community inclusion and engagement. Exceptions should be avoided in order to preclude them swallowing the rule. This does not mean that everything has to happen at once – that's why international law endorses the concept of 'progressive achievement.' But it is to say that no 'progressive achievement' can ever realistically happen if the new rule (independent living) is constantly dragged back by exceptions that will only perpetuate isolation.

What of the debate regarding size? That is, can a congregated residential setting with 20, 15, 10 or 5 persons comply with Article 19? Again, a combined reading of Article 19 with Article 8 would strongly suggest that a decreasing size is not dispositive. In other words, it is the isolated and isolating characteristics of the setting that is controlling, especially when ordinary members of the public are not primed to see the person behind the disability and as an individual. This would be very much in keeping with contemporary trends. For example, the Irish Health Service Executive report of 2011, 'Time to move on from congregated settings – a strategy for community inclusion,' recommends that no congregated settings should exist and that if exigent circumstances dictate otherwise then they should house no more than four persons – two of whom should not have a disability (and they should not be carers). All of which is against the backdrop of a serious transition programme to individual living arrangements to be achieved within seven years. An international committee of experts advised the Israeli Ministry of Social Affairs along the same lines in 2011.

That is why we do not favour or use the phrase 'inappropriate institutionalisation' or 'unjust' institutionalisation in this Study. Set against the imperatives of Article 19 which accentuates choice and preference, all institutions or congregated settings are presumptively unjust regardless of size.

### **(c) Making it happen: personalised services to enable independence & inclusion: Article 19(b)**

The design and delivery of social services in the past left much to be desired throughout the world and particularly in developed countries that could afford an elaborate social security safety net. For one thing, they were largely crafted around proxies of need – ideal images or categories of need that paid scant regard to individual circumstances. The result of these practices has been services that fail to address the myriad of extremely personal factors that can only be taken into account in more personalised services. The result has also been the provision of costly services that may not map onto actual need but which are held on to by individuals (and their families) out of fear of not having an assured level of access when the need actually arises. For another thing, the services – or their manner of delivery – may well have met need but tended to do so in a way that accentuated isolation and exclusion from the community.<sup>48</sup>

Indeed, some have recently called for the language of 'needs and services' to be abandoned since this language tends to carry with it a patronising undertone. Instead, some are calling for a new vocabulary of active citizenship and services that are re-engineered to make this happen. This requires two things. First, it requires a personalisation of services. The personalisation of social services is a general trend around the world in any event and is partly aided by new technology and better matches resources with real needs. So much so, that many social systems are experimenting with allocating individualised budgets that enable individuals to purchase services to meet felt as against supposed needs and to do so against an expanded and expanding range of suppliers (including many non-traditional suppliers).<sup>49</sup> Secondly, it requires those services

<sup>48</sup> Barnes and Mercer, *Independent Futures: Creating User-led Disability Services in a Disabling Society* (Policy Press, 2006) and Power, *Caring for independent lives: Geographies of caring for young adults with intellectual disabilities* (2008) 67 *Social Science & Medicine* 5, 834.

<sup>49</sup> Rabiee, Moran and Glendinning, *Individual Budgets: lessons from early users' experiences* (2009) 39 *British Journal of Social Work* 5, 918, Duffy, *Individual Budgets: Transforming the Allocation of Resources for Care* (2005) 13 *Journal of Integrated Care* 1, 8 and Lord and Hutchison, *Individualised Support and Funding: Building blocks for capacity building and inclusion* (2003) 18 *Disability & Society* 1, 71.

to be so **designed as to maximise opportunities for community engagement and inclusion**. So the litmus test of a 'good' service is not merely that it meets needs as classically understood but that it truly positions the person to engage and gain from meaningful community inclusion.

Of course there are many ways to approach personalisation ranging from individualised budgeting with or without supports, a liberalisation of the 'market' to allow novel suppliers in, etc. It's perhaps fair to say that Article 19 is agnostic about how this is to be achieved – but certainly requires movement in this direction. Article 19(b) is much more forthcoming on the need to ensure that the relevant services are animated by a philosophy of inclusion and have that effect. To underscore this, Article 19(b) refers explicitly to the need to configure supports to prevent isolation or segregation from the community. What is also interesting is that **Article 19(b) refers explicitly to personal assistance – a novel concept that flows directly from the international independent living movement**. In the past such personal assistance programmes were seen as a way of meeting basic needs. It is perhaps fair to infer that Article 19(b) re-envisages personal assistance primarily as a bridge to help connect people to their community and secondarily as a way of meeting basic human needs.<sup>50</sup>

There is also a clear link between Article 19(a) and Article 19(b) in terms of the choice to be afforded to persons with disabilities regarding the supports which they require. Commissioner Hammarberg states that:

Choice and control over the support needed to live and be included in the community are of paramount importance in the area of support services, in particular personal assistance. This is particularly so since these services, which are indispensable for individuals who need a high level of support, touch on the most intimate parts of life, such as daily care. The identity of the support person and the relationship between the support person and the individual being supported are crucial. Opportunities should be provided for people with disabilities who so desire to have utmost control over these matters, including hiring, employing, supervising, evaluating, and dismissing their personal assistant. This may require access to independent planning and facilitation services, in order to help develop life plans for life in the community and pursue these plans, as well as access to advocacy services in order to navigate the system and protect one's rights and interests.<sup>51</sup>

This interpretation has been echoed by the Academic Network of European Disability experts (ANED) in its 2010 synthesis report 'The Implementation of Policies Supporting Independent Living for Disabled People in Europe' where it is noted that:

**Overall, the goal of independent living for disabled people is that they should have choice and control over the decisions, equipment and assistance that they need to go about their daily lives, so that they can participate in society on the same basis as other people. This ultimately involves access not only to personal support services but also to wider services like appropriate housing, transport, education, employment and training.**<sup>52</sup>

So Article 19 is not just about a home of one's own – it is about the social services needed to enable individuals to imagine and lead the lives they want. And that increasingly calls for not just a new philosophy of services that is clearly animated in the UN CRPD but also a new kind of personal assistance – a transfer of emphasis onto a new kind of social support that takes the individuals' preferences seriously.

#### **(d) Embedding Inclusion: Expanding Community Services to be Inclusive of Persons with Disabilities: Article 19(c)**

Respecting choice in relation to living conditions and personalising social services goes a long way to the achievement of Article 19. But sustained progress can easily be undermined if the substantial resources currently tied up in institutional settings are not effectively transferred to general community support. It has

<sup>50</sup> For more on personal assistance and its role within Article 19, see ECCL, *Focus on Article 19 of the UN Convention on the Rights of Persons with Disabilities* (ECCL, Focus Report 2009).

<sup>51</sup> *The Right of People with Disabilities to Live Independently and be Included in the Community* CommDH/Issue Paper (2012)3 (Strasbourg, 13 March 2012), p. 20.

<sup>52</sup> *The Implementation of Policies Supporting Independent Living for Disabled People in Europe: Synthesis Report*, (Academic Network of European Disability experts (ANED), January 2010), p. 8.

been argued that previous attempts in the 1970s and 1980s at ‘deinstitutionalisation’ in the US have stumbled because of a lack of attention to community facilities and services.<sup>53</sup>

Most countries will not be in a position to simultaneously fund two large budget lines – one for institutions and one for independent living and being included in the community. Somehow or other the funds tied up in the former have to be invested in the latter. The most effective way of doing this is to open up existing community services which haphazardly included persons with disabilities in the past. Success or failure in doing so will determine the long term sustainability of a dynamic of positive change.

That is why Article 19(c) was deemed necessary. It not only requires that community services and facilities for the general public are available to persons with disabilities on an equal basis with others but are in addition responsive to their needs. In countries that have expended a large percentage of their resources on institutions this will be particularly hard to achieve. To make it happen will require forethought, deliberation, planning, and active involvement and consultation with civil society groups. And it will need to be done in a way that gives confidence to family members and others concerned with the welfare of the affected population. One thing is for sure, unless it is done – unless the resources currently tied up in institutions are released – then real progress towards the overall goals of Article 19 will be fitful and slow. This may entail some temporary spike in expenditure to gradually close institutions and build up community resources. The long term outcomes are worth it.

### 3. Progressive Achievement and the Necessity for a Dynamic of Change & Planned Transition

It is clear that Article 19 calls for a profound shift of philosophy, new kinds of social services and resources. Some countries are already well down this road – having started two decades ago.<sup>54</sup> Others have barely begun. But all are now legally required to get there by the UN CRPD. Most of the changes of emphasis and resources entail setting new policies and new priorities. By definition most of this will not and cannot happen overnight. To use the argot of international law, it will require a ‘progressive achievement’ of the right to live independently and be included in the community.

In as much as there are legal obligations that are to be immediately achieved in Article 19 it would perhaps be entirely fair to infer that Article 19 prohibits the construction of new institutions – entities that are not defined exclusively by their size but by their characteristics which can effectively exclude people from meaningful engagement in the community. The fixation on size of an institution as a talisman – i.e., the view that entities with 2,5,10, 15 or 20 or so are unproblematic – seems entirely misplaced. No congregated setting appears conducive to the right to live independently and be included in the community.

It would follow that, at a minimum, the EU should not be complicit either directly or indirectly through, inter alia, the Structural Funds, in facilitating the opening of new institutions. What then of the refurbishment of existing institutions to make their living conditions more humane and tolerable? The purist answer would be that such a development would be similarly objectionable since refurbishment is likely to take the pressure off the need to develop genuine community alternatives and, in any event, does not satisfactorily address the overriding need to build bridges between the individual and the community. A more nuanced answer would be that it depends on the depth and seriousness of the overall commitment to move resources toward the community. However, an extremely heavy onus of proof would be on the State to show that any such investment in institutions is strictly temporary (although it is never felt that way to the ‘residents’) and for the overriding purpose of eliminating inhumane and degrading treatment. Our own conclusion in keeping with the principle of ‘additionality’ (which will be examined in more detail in Chapter 6) under the EU Structural Funds - is that it would be better for EU resources to be expended exclusively on a transition process since primary responsibility and legal liability for existing human rights institutions rests with the Member States (see chapter 8). If this is not possible, funding for improving conditions should be allowed only as part of a genuine plan (with a heavy onus on the State to demonstrate that it has one) for dismantling the institution and transitioning residents to settings with support in the community.

<sup>53</sup> Bagenstos, *The Past and Future of Deinstitutionalization Litigation* (2012) University of Michigan Law School Public Law and Legal Theory Working Paper Series, Working Paper 265/2012 [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2005301](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2005301) (last accessed 5 April 2012).

<sup>54</sup> See, for example, Mansell and Ericsson, *Deinstitutionalization and Community Living - Intellectual Disability Services in Britain, Scandinavia and the US* (Nelson Thornes, 1996) and Forsberg and Starrin, *Deinstitutionalization and the 'long-term mentally ill': a Swedish case study* (1993) *Eur J Public Health* 3(2) 137.

The actual shift of emphasis and resources will clearly take time and effort and intensive planning and active consultation. In short, it will take 'progressive achievement' as understood in Article 4.(2) which states:

With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

States are therefore required to take all possible steps, using the resources available to them to their maximum ability, to fully realise the rights of persons with disabilities to live independently and be included in the community. This obligation is not empty. For example, in its General Comment No. 3 on the nature of States parties' obligations, the UN Committee on Economic, Social and Cultural Rights has clearly stated that:

while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.<sup>55</sup>

The Committee clarified its position in relation to the progressive realisation of the economic, social and cultural rights with respect to persons with disabilities when it stated in its General Comment 5 (1994) that:

The obligation of States parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required.<sup>56</sup>

Usefully in the context of disability the European Committee on Social Rights (the relevant Council of Europe treaty monitoring body under the Revised European Social Charter) has stated in its decision in *Autisme-Europe v France* (2004):

When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for others persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings.<sup>57</sup>

Unpacked, what are the essential ingredients of the obligation of 'progressive achievement' in the context of Article 19? This is in addition to the more immediate obligation discussed above which is to open no new institutions.

First of all, it is plain that any transition will require **foresight and planning**. One cannot simply rely on change as circumstances permit or as resources permit. There must be some sort of deliberative process in place that takes stock of where a State party is, what the obstacles to transition are and a clear roadmap for their removal over an agreed timeline. Indeed, it is possible to interpret this as an obligation of immediate effect in the sense that a decent stab should be made at the outset to initiate a planning process for a transition.

Secondly, it is equally plain **that persons with disabilities and their representative organisations should be centrally involved in this planning process**. A wide process of consultation is not only good in itself, but will sustain the process when times get hard or unexpected obstacles are encountered. A purely internal or bureaucratic process will not sustain a process of change unless all interested parties are actively engaged.

<sup>55</sup> The Committee on Economic, Social and Cultural Rights, General Comment 3, 14 December 1990, para. 2.

<sup>56</sup> The Committee on Economic, Social and Cultural Rights, General Comment 5, 12 September 1994.

<sup>57</sup> Para 34.

The legitimacy of the process will be heightened especially when priorities have to be set which inevitably entails hard choices. This is required in any event under Article 4(3) of the UN CRPD.

Thirdly, a clear timeline that itemises the resources to be transferred and policies to be put in place will lend itself to a robust method of independent monitoring. It is to be recalled that each Member State (and indeed the EU) will have to designate a framework including one or more independent elements for the monitoring of the convention (Article 33.3 UN CRPD). In practical terms and in this context, that will mean monitoring the progress achieved and obstacles encountered in the implementation of national plans toward community living. It is important that the relevant process becomes a 'learning organisation' – one that enables progress to be accurately gauged and one that learns from mistakes and adjusts accordingly.

In a 2010 Report entitled '*Forgotten Europeans – Forgotten Rights: the human rights of persons placed in institutions*' the Office of the UN High Commissioner for Human Rights (Regional Office for Europe) stated that transferring from institutional care to community-based services is not, in itself, sufficient to ensure that persons with disabilities can exercise their right to live and participate in the community. The 2010 Report also recommended that Governments develop "national strategies that cover the areas of social services, health, housing and employment."<sup>58</sup> In order for such strategies to be effectively implemented the 2010 Report recommended that legislation should be enacted which establishes independent living as a legal right, places duties on authorities and service providers and allows for recourse in case of violation.<sup>59</sup>

This need for legislation was addressed in an earlier 2009 Report by the Office of the UN High Commissioner in its Thematic Study of the UN CRPD where it stated that:

Such legislative frameworks shall include recognition of the right to access the support services required to enable independent living and inclusion in community life, and the guarantee that independent living support should be provided and arranged on the basis of the individual's own choices and aspirations, in line with the principles of the Convention.<sup>60</sup>

States will be naturally tempted to delay a transition and progress toward achieving a transition plan because of the economic dislocation experienced across Europe since the ongoing economic downturn since 2008. Of considerable relevance in this context are the findings of recent research concerning the overall cost-benefit equation involved in any transition toward community living. Mansell *et al*<sup>61</sup>, in their comprehensive analysis of 2007 into the economic implications of the transition from institutional to community-based services, conclude that:

There is no evidence that community-based models of care are inherently more costly than institutions, once the comparison is made on the basis of comparable needs of residents and comparable quality of care. Community-based systems of independent and supported living, when properly set up and managed, should deliver better outcomes than institutions.<sup>62</sup>

The authors also note that:

In a good care system, the costs of supporting people with substantial disabilities are usually high, wherever those people live. Policy makers must not expect costs to be low in community settings, even if the institutional services they are intended to replace appear to be inexpensive. Low-cost institutional services are almost always delivering low-quality care.<sup>63</sup>

This position has also been endorsed by Commissioner Hammarberg in his aforementioned Issues Paper where he states that:

Costs often serve as an excuse for maintaining the status quo. Resources are needed to fund the strengthening, creation, and maintenance of community-based services. For a time, there may be a need for additional resources, particularly during the process of phasing out residential institutions and

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<sup>58</sup> Parker, *Forgotten Europeans, Forgotten Rights – The Human Rights of Persons Placed in Institutions* (2010, Office of the High Commissioner for Human Rights, Regional Office Europe).

<sup>59</sup> *Ibid.*

<sup>60</sup> *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities A/HRC/10/48*, para. 51.

<sup>61</sup> Mansell, J., Knapp, M., Beadle-Brown, J., & Beecham, J. *Deinstitutionalisation and community living – outcomes and costs: report of a European Study*. Volume 2: Main Report. (2007) Canterbury: Tizard Centre, University of Kent.

<sup>62</sup> *Ibid.*, p. 97.

<sup>63</sup> *Ibid.*

replacing them with community-based services and supports. When this process is completed, however, studies have shown that there can be cost savings once services and supports are transferred to the community and institutions are phased out. In contexts where institutions are not prevalent but people with disabilities are marginalised within their communities, they and their families will need supports in their everyday life to enable community inclusion and participation. In both scenarios, the cost component would be mitigated as services for the general public are made accessible to people with disabilities<sup>64</sup>

The Commissioner made the following recommendations to Council of Europe Member States regarding the realisation of Article 19:

- Adopt a no-admissions policy to prevent new placements of persons with disabilities in institutional settings.
- Set deinstitutionalisation as a goal and develop a transition plan for phasing out institutional options and replacing them with community-based services, with measurable targets, clear timetables and strategies to monitor progress.
- Allocate the necessary budgetary and other resources towards community-based supports rather than institutional placement and services, in accordance with the principle of progressive realisation.
- Develop and implement a plan for services such as personal assistance, housing, support in finding a job, life planning, and support to family, which prevent isolation within the community, and which ensure that a person's support needs do not compromise their full and equal participation and inclusion in society.
- Define a statutory and enforceable individual entitlement to a level of support which is necessary to ensure one's dignity and ability to be included in the community.
- Ensure monitoring by independent national mechanisms of the human rights of residents of institutions until institutions are phased out, and of the human rights of people using community support services, including the quality and accessibility of community-based schemes and supports.
- Ensure that persons with disabilities and their representative organisations are involved and participate fully in planning, carrying out and monitoring the implementation of the right to live in the community.<sup>65</sup>

These recommendations make perfect sense within the frame of Article 19. What makes the EU unique relative to the Council of Europe is its ability to follow through with tangible assistance. It should now be clear that there are certain things the EU – through its Structural Funds and otherwise – should not do. It is equally clear that the EU can play a major role in embedding and facilitating a transition at Member State level that offers real prospects of success. Before unpacking that potential, the next chapter will recount the trajectory of EU disability law and policy – a trajectory that makes the alignment between the Structural Funds and the transition to community living a natural fit even without the added spur of a convention.

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<sup>64</sup> The Right of People with Disabilities to Live Independently and be Included in the Community CommDH/Issue Paper (2012)3 (Strasbourg, 13 March 2012), p. 21.

<sup>65</sup> *Ibid*, p. 5-6.

## Chapter 4

# The General Evolution of EU Disability Law & Policy – Background Commitment to Community Living

A consideration of why and how the Structural Funds might be used to make them play a much more proactive role in the achievement of the right to live independently and be included in the community is not simply a mechanical consideration of compliance with the UN CRPD. It makes sense to do so, quite apart from the UN CRPD, and especially given the background commitments and normative trajectory of EU disability law and policy. In an important sense the UN CRPD crystallises this trajectory and powerfully reinforces it.

European disability law is an amalgam of different initiatives as well as law and policy. Collectively they strongly point in the direction of a reinvigorated Structural Fund programme that advances the cause of the right to live independently and live in the community. This is not the place for an exhaustive account of that law and policy.<sup>66</sup> This chapter will provide an overview of some of its more salient features – features that go towards making a natural fit between this law and policy and the suggested alteration of the Structural Funds.

What follows is a brief account of the evolution of non-discrimination in EU law and policy – an ideal that, as the US Supreme Court<sup>67</sup> has demonstrated, is quite capable of reaching the issue of the right to live independently and be included in the community. We then unpack the EU Charter of Fundamental Rights – a quasi constitutional instrument that strongly embeds the core values and principles of equality and non-discrimination as a leitmotiv of the Union. Next we examine the key features of the EU disability strategy – a strategy that is almost unique in the sense that it pivots very strongly on the closer alignment of EU law and policy with the UN CRPD. Of course, the EU disability strategy is part of a wider web of European policy priorities and commitments and particularly the EU 2020 strategy for ‘smart, sustainable and inclusive growth’ – something that is unlikely to be achieved without social innovation particularly with respect to Europe’s most vulnerable.

### 1. The EU commitment to non-discrimination and its relevance to institutionalisation

The concept of equality has been embedded in EU law and policy from the very start. Through the prohibition on discrimination based on nationality, it played an important role in enabling a common market to be established. And through its more specific prohibition against gender discrimination it has enabled a much more inclusive economy and society to evolve. This has served a moral purpose – which lies at the heart of the European project. It has also served an economic purpose in helping create a more inclusive and therefore a more efficient common market. It was natural that groups who appreciated the benefit of this *acquis* but who nevertheless felt left out should argue strongly for an expansion of the underlying legal base to enable similar measures to be adopted to their benefit and the benefit of the Union as a whole.

Famously, Article 13 of the Treaty of Amsterdam (1997) was the result of this lobbying. It has now become Article 19 of the TFEU and authorises the Council on a proposal from the Commission to:

take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.<sup>68</sup>

Appropriate action is taken to include the adoption of Directives. Unfortunately, unanimity is required in Council for the adoption of measures under Article 13. Article 13 provided the legal basis for the Employment Equality Directive<sup>69</sup> (‘Framework Directive’) in 2000 which prohibits discrimination on the basis of disability in the areas of employment and vocational training. This Directive innovated by demanding ‘reasonable accommodation’ towards persons with disabilities. The Directive states that:

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<sup>66</sup> See, for example, Waddington *Reasonable Accommodation - Time to Extend the Duty to Accommodate Beyond Disability?* (2011) NJCM-bulletin, 38(2), 186-198, Lawson, A. (2009) ‘The UN Convention on the Rights of Persons with Disabilities and European Disability Law: A Catalyst for Cohesion?’ In: Arnardottir, O. and Quinn, G. (eds.) *The United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, Leiden: Martinus Nijhoff and Quinn G., ‘Disability Discrimination Law in the European Union’, in Meenan H, (Ed), *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives*, (Cambridge University Press 2007).

<sup>67</sup> *Olmstead v. L.C.* 527 U.S. 581 (1999).

<sup>68</sup> Article 19(1), Treaty on the Functioning of the European Union.

<sup>69</sup> Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] O.J.L. 303/16.

Employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.<sup>70</sup>

Left unclear was whether the denial of such accommodation amounted to discrimination under the Directive. This at least was made crystal clear under the UN CRPD. Despite its advance as a lynchpin of EU disability rights in these fields, Clifford notes that the definition of reasonable accommodation contained in the Framework Directive is not as strong as that contained in the UN CRPD.<sup>71</sup>

The Employment Directive was accompanied by a Directive prohibiting discrimination on the ground of race or ethnic origin and in a variety of domains including specifically, housing, the so called 'Race Directive'<sup>72</sup>. The interesting thing about this Directive at least for our purposes is that it purported to directly reach the issue of housing which is of course highly germane in the context of the right to live independently and be included in the community. Article 3(1) of the Race Directive states that its non-discrimination provision shall apply in relation to, *inter alia*:

- (a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, ;
- (e) social protection, including social security and healthcare;
- (f) social advantages;
- (h) access to and supply of goods and services which are available to the public, including housing.<sup>73</sup>

In 2004 the EU adopted a Directive on equal treatment between men and women in the access to and supply of services and goods.<sup>74</sup> It prohibits discrimination in the provision of goods and services, including housing, on the basis of sex.<sup>75</sup>

In 2006 the Intergroup of members of the European Parliament called 'Urban Logement' published proposals for a European Charter for housing<sup>76</sup>. It noted that:

Housing is an element of human dignity, an essential component of the European social pattern and of the social protection systems of the Member States;<sup>77</sup>

The Intergroup went on to recommend that the European social inclusion strategy should be fully integrated in Community policies and that the role of housing must be recognised within this. It suggested that quantitative objectives should be set to fight exclusion with a view to reinforce readability of social inclusion for the European citizens. In addition, it suggested that in order to allow a coherent analysis of the housing situation in Europe, indicators common to the Member States should be defined and the European Union should promote the exchange of good practices in terms of effective implementation of the right to housing.<sup>78</sup> These guidelines are of clear relevance to the monitoring required of both the EU and Member States in order to realise Article 19 at an EU level through the use of the structural funds.

Most recently, the 2010 Joint Report on Social Protection and Social Inclusion<sup>79</sup> arising out of the Open Method of Coordination on Social Protection and Social Inclusion (Social OMC) stated that:

The causes of housing exclusion, often compounded, can be structural (joblessness, poverty or lack of adequate and affordable housing), personal (family breakdown, illness), institutional (leaving care or prison) or linked to discrimination. Policies also need to adapt to changing patterns of homelessness,

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<sup>70</sup> Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] O.J.L. 303/16, Article 5.

<sup>71</sup> Jarlath Clifford, *The UN Disability Convention and its Impact on European Equality Law* (2011) Vol. 6, *The Equal Rights Review* 11, 14-15.

<sup>72</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJL 180, 19.7.2000.

<sup>73</sup> Emphasis added.

<sup>74</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of services and goods.

<sup>75</sup> *Ibid*, Article 3(1).

