

The European Union and the Right to Community Living



**Structural Funds and the European Union's
Obligations under the Convention on the
Rights of Persons with Disabilities**



**OPEN SOCIETY
FOUNDATIONS**

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*Structural Funds and the
European Union's Obligations under the
Convention on the Rights of Persons
with Disabilities*

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**Mental Health Initiative
Open Society Public Health Program**



This report was written by Camilla Parker and Luke Clements

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The European Union and its Member States have an obligation to ensure that European taxpayer money in the form of Structural Funds is invested in a manner that respects human rights and fundamental freedoms. These are among the basic values upon which the EU was founded.

At the Open Society Mental Health Initiative (MHI), we have worked for the past 17 years to develop community-based alternatives to institutions for people with mental disabilities across Central and Eastern Europe and the former Soviet Union. During this time, we have seen that in some EU Member States, European Structural Funds are being invested in ways that perpetuate the unjustifiable institutionalization of people with disabilities.¹

This is particularly disturbing considering that the EU has ratified the United Nations Convention on the Rights of People with Disabilities (CRPD). The CRPD is legally binding on States Parties and applies civil, cultural, economic, political, and social rights to people with disabilities. In particular, Article 19 of the CRPD affirms the right of all people with disabilities to live in the community.

In disbursing Structural Funds, the EU is a donor and thus has a responsibility to prohibit investment in projects that violate its values, not to mention its laws. Member States are re-granters of those funds, and they must also be held accountable for investments in their countries.

As this report illustrates, some Member States are acting contrary to EU law by using European money to renovate existing institutions and build new ones. Investment in institutions for people with disabilities contravenes the CRPD and violates the fundamental human rights of people with disabilities.

We sought the opinion of Queen's Counsel Richard Gordon to ensure a solid legal basis for this argument. Counsel's opinion, in conjunction with MHI's detailed analysis, forms the substance of this report.

It is hard to understand why, in 2012, there is still a debate about whether institutions are good or bad for people with disabilities. Why is it so easy to ignore and dismiss the experiences of the thousands of people who are still locked away in these institutions? Why are people with disabilities invisible to so many governments?

1. MHI's *Community for All* guide and checklist offer a detailed look at the rights identified in the CRPD, focusing on Article 19. The guide and checklist are intended to help advocates and program implementers identify the obligations on States to realize these rights. The guide and checklist are available at: http://www.soros.org/initiatives/health/focus/mhi/articles_publications/publications/community-for-all-2011202.

My firsthand experience in MHI is that people in institutions are dehumanized. This is devastating for any person. But the problem goes much deeper than that. Most of us have the freedom to come and go as we please. In institutions, residents who are considered *difficult* are tied up. Others are sent to solitary confinement, sometimes for days on end. The desperation and hopelessness faced by these men, women, and children are absolutely mind numbing.

The CRPD recognizes that it is society that disables people by designing everything, in the broadest sense, to meet the needs of the majority who are not disabled. It acknowledges that society can do a great deal to reduce, and ultimately remove, most if not all disabling barriers, and that doing so is society's responsibility rather than that of the person with a disability. While people have physical, sensory, intellectual, or psychological differences that may cause functional limitations, these need not lead to disability unless society fails to account for them and does not find ways to include all people, regardless of their individual differences.

The time is now for the European Commission and its Member States to take responsibility for ensuring that Structural Funds investments are no longer made to perpetuate the social exclusion of any European citizen.

Judith Klein
Director, Open Society Mental Health Initiative
Budapest, Hungary

Introduction

This report was written on behalf of the Open Society Mental Health Initiative (MHI) to consider the role of European Union (EU) funds, known as “Structural Funds,” in promoting the right of people with disabilities to live and participate in the community as equal citizens. It focuses on whether the use of Structural Funds by some EU Member States in Central and Eastern Europe (CEE) to build new, or renovate existing, long-stay institutions for people with disabilities, rather than develop alternative services that promote community living, is contrary to EU law. Now is the time to consider this question because the regulations governing Structural Funds are being reviewed for the elaboration of the new Cohesion Policy for 2014–2020.