<sup>76</sup> Proposal of a European Charter for Housing (2006) Available at [http://www.iut.nu/EU/Housing%20Charter/Charter\\_ENG\\_060406.doc](http://www.iut.nu/EU/Housing%20Charter/Charter_ENG_060406.doc) (last accessed 16th of March 2012).

<sup>77</sup> Article 1(1) of the Proposal of a European Charter for Housing.

<sup>78</sup> Article 8(1) of the Proposal of a European Charter for Housing.

<sup>79</sup> Joint Report on Social Protection and Social Inclusion (European Commission, DG Employment, Social Affairs & Inclusion, 2010).

and to new risk groups, such as people with low-paid, poor quality or intermittent jobs, including the young and migrant and mobile workers.

Tackling housing exclusion and homelessness therefore requires integrated policies combining financial support to individuals, effective regulation and quality social services, including housing, employment, health and welfare services. More attention needs to be paid to the quality standards of social services and the specific obstacles the homeless face in accessing them.<sup>80</sup>

## 2. Institutionalisation in US anti-discrimination law and its relevance to EU law

That the non-discrimination ideal can reach the question of institutionalisation is clear from a rightly famous 1999 decision of the US Supreme Court (*Olmstead v L.C.*)<sup>81</sup>.

In a 6-3 division the Supreme Court held that 'unjustified' institutionalisation for inmates in a State care centre who could function living independently and in a community setting was a violation of Title II of the Americans with Disabilities Act, 1990. Title II covers discrimination with respect to public services whether delivered by the States or by the States with Federal assistance.

Title II of the ADA builds on the previous Fair Housing Amendment Act of 1988 which already prohibited housing discrimination on the ground of disability in the private sector. It extends this protection to the public sector – and applies in States even if the State is not in receipt of Federal monies. The key point is that the Supreme Court had no problem conceptualising 'unjustified' institutionalisation as a form of discrimination. The Court did, however, impose a qualification on this finding by stating that 'unjustified' institutionalisation would only amount to discrimination where the placement could be reasonably accommodated by the State, taking into account the resources available to the State and the needs of others with mental disabilities.

The integration mandate (the view that persons should be given services in the least restrictive environment') is also premised on the existence of the following additional criteria - the individual expresses his or her preference in being placed in the community (or at least does not oppose placement efforts) and the relevant professionals agree that such a placement is appropriate.<sup>82</sup>

These qualifications in the majority judgment - particularly with reference to available resources and professional judgment as to the appropriateness of placements - dismayed many since it seemed to allow for an indefinite postponement of a transition. However, the decision did prod political action. Before the 2000 Presidential election, then Secretary of Health & Human Services Donna Shalala sent a letter to each State's Medicaid director indicating that the Federal Government intended to implement *Olmstead* as federal policy. Also, in his pre-election manifesto for the 2000 Presidential election, George W Bush promised action to support States in complying with the Supreme Court decision.

Indeed, when elected he issued Executive Order 13217.<sup>83</sup> This committed the Administration to implement the general integration mandate of the ADA as interpreted in *Olmstead*. It required Federal Agencies to promote community living for persons with disabilities by providing coordinated technical assistance to the States. A 'money follows the person' demonstrator project was initiated by the Department of Health and Human Services (2007-2011) which pilots innovation throughout the States.

This commitment has continued in the changeover of Administrations. On 22 June 2009 (the 10<sup>th</sup> anniversary of the *Olmstead* decision) President Obama launched "The Year of Community Living" in an effort to assist persons with disabilities. Specifically, the President directed Health and Human Services Secretary Kathleen Sebelius and Housing and Urban Development Secretary Shaun Donovan to work together to identify ways to improve access to housing, community supports, and independent living arrangements. As part of the effort, Secretaries Sebelius and Donovan announced several new initiatives including details about increased numbers of Section 8 vouchers. The Section 8 voucher scheme is the Federal government's major program for assisting very low-income families, the elderly, and the disabled to afford decent, safe, and sanitary housing in the private market. Since housing assistance is provided on behalf of the family or individual, participants are able to find their own housing, including single-family homes, townhouses and apartments. The participant is free to choose any housing that meets the requirements of the program and is not limited to units located in subsidized housing projects. The initiative also implemented enhanced inter-agency coordination and included

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<sup>80</sup> *Ibid*, Section 3.

<sup>81</sup> *Olmstead v L.C.* 527 U.S. 581 (1999).

<sup>82</sup> This professional judgment is derived from the 1982 Supreme Court case *Youngberg v. Romeo*, 457 US 307 (1982).

<sup>83</sup> Executive Order 13217 of June 18, 2001.

listening sessions conducted by the Department of Health and Human Services across the United States to hear the voices and stories of persons with disabilities.<sup>84</sup>

If EU Directives extended the protection of non-discrimination to persons with disabilities into the housing area (or public services generally which could be interpreted to include housing) then the same set of arguments that moved the US Supreme Court could be put to the European Court of Justice. The US Supreme Court judgment in *Olmstead* would doubtless have high persuasive value.

More importantly, the high-level political response in the US to the *Olmstead* decision by successive Administrations is exactly what is required at an EU level. Except in this case the prod for action is not a decision by the ECJ but EU confirmation of the UN CRPD.

### 3. Current Proposals to Expand EU Anti-Discrimination Law

It was inevitable that pressure would mount to extend the protections afforded by EU non-discrimination law for all groups into all domains which would of course include housing. In 2008 the European Commission proposed a new Equal Treatment Directive.<sup>85</sup> It has been the subject of difficult negotiations between the Member States since then. The UN CRPD is specifically cited in the preamble – along with other UN human rights conventions – as a source of the universal ideal of equality which is sought to be advanced in the Directive. The material scope of the draft Equal Treatment Directive explicitly reaches the issue of housing as an aspect of the supply of goods and services (draft Article 3(1)(d)). This applies to the public sector and only to individuals (suppliers) in so far as they are performing professional or commercial activity. Professional service providers acting for, or in concert with, the State would therefore be covered.

Professor Waddington notes that, in contrast with the other grounds of discrimination which the Directive seeks to address, the proposals regarding disability contain “a number of innovative features” which consciously map over some innovations from the UN CRPD. These include a broadened concept of disability, a newer definition of reasonable accommodation linking it more explicitly with discrimination and new provisions on accessibility.<sup>86</sup>

Although the original 2008 Equal Treatment proposal did not contain any definition of disability, the European Parliament subsequently proposed inserting a recital based on the definition contained in Article 1 of the UN CRPD. Waddington notes<sup>87</sup> that even though this definition will be included only in the non-binding Preamble to the Directive (if enacted), it is likely to have an impact on the future jurisprudence of the Court of Justice given its previous medical model definition of disability, as exemplified in its decision in *Chacón Navas*.<sup>88</sup>

In relation to reasonable accommodation and discrimination, the original draft contained the startling innovation that the measures necessary to advance the rights of persons with disabilities including appropriate modifications and adjustments shall be provided by anticipation. This is known as ‘anticipatory reasonable accommodation.’ If the would-be discriminator simply reacts to a ‘victim’ then it may be too late to engage in ‘reasonable accommodation’ since the cost will be too high and an ironclad defence of undue burden would apply. But if the would-be discriminator is obliged to anticipate the class of persons who might require accommodation in the future then s/he should provide it and the defence of undue burden would become less important.

Whether it succeeds in laying down a new norm in EU law or not this is particularly noteworthy for our purposes. In a sense it broadens the non-discrimination ideal to force a more thoroughgoing analysis of the true situation of persons with disabilities (or a class thereof) as well as a deeper understanding of the structural impediments to the enjoyment of their rights. In a sense it requires a systemic response rather than just a purely reactive response. And in a way this is what the suggested alterations of the regulation of the Structural Funds require – particularly the need for planning and for a dynamic of change headed in the right direction. So the ‘anticipatory turn’ of thinking with respect to the future of non-discrimination law fits with, and augers well for, a much more proactive view of the potential of the Structural Funds.

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<sup>84</sup>[http://www.whitehouse.gov/the\\_press\\_office/President-Obama-Commemorates-Anniversary-of-Olmstead-and-Announces-New-Initiatives-to-Assist-Americans-with-Disabilities/](http://www.whitehouse.gov/the_press_office/President-Obama-Commemorates-Anniversary-of-Olmstead-and-Announces-New-Initiatives-to-Assist-Americans-with-Disabilities/) (Last accessed 2 April 2012).

<sup>85</sup> European Commission, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 425, Brussels, 2 July 2008.

<sup>86</sup> Lisa Waddington, *Future prospects for EU equality law: lessons to be learnt from the proposed Equal Treatment Directive* (2011) E.L. Rev 163, 173.

<sup>87</sup> *Ibid*, 175.

<sup>88</sup> *Chacón Navas v Eurest Colectividades SA* (C-13/05) [2006] E.C.R. I-6467; [2006] 3 C.M.L.R. 40.

The most recent version of the draft Equal Treatment Directive<sup>89</sup> as emerging from negotiations in Council contains the following definition which similarly echoes that contained in the UN CRPD:

Reasonable accommodation means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities [the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms].<sup>90</sup>

In sum, the non-discrimination frame of reference is accepted with respect to persons with disabilities under EU law. EU non-discrimination law does not currently extend protections to persons with disabilities in the specific field of public services or housing. If it did then the logic in the US Supreme Court decision of *Olmstead* would surely apply. Inappropriate institutionalisation (or indeed any institutionalisation, as per Article 19 of the UN CRPD) could and would easily be characterised as discrimination. Even if the legal remedies were not robust (as they are not under US law) then a similar political response would be called for. That, in a sense, is what is being asked of the Structural Funds. The only difference is that we do not have to wait for a similar decision of the ECJ – the EU confirmation of the UN CRPD prompts a high level political response (in the form of new Regulations for the Structural Funds) in the same direction.

#### 4. The general EU commitment to accessibility

The issue of accessibility has been a particular concern of the European Commission since the initial proposal for an Accessibility Act (enacted via a Directive). It was also one of the nine ‘areas of mutual interest’ for the EU and its Member States listed in the First Disability High Level Group Report on Implementation of the UN CRPD.<sup>91</sup> The Preamble of the most recent version of the Equal Treatment Directive notes that:

Measures to ensure accessibility for persons with disabilities, on an equal basis with others, to the areas covered by this Directive play an important part in ensuring full equality in practice. Such measures should comprise the identification and elimination of obstacles and barriers to accessibility, as well as the prevention of new obstacles and barriers. They should not impose a disproportionate burden.<sup>92</sup>

In addition, and carrying forward the idea of ‘anticipatory’ measures, the Preamble goes on to state that:

In addition to general anticipatory measure to ensure accessibility, individual measures to provide reasonable accommodation in a reactive manner play an important part in ensuring full equality in practice for persons with disabilities to the areas covered by this Directive.<sup>93</sup>

This notion that accessibility is to be understood in terms of anticipatory obligations has been welcomed by commentators as going a long way towards complying with the UN CRPD.<sup>94</sup> When considered specifically in terms of the drafting of new regulations for the forthcoming programming period for the EU Structural Funds, the concept of anticipatory action supports the inclusion of provisions which ensure the utilisation of the funds in a manner which ensures the use of the Funds for programmes which achieve the inclusion in the community of persons with disabilities.

In sum, EU disability law and policy is firmly anchored in a broad understanding of equality and non-discrimination. Cognate jurisprudence from the US Supreme Court is to the effect that the non-discrimination ideal when applied to housing and the provision of social services means that institutionalisation constitutes a clear form of discrimination. This shows that there is nothing inherent in the non-discrimination ideal to stop it reaching the issue of institutionalisation. Conceptually speaking, the issue of institutionalisation is clearly within the embrace of the non-discrimination ideal. From a doctrinal point of view EU discrimination law can and does already reach the issue of housing albeit in the narrow domain of race discrimination. But this shows it has the capacity to reach the issue of housing (and institutionalisation) on the ground of disability. Indeed, the draft Equal Treatment Directive of 2008 is consciously modelled on core elements in the UN CRPD. The anticipatory

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<sup>89</sup> Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Version of 15 July 2011, 12446/11.

<sup>90</sup> *Ibid*, Article 4a(2).

<sup>91</sup> First Disability High Level Group Report on Implementation of the UN Convention on the Rights of Persons with Disabilities (2008).

<sup>92</sup> *Supra*, para. 19(b).

<sup>93</sup> *Supra*, para. 20(a).

<sup>94</sup> Waddington, *op. cit.*, 178.

dimension in particular points to a felt need for a more systemic approach to change which of course fits well with the suggested changes to the Structural Funds.

It should be emphasised that there is also a proposal from the European Commission for the enactment of a European Accessibility Act which, if enacted (as a Directive), would be of significant assistance in giving life to the transition toward independent living and community integration. Recognising the cogency of the arguments for such an Act,<sup>95</sup> Vice-President Reding has stated:

Accessibility means that people with disabilities have access on equal basis with others to the physical environment, to transport and to information and communication. Accessibility is a precondition for persons with disabilities to be able to enjoy the rights enshrined in the UN Convention, in the EU Treaty and the Charter for Fundamental Rights.<sup>96</sup>

The Act purports to set out a general accessibility framework in relation to goods, services and public infrastructure using different instruments such as standardisation, public procurement or state aid rules.<sup>97</sup> A roadmap for the Act has been published<sup>98</sup> and the Act is included under the European Commission's Work Programme (CWP) for 2012.<sup>99</sup>

The important point here is that accessibility legislation would not take full effect unless and until independent living were assured. Contrariwise, the right to independent living would not take full effect unless and until accessibility were assured. Tangible movement in the direction of enhanced EU accessibility law is greatly welcomed. And it makes eminent sense to round it out with equally tangible movement in favour of the right to independent living. As will be seen, the draft Regulations for the new programming period in the Structural Funds also makes explicit reference to accessibility. So these flanking policy trajectories are all working in the same direction.

## **5. The transversal imperative of Human Rights in EU law & policy**

Equality – though important – is but part of a broader continuum of human rights norms. The EU has always been founded on the trilogy of human rights, the rule of law and democracy. Article 2 of the TEU elaborates on these commitments by stating:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Slowly but surely the EU has been establishing the legal capacity to act on the basis of these commitments and anchoring them as the very foundation stone of the Union. They now constitute the essence of the underlying public or constitutional order of the Union.

Article F of the Treaty of European Union (Maastricht Treaty, 1992) committed the Union to respect fundamental rights as guaranteed in the European Convention on Human Rights (ECHR) and as “they result from the constitutional traditions common to the Member States” as general principles of community law. The concept of ‘general principles of community law’ has long included a consideration of the jurisprudence of the European Court of Human Rights. For our purposes this involves examining the caselaw of the European Court of Human Rights under Article 8 (right to respect for family and private life) and Article 14 (non-discrimination) of the ECHR.

The jurisprudence of the European Court of Human Rights is about to get even more important. Accession of the EU to the ECHR required treaty changes which were eventually made by the insertion of Article 6(2) into the TEU by the Lisbon Treaty. The draft legal instruments for the accession have now been transmitted to the

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<sup>95</sup> Report on mobility and inclusion of people with disabilities and the European Disability Strategy 2010-2020 (2010/2272(INI)), A7-0263/2011, 6 July 2011.

<sup>96</sup> Viviane Reding, Vice-President of the European Commission, EU Commissioner for Justice, ‘Towards an EU accessibility Act’ (EPP hearing on mobility and inclusion of people with disabilities, Brussels, 7 September 2011) - <http://www.eppgroup.eu/press/peve11/docs/110907reding-speech.pdf> (accessed 7 November 2011).

<sup>97</sup> European Disability Strategy 2010-2020 – frequently asked questions - <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/578> (accessed 7 November 2011)

<sup>98</sup> [http://ec.europa.eu/governance/impact/planned\\_ia/docs/2012\\_just\\_025\\_european\\_accessibility\\_act\\_en.pdf](http://ec.europa.eu/governance/impact/planned_ia/docs/2012_just_025_european_accessibility_act_en.pdf) (last accessed 5 April 2012).

<sup>99</sup> [http://ec.europa.eu/atwork/programmes/index\\_en.htm](http://ec.europa.eu/atwork/programmes/index_en.htm) (last accessed 5 April 2012).

Committee of Ministers of the Council of Europe, with further negotiations ongoing.<sup>100</sup> After the Parliamentary Assembly of the Council of Europe as well as the two European Courts have given their opinion on the final draft instruments, they require the adoption by the Committee of Ministers. The EU will accede to the ECHR once the accession agreement has entered into force, which requires the ratification by all States parties to the ECHR as well as the EU itself.<sup>101</sup>

So where stands the jurisprudence of the European Court of Human Rights with respect to the right to live independently and be included in the community as refracted through the prisms of Articles 8 and 14 of the ECHR?

In a pioneering piece, Camilla Parker and Luke Clements<sup>102</sup> suggest that Article 8 (Right to privacy and family life) jurisprudence will be relevant to all restrictions placed on individual liberty, particularly to restrictions on social interaction, the ability to establish and develop relationships, educational and other personal opportunities as well as those that impair an individual's 'physical or psychological wellbeing.' They argue that decisions by the European Court of Human Rights demonstrate the relevance of Article 8 in such instances, particularly its emphasis on the importance of personal autonomy.<sup>103</sup> The authors note that the Court has stressed that there must be a clear justification for interfering with a person's chosen lifestyle, 'even where the conduct poses a danger to health, or, arguably, where it is of a life threatening nature.'<sup>104</sup> Based on this, Parker and Clements suggest that Article 8 has the potential to extend to situations of 'passive institutionalisation' i.e. where the care regime is constructed in such a way as to make institutionalisation the default option, for example where there are little or no services or support available to people who wish to live in their own homes.<sup>105</sup>

This is further enhanced by the recent decision of the European Court of Human Rights in *Stanev v Bulgaria*<sup>106</sup> where the court held that the applicant's distance and isolation from the community, the institution's regimented daily schedule, the rules on leave of absence, the lack of choice in everyday matters, and the lack of opportunity to develop meaningful relationships, as well as the deprivation of legal capacity, were all factors that led to a violation of Article 5 of the ECHR (right to liberty).

The authors conclude:

Notwithstanding the Strasbourg Court's frequent observation that the boundaries between a state's positive and negative obligations under Article 8 do not lend themselves to precise definition, it is clear that the principles that regulate both obligations are not dissimilar. The court has, for instance, held that Article 8 embodies many (if not all) of the core components of the right to independent living: a right to positive measures to ensure 'the development, without outside interference, of the personality of each individual in his relations with other human beings'; a state obligation to avoid interferences with a person's development of their 'social identity' and a right (where the state bears responsibility for the applicant's predicament – or if s/he has significant impairments), to positive measures to address inappropriate living conditions.<sup>107</sup>

Article 14 of the ECHR deals more specifically with the right to non-discrimination. As originally drafted it only attaches to the quality or level of enjoyment of the other substantive rights set out under the ECHR. After many criticisms stretching over the decades the European Court of Human Rights finally substantially ratcheted upwards its understanding of the non-discrimination norm in *DH v Czech Republic*.<sup>108</sup> This case involved the placement of Roma children in "special schools" for the mentally disabled. The Grand Chamber held by 13 votes to 4 that there had been indirect discrimination against the school children in the provision of education, finding a violation of Article 14 (prohibition of discrimination) of the ECHR read in conjunction with Article 2 of

<sup>100</sup> Draft legal instruments on the accession of the European Union to the European Convention on Human Rights (Strasbourg, 19 July 2011) [http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE\\_documents/CDDH-UE\\_2011\\_16\\_final\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE_documents/CDDH-UE_2011_16_final_en.pdf) (last accessed 5 April 2012).

<sup>101</sup> <http://www.coe.int/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention> (last accessed 22 March 2012).

<sup>102</sup> Parker and Clements, *The UN Convention on the Rights of Persons with Disabilities: a New Right to Independent Living?* [2008] 4 E.H.R.L.R. 508.

<sup>103</sup> *Ibid*, 516.

<sup>104</sup> *Pretty v United Kingdom* (2002) 35 EHRR 1.

<sup>105</sup> *Supra* n. 37, 516.

<sup>106</sup> *Stanev v Bulgaria* [2012] ECHR 46 (17 January 2012).

<sup>107</sup> *Ibid*, 517.

<sup>108</sup> *DH & Ors v Czech Republic* Application no. 57325/00 (ECtHR, 13 November 2007). For commentary on this decision see Devroye, *The Case of D.H. and Others v. the Czech Republic* (2009) 7 *Northwestern Journal of International Human Rights* 1, 81 and Hobcraft - *'Roma Children and Education in the Czech Republic, DH and Others v The Czech Republic: Opening the door to indirect discrimination findings in Strasbourg?'* EHRLR 2 (2008) 245.

Protocol 1 (right to education), although the Court did not reach the logical question of whether the mere existence of such special schools violated the ECHR. As a result of the normative advances in *DH*, the Strasbourg Court now formally recognises the concept of indirect discrimination and will entertain statistical evidence to that effect. Similarly, it will reverse the onus of proof when a solid *prima facie* case of discrimination has been laid. It is entirely conceivable, therefore, that a case might be imagined to challenge institutionalisation that relies on a combination of Article 14 with Article 8. In such a case the Court would strictly scrutinise the reality and the justifications proffered for institutional living. Again, the US Supreme Court decision on *Olmstead* is likely to have very high persuasive value.

One disadvantage to traditional Article 14 ECHR jurisprudence is that it must be linked to the enjoyment of one of the substantive Articles. Article 8 would appear to be the most likely candidate (although a connection to Article 3's prohibition on inhuman and degrading treatment may also be in the frame). It should also be borne in mind that Protocol 12 (2000 – which came into effect in 2005) extends the prohibition of non-discrimination to cover 'any right set forth by law.'<sup>109</sup> This would certainly extend to cover living arrangements, housing and related social services. Although it has not received universal ratification by all Member States of the Council of Europe it has been ratified by some States which have been criticised in the past for alleged mis-use of Structural Funds.

A further move to express, crystallise and consolidate human rights in the Union came in the shape of the EU Charter of Fundamental Rights in 2000. Two provisions of the Charter are particularly relevant. First of all, the definition of discrimination expressly includes disability (Article 21). This was ground breaking at the time. Secondly, Article 26 deals more specifically with the rights of European citizens with disabilities. Significantly it is entitled 'Integration of persons with disabilities.' So from the outset the frame is set for social inclusion, participation and community engagement. The text reads:

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

Implicit – if not explicit – in this is the existence of such measures. That is to say, it assumes no policy vacuum but, to the contrary, anticipates a positive policy orientation especially in regard to the achievement of independence, social integration and active participation in the life of the community. This fits both naturally and logically with the current debate about how the Structural Funds might be amended to play their own role in aiding movement along this path.

Article 51 of the Charter was to the effect that the rights protected did not (and do not) create any new legal power or competence of the Union. Its provisions were stated to apply to the Institutions of the Union and to the Member States when implementing EU law.

An argument was always heard that the Charter should be more visibly embedded in the underlying treaties founding the Union. This was eventually accomplished by the Lisbon Treaty (2007). Article 6(1) of the Treaty on European Union (TEU) provides that the EU

recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union , which shall have the same legal value as the Treaties.

The EU Charter of Fundamental Rights<sup>110</sup> has therefore "become a cardinal element of the Union's body of "primary," that is "constitutional" rules."<sup>111</sup> Lexically speaking, the Charter is situated above secondary law and at the same level as the founding treaties.

In sum, the non-discrimination *grundnorm* of EU law and policy is certainly capable of being interpreted to argue against the proliferation of institutional care. The caselaw of the European Court of Human Rights would certainly point in that direction. The 1999 decision of the US Supreme Court demonstrates that the application of the non-discrimination ideal in the context of institutionalisation is not just fanciful but real. It would certainly follow that the Structural Funds – and similar instruments – must be interpreted in a manner that brings them into close alignment with the EU Charter. In cases of an obvious divergence it is clear that they would be

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<sup>109</sup> Mark Bell, 'The Relationship between EU law and Protocol No. 12', in *Non-Discrimination: A Human Right - seminar marking the entry into force of protocol no. 12, Strasbourg, 11 October 2005* (Council of Europe, 2006).

<sup>110</sup> Charter of Fundamental Rights of the European Union (2007/C 303/01) OJEU C 83/391, 30 March 2010.

<sup>111</sup> Xavier Groussot & Laurent Pech, *Fundamental Rights Protection in the European Union post Lisbon Treaty* (2010) Policy Paper no. 173, Foundation Robert Schuman, p. 2.

vulnerable to attack assuming one had *locus standi* to invoke the Charter before national courts and/or the European Court of Justice. More pertinently, from our point of view, it is clear that any re-negotiation of the regulations should at a minimum respect the provisions of the Charter and be visibly animated thereby.

## 6. The general European Disability Strategy – pointing to the added value of the Structural Funds

The EU has been active in the field of disability since at least the 1990s.<sup>112</sup> Little appreciated is the fact and the extent to which this activity was triggered by international norms and policy.<sup>113</sup> The innovative Unit in the European Commission on 'Integration of Persons with Disabilities' was formed as an EEC contribution to the UN Year of Persons with Disabilities in 1981 and still exists within the European Commission's DG Employment, Social Affairs and Equal Opportunities.

The most recent disability-specific strategy to emerge from the EU is the '*European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe*.'<sup>114</sup> It undertakes to tackle barriers in eight areas: accessibility, participation, equality, employment, education and training, social protection, health and external action. It will do so in active collaboration with the Member States in frank recognition that most of the legal competence rests with the Member States. The overall aim of the strategy is to:

empower people with disabilities so that they can enjoy their full rights, and benefit fully from participating in society and in the European economy, notably through the Single market.

The 2010-2020 disability strategy references both the UN CRPD as well as Articles 21 and 26 of the EU Charter of Fundamental Rights. Of particular relevance for our purposes is the action line on 'participation.' In this regard the EU will work to:

promote the transition from institutional to community-based care by: using Structural Funds and the Rural Development Fund to support the development of community-based services and raising awareness of the situation of people with disabilities living in residential institutions, in particular children and elderly people.<sup>115</sup>

Note the language of 'transition' from the very outset and the linkage forged directly with the Structural Funds. Most of this transition has to happen at Member State level but helped by instruments such as the Structural Funds. For its part the EU will support national activities to:

achieve the transition from institutional to community-based care, including use of Structural Funds and the Rural Development Fund for training human resources and adapting social infrastructure, developing personal assistance funding schemes, promoting sound working conditions for professional carers and support for families and informal carers

Note the core ingredients in this formulation. First of all there is transition from institutional to community based care. Secondly, there is a frank acknowledgement of the need to train (or re-skill) human resources. This resonates directly with Article 4.(1).(h) of the UN CRPD which effectively calls for the sensitisation and training of professionals to be responsive to the rights of persons with disabilities. Thirdly, there is explicit mention of personal assistance funding schemes which is similarly explicit on the face of Article 19(1)(b) of the UN CRPD. Fourthly, the notion of support for families is absolutely essential in easing the path of transition since family members are likely to be (rightly) anxious about the risks as well as the opportunities of transition. The relevant narrative ends by reiterating the EU's commitment to "achieve full participation by people with disabilities in society by providing quality community-based services including access to personal assistance."

All in all, the relevant action line in the EU strategy seems admirably tailored to moving forward the transition toward full implementation of Article 19 in a European context. Of course, much will depend on how the additionality of the Structural Funds will be best harnessed to achieve these ends in the next programming period.

<sup>112</sup> Quinn, 'The Human Rights of People with Disabilities under EU Law' in (Philip Alston ed) *The EU and Human Rights* (Oxford: New York, Oxford University Press, 1999).

<sup>113</sup> Quinn & Flynn, "Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability" (2012) 60 Am. J. Comp. L. 1, 23.

<sup>114</sup> COM(2010) 636 - European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe.

<sup>115</sup> *Ibid* p. 6.

## 7. The Europe 2020 strategy toward a ‘smart, sustainable and inclusive economy’ – the new imperative for social innovation

Europe is undergoing dramatic economic and social change. The challenges are well known and include profound economic change, a clear demographic shift to an ageing society and the need to refresh our social model. That is why the EU adopted its EU 2020 Strategy for a ‘smart, sustainable and inclusive economy’ in 2010.

The EU 2020 strategy frankly acknowledges the extent to which the economic crisis of the past few years has wiped out recent progress and exposed structural weaknesses. It defines ‘inclusive growth’ to include fostering a high-employment economy that can deliver economic, social and territorial cohesion.

Several Flagship Initiatives are pegged to the achievement of ‘inclusive growth.’ In the main these are economic. But they include a Flagship Initiative on a European Platform against Poverty. The main goal is to lift 25% (20 million) of those experiencing poverty (80 million) out of poverty by 2020. As part of the Flagship Initiative on a European Platform against Poverty the European Commission asserts that it will work, *inter alia*, to:

design and implement programmes to promote social innovation for the most vulnerable, in particular by providing innovative education, training, and employment opportunities for deprived communities, to fight discrimination (e.g. disabled),<sup>116</sup>

The commitment to innovation is striking. Implicit in it is a frank concession that traditional social policies have not achieved the aim of enabling people with disabilities to live in dignity and in settings that optimize their opportunities for social inclusion and community engagement – not to mention economic empowerment. At the national level the EU 2020 strategy states that the Member States will need:

To define and implement measures addressing the specific circumstances of groups at particular risk (such as one-parent families, elderly women, minorities, Roma, people with a disability and the homeless).<sup>117</sup>

The risk at issue is poverty but poverty is defined, at least in part, by social exclusion. This call for social innovation across the board fits nicely with the call for a renewal of the Structural Funds to ensure they do no harm and are optimised to leverage a transition toward an active life in the community. To do so would be fully consistent not merely with the UN CRPD but also with the Union’s stated priority of ensuring inclusive growth through social innovation.

In sum, even without the spur of a UN convention, the argument for a substantial realignment of the Structural Funds to make them much more sensitive to disability and to optimise their added value in leveraging the necessary transition away from institutions, seems overwhelming in its own right and fully consistent with, as well as the logical conclusion/outcome of, EU law and policy. This is clear when EU law is viewed through the prism of the UN CRPD.

Furthermore, innovation in this direction seems explicitly called for in the general EU 2020 strategy on which the economic prosperity and social cohesion of the Union depend. The fact that there is a UN convention adds clarity to the relevant goals and gives them a much more explicit legal expression. However the European Union should not be seeking more additionality from the Structural Funds simply because international law calls for it. Rather, it should be doing so because to do so makes sense given our values and the overall direction of our social policy. All of these laws and policies provide a powerful ‘push’ in the direction of enhancing additionality to the Structural Funds. The Convention merely provides an extra ‘pull’ to reinforce movement in that direction.

The next chapter explores the nature of that ‘pull’ – the nature of the legal obligations of the Union under the UN CRPD and the ‘reach’ of its provisions into the process of re-negotiating the underlying regulations.

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<sup>116</sup> *Ibid*, p. 19.

<sup>117</sup> *Ibid*, p. 19.

## Chapter 5

# The Legal Implications of EU Confirmation of the UN CRPD

### 1. The legal basis for EU negotiation & confirmation of the UN CRPD

What is the nexus between the UN CRPD and the EU Structural Funds? To what extent must the negotiators for the regulations to govern the new programming period factor in the norms of the UN CRPD? Will the EU have to answer to the UN Committee on the Rights of Persons with Disabilities for the manner by which the Funds are designed, regulated, monitored and implemented – even if the implementation takes place at Member State level? This chapter is not about the meaning of the relevant obligations with respect to the right to live independently and be included in the community. It is more about the reach of the relevant UN CRPD obligations to the Structural Funds and particularly during the negotiations taking place with respect to the drafting of new Regulations.

During the negotiations of the UN CRPD the EU Council Presidency made interventions on behalf of the Member States. That is to say, while most Member States were active and present they spoke through the Council Presidency. This meant that common positions had to be worked out before the Presidency could intervene and speak. This is common practice for the Member States when participating in multilateral *fora*. The European Commission was of course also present and active and worked mainly behind closed doors to achieve a common consensus based on best European standards.<sup>118</sup> It was admirably successful in this regard as the common European positions adopted in open negotiations were mostly extremely positive. Indeed, this was vital to the health of the overall UN process since, for the bulk of the substantive negotiations in the UN Ad Hoc Committee between 2002-2004, the US took a passive role.

The European Commission explicitly based its authority to participate in the proceedings on Article 13 of the EC Treaty.<sup>119</sup> It will be recalled that while Article 13 does not add to or detract from the existing competences of the Union it does allow the EU to take action to combat discrimination on a number of specific grounds and provided the legal basis for such legislative measures as the Employment Equality Directive. However, at both the signing and confirmation stage, the Council based its decision to 'confirm' on a combination of both Article 13 and 95 EC which permits the Community to take harmonizing measures which have as their object the establishment and functioning of the internal market.<sup>120</sup>

### 2. The status of the UN CRPD in EU law

Article 216(2) of the Treaty on the Functioning of the European Union states that “[A]greements concluded by the Union are binding upon the institutions of the Union and on its Member States.”

In the case of a treaty which has been confirmed/ratified by both the EU and individual Member States (known as mixed agreements),<sup>121</sup> such as the UN CRPD, the EU is bound by all provisions of the treaty which fall within its sphere of competence. As a result of the EU's agreement, and in addition to their obligations as States parties to the treaty, Member States have an EU law obligation to implement the treaty to the extent that its provisions are “within the scope of Community competence.”<sup>122</sup> Therefore, Member States which do not comply with the obligations arising from such mixed agreements have not only breached international law but EU law also. This can be viewed as an extension of the ‘duty of loyal cooperation’ under Article 4(3) of the Treaty on European Union which states that:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

<sup>118</sup> Grainne de Burca, *The European Union in the Negotiation of UN Disability Convention* (2010) E.L. Rev. 174, 181.

<sup>119</sup> Recommendation from the Commission to the Council in order to authorize the Commission to participate in the negotiations of an international legally binding instrument to promote and protect the rights and dignity of persons with disabilities, SEC (2003) 0116 final - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52003SC0116:EN:NOT> (last accessed 10<sup>th</sup> November 2011).

<sup>120</sup> Council Decision (EC) 2010/48 of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities OJ L 23/35.

<sup>121</sup> For a more detailed analysis of the nature of mixed agreements, see Craig & de Burca, *EU law: text, cases, and materials* (4 edn, OUP Oxford 2007), p. 99 and Leal-Arcas, *The European Community and Mixed Agreements* European Foreign Affairs Review, Vol. 6, Issue 4, Winter 2001, pp. 483-513, Kluwer Law International.

<sup>122</sup> Case C-239/03 *Commission of the European Communities v French Republic* [2004] ECR I-09325, para. 25. See also, Case 12/86 *Demirel* [1987] ECR 3719, para. 9 and Case C-13/00 *Commission v Ireland* [2002] ECR I-2943, para. 14.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

In terms of the legal status of the UN CRPD within EU law, it has been held by the European Court of Justice that international agreements concluded by the EU are inferior to the EU Treaties but superior to secondary EU law.<sup>123</sup> This is of particular relevance in the context of the EU Structural Funds which are governed by Regulations. At a minimum such Regulations must be drafted and interpreted in a manner that is consistent with the EU's obligations under the UN CRPD.<sup>124</sup> It will be recalled that Article 4(1)(c) calls on States parties to refrain from any act or practice that is inconsistent with the Convention. This would entail ending any practice that has arguably implicated the Structural Funds in practices such as building new institutions that are inconsistent with the Convention. Since there is also a clear obligation to mainstream the rights of persons with disabilities as embodied in the convention in any new policy process this would also mean taking the Convention proactively into account when framing the new Structural Fund Regulations.

Based on the reasoning in the European Court of Justice's decision in *Kadi*<sup>125</sup>, the UN CRPD cannot amend (i.e. enlarge) the existence or extent of EU competences. However, its competence in the area of non-discrimination has been re-emphasised by Article 10 of the TFEU which states that:

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

In sum, the UN CRPD is a 'mixed agreement' that engages the responsibility and legal liability of both the Member States and the EU. A heightened degree of co-operation and coherence is expected with respect to such agreements. It has been commented that its confirmation by the EU confers on it a quasi-constitutional status since it hovers somewhere between EU treaty law and secondary legislation.<sup>126</sup> At a minimum that confers on it a strong gravitational pull in the direction of an interpretation of EU secondary legislation that makes it align with the UN CRPD. It also means that fresh legislative proposals must be self-consciously crafted to not only fit with, but also help to advance, the goals of the UN CRPD.

### 3. The 'reach' of the Convention obligations to the Structural Funds

But does the UN CRPD specifically 'reach' the Structural Fund?

A 'regional integration organization' is described in Article 44(1) of the UN CRPD as an:

organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the present Convention.

This envisages a rich tapestry of competences that have been fully transferred and therefore exclusive to the regional integration organization, competences that are shared responsibilities between both levels, and competences that have not been transferred and therefore remain wholly within the exclusive domain of the Member States.

In order to keep lines of accountability clear (or at least as clear as can be) Article 44.(1) of the UN CRPD requires 'regional integration organizations' to declare upon the deposit of their instrument of confirmation or accession the extent of their competence with respect to the matters governed by the convention.

The relevant Council Decision on confirmation was taken by Council on 26 November 2009. The actual instrument of confirmation was deposited over a year later in December 2010. The Decision was accompanied by a reservation that ensured that the relevant UN CRPD provision on employment matched EU anti-discrimination law which effectively exempts the armed forces.

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<sup>123</sup> Case C-244/04 *IATA v. Department of Transport* [2006] ECR I-403, para. 35.

<sup>124</sup> See, for example, Case C-61/94 *Commission v. Germany* [1996] ECR I-3989, para. 52.

<sup>125</sup> Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2008] ECR I-6351.

<sup>126</sup> European Foundation Centre (2010), 'Study on challenges and good practices in the implementation of the UN Convention on the Rights of Persons with Disabilities VC/2008/1214', Brussels, p. 29-30.

The preamble to the Decision states that:

Both the Community and its member States have competence in the fields covered by the UN Convention. The Community and the Member States should therefore become Contracting Parties to it, so that together they can fulfil the obligations laid down by the UN Convention and exercise the rights invested in them, in situations of mixed competence in a coherent manner.

In a sense this states the obvious. Where competences are shared it makes no sense for the Member States to ratify exclusively or for the EU to confirm exclusively – they must both do so together. As the preamble intimates this allows for mixed competences to be exercised in a coherent manner – something that speaks indirectly to the Structural Funds which require an unusually high degree of cooperation between both levels.

In the Declaration required under Article 44(1) of the UN CRPD accompanying its confirmation,<sup>127</sup> the Community outlined its competence with respect to the UN CRPD's provisions. Recalling that this is not an inert or static field it started by recalling the evolutionary character of the boundary between EU and Member State competences:

The scope and the exercise of Community competence are, by their nature, subject to continuous development and the Community will complete or amend this Declaration, if necessary <sup>128</sup>

The Declaration states that the Community has exclusive competence with respect to the compatibility of State aid with the common market and Common Custom tariff. It also has exclusive competence with respect to its own internal public administration.

Among the competences that are shared it enumerates the following (para 2):

The Community shares competence with Member States as regards action to combat discrimination on the ground of disability, free movement of goods, persons, services and capital agriculture, transport by rail, road, sea and air transport, taxation, internal market, equal pay for male and female workers, trans-European network policy and statistics.

Are the Structural Funds covered? Certainly the general non-discrimination principle (shared competence) has some reach to the Structural Funds particularly when one recalls that EU non-discrimination law already touches the field of housing (albeit in the Race Directive) and that the US Supreme Court, for its part, is comfortable with the view that 'unjustified' institutionalisation is a form of discrimination. However, the non-discrimination competence upon which the Race Directive is based, Art. 13 EC / Art. 19 TFEU, is not the competence which has historically been used as the legal basis for the structural fund regulations. More pertinently – since the Treaty provision on non-discrimination cannot add to or detract from competences that already exist under EU law – paragraph 3 to the Declaration adds that certain other EU policies 'may be relevant to the UN Convention.' This is said to include (para 3):

[In order to promote its overall harmonious development, the Community shall develop and pursue its actions leading to the] strengthening of its economic and social cohesion.

The Declaration does not say in what way, or according to what criteria these policies are relevant or the extent to which they are relevant. It simply says that they may be relevant to the UN CRPD. From the above, it is more than fair to surmise that the interaction of the principle of non-discrimination (which is expressly a shared competence) with policies directed at 'social cohesion' are clearly within the normative reach of the UN Convention and therefore translate into obligations under EU law.

However, to put the matter completely beyond doubt, an Annex was added to the Declaration which lists 'illustrative' Community acts - Directives and Regulations - in a wide range of fields such as accessibility, independent living and social inclusion, work and employment, personal mobility, access to information, statistics and data collection and international cooperation. The relevant pieces of legislative acts listed are said to be 'illustrative' of the areas of competence the EU has in matters covered by the UN CRPD. The precise way in which these Acts are covered and engage exclusive Community responsibility depends on their terms and

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<sup>127</sup> Council Decision (EC) 2010/48 of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities OJ L 23/35, Annex II.

<sup>128</sup> *Ibid.*

particularly the degree to which they lay down ‘common rules.’ They each have to be examined in their own right.

It is crucial to note that Council Regulation (EC) No 1083/2006, which is the current General Regulation that governs the Structural Funds, is explicitly referred to as an act which illustrates the competence of the EC with regard to ‘accessibility.’ Since the General Regulation provides the backbone for the more fund-specific Regulations it is plain that the greater includes the lesser – i.e., that the Convention reaches beyond the General Regulation to sweep into the Fund specific Regulations. The reference to the 2006 General regulation is not meant to be tied to 2006 with no relevance to future Regulations or the process for drafting them. Rather the reference to this 2006 instrument is means to illustrate an *area* of Community law where Community legal responsibility has been engaged. The UN CRPD is therefore established as having definitive relevance in the negotiations process for any new Regulations.

In addition, several instruments related to the functioning of the internal market are listed, specifically relating to indirect taxation and state aid, which can be relevant to Article 19. It has been suggested that instruments of this nature could positively contribute to the elimination of barriers such as inaccessible goods and services for persons with disabilities.<sup>129</sup> It would therefore seem that each individual instrument mentioned in the Decision must be examined in order to establish the exact extent of the competence exercised by the EU with regard to the rights of people with disabilities in that particular field.<sup>130</sup>

In sum, and at the risk of reiterating points made earlier in this Study, the UN CRPD has a quasi-constitutional status – hovering somewhere beneath the founding Treaties and above secondary law and policy. It is a convention involving shared competences and which places a premium on the coherent development of EU and Member State law and policy. In its Declaration of competences the EU implicitly covered the Convention by reference to non-discrimination as well as ‘social cohesion.’ More to the point the foundational Regulation laying down the basic rules for the Structural Funds is explicitly referenced as one of those instruments that illustrate Community competence in Annex II of the Council Decision. This puts the matter of the reach of the relevant UN CRPD obligations beyond doubt. It is not a question of whether the UN CRPD is relevant to the drafting of the new Structural Funds regulations. It is more a matter of examining how the new Regulations can best advance the goals of the UN CRPD, especially with respect to the right to live independently and be included in the community and to do so in a manner consistent with the underlying purposes of the Funds.

Furthermore, Annex II attached to the Declaration of competences sweeps in a web of instruments that cumulatively cover accessibility as well as social inclusion – issues that are also vital to the successful implementation of Article 19 of the UN CRPD.

But on the core question of whether the UN CRPD applies to the negotiations on the Structural Funds there can be no doubt. It clearly applies.

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<sup>129</sup> *Supra* n. 126, p.10

<sup>130</sup> *Supra* n. 126, p. 38.

## Chapter 6

### The EU Structural Funds and the right to live independently and be included in the community – the story so far

This chapter will set out the legal framework within which the Structural Funds operate, with a particular focus on the two funds which are of relevance to the requirements of Article 19 of the UN CRPD: the European Social Fund (ESF) and the European Regional Development Fund (ERDF).

It will also recall some of the critiques by the disability community of the way with which the Funds were regulated and managed in the past with reference to the right to live independently and be included in the community. This chapter will also open the issue – however briefly – of the consistency that should pertain between the Union's commitment to use the Structural Funds in a positive manner within its borders (in keeping with Articles 4 and 19 combined) and its parallel commitment to harness its external development aid programmes to like effect (Article 32 'international cooperation'). Though not the primary focus of this Study it is important that there would be symmetry between the 'domestic' application by the EU within its borders and its external application through its foreign policy and especially its overseas development aid programme.

In an important sense, the analysis in this chapter is the bridge between the legal analysis of what the UN CRPD requires (chapters 2 & 3) and how the Structural Funds might be regulated and operationalized in the future (chapters 7 & 8). The aim is to optimise the added value of EU action to achieve the right to live independently and be included in the community.

#### 1. The rationale and objectives of the EU Structural Funds

The EU Structural Funds were created in order to address barriers to economic activity which might affect the functioning of the common market. It is hard to imagine an efficient – let alone fair – common market that allows loss to lie where it falls and fails to correct for systemic or accumulated economic disadvantage.<sup>131</sup> The market alone will not correct for its 'blind spots' and if no correction is found then the European market or economic integration project might itself be in jeopardy. Likewise, if wide disparities of the social situation in the Member States are not corrected then the advantages of increased economic activity will continue to flow unevenly. Thus, for a combination of both economic and social reasons the EU Structural Funds would have to be invented if they did not already exist.

The Structural Funds are distributed to (some) Member States over a programming period – usually seven years. It must be assumed that this structure of successive programming periods was adopted in order to allow for their adaptation to the shifting strategic priorities of the Union and to facilitate monitoring and evaluation. It follows that the current and future strategic priorities of the EU (set out in chapter 4) provide a critically important context in setting a strategic course for the Structural Funds.

The Structural Funds are but part of the wider EU Cohesion Budget reflecting EU Cohesion Policy during a particular programming period. Cohesion policy is based on the objective of reducing the gap in the different regions' levels of development in order to strengthen economic and social cohesion. Cohesion policy during the current period which is due to come to an end soon (2007-2013) has been focused on three priority objectives: convergence, regional competitiveness and employment. The Convergence Objective aims to help the least developed Member States and regions that are lagging behind to close the gap more quickly in relation to the EU average by improving conditions for growth and employment. The main fields of action are infrastructure (transport, environment, energy), employment (training), innovation (research and development), information and communication technologies and the administrative efficiency of public administrations and public services.<sup>132</sup> It might be said that the very existence of the Cohesion Policy is testament to a deeper commitment to equality. Indeed, the European Commission has long stressed that Cohesion Policy in general goes to "the quality of European citizenship."<sup>133</sup>

From a legal point of view the Structural Funds are traditionally governed by regulations. Regulations are EU legislative instruments which, based on Article 288 TFEU:

<sup>131</sup> Evans, *The EU Structural Funds* (OUP, 2004), 10.

<sup>132</sup> [http://ec.europa.eu/regional\\_policy/glossary/convergence\\_objective\\_en.htm](http://ec.europa.eu/regional_policy/glossary/convergence_objective_en.htm) (last accessed 5 April 2012)

<sup>133</sup> First Cohesion Report, COM (96)542, 13-14.

- Have general application – i.e., a regulation applies “to objectively determine situations and produces legal effects with regard to persons described in a generalised and abstract manner”.<sup>134</sup>
- Are binding in their entirety – i.e., its incomplete or selective implementation is prohibited under EU law. Also, its modification or adjunction, or the introduction of any national legislation capable of affecting its content or scope of application, is contrary to EU law.
- Are directly applicable in all Member States – i.e., they become part of the national law of the Member State at the date of their entry into force.<sup>135</sup>

Regulations are different from directives, which are addressed to national authorities, who must then take action to make them part of national law, and decisions, which apply in specific cases only, involving particular authorities or individuals.

In accordance with Articles 164 (ex Article 148 TEC) and Article 178 (ex Article 162 TEC) of the Treaty on the Functioning of the European Union, the Structural Fund regulations are adopted in accordance with ordinary legislative procedure (co-decision) and after consulting the Economic and Social Committee and the Committee of the Regions.

Each EU country has a different way of dividing its territory into administrative units. For the purposes of managing programmes and comparing statistics, the EU devised the NUTS (Nomenclature of territorial units for statistics) system - dividing each country into statistical units (NUTS regions).<sup>136</sup> The EU is currently divided into 271 "level 2" regions. Every region in the EU is covered by two of the aforementioned three main objectives of cohesion policy (convergence, regional competitiveness and employment, and European territorial cooperation). However, most of the funds are targeted where they are most needed, i.e., at regions with a GDP per capita under 75% of the EU average.

There are three Regulations that count for our purposes: A General Regulation providing common strategic priorities, common rules and institutions spanning the fund-specific instruments. The relevant fund-specific regulations cover the European Regional Development Fund (ERDF) and the European Social Fund (ESF). There is also a Regulation governing the Instrument for Pre-Accession Assistance (IPA) (a fund that assists candidate countries bring their socio-economic systems up to par for admission) which will be discussed later in this chapter.<sup>137</sup>

The sheer amount of monies is large. Approximately 35.7% of the EU budget 2007-13 (equivalent to ca. €347.41 billion over seven years at 2008 prices) is allocated to financial instruments which support Cohesion Policy.<sup>138</sup>

The creation of the funds perhaps owes less to logic and more to history. The European Social Fund (ESF) itself has a long history going back to the very foundations of the common market. It was created on the basis of Article 123 of the Treaty establishing the European Economic Community (1957) (hereinafter ‘the EEC Treaty’) which stated that:

In order to improve employment opportunities for workers in the internal market and to contribute thereby to raising the standard of living, a European Social Fund is hereby established in accordance with the provisions set out below; it shall aim to render the employment of workers easier and to increase their geographical and occupational mobility within the Community, and to facilitate their adaptation to industrial changes and to changes in production systems, in particular through vocational training and retraining.

The ESF is particularly relevant in the context of this Study because of its potential to facilitate a transition process to community living which, by definition, requires new types of services and new or up-skilled personnel. It will clearly not be enough to invest money into old services which may perpetuate the worst features of institutionalisation.

Subsequently, in 1975 (and coinciding with the enlargement of the European Community), the European Commission proposed the creation of a European Regional Development Fund by way of Regulation 724/75.<sup>139</sup>

<sup>134</sup> Case 101/76 *Koninklijke Scholten Honing v. Council and Commission* [1977] ECR 797.