The question of whether investing Structural Funds in institutions is contrary to EU law is of particular significance given the obligations set out in the United Nations Convention on the Rights of Persons with Disabilities (CRPD) which has been signed by all EU Member States and ratified by the majority of them.² The CRPD was also ratified by the EU in December 2010. By ratifying the CRPD, States Parties have committed to ensuring that all people with disabilities can live and receive the support they need to participate in society as equal citizens. This is made explicit in CRPD Article 19 (*Living independently and being included in the community*), which provides that people with disabilities have the right to live in the community, with the same choices as others and requires States Parties to take appropriate measures to facilitate their “full inclusion and participation in the community.”

Given the complexity of the issues involved, MHI sought the opinion of Richard Gordon QC (referred to in this report as “Counsel”), an expert in EU law and human rights and civil liberties.³ Counsel’s specific comments are set out in *italics and in bold* in the text.

Moving from Institutionalization to Community Living: The Role of Structural Funds

Despite the widespread acknowledgement that the institutionalization of people with disabilities is a serious human rights violation and is an outmoded and an unacceptable form of “care” in the 21st Century, the inappropriate and unjustified institutionalization of people with disabilities remains

2. Twenty out of the 27 Member States as of 23rd April 2012.

3. For further information see: www.brickcourt.co.uk/silks/richard-gordon-qc.asp.

prevalent across CEE.⁴ A primary reason for this is the severe lack of support in local communities that would enable them to live in their own homes.

The imperative for action to put an end to the institutionalization of people with disabilities, by shifting the provision of care from institutions to community-based services (“deinstitutionalization”), has been highlighted both at international and European levels. For example, the EU’s *European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe*⁵ states that the European Commission will promote the transition from institutional to community-based care by using Structural Funds to support the development of community-based services and raising awareness of the situation of people with disabilities living in residential institutions.

Fundamental legal and policy reform is required to enable people with disabilities to live and participate in the community. Structural Funds have the potential to be the catalyst for this change by providing the funding and technical support to assist Governments in planning and implementing deinstitutionalization strategies and in developing community-based alternatives.

However, the opportunity presented by Structural Funds to facilitate change in CEE is being squandered. Such concerns were highlighted in a report published by the European Coalition for Community Living (ECCL) in 2010, *Wasted Time, Wasted Money, Wasted Lives—A Wasted Opportunity?*⁶ It identified a range of problems, such as the inadequate monitoring and evaluation system for Structural Funds investments; lack of clarity on the scope and purpose of what is being financed; and Structural Funds being invested in renovating or expanding existing residential institutions or in building new institutions. The report also raised concerns about the lack of clarity on the meaning of certain provisions of the regulations governing Structural Funds, specifically whether the regulations governing the European Regional Development Fund (ERDF)⁷ permits the purchase of buildings. This is important because the provision of homes for people with disabilities is a vital element in the development of community-based alternatives to institutional care.

The Convention on the Rights of Persons with Disabilities and Community Living

The CRPD sets out a wide range of rights that address all aspects of life, such as respect for home and the family, education, employment, health, participation in political and public life, participation in cultural life, recreation, leisure and sport, the right to life, freedom from torture or cruel, inhuman or degrading treatment or punishment, and the right to equal protection and equal benefit of the law.

4. See Mansell, J., Knapp, M., Beadle-Brown, J. and Beecham, J. (2007) *Deinstitutionalisation and community living—outcomes and costs: report of a European Study*. Volume 2: Main Report. Canterbury: Tizard Centre, University of Kent, pp. 25–26 and Table 5, p. 26.

5. http://ec.europa.eu/news/justice/101115_en.htm.

6. <http://community-living.info/documents/ECCL-StructuralFundsReport-final-WEB.pdf>.