<sup>135</sup> Kaczorowska, *European Union Law* (2<sup>nd</sup> ed, Routledge-Cavendish, 2010), p. 223-224.

<sup>136</sup> [http://epp.eurostat.ec.europa.eu/portal/page/portal/nuts\\_nomenclature/introduction](http://epp.eurostat.ec.europa.eu/portal/page/portal/nuts_nomenclature/introduction) (last accessed 5 April 2012).

<sup>137</sup> *Cohesion policy 2007–13 Commentaries and official texts* (The European Communities, 2007), p. 6.

<sup>138</sup> [http://ec.europa.eu/regional\\_policy/glossary/cohesion\\_policy\\_en.htm](http://ec.europa.eu/regional_policy/glossary/cohesion_policy_en.htm) (last accessed 22 March 2012).

The ERDF aims to strengthen economic and social cohesion by correcting imbalances between its regions. This it does, *inter alia*, through infrastructure investment. This is obviously relevant for our purposes because investment needs to move away from institutions – even away from mini-institutions including group homes – into a personalised and community environment. The ERDF obviously has a role to play in easing this transition.

## 2. General Governance of the EU Structural Funds

Initially, the Structural Funds were governed solely by treaty provisions without any intervening secondary legislation. In 1988 the European Council structured the funds within the context of ‘economic and social cohesion.’ In order to regularise the role of the Structural Funds within cohesion policy they were henceforth governed by Regulation.<sup>140</sup>

A so-called ‘Coordination Regulation’ of 1988<sup>141</sup> defined the objectives and principles of the Structural Funds. In a sense it set out the relevant strategic priorities that were to be controlling. According to the 1988 Regulation these objectives were the following:

- Objective 1: promoting the development and structural adjustment of regions whose development is lagging behind;
- Objective 2: converting regions seriously affected by industrial decline;
- Objective 3: combating long-term unemployment;
- Objective 4: facilitating the occupational integration of young people;
- Objective 5: (a) speeding up the adjustment of agricultural structures and (b) promoting the development of rural areas.

This practice of allocating funds on the basis of background strategic priorities continued in subsequent programming periods with consequent tweaking of priorities depending on prevailing economic and social realities.

The Coordination Regulation also set out the tasks of the funds, the different forms of assistance, the most important of them being ‘Operational Programmes’. An Operational Programme is devised for each region of the Community and must set out that region’s priorities and this must be consistent with the larger National Strategic Reference Framework (NSRF). The NSRF is a reference document for programming Structural Funds and Cohesion Funds in a manner consistent with the Strategic Guidelines on Cohesion 2007-13. It defines the strategy chosen by the relevant Member State and presents a list of national and regional Operational Programmes (OPs) which it is seeking to implement, as well as some indication of the intended annual financial allocation for each OP.

It is the responsibility of each individual country to divide the funds between regions covered by the EU’s objectives. Countries then use the funds to finance selected projects. The Commission is not involved in selecting projects (except for a small number of large-scale projects) – this is done by the national and regional authorities responsible for managing the programmes drawn up to implement the Cohesion Policy for 2007-13. These “managing authorities” (which will be explained in more detail below) lay down selection criteria, organise selection committees and – via a project tendering procedure open to all – decide which projects will receive European funding. National and regional authorities specify in their operational programmes how they intend to distribute the available funding between the main objectives.<sup>142</sup>

The European Commission also adopted the practice of requiring agreement by the relevant Member State to a Community Support Frameworks or CSF (which in later periods was renamed the Community Strategic Guidelines) in order to agree priorities for the use of structural funds for the Member State in question.

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<sup>139</sup> Regulation (EEC) No 724/75 of the Council of 18 March 1975 establishing a European Regional Development Fund (OJ 1975 L73/1).

<sup>140</sup> Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments, OJ L 185, 15<sup>th</sup> of July 1988 and Council Regulation (EEC) No 4254/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the European Regional Development Fund, Official Journal L 374 , 31<sup>st</sup> of December 1988.

<sup>141</sup> Council Regulation (EEC) No 2052/88 of 24 June 1988, Official Journal of the European Communities L 185, 15<sup>th</sup> of July 1988.

<sup>142</sup> [http://ec.europa.eu/regional\\_policy/faq/index\\_en.cfm](http://ec.europa.eu/regional_policy/faq/index_en.cfm) (last accessed 5 April 2012)

The 1988 Coordination Regulation<sup>143</sup> defined the content of Operational Plans and CSFs, major projects for which Commission decisions would be required and laid down the system of commitments and payments for investments and financial control.<sup>144</sup>

The Coordination Regulation also required operations utilising the Structural Funds to be the subject of *ex-ante* and *ex-post* assessment based on the achievement or otherwise of the agreed core objectives. Monitoring was to be carried out by way of jointly agreed reporting procedures, sample checks and the establishment of national Monitoring Committees.<sup>145</sup>

Subsequently, the Structural Fund Regulations adopted in 1999 placed a stronger emphasis on accountability.<sup>146</sup> This was achieved by the requirement for the designation of programme 'Managing Authorities' which were introduced in order to "counterbalance the greater demand for decentralised management."<sup>147</sup> During this programming period, mid-term evaluations or interim assessments, which had taken place to a certain extent during the 1994-1999 programming period, became mandatory and were to be carried out by the relevant Monitoring Committees in each Member State. In addition, the concept of the 'performance reserve' was introduced. This linked (i.e., potentially held back) a small proportion of the funds (4% for each programme) to agreed performance criteria.<sup>148</sup> That is, it could be withheld on proof of unsatisfactory compliance. This was effectively the only means available to the European Commission to deter serious non-compliance.

During the 2007-13 programming period, EU Cohesion policy in general focused on three strategic priorities:

1. **Convergence** - The aim is to reduce regional disparities in Europe by helping those regions whose per capita gross domestic product (GDP) is less than 75% of the EU to catch up with the ones which are better off.
2. **Regional Competitiveness and Employment** - The aim is to create jobs by promoting competitiveness and making the regions concerned more attractive to businesses and investors.
3. **European territorial cooperation** - The aim is to encourage cooperation across borders - be it between countries or regions – that would not happen without help from the cohesion policy.<sup>149</sup>

The individual Structural Funds were then specifically formulated in such a way as to achieve these three core objectives.

### **3. Respecting national sovereignty: overarching principles of EU complementarity, additionality and proportionality**

The EU is not a State or super-State. It works in harmony with continuing national sovereignty. It is important therefore to channel EU activity in ways that preserve sovereignty and add real value. This background consideration led to the crafting of three general principles that have to be respected when designing and implementing the architecture for the Structural Funds in each programming period. These principles are particularly important in the context of a 'mixed agreement' like the UN CRPD where competences are

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<sup>143</sup> Council Regulation (EEC) No 4253/88 of 19 December 1988, Official Journal of the European Communities L 374, 19<sup>th</sup> of December 1988.

<sup>144</sup> European Regional Policy (Inforegio) *Panorama – EU Cohesion Policy 1988-2008: Investing in Europe's Future* (June 2008, No. 26), p. 12.

<sup>145</sup> *Ibid.*, Article 25(1).

<sup>146</sup> Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds, Regulation (EC) No 1783/1999 of the European Parliament and of the Council of 12 July 1999 on the European Regional Development Fund, Regulation (EC) No 1784/1999 of the European Parliament and of the Council of 12 July 1999 on the European Social Fund, Council Regulation (EC) No 1263/1999 of 21 June 1999 on the Financial Instrument for Fisheries Guidance (FIG), Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for Rural Development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations.

<sup>147</sup> A. Mairate, *Developing evaluation capacity in the Member States: the case of Structural Funds* ('Country Led Evaluation Systems: Practical experiences of the Central and Eastern European Region' - IDEAS Workshop, Prague, 19-20 June 2006), p. 2.

<sup>148</sup> *Ibid.*

<sup>149</sup> [http://ec.europa.eu/regional\\_policy/how/index\\_en.cfm#3](http://ec.europa.eu/regional_policy/how/index_en.cfm#3) (last accessed 1 December 2011).

essentially shared. These principles are: 'complementarity'<sup>150</sup>, 'additionality'<sup>151</sup> and 'proportionality'<sup>152</sup> and are re-embedded in the proposals for regulations governing the next programming period.<sup>153</sup>

The Principle of **Complementarity** is to the effect that:

Community operations shall be such as to complement or contribute to corresponding national operations. They shall be established through close consultations between the Commission, the Member State concerned and the competent authorities and bodies - including, within the framework of each Member State's national rules and current practices, the economic and social partner, designated by the Member State at national, regional, local or other level, with all parties acting as partners in pursuit of a common goal.<sup>154</sup>

The principle therefore requires that funding is awarded and utilised in a manner which is consistent with the needs of the relevant Member State in light of the EU's cohesion policy. Again, this is very relevant in the sense that a search needs to take place to ensure complementarity between the Structural Funds and any local transition process towards community living.

The Principle of **Additionality** has routinely been contained in the relevant Structural Fund general regulation. It provides that the receipt of Union assistance may not be used by Member States as a basis to reduce their individual contribution towards achieving cohesion. For instance, the regulation for the current programming period states that:

Contributions from the Structural Funds shall not replace public or equivalent structural expenditure by a Member State.<sup>155</sup>

At the beginning of each programming period the Commission decides the level of expenditure that the Member State will maintain throughout the programming period. In its proposal for regulations for the forthcoming programming period the Commission has suggested that this principle remain in place.<sup>156</sup> This too is important for present purposes since the Structural Funds should not be a substitute for a national transition plan and related State expenditures. But they may well have a role in easing the transfer of resources tied up in institutions into community living.

The Principle of **Proportionality** is linked to the general EU principle of subsidiarity. It is contained in Article 5 of the Treaty on European Union (TEU) which states:

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

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<sup>150</sup> Article 9, Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 OJ L 210, 31.7.2006, p. 25–78.

<sup>151</sup> *Ibid*, Article 15.

<sup>152</sup> *Ibid*, Article 13.

<sup>153</sup> Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Council Regulation (EC) No 1083/2006 Brussels, 14.3.2012 COM(2011) 615 final/2 2011/0276 (COD).

<sup>154</sup> Article 4(1) of Council Regulation (EEC) No 2081/93 of 20 July 1993 amending Regulation (EEC) No 2052/88 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1993/5).

<sup>155</sup> Article 15(1) of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/199 (OJ 210/27).

<sup>156</sup> Article 86 of Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1083/2006 - [http://ec.europa.eu/regional\\_policy/sources/docoffic/official/regulation/pdf/2014/proposals/regulation/general/general\\_proposal\\_en.pdf](http://ec.europa.eu/regional_policy/sources/docoffic/official/regulation/pdf/2014/proposals/regulation/general/general_proposal_en.pdf) (last accessed 9 November 2011).

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

According to this principle therefore, the EU will only take the action it needs to in order to achieve its aims and no more. This is linked to the issue of competences which was addressed in Chapter 5 of this Study. The criteria for applying the principle of proportionality is further set out in the Protocol (No 2) on the application of the principles of subsidiarity and proportionality annexed to the Treaties.<sup>157</sup>

A consideration of these principles leads to the conclusion that EU action through the Structural Funds could 'complement' Member State action by reinforcing a transition to community living, would be 'additive' in the sense that they would give Member States an added degree of latitude in effectuating a transition, and would be subsidiary and proportionate since the primary obligation for a meaningful transition rests with the Member States.

These principles are relevant for our purposes because the subsidiary role of the Structural Funds in aiding a process of transition to community living is very important.

#### **4. General Regulatory Framework: General Regulation Governing the Structural Funds**

Council Regulation 1083/2006<sup>158</sup> is the General Regulation which lays down the common rules which apply to the Structural Funds with regard to programming, managing, controlling and evaluating the cohesion policy for the current programming period (2007-2013).<sup>159</sup>

In accordance with the 2006 General Regulation each Member State had to prepare a National Strategic Reference Framework (NSRF).<sup>160</sup> Such a Framework:

set[s] out the investment priorities for the new generation of regional and sectoral programmes to be supported by the European Union over the seven year period 2007-13. They draw their inspiration from the priorities adopted by the Member States in October 2006 in the "Community Strategic Guidelines for Cohesion". In accordance with the Guidelines, the strategies confirm that cohesion policy has today become the major source of investment from the European budget directly contributing to the Lisbon Strategy, as agreed in 2005 and which aims to boost economic growth and job creation throughout the Union. The programmes seek to support the modernisation and diversification of national and regional economies, improve competitiveness and underpin efforts to maintain macroeconomic stability.<sup>161</sup>

The current General Regulation (2007-2013) already addressed the issue of disability in Article 16 which states that:

The Member States and the Commission shall take appropriate steps to prevent any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation during the various stages of implementation of the Funds and, in particular, in the access to them .

<sup>157</sup> Protocol (No 2), annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, on the application of the principles of subsidiarity and proportionality, OJ 2008 C 115, p. 206.

<sup>158</sup> Article 16 of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, OJ L 210, 31.7.2006

<sup>159</sup> *Supra*, n. 5, p. 13.

<sup>160</sup> Chapter II of the General Regulation.

<sup>161</sup> Foreword by Commissioner for Regional Policy in *Cohesion Policy 2007-13, National Strategic Reference Frameworks*, Luxembourg: Office for Official Publications of the European Communities, 2007, p. 3.

In particular, accessibility for disabled persons shall be one of the criteria to be observed in defining operations co-financed by the Funds and to be taken into account during the various stages of implementation.<sup>162</sup>

Two aspects of this are relevant. First of all, the inclusion of disability in the general prohibition against discrimination – a concept that is quite capable of reaching and impugning institutionalisation. Secondly, the more specific reference to accessibility – something that is of course vital to the full achievement of the goals of Article 19 of the UN CRPD.

In September 2009 the European Commission commissioned a '*Study on the Translation of Article 16 of Regulation EC 1083/2006 for Cohesion policy programmes 2007-2013 co-financed by the ERDF and the Cohesion Fund*.'<sup>163</sup> This Study was produced by the Public Policy and Management Institute (PPMI, Lithuania) in partnership with Net Effect (Finland) and Racine (France). It concluded that there was a good overall awareness of the Article 16 requirements in programmes supported by the ERDF (explicit reference to it was made in 64% of the programmes analysed).<sup>164</sup> However, in most cases (70%), Member States consider equal opportunities as horizontal or general priorities and do not devote attention in separate ground-specific strategies. In 22% of the examined programmes the three themes (gender equality, non-discrimination and accessibility) appeared as declarative statement without clear targets, relevant selection criteria or obligations in terms of monitoring. Only 8% of the programmes integrated the three themes in a comprehensive strategy with clear identification of problems and quantified targets.<sup>165</sup> In addition, the target groups for "non-discrimination" differed across Member States: in EU12 (the 12 countries that became members of the EU by way of the enlargement on 1st May 2004) it was targeted mostly towards ethnic minority groups, particularly the Roma, while in EU15 (the 15 countries that were members of the EU before the enlargement on 1st May 2004) it was more about women, migrants and elderly.<sup>166</sup> It is clear that this discrepancy in the understanding and application of the non-discrimination provision at Member State level is something which would impede the achievement of universal goals in relation to Article 19 of the UN CRPD. It does not appear that the Study addressed the issue of accessibility for persons with disabilities which was explicitly referenced in Article 16.

Article 28.3 of the current General Regulation states that:

Before or at the same time as the adoption of the operational programmes referred to in Article 32(5), the Commission, following consultation with the Member State, shall take a decision covering:

- (a) the list of operational programmes ;
- (b) the indicative annual allocation from each Fund by programme ; and
- (c) for the Convergence objective only, the level of expenditure guaranteeing compliance with the additionality principle and the action envisaged for reinforcing administrative efficiency .

Member States submit their Operational Programmes which have been devised within the common framework of the Community Strategic Guidelines on Cohesion. All Operational Programmes must be approved by the European Commission. The Community Strategic Guidelines on Cohesion contain the principles and priorities of cohesion policy and suggest ways the European regions can utilise the structural funds. National authorities use these guidelines as the basis for drafting their National Strategic Reference Frameworks (NSRFs).

Each Operational Programme relates to one of the three 'objectives' mentioned above and sets out a development strategy with a coherent set of priorities to be carried out with the aid of a single fund or, in the case of the Convergence objective, with the aid of the Cohesion Fund (a fund which assists Member States with a GNI (gross national income) per inhabitant of less than 90% of the EU-27).<sup>167</sup>

The Member States and their regions manage the programmes, implement them by selecting projects, control and assess them. For each operational programme, the Member State appoints a Managing Authority (a national, regional or local public authority or public/private body). Applications for structural funding are then made to the Managing Authority, usually by way of calls to tender. The project selection criteria are agreed by

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<sup>162</sup> *Supra*, n. 6.

<sup>163</sup> *Study on the Translation of Article 16 of Regulation EC 1083/2006 for Cohesion policy programmes 2007-2013 co-financed by the ERDF and the Cohesion Fund* (Public Policy and Management Institute (PPMI, Lithuania) in partnership with Net Effect (Finland) and Racine (France), September 2009)

<sup>164</sup> *Ibid.*, p. 81.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> [http://ec.europa.eu/regional\\_policy/glossary/operational\\_programme\\_en.htm](http://ec.europa.eu/regional_policy/glossary/operational_programme_en.htm) (last accessed 20 December 2011).

each operational programme's Monitoring Committee and are published. Projects are be evaluated according to these criteria.<sup>168</sup>

There is a consensus that two structural funds which are of most relevance to ensuring the achievement of the right to live independently and be included in the community of persons with disabilities are the European Social Fund (ESF) and the European Regional Development Fund (ERDF), each of which are governed by their own regulations.

## **5. Specific Regulatory Law: Regulation of the European Social Fund (ESF)**

The European Social Fund is now governed by Articles 162-164 of the TFEU. Article 162 sets out the purpose of the Fund:

In order to improve employment opportunities for workers in the internal market and to contribute thereby to raising the standard of living, a European Social Fund is hereby established in accordance with the provisions set out below; it shall aim to render the employment of workers easier and to increase their geographical and occupational mobility within the Union, and to facilitate their adaptation to industrial changes and to changes in production systems, in particular through vocational training and retraining.

The ESF is intended, *inter alia*, to assist in:

improving the adaptability of workers and enterprises, enhancing human capital and access to employment and participation in the labour market, reinforcing the social inclusion of disadvantaged people, combating discrimination, encouraging economically inactive persons to enter the labour market and promoting partnerships for reform.<sup>169</sup>

Article 164 of the Treaty on the Functioning of the European Union (ex Article 148 TEC) requires that the ESF be governed by Regulation:

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt implementing regulations relating to the European Social Fund.

The ESF is managed by the Directorate General for Employment, Social Affairs & Inclusion (DG EMPLOI). The European Commission has stated that the ESF is the main financial instrument to assist Member States to achieve goals established in the European employment strategy and the disability action plan.<sup>170</sup> In addition, due to the fact that people with disabilities are a vulnerable group with low employment rates, particular attention must be paid to their integration in the labour market.<sup>171</sup> It therefore represents a key source of funding for Member States in the area of training and accessibility.

## **6. Specific Regulatory Law: Regulation of the European Regional Development Fund (ERDF)**

Article 178 of the Treaty on the Functioning of the European Union (ex Article 162 of TEC) states that:

Implementing regulations relating to the European Regional Development Fund shall be taken by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.

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<sup>168</sup> [http://cordis.europa.eu/eu-funding-guide/annex03\\_en.html#05](http://cordis.europa.eu/eu-funding-guide/annex03_en.html#05) (last accessed 21 March 2012).

<sup>169</sup> Regulation (EC) No 1081/2006 of the European Parliament and of the Council of 5 July 2006 on the European Social Fund and repealing Regulation (EC) No 1784/1999, Official Journal L 210, Preamble, para. 9.

<sup>170</sup> European Communities, Ensuring accessibility and non-discrimination of people with disabilities: Toolkit for using Structural and Cohesion Funds, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit G.3, 2009, p. 13.

<sup>171</sup> *Ibid*, p. 15.

The ERDF is intended to be used towards the support of economic development and infrastructure and, *inter alia*, “investments in health and social infrastructure which contribute to regional and local development and increasing the quality of life.”<sup>172</sup>

The current ERDF Regulation contains a restrictive clause which states that “the purchase of land for an amount exceeding 10% of the total eligible expenditure for the operation concerned” shall not be eligible for assistance under the ERDF.<sup>173</sup> Member States are therefore prohibited from using the ERDF for the construction or renovation of institutions where that ERDF expenditure would amount to more than 10% of the total cost of the project.

The ERDF is managed by the Directorate General for Regional Policy (DG REGIO) which also manages the Cohesion Fund and the Instrument for Pre-Accession assistance which helps candidate countries to develop transport networks and improve environmental infrastructure).

## **7. Critiques of the Structural Funds during the current programming period from a disability perspective (2007-2013)**

A number of reports – independent and otherwise - have made serious critiques of the use of the Structural Funds from a disability perspective which deserve to be highlighted and appropriate lessons derived in the forthcoming negotiations.

The European Coalition for Community Living (ECCL) – a leading European level NGO focused on the right to live independently – published a major report in 2010 entitled: ‘*Wasted Money, Wasted Time, Wasted Lives A Wasted Opportunity?*’<sup>174</sup> It outlined its key concerns regarding the use of structural funds at a Member State level as follows:

- Lack of clear direction on developing alternatives to institutional care
- Residential institutions are being reconstructed, expanded and built
- Restrictive interpretations of the rules for Structural Funds
- Barriers to the development of community-based services
- Lack of transparency in the operation of Structural Funds
- Problems with the monitoring and evaluation of Structural Funds<sup>175</sup>

The ECCL went on to make the following recommendations regarding the future use of structural funds:

- The current use of Structural Funds should be reviewed as a matter of priority. Structural Funds must not be used to build new long stay residential institutions or renovate existing residential institutions. When interim measures are needed to address risks to residents’ health or safety, other funding that can be made available immediately should be used. The action taken must be part of a wider programme that is directed to the development of alternative services in the community and has a clear timetable for the closure of the institution;
- The priorities included in Structural Funds’ Operational Programmes must explain how they will support the implementation of the EU social inclusion policies, the national strategies for social inclusion of people with disabilities and the UN Convention on the Rights of Persons with Disabilities;
- The ‘Guidelines on the use of Structural Funds and other EU funding instruments for deinstitutionalisation’ recommended by the Ad Hoc Expert Group should be developed. These guidelines should provide Member States with examples of how Structural Funds and other EU funding instruments can be used to support projects that deliver good quality services in the community and promote the social inclusion of people with disabilities.<sup>176</sup>

Echoing the requirements of Article 4.(3) of the UN CRPD, it recommended that people with disabilities and their representative organisations be involved in the planning, implementation, monitoring and evaluation of the

<sup>172</sup> Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) No 1783/1999, Official Journal L 210/1, Article 4(11).

<sup>173</sup> *Ibid*, Article 7(1)(b) [Emphasis added].

<sup>174</sup> *Wasted Money, Wasted Time, Wasted Lives A Wasted Opportunity? A focus report on how the current use of Structural Funds perpetuates the social exclusion of disabled people in Central and Eastern Europe by failing to support the transition from institutional care to community-based services*, European Coalition for Community Living (ECCL), 2010.

<sup>175</sup> *Ibid*, p. 23.

<sup>176</sup> *Ibid*, p. 65.

relevant Operational Programmes.<sup>177</sup> It recommended that the remit and procedures of the national Monitoring Committees for Structural Funds programmes enable non-governmental organisations representing people with disabilities to contribute to their work and decision-making process.<sup>178</sup> It also recommended that non-governmental organisations providing community-based services for people with disabilities are consulted on how to make the application/tendering process of Structural Funds programmes more accessible and endorsed the conclusions of an Ad Hoc Expert Group report (below) in its suggestion that a pool of independent experts on deinstitutionalisation be established to provide technical assistance to the European Commission and the Member States when allocating resources from the Structural Funds.<sup>179</sup>

Highlighting the lack of comprehensive information about the use of Structural Funds in relation to disabled people currently living in residential institutions and the difficulty of obtaining information about projects that have been, or currently are being funded, through Structural Funds, the ECCL also recommended that research be commissioned to evaluate how Structural Funds are being used in relation to the provision of social care services for people with disabilities.<sup>180</sup> This recommendation echoes the obligations placed on States parties to the UN CRPD under Article 31 to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the UN CRPD.

Finally, the ECCL recommended that training on the UN CRPD and on how Structural Funds can facilitate the implementation of the UN CRPD should be provided to the relevant Directorates at the European Commission and in the Member States. It recommended that people with disabilities and their representative organisations should be closely involved in the planning and delivery of such training.<sup>181</sup>

This 2010 ECCL Report built on the ECCL's previous 'Focus Report' on Article 19 of the UN CRPD which it published in 2009. In its 2009 Report the ECCL laid out its understanding of the requirements of Article 19 of the UN CRPD. It specifically recommended that:

Governments and the European Commission should ensure that public funds are not used to redevelop or build new institutions. Investments in, and support to, existing institutions for disabled people must be limited to targeted interventions – actions that are necessary to address risks to residents' health or safety – and should be accompanied with a plan to develop alternative services in the community and close the institution.<sup>182</sup>

To its credit, the European Commission has long been aware that a more concerted effort to using EU Funds more strategically to achieve independent living and be included in the community is needed. It therefore established in 2009 an '*Ad Hoc Expert Group on the Transition from Institutional to Community-based Care*'. The Group reported in 2009.<sup>183</sup> It advised that the European Social Fund could provide funding for the training (and re-training) of staff while the European Regional Development Fund (ERDF) can simultaneously be used for developing social infrastructure which will support the new community-based services.