7. Regulation (EC) No. 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Development Fund and repealing Regulation (EC) No. 1783/1999—see Article 7.

CRPD Article 19 provides for “the equal right of all persons with disabilities to live in the community, with choices equal to others.” In meeting their obligations under Article 19, States Parties must ensure that people with disabilities have access to a range of community support services. Although it may take time for some States Parties to meet this requirement, particularly in those countries that have few or no community-based services and limited resources, this does not justify inaction. Governments must take measures with a view “to achieving progressively the full realization of these rights” (CRPD Article 4(2)). While Article 19 makes no specific reference to closing institutions, its provisions make clear that their closure is required. For example, the requirement that States Parties ensure that persons with disabilities have access to community services that support their social inclusion and “prevent isolation or segregation from the community” cannot happen if people with disabilities continue to be placed in institutions.

Thus in relation to Article 19, States Parties must demonstrate that they are taking concrete and targeted steps towards realizing the right to community living. The details of what action will be required to be taken will vary depending on the country context. However, it is argued⁸ that the “progressive realization” obligation under Article 4(2) requires all States Parties, including the European Commission, to elaborate a “community living” plan. This must include a strategy and action plan for the closure of long-stay institutions and set out how the comprehensive review of law, policy and practice in relation to matters covered by Article 19 will be conducted (see Article 4(1)).

The Legal Framework for Structural Funds Investments and the Implications of the CRPD

Because the EU ratified CRPD, it is binding on the European Commission as well as on the Member States. Both are under an EU legal obligation to implement the CRPD insofar as its provisions are within the scope of EU competence. The CRPD has strong and clear relevance to the investment of Structural Funds. Counsel advises:

This means, amongst other things, that regulations governing the use of structural funds must (to be lawful) be interpreted consistently with the requirements of the CRPD.

Structural Funds, Institutionalization, and EU Obligations to Combat Discrimination and Social Exclusion

For the reasons set out below, it is argued that the inappropriate institutionalization of people with disabilities constitutes unlawful discrimination for the purposes of EU law.

8. Adopting the approach taken in *Promotion and protection of all human Rights, civil, political, economic, social and cultural rights—Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Paul Hunt A/HRC/7/11, 31 January 2008 which considers the obligations flowing from the right to health under Article 12 of the International Covenant on Economic, Social and Cultural Rights.

- **Overview—duty to protect from discrimination and social exclusion:**
 - **Equality and non-discrimination:** These principles are reflected in the regulations governing Structural Funds, which make clear that in determining the scope and purpose of programs to be financed, the European Commission and Member States must take into account their obligations to “combat discrimination”⁹ and “social exclusion.”¹⁰
 - **Effect of the EU’s ratification of the CRPD:** With the adoption of the CRPD, developments in EU law and jurisprudence emanating from the European Court of Human Rights,¹¹ there is now a requirement to provide a high measure of protection of people with disabilities from discrimination.

- **Indirect disability discrimination:**
 - Structural Funds investments in institutions constitutes indirect disability discrimination on the basis that there is no objective (for example economic or social) justification for the disproportionate numbers of people with disabilities living in institutions compared to non-disabled people.
 - While a State might be able to point to historic reasons for this, such an excuse will be difficult to sustain where additional external funding (such as Structural Funds) is being invested in perpetuating institutions rather than in developing community-based services.

- **Denial of reasonable accommodation:**
 - Investing Structural Funds in institutions rather than developing community-based alternatives amounts to a denial of reasonable accommodation. This is because, in light of its duty under the CRPD to promote equality and eliminate discrimination (see Article 5(3) and the definition of disability discrimination that includes the denial of reasonable accommodation), a Member State is required to provide clear reasons why it invested in maintaining institutions.