The Ad Hoc Expert Group Report also recommended that Member States should ensure that funds from the ERDF are not used to build new segregating residential institutions and that their use for improving the infrastructure of existing ones, if allowed at all, is tied with investment into systemic care reform and does not exceed 10% of the overall expenses.<sup>184</sup> It also recommended that the European Commission provide guidelines on the use of the Structural Funds and other EU funding instruments for deinstitutionalisation. It recommended that these guidelines provide examples of good practice on how Structural Funds and other EU funding instruments can support projects on the development of community-based alternatives to institutions, by means of identifying procedures and main actors to be involved. It also suggested that the Commission make clear that projects which aim to build, enlarge or perpetuate institutions are not in line with the UN CRPD and EU's own policies on equal opportunities, social inclusion and discrimination, and are therefore not eligible for funding.<sup>185</sup> These Guidelines are expected to be published toward the end of 2012.

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<sup>177</sup> *Ibid*, p. 66.

<sup>178</sup> *Ibid*, p. 67.

<sup>179</sup> *Ibid*, p. 66.

<sup>180</sup> *Ibid*, p. 67.

<sup>181</sup> *Ibid*.

<sup>182</sup> *Focus on Article 19 of the UN Convention on the Rights of Persons with Disabilities*, European Coalition for Community Living (ECCL), 2009, p. 12.

<sup>183</sup> The Report of the Ad Hoc Expert Group on the Transition from Institutional to Community-based Care, September, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, 2009.

<sup>184</sup> *Ibid*, p. 21.

<sup>185</sup> *Ibid*, p. 22-23.

The Ad Hoc Group also recommended that the Commission establish a pool of independent experts on deinstitutionalisation which can provide technical assistance to the Commission itself and above all to the Member States when allocating resources from the Structural Funds. It also recommended the use of funding from the technical assistance budget within the Operational Programmes to establish this pool of experts (including all stakeholders). This is consistent with the obligation contained in Article 4(3) of the UN CRPD.

Seemingly separately, the European Commission (Directorate-General for Employment, Social Affairs and Equal Opportunities) published a Toolkit in 2009 with the stated purpose that it could be a practical tool for Managing Authorities, intermediate bodies and project promoters during the preparation, implementation, monitoring and evaluation of Structural Fund programmes and projects and to help project promoters designing and implementing projects which are accessible to people with disabilities. It was envisioned that the Toolkit would also be useful for individuals with disabilities, the organisations representing them and those interested in learning more about the issue of disability and the structural funds.<sup>186</sup>

In particular, it is aimed to “promote the understanding and application of the non-discrimination and accessibility requirements stemming from the obligations in Article 16 of the General Funds regulation on the specific needs of people with disabilities.”<sup>187</sup>

Within this Toolkit the European Commission has made clear that the Structural Funds represent a key aspect of UN CRPD compliance for Member States by stating that:

The UN Convention as a whole, and specifically Article 19, favours independent living in the community instead of expanding residential institutions. This means, for example, that investing EU Funds in solutions which oppose and hamper community living of people with disabilities would act against the Convention. This would be a violation of fundamental rights of people with disabilities, leading to even more exclusion. The European Structural Funds are to be used to support the common values of the European social model – such as solidarity, human dignity and equal opportunities, to name just a few – as well as all human rights and fundamental freedoms. In addition, Article 9 of the UN Convention sets clear obligations for States Parties (all EU Member States and the Community once they have ratified/concluded the Convention to the extent of their competences) to make the built environment, transport and ICT accessible for persons with disabilities.<sup>188</sup>

Despite this strong and laudable statement by the Commission on the appropriate use of the structural funds in the context of UN CRPD obligations, there is ample evidence in the ECCL report and otherwise to demonstrate that the relevant Regulations need to be drafted in such a way as to make the implementation of the UN CRPD mandatory if both the EU and its Member States are to live up to their legal obligations in the convention.

## **8. Keeping external development aid commitments consistent with internal commitments**

Part of the broader context to the debate about the reform of the EU Structural Funds has to do with the various external projections of the Union onto the world stage. The EU is a considerable force for good on the world stage through, *inter alia*, its Development Aid programme and its Instrument for Pre-Accession Assistance to candidate countries (IPA). It is important that developments within the Structural Funds are not entirely self-regarding and that the EU matches its renewed internal commitment to the transition to community living with its external funding and other foreign policy programmes and instruments.

It will be recalled that Article 32(1)(a) of the UN CRPD specifically calls for development aid programmes be ‘inclusive of and accessible to’ persons with disabilities. This legal obligation applies as much to EU development aid as it does to the development aid programmes of the Member States.

It is necessary to emphasize that the EU Declaration on competence accompanying its ‘confirmation’ specifically highlighted its competence in the field of development aid. The relevant annex contains a list of EU acts that illustrate the extent of its competence and in the field of international cooperation identifies the following:

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<sup>186</sup> European Communities, *Ensuring accessibility and non-discrimination of people with disabilities: Toolkit for using Structural and Cohesion Funds*, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit G.3, 2009, p. 5.

<sup>187</sup> *Ibid.*

<sup>188</sup> European Communities, *Ensuring accessibility and non-discrimination of people with disabilities: Toolkit for using Structural and Cohesion Funds*, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit G.3, 2009, p. 7-8.

- Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation (OJ L 378, 27.12.2006, p. 41)
- Regulation (EC) No 1889/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide (OJ L 386, 29.12.2006, p. 1)
- Commission Regulation (EC) No 718/2007 of 12 June 2007 implementing Council Regulation (EC) No 1085/2006 establishing an Instrument for Pre-accession Assistance (IPA) (OJ L 170, 29.6.2007, p. 1)

The EU has therefore expressly stated its competence to act in these areas concerning the compliance with UN CRPD obligations, including those under Article 19 of the Convention.

In March 2003 the European Commission (DG Development) produced a '*Guidance Note on Disability and Development*'<sup>189</sup> in order to provide guidance to EU delegations and services on how to address disability issues effectively within development cooperation. It noted that governments rarely considered the needs of disabled people when formulating their development cooperation agenda and in most cases had not made sufficient efforts to consult representatives of the disability community.<sup>190</sup> In the context of poverty, it stated:

Exclusion leads disabled people to fall further into chronic poverty with little opportunity of breaking out of the cycle. When the main family breadwinner becomes disabled, the whole household risks sliding more deeply into poverty. Removing barriers and enabling disabled people to contribute could help reduce poverty in the whole community. Conversely, without their inclusion, sustainable poverty reduction for the whole community will be unachievable.<sup>191</sup>

and that:

In addition to social and attitudinal barriers disabled people also face architectural and environmental barriers that limit access to community services and facilities and hinder equal participation. Most roads, houses and public utilities – including public transport - do not cater for special mobility needs. Little or no attempt is made to legislate to require accessibility provisions in public services.<sup>192</sup>

The most recent examination of the EU's development aid programme with respect to disability is a 2010 'Study of Disability in EC Development Cooperation'.<sup>193</sup> The authors noted that, regarding external action by the Community, the EU Disability Strategy 2010-2020 aims to promote the rights of people with disabilities within EU external action, to reinforce the network of disability focal points in EU delegations and enhance knowledge and awareness on disability matters, to highlight the importance of ratifying the UN CRPD in the enlargement process and development cooperation programmes.<sup>194</sup> However, it also noted that the European Commission's 'Guidance Note on Disability and Development' (2003) had not been systematically applied or monitored and had only been intended to provide guidance to Commission staff when dealing with issues concerning disability.<sup>195</sup> The 2005 European Consensus on Development,<sup>196</sup> the main policy statement on development shared by the European Commission and EU Member states, does not specifically mention disability.<sup>197</sup>

The authors of the aforementioned 2010 Study conclude that:

Because there is no specific policy document dealing with disability and development, because the European Consensus does not specifically mention disability, and because disability is not considered a cross-cutting issue in the European Consensus, a systematic inclusion of disability in EC development cooperation is problematic. For example, it is absent from the Commission's programme and project forms and checklists, as well as tenders and calls for proposals.

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<sup>189</sup> Guidance Note on Disability and Development (European Commission: DG Development, March 2003).

<sup>190</sup> *Ibid*, p. 2.

<sup>191</sup> *Ibid*, p. 5.

<sup>192</sup> *Ibid*.

<sup>193</sup> *Study of Disability in EC Development Cooperation*, by Coleridge, Simonnot, Steverlynck, published by the European Commission, DG EUROPEAID (November 2010).

<sup>194</sup> *Ibid*, p. 61.

<sup>195</sup> *Ibid*, p. 77.

<sup>196</sup> Joint statement by the Council and the representatives of the Governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: "The European Consensus" (2006/C46/01).

<sup>197</sup> *Study of Disability in EC Development Cooperation*, European Commission (November 2010), p. 77.

Any future revision of the European Consensus should take into account the obligations regarding development cooperation which the EU will acquire when concluding the CRPD. This, and the subsequent integration of disability concerns in the operational procedures of the institution, may help bridge the existing gap between rhetoric and implementation.<sup>198</sup>

The EU Disability Strategy 2010-2020 has attempted to partially reconcile the EU's obligations under the UN CRPD with its external development programme by stating that:

The EU and the Member States should promote the rights of people with disabilities in their external action, including EU enlargement, neighbourhood and development programmes. The Commission will work where appropriate within a broader framework of non discrimination to highlight disability as a human rights issue in the EU's external action; raise awareness of the UN Convention and the needs of people with disabilities, including accessibility, in the area of emergency and humanitarian aid; consolidate the network of disability correspondents, increasing awareness of disability issues in EU delegations; ensure that candidate and potential candidate countries make progress in promoting the rights of people with disabilities and ensure that the financial instruments for pre-accession assistance are used to improve their situation.

EU action will support and complement national initiatives to address disability issues in dialogues with non-member countries, and where appropriate include disability and the implementation of the UN Convention taking into account the Accra commitments on aid effectiveness. It will foster agreement and commitment on disability issues in international fora (UN, Council of Europe, OECD).<sup>199</sup>

It is clear that a lot more action will be needed to bring the EU development aid regime into line with its legal obligation under Article 32 of the UN CRPD to develop inclusive and accessible development aid programmes that include people with disabilities.

Another dimension for development aid (of sorts) has to do with the Instrument for Pre-Accession Assistance (IPA). This is the financial instrument for the European Union (EU) pre-accession candidate countries during the period 2007-2013. This essentially covers the Western Balkan countries (e.g., Serbia), Turkey and Iceland. The IPA is intended as a flexible instrument and therefore provides assistance which depends on the progress made by the beneficiary countries and their needs as shown in the Commission's evaluations and strategy papers.<sup>200</sup> Assistance through IPA can take the following forms:

- Investment, procurement, contracts or subsidies
- Administrative cooperation, involving experts sent from Member States (e.g. twinning)
- Action by the EU in the interest of the beneficiary country
- Measures to support the implementation process and programme management
- Budget support (granted exceptionally and subject to supervision)<sup>201</sup>

The legal basis for the IPA is Council Regulation 1085/2006.<sup>202</sup> Subsequent implementing rules were laid down by regulation and stated that:

The human resources development component shall contribute to strengthening economic and social cohesion as well as to the priorities of the European Employment Strategy in the field of employment, education and training and social inclusion.<sup>203</sup>

And that this component should be used to:

reinforce social inclusion and integration of people at a disadvantage, with a view to their sustainable integration in employment, and combat all forms of discrimination in the labour market, in particular by promoting:

(i) pathways to integration and re-entry into employment for disadvantaged people;

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<sup>198</sup> *Ibid.*

<sup>199</sup> EU Disability Strategy 2010-2020, p. 9.

<sup>200</sup> [http://europa.eu/legislation\\_summaries/agriculture/enlargement/e50020\\_en.htm](http://europa.eu/legislation_summaries/agriculture/enlargement/e50020_en.htm) (last accessed 22 March 2012).

<sup>201</sup> [http://ec.europa.eu/enlargement/how-does-it-work/financial-assistance/instrument-pre-accession\\_en.htm](http://ec.europa.eu/enlargement/how-does-it-work/financial-assistance/instrument-pre-accession_en.htm) (last accessed 22 March 2012).

<sup>202</sup> Council Regulation 1085/2006, adopted on 17 July 2006.

<sup>203</sup> Article 151(1) of Commission Regulation (EC) No 718/2007 of 12 June 2007 implementing Council Regulation (EC) No 1085/2006 establishing an instrument for pre-accession assistance (IPA).

(ii) acceptance of diversity in the workplace and non discrimination;<sup>204</sup>

The Commission proposal for a revised regulation to govern the IPA for the period 2014-2020<sup>205</sup> contains as a specific objective of the use of the IPA support for economic, social and territorial development, with a view to a smart, sustainable and inclusive growth, inter alia through social and economic inclusion, in particular of minorities and vulnerable groups.<sup>206</sup> However, no reference is made to the EU's UN CRPD obligations within the proposal. This too will need to change to bring the IPA into alignment with the EU's legal obligations under Article 32.

Yet, despite these deficiencies, there are already indications that the combination of a growing awareness of the requirements of Article 19 of the UN CRPD and the involvement of civil society organisations in the allocation of IPA funds can have real impact on candidate country policies. For example, in February 2011 a 'service procurement notice'<sup>207</sup> was advertised by the European Union, represented by the European Commission, on behalf of Serbia for support to the Serbian Ministry of Labour and Social Policy for the 'preparation for works on (re)construction of residential care institutions for persons with mental disability and mental illness.'<sup>208</sup> The stated purpose of this project was to prepare technical documentation for works on (re)construction and adaptation of six residential care institutions for persons with mental disability and mental illness in Serbia<sup>209</sup> – a clear violation of the requirements of Article 19.

As a result of intense lobbying by Serbian, Balkan and European civil society organisations, the Office of the UN High Commissioner for Human Rights (Regional Office for Europe), and an intervention by a Member State in Council, the decision was taken in August 2011 to cancel the intended project. Subsequently, a new service procurement notice was advertised<sup>210</sup> seeking applications for a project in order to achieve the following objectives:

1. preparation of a transformation plan for residential and psychiatric institutions and a development plan for cross-sectoral community-based social and health services;
2. implementation of the transformation and development plans to strengthen capacity at national and local level to improve the range and quality of cross-sectoral services for de-institutionalisation of persons with mental health problems;
3. providing support to a grant scheme for funding the local self-governments and their partners, civil society organisations, service providers, residential institutions and other eligible stakeholders in developing and implementing the models of services to achieve a gradual de-institutionalisation for persons with mental disability and mental illness.

The grant scheme support is covering the preparation of guidelines, and assistance provided to the EU Delegation in the evaluation process and during the implementation phase of the awarded grant contracts.<sup>211</sup>

The notice also acknowledged that the quality of services in Serbian institutions was unbalanced and that adequate support to maintain the mental and physical potential of beneficiaries residing in those institutions in order to improve the quality of their lives was not always provided.<sup>212</sup> This shows the positive impact of civil society engagement in the process – something that augurs well for the general Structural Funds which, as we shall see in the next chapter, explicitly creates space for civil society engagement.

In sum, while positive moves have been made regarding development aid, more needs to be done. There needs to be clear symmetry between positive moves to align the Structural Funds with the UN CRPD and flanking moves to bring development aid and IPA aid similarly into line.

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<sup>204</sup> *Ibid*, Article 151(2)(c).

<sup>205</sup> Proposal for a Regulation of the European Parliament and of the Council on the Instrument for Pre-accession Assistance (IPA II), Brussels, 7.12.2011, COM(2011) 838 final, 2011/0404 (COD).

<sup>206</sup> *Ibid*, Article 2(1)(b)(iv).

<sup>207</sup> RS-Belgrade: IPA — preparation of documentation for the (re)construction and/or adaptation of 6 residential institutions 2011/S 21-032516 Location: Europe (non-EU) — Serbia, Service procurement notice.

<sup>208</sup> <https://webgate.ec.europa.eu/europeaid/online-services/index.cfm?do=publi.welcome&nbPubliList=10&orderby=upd&orderbyad=Desc&searchtype=RS&aofr=130668> (last accessed 5 April 2012).

<sup>209</sup> *Ibid*.

<sup>210</sup> RS-Belgrade: IPA — enhancing the position of residents in residential care institutions for persons with mental disability and mental illness and creation of conditions for their social inclusion in the local community 2011/S 200 324809 Location: Europe (non-EU) — Serbia, Service procurement notice <http://ted.europa.eu/udl?uri=TED:NOTICE:324809-2011:TEXT:EN:HTML> (last accessed 5 April 2012).

<sup>211</sup> *Ibid*, p. 1.

<sup>212</sup> *Ibid*.

But all the above is prologue to an examination of the proposals of the European Commission for a new set of Regulations which follows in chapter 7.

## Chapter 7

# Optimising EU additionality: A legal analysis of the European Commissions' draft Regulations for the next programming period of the Structural Funds (2014-2020)

European institutions are not unmindful of the need to bring all cognate EU laws and instruments into closer alignment with the UN CRPD. That they have competence to do so is put beyond doubt by the Declaration accompanying the Decision to 'confirm' the UN CRPD (see chapter 5).

We are now at a critical crossroads in the process as negotiations are underway this year (2012) to produce a new set of Regulations for the next programming period of the Structural Funds. What follows below is an examination of the proposals of the European Commission to date. We examine them mainly from the perspective of the extent to which they meaningfully advance the UN CRPD and especially the right to live independently and be included in the community.

To recap from chapter 6, the way the Funds typically operate is that each 7 year funding cycle is accompanied by a controlling set of strategic priorities set by the EU and tailored to each Member State within each Fund. A General Regulation sets out the general principles and rules common to all the Funds for coherence. Each Fund has its own Regulation. A Partnership Contract is concluded between the Member States and the European Commission and an Operational Programme is drawn up by each Member State to give effect to the Contract. Each Member State issues periodic calls to tender to begin disbursing the funds to meet its Operational Programme goals. Monitoring and evaluation is done primarily by the Member States but with oversight from the European Commission.

Our own assessment and recommendations follow in the next chapter. But first, what are the European Commission's proposals and how do they measure up to what is required under the UN CRPD and more particularly Article 19 in association with Article 4 (general obligations), Article 8 (awareness raising) and Article 9 (accessibility).

### 1. European Commission Proposals for the Structural Funds for the Forthcoming Programming Period (2014-2020)

In October 2011 the European Commission published its proposals for new regulations to govern the Structural Funds during the forthcoming programming period 2014-2020.

The draft General Regulation contains two Parts: Part I sets out common provisions to govern all Structural Funds and Part II contains more specific rules and principles applicable to each of the separate Funds.

Following enactment of the Regulations, the European Commission will publish a 'Common Strategic Framework' (CSF) which will translate these objectives and targets into key actions for the use of the cohesion funds and provide direction to the programming process at the level of Member States and regions.<sup>213</sup>

The CSF will replace the Community Strategic Guidelines which existed in previous programming periods. The CSF will follow through on the Regulations by establishing the key areas of support, territorial challenges to be addressed, policy objectives, priority areas for cooperation activities, coordination mechanisms and mechanisms for coherence and consistency with the economic policies of Member States and the Union.<sup>214</sup>

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<sup>213</sup>Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1083/2006, Brussels, 6.10.2011 COM(2011) 615 final 2011/0276 (COD)., Preamble, para. 14.

<sup>214</sup> *Ibid*, Preamble, para. 15.

## 2. The Proposed General Regulation (2014-2020)<sup>215</sup>

The draft General Regulation contains common provisions which are intended to govern all the cohesion instruments, including the European Social Fund and the European Regional Development Fund. These are the overarching provisions which will apply to the specific regulations for each Fund and it is therefore necessary to examine them in some detail.

The proposed General Regulation states that the general principles which will govern the support of all cohesion funds will include partnership and multi-level governance, compliance with applicable EU and national law, promotion of equality between men and women and sustainable development.<sup>216</sup>

### (a) Harnessing the Funds to Achieve Overall EU Strategic Priorities

The new strategic priorities to be controlling across the Funds are taken directly from EU 2020 – towards a ‘smart, sustainable and inclusive economy’ (Article 4.(1)). Following from this a set of eleven ‘thematic objectives’ are laid out in Article 9 which each Fund is expected to support in order to advance the goals of EU 2020. These include:

- ...  
9. promoting social inclusion and combating poverty.

Based on the CSF, Partnership Contracts will be devised by the Member States and concluded with the European Commission in line with the CSF. Essentially the Partnership Contracts will set out the spending priorities and milestones with respect to the use of the Funds. Importantly, they are not to be framed in isolation.

Of particular importance is Article 5.(1)(c) which stipulates, *inter alia*, that each Member State will bring together different groups to sit on the partnership body including specifically

bodies representing civil society...and bodies responsible for promoting equality and non-discrimination.

Operational Programmes of the Member States will then be drawn up on the basis of the Partnership Contracts. Importantly, Partnership Contracts will contain, *inter alia*, a “summary analysis of *ex ante* evaluations of the programmes.” In a sense the partnership group (which should include civil society) will have first say on whether essential preconditions are being met.

Article 7 (within the rubric of ‘principles of Union Support for CSF Funds’) sets out the overarching norm of equality and non-discrimination to suffuse all programming. It is to the effect that the Member States and the Commission shall take appropriate steps to prevent any discrimination based on a number of grounds including disability. No specific mention is made of the UN CRPD. The goal of preventing discrimination could fairly be said to include the objective of preventing institutionalisation consistent with the general understanding of the reach and impact of the norm of non-discrimination as applied to housing in the US Supreme Court decision in *Olmstead*.

Continuing with the general theme of equality and non-discrimination, and giving it more operational effect at the beginning of the programme drafting cycle, Article 87(3)(ii) of the draft General Regulation (which occurs within a chapter on the ‘General provisions on the Funds’) requires that each Operational Programme shall include:

a description of the specific actions to promote equal opportunities and prevent any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation during the preparation, design and implementation of the operational programme and in particular in relation to access to funding, taking account of the needs of the various target groups at risk of such discrimination and in particular the requirements of ensuring accessibility for disabled persons.

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<sup>215</sup> Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1083/2006, Brussels, 6.10.2011 COM(2011) 615 final 2011/0276 (COD).

<sup>216</sup> *Ibid*, para. 5.1.1.

The specific mention of accessibility is to be greatly welcomed as this is essential for any meaningful strategy towards community living. However, the opportunity might have been taken to specifically cite institutionalisation as a form of discrimination that is specifically prohibited. It would certainly fit within the concept of discrimination and it would make sense to highlight it in a key provision dealing with embedding the principle of non-discrimination where it matters most – when Operational Programmes are being crafted.

### **(b) New ex ante conditionalities – The Opportunity to Build a Bridge between the Structural Funds and the UN CRPD**

Crucially, the proposed General Regulation contains general *ex-ante* conditionalities which are essential pre-conditions for the receipt of Structural Funds. While they existed in the past (e.g., under a general rubric of avoiding discrimination) they are now systematised and given prominence in the draft General Regulation. They are set out in detail in Annex IV of the draft General Regulation. They are enumerated and aligned with the eleven strategic priorities of the new programming period (Article 9) – with non-discrimination as an overarching priority (Article 7). In the table that sets out the eleven thematic goals plus non-discrimination ‘fulfilment criteria’ are added to give an indication of the kinds of steps that should be taken by the Member States in order to be in compliance.

In explaining the rationale for the inclusion of such conditions for the next programming period of cohesion policy, the EU Commission has stated that it must be ensured:

that the conditions necessary for [the] effective support [of the funds] are in place. Past experience suggests that the effectiveness of investments financed by the funds have in some instances have been undermined by weaknesses in national policy, and regulatory and institutional frameworks. The Commission therefore proposes a number of *ex ante* conditionalities, which are laid down together with the criteria for their fulfilment in the General Regulation.<sup>217</sup>

In other words, in order to avoid factors that would exert a gravitational pull away from the strategic goals of the new programming period these distorting variables would have to be ironed out in advance of any funding.

Member States are to assess whether the *ex ante* conditions are been met (Article 17.(2)). They are expected to set out in their Operational Programmes

the detailed actions relating to the fulfilment of *ex ante* conditionalities including the timetable for their implementation (Article 17.(4)).

If they are not met at the time of the conclusion of their Partnership Contracts the Member State in question will set out clearly the actions to be taken to bring it into compliance within two years of the Contract (Article 17.(3)).

Crucially, the European Commission shall assess information connected with the fulfilment of the *ex ante* conditions and:

May decide to suspend all or part of interim payments to the programme pending the satisfactory completion of actions to fulfil an *ex ante* conditionality.

And,

The failure to complete actions to fulfil an *ex ante* conditionality by the deadline set out in the programme shall constitute a basis for suspending payments by the Commission.

[Article 17.(3)].

This gives reality to the *ex ante* conditionalities – something beyond rhetoric turns on their fulfilment which should concentrate the minds of national authorities.

Two sets of *ex ante* conditionalities are particularly important for our purposes.

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<sup>217</sup> European Commission, *Cohesion Policy 2014-2020 – Investing in Growth and Jobs* (Luxembourg: Publications Office of the European Union, 2011), p. 3.

The first important *ex ante* condition for our purposes focuses on the general (i.e. unenumerated under Article 9) thematic priority of combating discrimination. Within that rubric and in the specific context of disability (following general provision as well as provision on gender) , this *ex ante* condition is to the effect of requiring Member States to create:

[The existence of ] a mechanism which ensures effective implementation and application of the UN Convention on the rights of persons with disabilities.<sup>218</sup>

Presumably the relevant 'mechanism' applies to the Article 33 (1) 'focal point' and 'coordination' mechanism within Government for the implementation of the UN Convention. It will be recalled that the general obligation of States parties to involve and consult persons with disabilities in these mechanisms is now a legal obligation. The reiteration of the need for Governments to set up these bodies is greatly welcomed in the draft *ex ante* conditionality. It is assumed that the overarching obligation to involve and consult with persons with disabilities will also be respected (and monitored in the relevant monitoring programme). It is also assumed that the national 'focal point' and 'coordinating' mechanism will explicitly bring the operation of the Structural Funds in their jurisdiction under their remit.

The 'criteria for fulfilment' of this *ex ante* condition are stated to be:

Effective implementation and application of the UN Convention on the rights of persons with disabilities is ensured through:

- Implementation of measures in line with Article 9 of the UN Convention to prevent, identify and eliminate obstacles and barriers to accessibility of persons with disabilities;
- institutional arrangements for the implementation and supervision of the UN Convention in line with Article 33 of the Convention;
- a plan for training and dissemination of information for staff involved in the implementation of the funds;
- measures to strengthen administrative capacity for implementation and application of the UN Convention including appropriate arrangements for monitoring compliance with accessibility requirements.

The reference to accessibility is quite important for the purposes of achieving the right to live independently and be included in the community. It applies particularly to infrastructural projects under the ERDF. Using the Structural Funds to ensure and enhance accessibility plays a major role in giving life to the right to live independently and be included in the community.

The reference to institutional arrangements for the implementation and supervision of the UN convention is also greatly welcomed. Supervision in this context must be understood as including the monitoring requirements under Article 33(2) of the UN Convention which, recall, has to contain a framework with one or more independent elements for the 'protection, promotion and monitoring' of then convention. Again, recall that Article 33.(3) UN CRPD specifically requires the active involvement of persons with disabilities in this process.

The reference to training is also useful and most welcome. It stands to reason that in any serious process of transition the (re)training of human personnel is going to be a critical success factor. This applies both to staff involved in the administration of the Funds as well as personnel more generally in the field. As indicated earlier, the culture shift needed within services more generally will be quite significant. It will entail service providers seeing themselves less as meeting needs and more as building bridges into the community and mending gaps in social connectedness. A mind-set change is needed and the Funds can play an enormously significant role in nudging this culture shift into place.

The reference to strengthening administrative capacity for implementation, application and monitoring of the convention is also welcomed significant step forward.

The second draft *ex ante* conditionality of relevance falls under the 9<sup>th</sup> thematic priority (enumerated under Article 9) of 'Promoting Social Inclusion and Combating Poverty.' Rather confusingly this becomes the 10<sup>th</sup>

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<sup>218</sup> Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1083/2006, Brussels, 6.10.2011 COM(2011) 615 final 2011/0276 (COD), p. 152.

'thematic objective' in the Annex (the 10<sup>th</sup> becoming the 9<sup>th</sup>). Falling thereunder there is an *ex ante* condition dealing with 'active inclusion – integration of marginalised communities such as the Roma.' This calls for the existence of a national anti-poverty reduction strategy as well as a strategy for Roma inclusion. With respect to the relevant 'criteria for fulfilment' covering the national strategy for poverty reduction there is a criterion that specifically calls for:

measures for the shift from residential to community based care.<sup>219</sup>

This is very welcome as it sets the overall frame for the specific Funds and particularly the Social Fund where social innovation is particularly required. Recall, this is an *ex ante* condition. In other words, it must exist in order to qualify a Member State to receive funding.

In sum, the proposed inclusion of *ex ante* conditionality in the draft General Regulation is welcomed great step forward. Indeed it is hard to see how the EU could avoid *ex ante* conditionality if only to minimise its legal liability to the UN Committee on the Rights of Persons with Disabilities for Member State actions that it could have avoided through better regulation of the Structural Funds. And the Declaration accompanying its 'confirmation' of the Convention made it inevitable that the *ex ante* conditions would include an express reference to the UN CRPD.

The *ex ante* condition of crafting measures 'for the shift from residential to community based care' is particularly important. It provides a vital jump spark connection back to the UN CRPD. If it was not there it would have to be put in on account of the status of the UN CRPD. And the more particular reference to the implementation and monitoring mechanism required under the UN CRPD is also welcomed. The reality that the Convention engages the mixed competences of both the EU and the Member States means that the relevant mechanisms have to be sensitised to the Structural Funds and how they operate. This is not just about ensuring a robust domestic implementation and monitoring mechanism in the abstract (which is required by Article 33(1) and (2) in any event). It is about tweaking those mechanisms to ensure that they avert their gaze appropriately to how or whether the Structural Funds are themselves contributing to or hindering the achievement of the UN CRPD.

On 24 April 2012, at the General Affairs Council meeting in Luxembourg, Member States agreed on a "partial general approach" and adopted a compromise text on the above issue. The compromise text withdraws from the EC's proposal the general *ex ante* conditionalities in the areas of non-discrimination, disability and gender equality as well as the thematic conditionality on transition to community-based care. A "partial general approach" A general approach is a political agreement of the Council pending the adoption of a first reading position by the European Parliament. The general approach in this case is partial since some elements are excluded, in particular the sums to be devoted to cohesion policy and the eligibility of different regions which will be decided under the EU's new multiannual financial framework.<sup>220</sup>

### **(c) 'Nothing about us without us' - Toward a more inclusive Monitoring and Evaluation process.**

An old Russian proverb says 'trust but verify.' The real value of the proposed *ex ante* conditionalities really comes down to the process of ensuring they are met.

Recall, Article 5 of the draft General Regulation already envisages that civil society and NGOs will be present on the Partnership Body that essentially drafts the Partnership Contract. This is where the *ex ante* conditions will first appear. The opportunity must be taken to specifically include independent representative organisations of persons with disabilities on the partnership body. This is legally required in any event by Article 4 (3) of the UN CRPD. Article 5 of the draft General regulation now gives an explicit opening and mandate in the mechanism for the Structural Funds to make it so.

With respect to monitoring, each State party will be obliged to set up a Monitoring Committee to monitor implementation of the programme (Title IV, Chapter 1 – 'Monitoring', Articles 41-50).

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<sup>219</sup> *Ibid*, p. 148.

<sup>220</sup> See <http://register.consilium.europa.eu/pdf/en/12/st08/st08207-ad02re02.en12.pdf>

[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/genaff/129759.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/129759.pdf).

The Monitoring Committee will be composed of the national Managing Authority of the programme as well as representatives of the 'partners'. Given that the partners must include civil society groups - and given Article 4 (3) of the UN CRPD which legally demands the presence of disabled groups on such mechanisms – then it follows that such Monitoring Committees must have representatives from disability groups. The European Commission is also entitled to participate in the work of the Monitoring Committee in an advisory capacity.

The key function of the Monitoring Committee is to “review implementation of the programme and progress toward achieving its objectives” (Article 41.(1)). The Monitoring Committee has to be consulted and give its opinion with respect to any proposed amendments to the Operational Programme (Article 41. 3). And the Monitoring Committee has the competence to issue recommendations regarding implementation and evaluation and monitor actions taken as a result of its recommendations (Article 43.(4)).

It is clear that representative organisations of persons with disabilities will have a clear and crucial role to play in this independent monitoring process.

Each Member State is required to submit an annual report on implementation of each programme in the preceding financial year to the European Commission from 2016 until and including 2022.<sup>221</sup> The proposed General Regulation states that these annual implementation reports shall:

set out information on implementation of the programme and its priorities by reference to the financial data, common and programme-specific indicators and quantified target values, including changes in result indicators, and the milestones defined in the performance framework. The data transmitted shall relate to values for indicators for fully implemented operations and also for selected operations. They shall also set out actions taken to fulfil the *ex ante* conditionalities and any issues which affect the performance of the programme, and the corrective measures taken.<sup>222</sup>

These annual reports should be a good source of information on how the goals of the UN CRPD are being met through the Structural Funds in the Member State in question. In response, the Commission may issue recommendations to address any issues which affect the implementation of the programme.<sup>223</sup> Presumably this will mean that the Commission can make recommendations with respect to the implementation of the UN CRPD.

Further, the proposed General Regulation requires that an annual review meeting between the Commission and each Member State be organised in order to examine the performance of each programme, taking account of the annual implementation report and the Commission's observations and recommendations (if any).<sup>224</sup> Again this should provide a valuable space for conscious reflection (especially on the part of the European Commission) on the implementation of the UN CRPD.

In addition, Article 46(1) of the proposed General Regulation states that:

By 30 June 2017 and by 30 June 2019, the Member State shall submit to the Commission a progress report on implementation of the Partnership Contract as at 31 December 2016 and 31 December 2018 respectively.

This progress report should include and assess, *inter alia*, whether the actions taken to fulfil *ex ante* conditionalities not fulfilled at the date of adoption of the Partnership Contract have been implemented in accordance with the timetable established (which has to be within two years of concluding the Contract) and progress towards achievement of priority areas established for cooperation.<sup>225</sup>

More qualitative impact evaluations are also required under the draft Regulation. The basic idea is that adjustments can be made in accordance with experience especially of impact. Article 47(1) of the proposed General Regulation states that:

Evaluations shall be carried out to improve the quality of the design and implementation of programmes, as well as to assess their effectiveness, efficiency and impact.

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<sup>221</sup> *Ibid*, Article 44(1).

<sup>222</sup> *Ibid*, Article 44(2).

<sup>223</sup> *Ibid*, Article 44(7).

<sup>224</sup> *Ibid*, Article 45(1).

<sup>225</sup> *Ibid*, Article 46(2)(c) and (e).

The evaluation is to be done by 'experts that are functionally independent of the authorities responsible for programming' (Article 47(3)). Three different sets of evaluation are required: (1) *ex ante* evaluation, (2) evaluation during a programming period and (3) *ex post* evaluation.

*Ex ante* evaluation is intended to test the integrity and improve the quality of the design of each programme (Article 48). Among the many factors that the *ex ante* evaluation is to assess are the following:

- 48.(3) (e) the relevance and clarity of the proposed programme indicators,
- (g) how the expected outputs will contribute to results,
- (k) the suitability of the milestones selected for the performance framework,
- (l) the adequacy of planned measures....to prevent discrimination.

It is suggested that these axes give ample scope to factor in a consideration of how or whether Member States are embedding a transition to community living and how or whether the Structural Funds are been used appropriately to achieve this end.

Member States are also expected to carry out evaluations during the currency of a programming period which shall include evaluations to "assess effectiveness, efficiency and impact" (Article 49 (2)). Importantly, the European Commission is given latitude to carry out 'at its own initiative' an evaluation of programmes (Article 49 (4)). Finally, *ex post* evaluation has to be carried out at the end of the programming period by the European Commission or by the Member State in close cooperation. This will specifically include an evaluation of how, or whether, the Funds have been used to advance the key strategic objectives of a 'smart, sustainable and inclusive economy.'

All evaluations shall be examined by the Monitoring Committee and sent to the Commission. Assuming representative organisations of persons with disabilities sit on the relevant Monitoring Committee (which, legally, they should) then this would give them an opportunity to shape how evaluations are to be conducted.

The draft proposal also includes a requirement that:

5% of the resources allocated to each CSF Fund and Member State, <sup>226</sup>, shall constitute a performance reserve ....

A performance review is also to be undertaken by the Commission, in cooperation with the Member States regarding the performance of programmes in 2017 and 2019.<sup>227</sup> It is proposed that this review should examine the achievement of the milestones of the programmes at the level of priorities, on the basis of the information and the assessments presented in the progress reports submitted by the Member States in the years 2017 and 2019.<sup>228</sup>

Based on this review, where there is evidence that a priority has failed to achieve the milestones set out in the performance framework, the Commission may suspend all or part of an interim payment of a priority of a programme.<sup>229</sup> In addition, where the Commission, based on the examination of the final implementation report of the programme, establishes a serious failure to achieve the targets set out in the performance framework, it may apply financial corrections in respect of the priorities concerned.<sup>230</sup>

The General Regulation therefore incentivises the achievement of commitments made regarding programmes which utilise cohesion funds such as the ESF and the ERDF. As mentioned above, the two funds which are of most relevance to the achievement of deinstitutionalisation are the ESF and the ERDF.

In sum, the draft general Regulation creates ample space for the active involvement of persons with disabilities and their representative organisations at all stages in the design, monitoring and evaluation of programmes. And the process gives ample scope to the European Commission to scrutinise whether funds are been used to best advance the UN CRPD and especially the transition to community living.

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<sup>226</sup> *Ibid*, Article 18.

<sup>227</sup> *Ibid*, Article 19(1).

<sup>228</sup> *Ibid*, Article 19(2).

<sup>229</sup> *Ibid*, Article 20(3).

<sup>230</sup> *Ibid*, Article 20(4).

### 3. The proposed European Social Fund Regulation (2014-2020)

The draft Regulation for the European Social Fund is accompanied by an Explanatory Memorandum which emphasises that the Fund aims to promote, *inter alia*, 'social inclusion thereby contributing to economic, social and territorial cohesion.'<sup>231</sup>

The draft Regulations for the ESF specifically references<sup>232</sup> the new EU Programme for Social Change and Innovation (PSCI), which is a mix of older programmes including PROGRESS, EURES, European Progress for Microfinance Facilities.<sup>233</sup> The PSCI is an instrument to be managed directly by the Commission, in support of employment and social policies across the EU. It forms part of the Commission's proposal for the EU regional, employment and social policy for 2014-2020. It is intended that the PSCI will support policy coordination, sharing of best practices, capacity-building and testing of innovative policies, with the aim that the most successful measures be up-scaled with support from the European Social Fund. The proposal for a regulation on the PSCI states that one of its general objectives will be to:

Promote equality between women and men and combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation<sup>234</sup>

It may well be the case that elements of this new innovation programme can also be harnessed to help fertilise the transition process that is clearly needed. This lies beyond the scope of this Study although it is clearly relevant given that one of the PROGRESS strategies for the period 2007-2013 was ensuring that equality considerations, including disability accessibility requirements, were taken into account in all PROGRESS policy sections and activities.<sup>235</sup>

The Explanatory Memorandum also specifically references the 'European Platform against Poverty' which forms an integral part of Europe 2020 and which specifically calls for social innovation for, *inter alia*, transformation in the lives of persons with disabilities (see chapter 4).

Preambular paragraph 11 of the posed ESF Regulation states:

In accordance with Article 10 of the Treaty, the implementation of the priorities financed by the ESF should contribute to combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation

The ESF should support the fulfilment of the obligation under the UN Convention on the Rights of Persons with Disabilities with regard *inter alia* to education, work and employment and accessibility. The ESF should also promote the transition from institutional to community-based care.<sup>236</sup>

This preambular language is exceptionally useful in that it repeats familiar language on ending discrimination – surely an idea that precludes the building of new institutions. And, more to the point, it frankly concedes the need for a transition from institutional to community care and living. This is a crucial bridge back to the Convention and specifically Article 19 on the right to live independently and be included in the community. It shows a commendable awareness that a transition process is imperative and that social innovation will be called for to enable it to happen. The Social Fund will no doubt have a very important role in making this happen since the culture shift and related training need for human resources will be key.

Article 2 of the draft Regulation follows through by including within the stated mission of the ESF into the next period the goal of benefiting people:

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<sup>231</sup> Explanatory Memorandum COM(2011)607, p 2.

<sup>232</sup> Proposal for a Regulation of the European Parliament and of the Council on the European Social Fund and repealing Regulation (EC) No 1081/2006, Brussels, 6.10.2011 COM(2011) 607 final 2011/0268 (COD), p. 2.

<sup>233</sup> Proposal for a Regulation of the European Parliament and of the Council on a European Union Programme for Social Change and Innovation COM/2011/0609 final - 2011/0270 (COD).

<sup>234</sup> *Ibid*, Article 4(2)(a).

<sup>235</sup> Community Action Programme in the Sphere of Employment and Social Solidarity – PROGRESS - Committee for the implementation of the Community Programme for Employment and Social Solidarity - PROGRESS – 2007-13 – Draft Strategic Framework for the implementation of the Community Programme for Employment and Social Solidarity – PROGRESS (European Commission, Employment, Social Affairs and Equal Opportunities DG, Directorate-General General Coordination, Interinstitutional Relations, Brussels, 18 March 2008), p. 6.

<sup>236</sup> Proposal for a Regulation of the European Parliament and of the Council on the European Social Fund and repealing Regulation (EC) No 1081/2006, Brussels, 6.10.2011 COM(2011) 607 final 2011/0268 (COD), p. 9.

including disadvantaged groups such as people with disabilities with a view to implementing reforms in the fields of social policies.

It also explicitly states that one of the key goals of the ESF in this regard is to:

Provide support to enterprises, systems and structures with a view of to facilitating their adaptation to new challenges and the implementation of reforms in particular in the fields of social policies.

This too is greatly to be welcomed particularly as it highlights the rights of persons with disabilities at the very outset in the mission statement of the ESF. And the direct mention of supporting adaptation to new challenges and reform is highly relevant in the context of the transition set to take place in the move to community living.

The 'scope of support' section (Article 3) deals more particularly with 'promoting social inclusion and combating poverty.' It deals with the need to achieve 'active inclusion' and to combat discrimination on the grounds, *inter alia*, of disability and to encourage community-led development strategies. This, again, is greatly to be welcomed as it is exactly the kind of frame of reference needed in the context of the social innovation that needs to take place is community living is to become a reality.

More particularly, Article 8 of the proposed ESF regulation states that:

The Member States and the Commission shall promote equal opportunities for all, including accessibility for disabled persons through mainstreaming the principle of non-discrimination and through specific actions within the investment priorities . Such actions shall target people at risk of discrimination and people with disabilities, with a view to increasing their labour market participation, enhancing their social inclusion, reducing inequalities in terms of educational attainment and health status and facilitating the transition from institutional to community-based care.<sup>237</sup>

Again, this draft language is commendable. And the specific reference to the transition from institutional to community-based care – which was already highlighted in the draft preambular language - is greatly welcomed. Without labouring the point, it is precisely language like this that is needed to set the frame right for the social transformation process that needs to take place to enable community living to become a reality. And it is exactly this kind of language that is needed to provide the jump spark connection between the convention and the Social Funds.

Importantly, draft Article 6 deals with the 'involvement of partners.' It is to the effect that the involvement of partners 'in particular non-governmental organisations' in the implementation of the relevant operational programme (as envisaged already in Article 5 of the draft general regulation) may itself be supported using the ESF. Interestingly, the managing authorities are enjoined to set aside a sufficient amount to be allocated to 'capacity building activities' such as training, networking and strengthening social dialogue. This is particularly relevant where social movements on disability are still in embryonic form and need support to develop to the point that they become constructive interlocutors in the dialogue for change.

Social transformation is the key. Usefully, Article 9 of the draft ESF Regulation is directed towards 'social innovation.' The aim is the 'testing and scaling up of innovative solutions to address social needs' (Article 9 (1)). The Member States are enjoined to identify themes for social innovation in their Operational Programmes. Since these programmes are to be designed with the relevant 'partners' this gives representative organisations of persons with disabilities considerable scope to ensure that the relevant innovation measures include those directed at moving the transition forward from institutional to community living. Furthermore, Article 10 of the draft enables States to enter 'transnational learning' arrangements with the support of the Fund. The Member States can pick from a list of themes to be proposed by the European Commission. It is strongly suggested that this list should include transnational learning platforms on the transition from institutions to community living.

#### **4. The proposed European Regional Development Fund Regulation (2014-2020)**

The draft Regulation for the ERDF can support a range of projects and activities that may be of relevance in the context of disability. They include 'investment in social, health and educational infrastructure' as well as 'networking cooperation and exchange of experience between regions, towns and relevant social and economic actors.'

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<sup>237</sup> *Ibid*, Article 8.

One of the 'investment priorities' is stated to be:

5.9.(a) investing in health and social infrastructure which contribute to national, regional and local development, reducing inequalities in terms of health status, and transition from institutional to community-based services.<sup>238</sup>

Again, the specific reference to a transition from institutional to community based services is critically important.

Article 5.9 (c) goes on to state that 'support for social enterprise' is also a priority which is also relevant in the disability context given that an entirely new social frame of reference will be needed to give life to the right to live independently and be included in the community.

Interestingly, Article 7 deals with support from the ERDF for 'sustainable urban development.' It enables Member States to identify a list of cities in its Partnership Contract 'where integrated actions for sustainable urban development' are to be implemented with support from the ERDF. With some imagination this agenda could be interpreted to include actions to support the evolution of more accessible (as well as visitable) cities.

The old 10% cap that applied to the purchase of land (with the ongoing question mark whether this also extended to the purchase of property on land) is carried forward in Article 59 (3)(b) of the General regulation. This of course applies to the ERDF as well as to the other Funds. This has been criticised by the European Coalition for Community Living. The cap makes some sense on a theory of 'additionality' whereby EU funds should not be used to defray costs that States must themselves normally meet. But perhaps it need not be as inhibiting as suggested since the realisation of capital on the sale of institutions should provide States with sufficient assets to leverage the financial credit to enable more individualised housing options to be built in community settings. Put another way, the initiation of a serious transition process can be planned to successively capitalise on assets to be released from the sale of institutions perhaps aided by the 10% maximum allowable under ERDF.

In sum, the three draft regulations provide extremely useful anchorage points with respect to both the substance and the process aspects of the UN CRPD. The general language on non-discrimination, the general language with respect to accessibility, the more specific language with respect to the necessity of a robust mechanism for the monitoring of the UN CRPD, the useful language with respect to the active involvement of the civil society groups and the role of the European Commission in overseeing the implementation of *ex ante* conditionalities is all positive. Indeed, it is minimally necessary if the UN CRPD is to be respected. The next chapter gathers together the key points in our analysis of the relevant obligations of the UN CRPD and, in this light, reflects on the potential and adequacy of the draft proposals of the Commission and then puts forward some concrete recommendations of relevance to the negotiations that lie ahead.

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<sup>238</sup> Proposal for a Regulation of the European Parliament and of the Council on specific provisions concerning the European Regional Development Fund and the Investment for growth and jobs goal and repealing Regulation (EC) No 1080/2006, Brussels, 6.10.2011 COM(2011) 614 final 2011/0275 (COD), Article 5(9)(a).

## Chapter 8

### Conclusions & Recommendations

In this chapter we set out our conclusions based on the analysis thus far, our perspective on the draft Regulations proposed by the European Commission and our overall recommendations with respect to the process ahead.

The use of *ex ante* conditionality as proposed by the European Commission is to be greatly welcomed. As the 2009 Study on the implementation of Article 16 of the current General Regulation pointed out, general references to non-discrimination in previous sets of *ex ante* conditionalities are not enough. Something sharper is needed to give life to the ideal.

Our recommendations are very much directed to making this *ex ante* conditionality as real and as closely aligned as possible to the UN CRPD to ensure that the Structural Funds play their part in achieving the right to live independently and be included in the community for all European citizens with disabilities.

The transition to community living is now, for the first time ever, a core international legal obligation incumbent on both the Member States and the EU.

#### 1. Key Findings in our Analysis

What are the key findings in our analysis?

##### **(a) The UN Convention is directly relevant to the drafting of the regulations for the EU Structural Funds**

First of all, the preceding chapters are purely academic in the absence of a clear bridge between the UN CRPD and the Structural Funds. Thankfully there is such a clear bridge in the form of the Declaration of EU competences that was lodged with the EU's instrument of confirmation. The General Regulation governing the current Structural Funds is expressly specifically covered as one of those that illustrate the extent of the area of the competence of the EC. Indeed, it is said that then convention has a 'quasi constitutional' status – hovering between the founding Treaties and secondary law.

The convention is a 'mixed convention' that gives rise to both EU and Member State responsibility and legal liability. In practical terms that means the EU is directly answerable for how the Funds are designed and monitored. Member States which fail to respect the UN CRPD in their implementation of the Funds act in breach of the convention and also EU law in so far as compliance with the convention is considered necessary in order to comply with EU law.

In any event, there is no legal doubt that the negotiators of the new Regulations must pro-actively consider how best to reflect the obligations of the UN CRPD in fresh legislation. Thanks to the EU confirmation and associated Declaration of competence the question is not whether but how.

##### **(b) Forging a direct link between independent living and the Structural Funds makes sense in any event**

Secondly, even if there were no convention, the proposed *ex ante* conditionality would make sense as a logical extension of pre-existing EU law and policy. The move to a philosophy of independence and community engagement has already been mentioned in the context of the evolution of general EU disability law and policy. And the EU 2020 commitment to a 'smart, sustainable and inclusive economy' depends in no small part on social innovation in the disability context – something that is significantly ahead of other spheres such as ageing. Additionally the new EU disability strategy speaks directly to the need for a transition to take place from institutions to community living. And a new European Accessibility Act is promised which would go a long way toward making community living a reality.