Taking these points into account, Counsel considers that the use of Structural Funds to perpetuate institutionalization is contrary to EU law. Counsel advises that the use of structural funds that *have the effect of perpetuating the institutional conditions in the CEE is manifestly unlawful and in breach of the high measure of protection against discrimination that EU law now accords to persons with disability.*¹²

Specifically, this is because continued investment in *institutionalization is a misuse of the entire purpose of Structural Funds and contrary to the underlying purpose of the CRPD and, in particular, to the terms of CRPD Articles 5 and 19.* Furthermore, the consequences of institutionalization, such as the *erosion of autonomy and independence, undermining of inclusion within the rest of society, and damage to healthy development* are

9. See Article 16 General regulations (Equality between men and women and non-discrimination).

10. See Article 3 of the General Regulations.

11. See, for example, *Alajos Kiss v. Hungary* Application No. 38832/06, 20 May 2010.

12. The question of whether taking action to temporarily ameliorate conditions within an institution are nonetheless in breach of EU (and ECHR) law needs to be considered separately.

clearly in breach of Article 8 of the ECHR, as well as Article 14 taken in conjunction with Article 8. Counsel considers that the Court of Justice of the European Union would be highly likely to find discrimination contrary to the CRPD.

Protecting the Rights of Persons with Disabilities and Promoting Community Living: The Role of the EU

The European Commission and Member States are subject to a range of obligations regarding Structural Funds investments. These are summarized below.

European Commission's Obligations

- **General Obligations:** the European Commission must act in a manner that ensures that the rights of persons with disabilities are respected, protected and fulfilled.
- **Monitoring obligations under the CRPD:** the European Commission must monitor Member States' operational plans and ensure that investments are not used for the purposes of (or with the effect of) institutionalizing people with disabilities. Where funds are misused and institutionalization is perpetuated, the European Commission should take infringement action against Member States if it is unable to prevent the continued institutionalization of people with disabilities.
- **Protection from disability discrimination under CRPD:** if the use of Structural Funds amounts to disability discrimination within the meaning of CRPD, then the European Commission could be liable to legal challenge for:
 - (i) approving without proper evaluation and/or monitoring operational plans which might be, or were being, used to effect discrimination against people with disabilities,
 - (ii) failing to take infringement actions against Member States that are contravening the CRPD.
- **Review of law, policies and practices:** having ratified the CRPD, the European Commission has the same obligations as Member States to undertake a review of its law, policies and practices to identify (and address) areas of non-compliance, as required by CRPD Article 4(1).

Member States' Obligations

- **Progressive realization:** Although Article 19 makes no specific reference to closing institutions, it is implicit that their closure, together with the development of community-based alternatives, is necessary for CRPD compliance. For example, the community-based services to be provided under Article 19(b) must “prevent isolation or segregation from the community” and the opportunity to choose where and with whom to live. Given that Structural Funds provide States with additional resources, there is limited scope for investing these funds in any way that would conflict with the Article 19 obligation to develop community-based alternatives to institutionalization.

- **Promoting equality and non-discrimination:** States Parties must comply with their obligations to promote equality and prevent disability discrimination, CRPD Article 5, and should invest Structural Funds to meet their obligations under CRPD Article 19.
- **Possible approach of the Court of Justice of the European Union:** Investments of Structural Funds in institutions instead of developing community-based alternatives appears to contravene the concept of progressive realisation. Counsel comments:

*Whilst the courts will be wary of making firm declarations on the use of public funds it is likely that they will be less circumspect in demanding that the process by which such awards are made is based on rational and legal criteria and pays due regard to any positive obligations on the grant maker or grant recipient. Such a contention gains support from the judgments by the US Supreme Court in *Olmstead*¹³...and South African Constitutional Court in *Grootboom*.¹⁴ On the basis of such judgments there would appear to be strong grounds for believing that the CJEU too would be prepared to scrutinize the process by which Structural Funds are allocated (including, for example, the restrictions that should be imposed on their use by Member States).*

Conclusions and Recommendations

The relevant principles and conclusions on the key legal issues, as confirmed by Counsel, are set out below. In light of these conclusions, recommendations are made on how the proposed regulations governing Structural Funds during the next financing period should be amended to ensure compliance with the CRPD.

General Legal Principles

- The rules relating to the availability, provision and monitoring of the use of Structural Funds fall within the area of EU competence.
- The CRPD is applicable to the use of Structural Funds given the connection between Structural Funds and both the power of the EU to take action to combat discrimination and to promote economic and social cohesion.
- Structural Funds investments in institutions is prima facie contrary to EU law on the basis that it:
 - (a) constitutes a breach of the EU's international legal obligations (in particular the CRPD and the ECHR); and
 - (b) amounts to indirect disability discrimination.

13. US Supreme Court (98–536) 527 US 581 (1999).

14. Constitutional Court of South Africa in *Government of South Africa v. Grootboom* (2000) (11) BCLR 1169 (CC).

While in very limited circumstances Structural Funds might be invested to ameliorate poor living conditions in institutions, these are restricted to cases in which:

- (a) There is a clearly identified and compelling case to take limited action (for example to prevent an urgent and life threatening risk to residents); and
- (b) Their use forms part of a wider strategic program to develop community living.

Structural Funds cannot be invested in institutions in the absence of a community living plan where the funds are solely being invested in improving conditions in institutions.

European Commission Obligations

- **General**
 - EU funds should not be invested in a manner that undermines the rights set out in the CRPD.
 - EU funds should not be invested in a manner that conflicts with its obligations under CRPD Article 9 (Accessibility).
- **Specific**
 - The European Commission has a duty to regulate the allocation and to monitor the use of Structural Funds in accordance with its legal obligations to combat discrimination and social exclusion; and in particular a legal duty to ensure that Structural Funds are not invested in a manner that leads (or could lead) to discrimination against people with disabilities.
 - Where there is potential for Structural Funds to be invested in ways that may impact the care facilities and services available to people with disabilities, then there is a duty on the European Commission to ensure that (absent clear, explicit and compelling reasons) Structural Funds are only invested in initiatives that support the development of community-based alternatives to institutionalization.
 - In relation to the Operational Programmes that outline how Member States will use the Structural Funds, the European Commission has a duty to ensure that Member States provide explicit information as to how Structural Funds investments may impact the care facilities and services available to people with disabilities, and when possible, to:
 - (a) state precisely how these funds will be used; and
 - (b) provide either a categorical assurance that they will not be used to maintain or extend the system of institutional care or alternatively, if they are to be used for the purpose of ameliorating life threatening living conditions in institutions, to provide clear and compelling reasons as to why this is needed and a precise account as to how this forms part of a wider concrete strategy to develop community living programs.

- **Member State obligations**
 - Member States must invest Structural Funds in accordance with their obligations to combat discrimination and social exclusion.
 - The use by a Member State of EU Structural Funds to invest in institutions rather than develop community-based alternatives would (prima facie):
 - (a) amount to a breach of its “reasonable accommodation” obligations to people with disabilities, as required by (amongst others) CRPD Article 5(3); and
 - (b) constitute indirect discrimination against people with disabilities.
 - Member States are obliged to:
 - (a) monitor their use of Structural Funds to ensure that they are not invested in a manner that contravenes their obligations to combat discrimination and social exclusion; and
 - (b) publish a detailed record of the evidence that establishes this monitoring has occurred, as well as the results of this monitoring.