So even if the bridge between the UN CRPD and the Structural Funds were not there in the form of the Declaration it fits perfectly given the whole posture of EU disability policy. That being said, the existence of the UN convention and its confirmation by the EU make the addition of *ex ante* conditionality mandatory and not just desirable as a logical outcrop of current policy commitments.

### **(c) The general obligations of States Parties to engage in reform are clear**

Thirdly, the general legal obligations incumbent on States Parties contained in the UN CRPD are clear and robust. These general legal obligations are in addition to more specific legal obligations in provisions such as Article 19 CRPD. They go to both substance as well as process.

From a substantive point of view States parties (and a regional integration organization such as the EU is deemed a 'State Party') have an overarching obligation to ensure that their laws, policies and programmes are in compliance with the convention. This may require the amendment or repeal of inconsistent laws or policies and the enactment of fresh ones (Article 4(1)(b)). It certainly requires refraining from any act inconsistent with the convention. The negotiation of the relevant Regulations for the Structural Funds into a new period therefore presents an ideal opportunity to reflect on how they might be better aligned to achieve the goals of the convention. States parties have a legal obligation to mainstream a disability perspective into all laws and policies and relevant processes (Article 4(1)(c)). This too provides a spur for a more active and conscious consideration of the CRPD in the ongoing process of negotiation on the new Regulations.

### **(d) The process obligation in the UN CRPD to actively involve civil society is clear**

The process-oriented general obligations are just as important as the substantive ones. From a process point of view, the convention requires that persons with disabilities shall be actively involved and consulted in the design and implementation of policies that affect them and in all decision-making processes that affect them (Article 4(3) UN CRPD). After all, what's the point in having an instrument that challenges the outcome of bad legislative processes if these processes themselves are not to be changed. Otherwise the system is fated to continue making the same mistakes. This too presents an opportunity to more proactively involve people with disabilities and their representative organizations at the design stage for the new Regulations. It is to be noted that Article 4(3) UN CRPD specifically goes beyond the design and implementation of policies and programmes and also speaks directly to involvement in decision-making processes affecting them.

Furthermore, persons with disabilities and their representative organizations must be consulted in any monitoring framework or mechanism that monitors compliance with the convention (Article 33 (3)). This is important in the context of the Structural Fund Regulations since they will have their own elaborate monitoring and evaluation mechanism. The obligation in Article 33 (3) relates to the domestic monitoring of the convention (within a framework with one or more independent elements – which is taken to mean a national human rights institution such as a national human rights commission). At a minimum this national monitoring body must bring within its purview the operation of the Structural Funds in its jurisdiction. Likewise, any monitoring mechanism set up under the Structural Funds will, effectively, be engaged in monitoring compliance with the CRPD. It follows that persons with disabilities and their representative organizations should be actively involved and consulted in this mechanism.

### **(e) The philosophy & specific obligations of Article 19 CRPD are clear**

Fourthly, the nature of the more specific obligations incumbent on States parties under Article 19 are equally clear and robust. It is plain that some deep commitment to personhood and human flourishing is immanent in Article 19. Not only have institutions – even mini-institutions - exposed persons with disabilities to further human rights abuses especially in the form of violence, exploitation and abuse, they have also foreclosed a key possibility for human development – namely active community engagement. This civic engagement is a two way street: it further augments one's self-esteem and confidence, and it changes the quality of community – a tolerant place where people connect as people and not through the proxy of labels like disability.

It is important to emphasize that Article 19 embodies a very positive philosophy. It is primarily defined by what it is for and secondarily by what it is against. It follows that Article 19 has a negative afterglow – one that is against institutions of any sort. But it would be wrong to view it as having an exclusively negative outlook. It is primarily about the steps needed to be taken to make living independently and being included in the community a reality.

Article 19 is for having a place of one's own – not as a passing fetish in a consumerist society but more as a platform to position people for growth through active social inclusion. As one philosopher says 'property is the materialization of identity' – a place that reflects as well as reinforces one's sense of self. Community

engagement and social inclusion is the leitmotiv of Article 19. Again, there is a natural resonance here between what the Convention requires and the overall thrust of EU social policy. The only difference is that now the UN CRPD demands that this policy commitment to social inclusion specifically include those who were formerly institutionalized and in transition to open community living.

The argument that a State must respect the wishes of an individual with a disability who wishes to continue to live in an institution or to move into one is a false argument. For one thing, that would defeat another important goal of the convention which is to 'nurture receptiveness to the rights of persons with disabilities' among the public at large (Article 8). It proves impossible to do so when the public just sees disability (as it will in a group setting) rather than a person interacting freely with others. Furthermore, it would have the effect of tying up scarce assets that will sooner or later have to be unbundled and moved into personalised social services as well re-invested as into general community services.

Personalised services as well as access to generally available community services are going to be key. And indeed, the new kinds of personalised services will be very different to the old. They will work best when as much power and resources are devolved to the individual –through, e.g., individualized budgets with adequate supports. Indeed, the role of the personal assistant (expressly mentioned on the face of Article 19) should primarily be to build bridges into the community and secondarily to treat basic needs. Connecting people through innovative social policy should be a primary policy goal – not just husbanding scarce resources to meet needs. Some have even questioned whether the traditional language of needs and services will any longer do. Certainly the resources currently tied up in institutions would need to be released to help make this transition a reality. Again, the Structural Funds can and should play a major role in helping ease the transition to a new concept of services.

#### **(f) Key obligation: Article 19 CRPD demands a robust transition toward independent living and being included in the community**

Fifthly, Article 19 contains a mix of obligations of immediate effect and obligations that will require to be 'progressively achieved.' The overarching obligation is on States to secure rights on an 'equal basis with others' and not to discriminate.

As already indicated, the US Supreme Court has already held that 'unjustified' institutionalization is itself a clear form of discrimination. Conceptually at least, this demonstrates the elastic nature of the non-discrimination ideal which can easily reach the issue of institutionalisation. At an absolute minimum no new institutions should be opened and the Structural Funds should never be used to this effect. This applies equally to mini-institutions which are similarly isolating. In other words, the temptation to close down large institutions and disperse the inhabitants to smaller group facilities should be actively resisted. Largeness brings its own problems. Still, smaller institutions do not shed the inherent problematic of all institutions which is their social (if not geographic) isolation from the community. Instead, all efforts should be directed at respecting the will and preference of the individual with respect to their own living arrangements. Of course there are discrete financial and other limits on all of our personal desires with respect to living arrangements. This is not the point. The point is that an active process of providing a genuinely equal opportunity for community living for Europe's disabled citizens has to begin and it inevitably entails a transition that if delayed will not happen.

Many more of the obligations in Article 19 are obligations of 'progressive achievement.' They are going to take time, foresight, resources and imagination to achieve. That does not rob the obligations of all normative significance or 'critical bite.' It is plain that all of Europe is going through a transition toward the achievement of Article 19. Some are farther than others. All have a lot to learn.

Transition means a movement from one point to another. This assumes that States have honestly identified where they are and where they would like to get to and the resources and time dedicated to achieving this end. This in turn assumes a process of open reflection which some States have already gone through. Recently, the Governments of Ireland and Israel have commissioned reports to kick start the relevant transition planning process.

A more difficult question has to do with the refurbishment of existing institutions, especially in poorer Member States where the transition will be more complex and where urgent human rights violations need to be stemmed as a matter of priority. This is not an easy question since 'temporary measures' often turn out to be not so temporary and may well have disastrous long-term results especially for those subjected to them. Respecting the principle of 'additionality' it is perhaps best if the Structural Funds stayed away from this issue and focused

more insistently on easing the process of transition. After all, such institutions were probably opened a long time ago by the Member States who bear the primary responsibility for their existence as well as conditions. It would be a much better use of EU funds to focus insistently on facilitating the path to transition. There may be close calls in certain situations where some expenditure of EU monies might be defensible in dire situations and provided always that a dynamic of reform is truly embedded and inexorable. But they should be truly exceptional cases. It proves important to point out – especially during tight fiscal circumstances – that any deterioration of conditions in institutions (e.g., overcrowding) is not acceptable.

And it would seem incontrovertible – from a legal point of view – that active involvement and consultation of persons with disabilities and their representative organizations in any process to design, monitor and implement a transition would be key. All transitions involve complex trade-offs. It is crucial that the people most directly involved are actively involved in making the hard decisions. The process and the decision in the process command the widest possible respect if the people most directly affected are brought into the loop from the outset. This is not just good practice – it is required by the UN CRPD.

### **(g) Transition is more important in times of austerity – not less**

Many will be naturally tempted to ‘confess and avoid’ the implications of the UN Convention. That is to say, they will say that although the legal requirements Article 19 are clear indeed admirable – they are unachievable given Europe’s straightened financial circumstances. There are a number of answers to this.

First of all, what matters is having the right dynamic of reform embedded in the system. Change is going to take time. But if there is a delay on even starting the process then there is no guarantee that the process will begin in earnest once the resource base increases. Rather, it is in times of financial retrenchment that intense efforts must be made to embed the right dynamic of change which then stands a much better chance of flourishing when conditions improve.

Secondly, it is plain that Europe’s social model is undergoing change in any event. This is partly due to financial constraint. And it is also due to the fact that our social model needs to be refreshed to not merely cater for needs but to position people to be socially included. In general terms, this means personalizing social services and getting more out of existing general services. In this sense the transition to independent living and community involvement can be seen as part of a larger process to help build a much more innovative social Europe. This process will continue apace in any event and it would be better if disability were there from the outset.

Thirdly, it is not necessarily true to say that the transition to community living will be more cost intensive. Professor Mansell and others have shown that the costs between institutions (where large amounts of taxpayers monies are tied up) and community living are comparable. What might cost is the transition rather than the end point. Here, if anywhere, the principle of additionality means there is a clear role to be played by the Structural Funds. In any event, even if one were to judge the new policy exclusively on economic grounds (which is certainly not the underlying predicate of Article 19) then it is quite conceivable that the social activation of persons formerly institutionalized will lead to increased economic activity and, through time, increased participation in the labour market

In sum, transition entails the ‘progressive achievement’ of Article 19. Progressivity means having the right dynamic in place and having the right kinds of tools to learn from the process and adjust accordingly. International law also has developed principles dealing with retrogressive measures in frank acknowledgement that resource levels do not always remain static.

### **(h) Progress on Article 19 requires flanking progress in other fields**

It is clear that Article 19 does not exist in a hermetically sealed policy vacuum. Real advance will only be made when other policies also move forward in tandem. What is the point of living independently if one cannot access the community? Accessibility in its broadest sense and which also includes visitability to private space (where most of living goes on) is clearly crucial (Article 9). This is why the issue of accessibility is so important in the discussion on the Structural Funds.

Returning power and voice to people through reform of legal incapacity laws (as required under Article 12 UN CRPD) is also critically important. One can only choose with whom one wants to live and on what basis if the law first makes clear that individuals have a right to choose. The reform of legal capacity law is not a matter of

EU responsibility, nor indeed of the Structural Funds. Yet, at a minimum the Regulations should be premised on an assumption of legal capacity to make decisions (with or without support) and not accept assertions of incapacity as a reason for not moving forward with a transition.

## 2. Analysis of the Commission's proposals

Given the prominence of the UN CRPD in EU as an instrument of quasi-constitutional significance in EU law it was inevitable that it would figure prominently in the draft Regulations proposed by the European Commission. The phenomenon of *ex ante* conditionality proposed by the European Commission is to be greatly welcomed in any event. And the specific reference to the UN convention on the rights of persons with disabilities within the proposed *ex ante* conditions is a perfect tool with which to advert the gaze of the recipient Member States to the overarching legal requirement for compliance with the UN CRPD.

The most crucial point to take away from the legal analysis throughout this Study is the need to reflect and retain in the draft Regulations the requirement for a transition from institutional care (even in mini-institutions) to a live in the community. Practically everything of significance flows from this. Clearly the Funds have a crucial catalytic role to play in easing this transition and ensuring that it becomes embedded as an inexorable policy default.

The other important point to take away has to do with process - whether the process relates to design, implementation or monitoring. Importantly, this process must be open to the active involvement (not just consultation) of persons with disabilities and their representative groups. This is not just a desideratum of generating rational policy. It is a legal requirement under Article 4 of the UN CRPD.

Thankfully, the draft regulations reflect a sense of the importance – or legal imperative – of the UN convention. The draft proposals contain important toeholds for the UN convention in the design, implementation and monitoring of the Structural Funds into the next programming period. What follows is a summary of our analysis of the proposals and some recommendations as the negotiations get underway.

### (a) Draft General Regulation

Several aspects of the draft General Regulation deserve attention. They can be dealt with in terms of substance and process as follows.

#### Substance

**Draft Article 7 – headline norm of non-discrimination.** Within Title 1 dealing with general principles ('principles of Union Support for CSF Funds), Article 7 reiterates the overarching importance of the principle of equality and non-discrimination which expressly includes the ground of disability. There is no explicit mention of the UN CRPD in the draft. This is acceptable given the need not to over-burden a headline norm with ground-specific details. However, it should proceed on an explicit understanding that the UN CRPD informs our understanding of non-discrimination as applied to disability and that institutionalisation is itself a form of discrimination.

**Draft Article 87(3)iii- tangible steps to end discrimination.** This provision emphasizes that the Member States are expected to steps to prevent discrimination. It is to the effect that these steps shall take into taking into account 'in particular the requirements of ensuring accessibility for disabled persons.' The reference to accessibility is to be welcomed. Nevertheless, such reference, though intimately connected with discrimination, does not exhaust the positive import of the non-discrimination ideal in the context of disability. It might have been more useful to add some language developing the concept of discrimination as applied in the disability context by emphasizing that institutionalization is itself deemed to be a form of discrimination. This is not such a big step as the US Supreme Court already agrees in principle.

**Draft Ex Ante Conditionality under the free standing Strategic Priority to end discrimination.** The *ex ante* condition in the draft text to the effect that there would exist an 'effective implementation and application of the UN convention' pegs the Structural Funds to the existence of an implementation and monitoring process that is required in any event under Article 33 of the convention. Article 33 CRPD – which applies to States parties in any event - demands the existence of a national 'focal point,' a national 'coordination mechanism' and a national 'monitoring framework' which must contain 'one or more independent elements.'

It is curious that such an emphasis should be placed on these obligations in the convention in the draft *ex ante* conditions given that these obligations already arise. Indeed, Article 4.(1)(c) of the UN CRPD requires States parties to take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes. This, in principle would already reach the actions of the Member States in the implementation/monitoring of the Structural Funds. Perhaps it was added in order to emphasize that the relevant implementation/monitoring mechanisms that are to be set up under Article 33 by the Member States should explicitly include the application of the Structural Funds. If so, then it seems this *ex ante* condition is being used to put a matter beyond doubt.

The emphasis on process leaves out one important dimension that might have been useful to emphasize. There is an opportunity here to emphasize that the relevant domestic Article 33 implementation/monitoring mechanism should explicitly include, actively involve and consult with people with disabilities and their representative organization. Furthermore, there is an opportunity to emphasize that the relevant monitoring/evaluation processes set up by Member States should likewise be open. Article 5 of the draft General regulation is already to the effect that the relevant national partnership process should include civil society organisations. It would not have taxed the text to explicitly mention the need to include persons with disabilities in the process referred to in this *ex ante* conditionality.

**Draft Ex Ante Conditionality under Strategic Priority 9 – transition to community living.** The *ex ante* conditionality that national poverty reduction strategies ‘includes measures for the shift from residential to community based care’ is exactly what is needed at a minimum to ensure that movement begins to happen toward transition. It might, however, be questioned whether this is the best place to emphasize the need for a transition since the relevant transition is not merely about ending poverty and has more to do with a broader conception of ending discrimination and advancing social inclusion. However, in as much as poverty is understood broadly to encompass social exclusion then it at least makes some sense. Perhaps it would have been better to make the requirement for measures to ensure the achievement of the shift from residential to community based care the first and most important *ex ante* condition under the rubric of non-discrimination and disability. That is to say, it would have perhaps been better to make this a core *ex ante* condition rather than something that attaches once anti-poverty strategies are explicitly in the frame.

### Process

**Draft Article 5(1)(c) – Partnerships to include civil society.** This makes it plain that the relevant ‘Partnership’ body at national level is to include civil society organisations. This is most welcome. It is critically important since these Partnerships will have first cut at assessing how or whether the *ex ante* conditionalities are met.

It is extremely important that Member States now take the opportunity to specifically include representative organisations of persons with disabilities in these Partnerships. That much is already required in any event under Article 4.(3) of the UN CRPD. It is suggested that more explicit language to this effect could be added to put the matter beyond doubt.

**Draft Article 41 et seq – National Monitoring.** This set of provisions envisages a national Monitoring Committee which likewise will include the ‘partners.’ This too is critically important and it is crucial that representative organisations of persons with disabilities be included. It is strongly suggested that more pointed language to this effect should be added.

**Draft Article 48 - Evaluation.** It should be made plain that the evaluation criteria for the *ex ante*, programme and *post ante* evaluations should include a criterion that explicitly refer to the UN convention and especially Article 19 on the right to live independently and be included in the community. This will advert the gaze of the European Commission when reviewing the adequacy of programmes and their implementation specifically to the UN CRPD.

In sum, the reference to the *ex ante* conditionality of transition to community care (within the context of national reduction of poverty strategies) is most welcome. It is so important that it might, with profit, have been added as the core *ex ante* condition in the context of ending discrimination.

The reference to the *ex ante* conditionality of having a national implementation and monitoring process under the CRPD would, at first blush, seem unnecessary since States parties are legally obliged to have this in any event. It may have been inserted to emphasize that any national mechanisms (focal point, coordination mechanism, framework for monitoring including an independent element) should explicitly embrace the national

implementation/monitoring of the Structural Funds. It makes sense to keep it in if only to forge a strong link between the Article 33 CRPD mechanism demanded of all States parties and the Structural Funds.

The reference to non-discrimination in various elements in the draft General Regulation might have been used as an opportunity to assert that institutionalisation is itself a form of discrimination and that whatever else States do they should not use Structural Funds to open new institutions. This is achieved more directly in the fund-specific proposals which cover the vital necessity for a transition to community living. But it would have been preferable if this emphasis on transition would have been bottomed on a very clear understanding in the general regulation that institutionalisation is a form of discrimination.

Crucially, from a process point of view, the specific mention of civil society groups as a key part of partnership is most welcome. At the very least this should go forward on a clear understanding that this includes persons with disabilities and their representative organisations. An opening in the draft texts might therefore be found to explicitly state that this includes representative organizations of persons with disabilities. Given EU confirmation of the UN CRPD this ground-specific reference would not unduly tax the draft Regulations but would put the involvement of disability organisations beyond doubt as is required in any event under Article 4.(3) of the CRPD.

### **(b) Draft Regulation for the European Social Fund**

The draft Regulation on the European Social Fund similarly contain very positive elements that show real promise in aligning the Fund more closely to the achievement of the UN CRPD.

**Draft Preamble paragraph 11.** The draft contains the idea that the Fund should support the fulfilment of the UN Convention in areas such as education, work and accessibility. This is without prejudice to the generality of the convention. The specific mention of the UN convention is to be greatly welcomed. More pertinently, preamble paragraph 11 goes on to say that the ESF should 'also promote the transition from institutional to community-based care.' This preamble language is very welcome as it frames the ESF using the right kind of values and in a way that is conscious of the positive potential of the Fund.

**Draft Article 2.** This talks of the need for the Fund to benefit disadvantaged groups such as persons with disabilities by implementing reforms in the field of social policies. This too is welcome since it connects disability with the pressing need for social policy reform. Indeed it brings to mind the aforementioned EU Programme for Social Change and Innovation which bundles together a variety of pre-existing programmes and instruments and turns them into useful tools to stimulate social innovation.

**Draft Article 8.** This provision (under the heading 'Promotion of equal opportunities and non-discrimination') goes on to talk more directly about the ESF 'facilitating the transition from institutional to community based care.' This language is exceptionally welcome. It speaks exactly to the kind of process that will be needed in the years ahead. And it has the potential to unlock the power of the ESF as a spur in making that process real.

**Draft Article 3.** It is one thing to talk about social policy reform – it is quite another to take tentative steps in that direction. Article 3 creates the possibility of using the Fund to engage in social innovation. This is particularly important with respect to the shift from institutional to community living. It is suggested that useful language might be added to advert the attention of the national partners involved in crafting Partnership Contracts to the need for social innovation especially in this context.

**Draft Article 6.** This speaks of the need to involve the 'partners' referred to under Article 5 of the draft General regulation (which specifically includes civil society organisations) in the implementation of the relevant national programmes. This too opens up considerable scope for the involvement of disability NGOs where it counts most. It is suggested that specific reference be made in the draft language to the involvement of civil society groups representing persons with disabilities.

In sum, and with respect to the proposed ESF Regulation, the explicit mention of the UN CRPD in the preamble is to be greatly welcomed. The language used in connection with the reform of social policy and especially the need for the Fund to support social innovation is also to be greatly welcomed. Its specific relevance in the context of disability might be drawn out with the addition of appropriate language which could very directly link it to the transition to community living. The explicit mention of the need for a transition to community living is also greatly to be welcomed. The same holds for the process-based concern of involving persons with disabilities seems covered by Article 6 although it might be preferable to spell it out in some more detail.

### **(c) Draft European Regional Development Fund**

Likewise, there are many positive elements in the draft regulation on the European Regional development Fund.

**Draft Article 5(9)(a).** The draft Regulation on the European Regional Development lists as one of its 'investment priorities' the 'transition from institutional to community-based services.' Again, what is important here is the language of transition and a commitment to support that transition.

**Draft Article 5(9)(c).** This provision goes on to offer support from the funds for 'social enterprise.' This could prove very important in giving life to the transition toward community living. It is suggested that language clarifying this point could be added.

**Draft Article 7.** This offers support from the ERDF for sustainable urban development. It might have been useful to link this provision back to the explicit reference to accessibility which figured prominently in both the draft General Regulation as well as the draft regulation of the European Social Fund. Curiously, there is no reference to accessibility in the draft ERDF Regulation where one might most expect it.

There is also no reference in the draft ERDF Regulation on process or partnership. Presumably that is because it is covered already by Article 5 of the draft General Regulation.

### **3. Recommendations**

It is very gratifying to see the European Commission take the UN CRPD seriously.

Our recommendations build on our analysis of Article 19 of the UN CRPD as well as our understanding of the proposal of the European Commission thus far.

#### **Recommendation 1. The explicit reference to the UN CRPD in the Draft Regulations must remain**

Both the draft General Regulation and the draft ESF Regulation specifically cite the implementation of the UN convention as a key goal. At a minimum this has to remain in the draft Regulations. This is not due to the priority or superiority of disability rights over other sets of rights. It has to do with the fact that the UN CRPD deserves to be highlighted because of its status as the only human rights convention 'confirmed' thus far by the EU. Consistent with the draft General regulation and the draft ESF Regulation the UN CRPD should also be explicitly referenced in the draft ERDF Regulation.

#### **Recommendation 2. The explicit reference to the necessity for a transition to community living in all three draft Regulations must remain**

All three draft Regulations refer in their own way to the necessity for a transition away from institutions to independent living and being included in the community. Given that this is the single most important imperative under Article 19 of the UN CRPD and given that this is where the Funds can have the most traction in adding value to Member State action, it is recommended that this must remain in each draft Regulation.

It is clear that the framers see the Funds as playing a hugely important catalytic role in embedding this transition which, if anything, is probably more important in times of economic retrenchment than before.

#### **Recommendation 3. Expand the definition of discrimination to explicitly include institutionalisation**

Article 7 of the draft General Regulation (headline principle against discrimination) should be expanded to make it plain that institutionalisation amounts to *per se* discrimination. This is no more and no less than what the US Supreme Court has said and is in keeping with ECHR jurisprudence. To add this clarification gives a sound foundation to the general mandate to trigger the transition to community living.

#### **Recommendation 4. No new institutions should be built using Structural Funds.**

It logically follows that the Funds should never be used to fund the establishment of new institutions – or whatever size. The draft regulations should make this clear.

**Recommendation 5. No refurbishment of institutions using the Structural Funds should be allowed except in extreme cases**

A consideration of EU 'additionality' leads inexorably to the conclusion that the Funds should not be used to refurbish (much less enlarge) existing institutions. Member States are primarily responsible for human rights violations in institutions which for the most were built and run using State resources. An exception might be made in egregious cases of inhumane and degrading treatment and in circumstances where resources are genuinely unavailable at the domestic level. However, an extremely heavy onus should be put on such States to demonstrate their exigency and the overriding humanitarian consideration of treating all persons with respect. In no case should Funds be disbursed to refurbish institutions in the absence of a clear plan for a transition to community living, with clear timelines and milestones and with a clear statement of the resources to be used and/or transferred from institutions. This should be made plain in the draft regulations.

**Recommendation 6. Retain the reference to mechanisms for implementing /applying the UN CRPD**

The explicit linkage between the aims, methods, implementation, evaluation and monitoring of the UN CRPD must be retained. Both Member States and the EU are under a specific legal obligation under Article 4 of the UN CRPD to mainstream disability into all relevant policies and programmes.

**Recommendation 7. Ensure that each 'Operational Programme' clearly set out the steps to facilitate the transition to community living**

Article 87(3)ii of the draft General Regulation might be amended to make it clear that among the steps to be taken to end discrimination on the ground of disability are steps in the direction of the transition to community living. This does no more than build on the goal of transition which is already referenced in the three draft regulations.

**Recommendation 8. The transition to community care should be seen from a discrimination perspective and not just a poverty reduction perspective**

The *ex ante* conditionality under strategic priority 9 in the draft General Regulation – to the effect that national poverty reduction strategies should include measures for the 'shift from residential to community based care' – is not out of place particularly when one considers that social exclusion is itself one powerful aspect of poverty. However, this should be complemented by anchoring the idea of a transition more directly and explicitly into the general principle of equality and non-discrimination.

Transition models are already available – most recently exemplified in the Irish Health Services Executive report on 'Time to move on from Congregated settings: A strategy for community inclusion' (2011) and the Israeli Ministry of Social Services Report 'Integrated Community Living for People with Intellectual Disabilities' (2011).

**Recommendation 9. Expand the non-discrimination idea to look beyond mechanisms for implementing/applying the UN CRPD**

The *ex ante* conditionality under the draft General Regulation dealing with discrimination pegs the non-discrimination idea to the existence of a national mechanism to implement and monitor the UN convention. While this is appreciated and should remain, it must be pointed out that States parties to the UN convention are already under this obligation. It is recommended that this *ex ante* conditionality should first build on the assertion that institutionalisation amounts to discrimination.

**Recommendation 10. 'Partnership' bodies must include persons with disabilities and their representative organisations**

It should be made plain that the 'partnership' body (Article 5.(1)(c) of the draft General Regulation) which is said to include civil society and NGOs should particularly include disability NGOs. This can be justified both because Article 4.(3) of the UN CRPD requires it and also because this is a classic example of a highly disadvantaged minority who stand to have their exclusion compounded unless given participation rights where it matters most both in terms of programme design and monitoring. This draws out the logic already implicit in Article 5(1)(c) of the draft General Regulation especially when cast in the light of Article 4.(3) of the UN CRPD.

'Monitoring Bodies' are said to include the 'partners' which naturally includes civil society organisations (Articles 41-50). To put the matter beyond doubt it would be preferable to explicitly state that this will include persons with disabilities and their representative organisations.

**Recommendation 11. Make it plain that the evaluation criteria refer explicitly to satisfactory progress in the transition to community living and with the UN CRPD generally**

It should be made plain that the evaluation criteria (Article 48 in draft general Regulation) to be used in impact evaluation (*ex ante*, during and post programme) specifically include impact in terms of progress in achieving a transition to community living as well as progress in implementing the UN convention more generally.

**Recommendation 12. The European Commission should self-consciously use the annual reports on implementation of programmes and its annual review meeting with recipient Member States to reflect on progress toward a transition to community living and implementation of the Convention**

The Annual Reports and the annual review meeting between the European Commission and the recipient Member States should be viewed as an opportunity to reflect on progress in the transition to community living and implementation of the convention more generally.

**Recommendation 13. The reference to Social Innovation should specifically refer to the need for innovation with respect to the transition to community living**

The mention of social policy reform and social innovation in the draft ESF Regulation and social enterprise in the draft ERDF Regulation might be amended with suitable language to draw attention to the importance of innovation especially in the context of enabling transition to community living to occur. This would provide an even clearer bridge between the general goal of a transition and the more specific and appropriate uses of the Funds.

**Recommendation 14. Make it plain that 'transnational learning' in the ERDF draft regulation includes opportunities to share experience with respect to the transition to community living**

Article 20 of the draft ERDF Regulation points to the need for the Fund to support transnational learning. This might be amended to make it plain that such learning is particularly welcome to enable Member States to share experience, research and practices to help advance the transition toward community living.

**Recommendation 15. Ensure that the 'sustainable urban development' line of action in the draft ERDF Regulation specifically includes disability access in the broadest sense**

Enhancing disability accessibility (already mentioned in scattered places throughout the draft regulations) should feature prominently in efforts toward using the ERDF to stimulate the development of 'sustainable urban developments' (draft Article 7 ERDF). This is a unique opportunity to harness resources to achieve genuine accessibility. All programmes in this regard should demonstrate tangible movement toward inclusion and access.

**Recommendation 16. Explore ways to positively link the 'EU Programme for Social Change and Innovation' to the key strategic goal of transition to community living**

This programme aims in part to test innovative social policy solutions with a view to up-scaling them through the ESF. It is recommended that the Programme be specifically adapted and used to spur innovation with respect to the transition to community living. Every learning tool at the disposal of the Union should be used to facilitate the Member States in effectuating the transition.

# Annex I

## Glossary

### **The Academic Network of European Disability experts (ANED)**

The Academic Network of European Disability experts (ANED) was created by the European Commission in December 2007. ANED will establish and maintain a pan-European academic network in the disability field to support policy development in collaboration with the Commission's Disability Unit. Its philosophy and aims support the objectives of European disability policy towards the goal of full participation and equal opportunities for all disabled people.

ANED builds upon the expertise of existing disability research centres and national networks, supported by contacts in each country, expert rapporteurs in specific themes, and links to other policy and research networks. In this way, it provides a co-ordinating infrastructure of academic support for practical implementation of the European Disability Strategy and the United Nations Convention on the Rights of Persons with Disabilities in Europe.

The Network is managed by Human European Consultancy (NL) in partnership with the Centre for Disability Studies at the University of Leeds (UK).

### **Additionality**

Additionality is one of the principles driving the workings of the Structural Funds. This principle stipulates that contributions from the Structural Funds must not replace public or equivalent structural expenditure by a Member State in the regions concerned by this principle. In other words, the financial allocations from the Structural Funds may not result in a reduction of national structural expenditure in those regions.

### **Certifying Authority**

A certifying authority is responsible for guaranteeing the accuracy and probity of statements of expenditure and requests for payments before they are sent to the European Commission. Management of the European Regional Development Fund, European Social Fund and Cohesion Fund is shared with member countries, regions and other intermediary bodies. A certifying authority is nominated by one or more of the aforementioned groups for each Operational Programme co-financed by these Funds.

### **Cohesion Fund**

Since 1994, the Cohesion Fund has been used to provide support for the poorer regions of Europe and stabilise their economies with a view to promoting growth, employment and sustainable development. The Fund contributes to financing environmental measures and trans-European transport networks - particularly high-priority projects of European interest - in the 12 Member States that have joined the EU since 2004, as well as in Spain, Greece and Portugal. The Cohesion Fund may also be used to finance the priorities of the EU's environmental protection policy.

Member States with a Gross National Income (GNI) per inhabitant below 90% of the EU average are eligible for funding from the Cohesion Fund. The ceiling for the Cohesion Fund's contribution to public expenditure in the Member States is set at 85%. The budget for the Cohesion Fund is worth almost €70 billion for the period 2007-13.

### **Cohesion Policy**

Cohesion Policy is the European Union's strategy to promote and support the "overall harmonious development" of its Member States and regions.

Enshrined in the Treaty on the Functioning of the European Union (Art. 174), the EU's Cohesion Policy aims to strengthen economic and social cohesion by reducing disparities in the level of development between regions. The policy focuses on key areas which will help the EU face up to the challenges of the 21st century and remain globally competitive.

Approximately 35.7% of the EU budget 2007-13 (equivalent to ca. €347.41 billion over seven years at 2008 prices) is allocated to financial instruments which support Cohesion Policy. These are managed and delivered in partnership between the European Commission, the Member States and stakeholders at the local and regional level.

### **Common Strategic Framework**

The legislative proposals for the forthcoming programming period propose the transformation of the Community Strategic Guidelines into a Common Strategic Framework. This Framework will contain the EU's top priorities and applicable to all Funds.

### **Community Strategic Guidelines on Cohesion 2007-13**

These Guidelines are an important part of the new Cohesion Policy as they strengthen its strategic dimension. They were prepared by the European Commission and adopted by the Council of the European Union (i.e. all the Member States). The Guidelines define the programming priorities at the European level for a seven-year period. Each Member State then presents a 'National Strategic Reference Framework' in line with the Guidelines. The Guidelines contribute towards achieving results in other EU priorities, e.g. those stemming from the Lisbon Strategy and the Integrated Guidelines for growth and jobs. Examples of the areas covered are investment, jobs, knowledge and innovation.

### **Conditionality**

Member States will be required to fulfill a range of specific conditionalities.

'Ex ante' conditionalities, which are linked to management, control and administrative capacity, will be set before the funds are disbursed.

'Ex post' conditionalities, relating to the attainment of Europe 2020 objectives and measured by way of performance indicators, will make the release of additional funds subject to performance.

### **Council of Europe Commissioner for Human Rights**

The fundamental objectives of the Commissioner for Human Rights are laid out in Resolution (99) 50 on the Council of Europe Commissioner for Human Rights. According to this resolution, the Commissioner is mandated to:

- foster the effective observance of human rights, and assist member states in the implementation of Council of Europe human rights standards;
- promote education in and awareness of human rights in Council of Europe member states;
- identify possible shortcomings in the law and practice concerning human rights;
- facilitate the activities of national ombudsperson institutions and other human rights structures; and
- provide advice and information regarding the protection of human rights across the region.

The Commissioner's work focuses on encouraging reform measures to achieve tangible improvement in the area of human rights promotion and protection. Being a non-judicial institution, the Commissioner's Office cannot act upon individual complaints, but the Commissioner can draw conclusions and take wider initiatives on the basis of reliable information regarding human rights violations suffered by individuals.

### **Council of the European Union**

Also informally known as the EU Council, this is where national ministers from each EU country meet to adopt laws and coordinate policies.

### **The Court of Justice of the European Union**

The Court of Justice interprets EU law to make sure it is applied in the same way in all EU countries. It also settles legal disputes between EU governments and EU institutions. Individuals, companies or organisations can also bring cases before the Court if they feel their rights have been infringed by an EU institution.

The Court of Justice has one judge per EU country. The Court is helped by eight 'advocates-general' whose job is to present opinions on the cases brought before the Court. They must do so publicly and impartially. Each judge and advocate-general is appointed for a term of six years, which can be renewed. The governments of EU countries agree on whom they want to appoint.

To help the Court of Justice cope with the large number of cases brought before it, and to offer citizens better legal protection, a 'General Court' deals with cases brought forward by private individuals, companies and some organisations, and cases relating to competition law.

## **EU Charter of Fundamental Rights**

The European Union Charter of Fundamental Rights, was signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000.

The Charter is the end-result of a special procedure, which may be summarised as follows:

- the Cologne European Council (3-4 June 1999) entrusted the task of drafting the Charter to a Convention,
- the Convention held its constituent meeting in December 1999 (see annex for its composition) and adopted the draft on 2 October 2000,
- the Biarritz European Council (13-14 October 2000) unanimously approved the draft and forwarded it to the European Parliament and the Commission,
- the European Parliament gave its agreement on 14 November 2000 and the Commission on 6 December 2000,
- the Presidents of the European Parliament, the Council and the Commission signed and proclaimed the Charter on behalf of their institutions on 7 December 2000 in Nice.

In December 2009, with the entry into force of the Lisbon Treaty, the charter was given binding legal effect equal to the Treaties. To this end, the charter was amended and proclaimed a second time in December 2007.

The European Union Charter of Fundamental Rights sets out in a single text, for the first time in the European Union's history, the whole range of civil, political, economic and social rights of European citizens and all persons resident in the EU.

They are based, in particular, on the fundamental rights and freedoms recognised by the European Convention on Human Rights, the constitutional traditions of the EU Member States, the Council of Europe's Social Charter, the Community Charter of Fundamental Social Rights of Workers and other international conventions to which the European Union or its Member States are parties.

## **European Commission**

The European Commission is one of the main institutions of the European Union. It represents and upholds the interests of the EU as a whole. It drafts proposals for new European laws. It manages the day-to-day business of implementing EU policies and spending EU funds.

The 27 Commissioners, one from each EU country, provide the Commission's political leadership during their 5-year term. Each Commissioner is assigned responsibility for specific policy areas by the President. The current President of the European Commission is José Manuel Barroso who began his second term of office in February 2010.

The President is nominated by the European Council. The Council also appoints the other Commissioners in agreement with the nominated President. The appointment of all Commissioners, including the President, is subject to the approval of the European Parliament. In office, they remain accountable to Parliament, which has sole power to dismiss the Commission.

The day-to-day running of the Commission is taken care of by the Commission's staff – administrators, lawyers, economists, translators, interpreters, secretarial staff, etc. organised in departments known as Directorates-General (DGs).

The Commission represents and upholds the interests of the EU as a whole. It oversees and implements EU policies by:

- proposing new laws to Parliament and the Council
- managing the EU's budget and allocating funding
- enforcing EU law (together with the Court of Justice)
- representing the EU internationally, for example, by negotiating agreements between the EU and other countries.

## **European Committee of Social Rights**

The mission of the European Committee of Social Rights (ECSR) is to judge that States party are in conformity in law and in practice with the provisions of the European Social Charter.

In respect of national reports, the Committee adopts conclusions, in respect of collective complaints, it adopts decisions.

The Committee is composed of 151 independent, impartial experts, elected by the Committee of Ministers<sup>2</sup> for a 6-year term of office, renewable once. It elects the members of its Bureau, composed of the President, one or more Vice-Presidents and a General Rapporteur, to serve for a two-year period, renewable.

### **European Council**

The European Council defines the general political direction and priorities of the European Union. With the entry into force of the Treaty of Lisbon on 1 December 2009, it became an institution. Its President is Herman Van Rompuy. The European Council provides the Union with the necessary impetus for its development and defines the general political directions and priorities thereof. It does not exercise legislative functions. It consists of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy takes part in its work. When the agenda so requires, the members of the European Council may decide each to be assisted by a minister and, in the case of the President of the Commission, by a member of the Commission.

### **European Parliament**

The European Parliament (EP) is, along with the Council of the EU, the European Commission and the European Court of Justice, one of the key institutions of the European Union (EU). Directly elected every 5 years throughout the 27 Member States of the EU, it is a multinational, multilingual parliament of 736 members and 23 languages.

The EP shares European legislative powers with the Council of the EU, and examines, modifies and occasionally rejects legislative proposals from the European Commission. In some fields its role is still consultative, but in many others, in areas as important as the environment, transport, social policy and food safety, it has full powers of co-decision.

The EP shares budgetary powers with the Council of the EU. It has a particularly powerful role in adopting the annual EU budget, and helping to distribute financial resources between different Community programmes. It has an important say on the shape of longer-term EU expenditure, and on the financial resources available for these purposes.

### **European Regional Development Fund (ERDF)**

The ERDF was set up in 1975 and provides financial support for the development and structural adjustment of regional economies, economic change, enhanced competitiveness as well as territorial cooperation throughout the EU. Along with the European Social Fund (ESF), the ERDF is one of the two Structural Funds of the EU.

For the 2007-13 period, the budget for the ERDF amounts to more than €200 billion. The Fund focuses on a number of priorities within the scope of the Convergence, Regional Competitiveness and Employment and European Territorial Cooperation objectives. In particular, it contributes towards co-financing investment projects in the areas of creating sustainable jobs, infrastructure, support for regional and local development, and SMEs.

### **European Social Fund (ESF)**

Established in 1958, the ESF is one of the EU's main financial instruments for supporting national policies that seek to increase employment and employment opportunities, improve quality and productivity at work, and reduce social exclusion and regional employment disparities.

For the 2007-13 period, key areas of action for the ESF include the adaptability of workers and enterprises, access to employment and participation in the labour market, social inclusion of disadvantaged people, combating all forms of discrimination, and creating partnerships to manage reforms in employment. Over the same period, the budget for the ESF will be worth some €75 billion.

ESF funding is distributed under two EU Regional Policy objectives for 2007-13: 'Convergence' and 'Regional Competitiveness and Employment'.

## **Europe 2020**

Europe 2020 is the EU's growth strategy for the period 2010-2020. It has the objective of making the EU a smart, sustainable and inclusive economy. These three mutually reinforcing priorities are intended help the EU and the Member States deliver high levels of employment, productivity and social cohesion.

The Union has set five objectives - on employment, innovation, education, social inclusion and climate/energy - to be reached by 2020. Each Member State has adopted its own national targets in each of these areas. Concrete actions at EU and national levels underpin the strategy.

## **Instrument for Pre-Accession Assistance (IPA)**

The Instrument for Pre-Accession Assistance (IPA) has been established by the EU to support candidate countries and potential candidate countries.

The IPA covers the period 2007-13 and replaces a number of older EU pre-accession programmes like PHARE, ISPA, SAPARD and CARDS as well as a financial instrument for Turkey.

More than €11 billion is available through the IPA, which will be spent via the following five strands:

- transition assistance and institution building
- cross-border cooperation
- regional development
- human resources development
- rural development

Candidate countries (Croatia, Turkey, Former Yugoslav Republic of Macedonia) can apply for assistance under all five strands; potential candidates (Albania, Bosnia-Herzegovina, Montenegro, Serbia, Kosovo under UN Security Council Resolution 1244) are limited to the first two.

IPA support is provided through multi-annual programmes. This arrangement will prepare candidate countries to manage the European funds they will receive after obtaining EU membership, including those that fall under Regional Policy for 2007-13.

## **Lisbon Strategy**

Set out by the Heads of State and of Government at the Lisbon European Council in March 2000, the Lisbon Strategy is an action and development plan for jobs and economic growth in the EU. Policy measures proposed under the Lisbon Strategy cover a wide range of national and EU policies, aiming to support knowledge and innovation, make Europe a more attractive place to invest and work, and create more and better jobs.

The Lisbon Strategy was relaunched after a mid-term review in 2005. Based on a close partnership with the Commission, the Member States have been undertaking reforms that are based on collectively agreed policy guidelines as well as National Reform Programmes.

For the programming period 2007-13 the link between the Lisbon Strategy and Cohesion Policy has been reinforced, with increased spending under the Structural and Cohesion Funds on priority activities that contribute to the achievement of the objectives of the Lisbon Strategy for growth and jobs.

## **Managing authority**

Under the auspices of the EU's Cohesion Policy for 2007-13, a managing authority is responsible for the efficient management and implementation of an Operational Programme.

A managing authority may be a national ministry, a regional authority, a local council, or another public or private body that has been nominated and approved by a Member State. Managing authorities are expected to conduct their work in line with the principles of sound financial management.

For each Operational Programme, a managing authority must provide the Commission with an annual implementation report by 30 June each year. They must send a final report by 31 March 2017.

Other key tasks for a managing authority include:

- ensuring that activities selected for funding match the operational programme's criteria
- checking that co-financed products and services are delivered efficiently according to EU and national rules
- recording and storing accounts, and ensuring that a rigorous audit trail exists

- ensuring that an Operational Programme's performance is properly evaluated

### **Mental Disability Advocacy Centre**

The Mental Disability Advocacy Center (MDAC) is an international human rights organisation which advances the rights of children and adults with intellectual disabilities and psycho-social disabilities. MDAC uses law to promote equality and social inclusion through strategic litigation, advocacy, research and monitoring and capacity-building. MDAC operates at the global level as well as regional and domestic levels in Europe and Africa.

MDAC is headquartered in Budapest, Hungary and was registered as a foundation by the Budapest Capital Court (registration number 8689) in November 2002. The Open Society Foundations (OSF) founded MDAC and continues to be one of its donors. MDAC has participatory status with the Council of Europe. In 2011 MDAC was granted a special consultative status with the United Nations Economic and Social Council.

### **Monitoring Committee**

Member States are required to appoint monitoring committees to check that Operational Programmes (OPs) which use Structural and Cohesion funding are being correctly implemented. These committees are chaired by the relevant Member State (or managing authority) and comprise regional, economic and social partners.

A monitoring committee's key tasks include:

- assessing the effectiveness and quality of OPs
- approving criteria for financing under each OP
- making periodical reviews of OPs and their progress towards specific targets
- examining the results of implementation to assess whether those targets have been met
- where necessary, proposing revisions to OPs, including changes related to their financial management

### **National Strategic Reference Framework (NSRF)**

For the programming period 2007-13 each Member State has produced a National Strategic Reference Framework (NSRF). This is a reference document for programming Structural Funds and Cohesion Fund interventions in a manner consistent with the Strategic Guidelines on Cohesion 2007-13. It defines the strategy chosen by the relevant Member State and presents a list of national and regional Operational Programmes (OPs) which it is seeking to implement, as well as an indicative annual financial allocation for each OP. The NSRF should also be consistent with the Member State's National Reform Programme (NRP) relating to the Lisbon Strategy for growth and jobs.

### **NUTS (Nomenclature of territorial units for statistics)**

At the beginning of the 1970s, Eurostat set up the NUTS classification as a single, coherent system for dividing up the EU's territory in order to produce regional statistics for the Community. For around thirty years, implementation and updating of the NUTS classification was managed under a series of "gentlemen's agreements" between the Member States and Eurostat.

Work on the Commission Regulation (EC) No 1059/2003, to give NUTS a legal status started in spring 2000. This was adopted in May 2003 and entered into force in July 2003.

The regulation also specifies stability of the classification for at least three years. Stability makes sure that data refers to the same regional unit for a certain period of time. This is crucial for statistics, in particular for time-series.

However, sometimes national interests require changing the regional breakdown of a country. When this happens the county concerned informs the European Commission about the changes. The Commission in turn amends the classification at the end of period of stability according the rules of the NUTS Regulation.

A first regular amendment, Commission Regulation (EC) No 105/2007, was the replacement of the NUTS version 2003 by the version 2006 on 1 January 2008. This was preceded by completions of the NUTS classification with the regional breakdowns of the countries that have joined the EU in 2004 and 2008: Commission Regulation (EC) No 1888/2005 and Commission Regulation (EC) No 176/2008.

The second regular amendment, Commission Regulation (EU) No 31/2011, has been adopted by the Commission and will be applicable from 1 January 2012.

### **Operational Programme**

Member States submit their Operational Programmes within the common framework of the Strategic Guidelines on Cohesion Policy and on the basis of the National Strategic Reference Framework (NSRF). Each Operational Programme relates to one of the three new objectives and sets out a development strategy with a coherent set of priorities to be carried out with the aid of a single fund or, in the case of the Convergence objective, with the aid of the Cohesion Fund and the European Regional Development Fund.

### **Partnership Contracts**

The legislative proposals for the forthcoming programming period introduce the concept of partnership contracts between the Commission and Member States in which their development needs are assessed and conditions relating, in particular, to the attainment of the Europe 2020 objectives are defined. The disbursement of funds will then be subject to the fulfillment of these ex-ante, ex-post and macro-economic conditions.

Partnership Contracts have been introduced in order to make use of funding received by Member States, through conditionality determined in accordance with the priority thematic area of the programme to be financed.

### **Performance Reserve**

The release of 5% of the funds placed in reserve will be subject to meeting the targets set out as part of the ex-ante conditionality.

### **Structural Funds**

The Structural Funds have two components: the European Regional Development Fund (ERDF), providing financial support since 1975 for the development and structural adjustment of regional economies, economic change, enhanced competitiveness as well as territorial cooperation throughout the EU; and the European Social Fund (ESF), set up in 1958 and seeking to contribute to the adaptability of workers and enterprises, access to employment and participation in the labour market, social inclusion of disadvantaged people, combating all forms of discrimination, and creating partnerships to manage reforms in employment.

### **UN Committee on Economic, Social and Cultural Rights**

The Committee on Economic, Social and Cultural Rights (CESCR) is the body of independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties. The Committee was established under ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant.

All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially within two years of accepting the Covenant and thereafter every five years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations".

With regard to individual complaints, on 10 December 2008, the General Assembly unanimously adopted an Optional Protocol (GA resolution A/RES/63/117) to the International Covenant on Economic, Social and Cultural Rights which provides the Committee competence to receive and consider communications. The General Assembly took note of the adoption by the Human Rights Council by its resolution 8/2 of 18 June 2008, of the Optional Protocol. The Optional Protocol was opened for signature at a signing ceremony in 2009. In addition to the Committee on Economic, Social and Cultural rights, other committees with competence can consider individual communications involving issues related to economic, social and cultural rights in the context of its treaty.

The Committee meets in Geneva and normally holds two sessions per year, consisting of a three-week plenary and a one-week pre-session working group.

The Committee also publishes its interpretation of the provisions of the Covenant, known as general comments.

### **UN Convention on the Rights of Persons with Disabilities**

The Convention on the Rights of Persons with Disabilities and its Optional Protocol was adopted on 13 December 2006 at the United Nations Headquarters in New York, and was opened for signature on 30 March 2007. It is the first comprehensive human rights treaty of the 21st century and is the first human rights

convention to be open for signature by regional integration organizations. The Convention entered into force on 3 May 2008.

The Convention is intended as a human rights instrument with an explicit, social development dimension. It adopts a broad categorization of persons with disabilities and reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms. It clarifies and qualifies how all categories of rights apply to persons with disabilities and identifies areas where adaptations have to be made for persons with disabilities to effectively exercise their rights and areas where their rights have been violated, and where protection of rights must be reinforced.

The Convention was negotiated during eight sessions of an Ad Hoc Committee of the General Assembly from 2002 to 2006, making it the fastest negotiated human rights treaty.