The Structural Funds Regulations: Recommendations

This report considers the general legal principles and legal obligations of the European Commission and Member States that are relevant to Structural Funds investments in services for people with disabilities. The new regulations governing the use of Structural Funds for 2014–2020 must reflect these legal principles and obligations. They must make clear that Structural Funds can only be used to support the development of community-based alternatives to institutionalization, thereby promoting the rights of people with disabilities to community living. In particular, this report recommends:

- The Structural Funds Regulations should be interpreted in the light of the CRPD.
 - In light of the EU’s accession to the CRPD, the regulations governing the use of Structural Funds require explicit amendment to prohibit investments in the maintenance or extension of institutional care. This could be achieved by requiring from Member States:
 - An explanation of how Structural Funds will be used to prevent discrimination [(Article 48(3)(l) of the proposed new general regulations concerning the areas covered by the *ex ante conditionalities*¹⁵ is relevant because it requires that an evaluation cover the adequacy of planned measures to promote equal opportunities between men and women and to prevent discrimination.];

15. See Annex IV of the proposed general regulations Proposal for a Regulation of the European Parliament 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{SEC(2011) 1141 final} {SEC(2011) 1142 final}.

- A description of the range of community-based services that will be developed and how people with disabilities and civil society were involved in developing these;
 - An explanation as to how any residential services that will be provided or sustained as a result of the use of Structural Funds will comply with Article 19 (for example, ensuring that all individuals have choice of where to live; that they are not obliged to live in particular living arrangements; and that they have access to other community-based supports as well as to other mainstream services).
- The Commission should devise new regulations for Structural Funds that permit investments in existing housing to be purchased as homes for persons with disabilities.

Introduction

Scope and Purpose of this Report

This report was written on behalf of the Open Society Mental Health Initiative (MHI) to consider the role of European Union (EU) funds, known as ‘Structural Funds’ in promoting the right of people with disabilities to live and participate in the community as equal citizens. It focuses on whether the use of Structural Funds by some EU Member States in Central and Eastern Europe (CEE) to build new, or renovate existing, long-stay institutions for people with disabilities, rather than develop alternative services that promote community living, is contrary to EU law.

The question of whether this practice is contrary to EU law is of particular significance given the obligations set out in the United Nations Convention on the Rights of Persons with Disabilities (CRPD) which has not only been ratified by many EU Member States,¹⁶ but also by the EU, a supranational body, in December 2010.¹⁷ By ratifying the CRPD, States Parties have made a commitment to ensuring that all people with disabilities can live and receive the support they need to participate in society as equal citizens. This is made explicit in Article 19 (*Living independently and being included in the community*), providing that people with disabilities have the right to live in the community, with the same choices as others. Article 19 emphasizes the importance of providing support that enables people with disabilities to engage in community life, requiring States Parties to take appropriate measures to facilitate their ‘full inclusion and participation in the community.’

It is a crucial time to consider this question. This is because the regulations governing the Structural Funds are being reviewed as part of the preparations for the new Cohesion Policy and financing period (2014–2020). Accordingly, this report seeks to contribute to the review by making recommendations on what areas the regulations must cover in order to adequately reflect the requirements of the CRPD.

16. Twenty out of the 27 Member States as of 23rd April 2012.

17. Council Decision 2010/48 EC on 26 November 2009 permitted the EU to conclude the Convention, following adoption, by the Council, of a Code of Conduct and the submission of an instrument of formal confirmation at the United Nations.

Given the complexity of the issues involved, MHI sought the opinion of Richard Gordon QC (referred to in this report as ‘Counsel’), an expert in EU law and human rights and civil liberties.¹⁸ The report incorporates Counsel’s legal opinion throughout, with his specific comments set out in *italics and in bold* in the text.

Importance of Community Living

The term ‘community living’ describes the right of people with disabilities to live in the community and receive the support that they need to participate in society as equal citizens. This right is now encapsulated in Article 19 of the CRPD and applies to all people with disabilities. As the former Council of Europe Commissioner for Human Rights, Thomas Hammarberg stated in his Issue Paper on Article 19:

“The right to live in the community applies to all people with disabilities. No matter how intensive the support needs, everyone, without exception, has the right and deserves to be included and provided with opportunities to participate in community life. Time and again it has been demonstrated that people who were deemed too “disabled” to benefit from community inclusion thrive in an environment where they are valued, where they partake in the everyday life of their surrounding community, where their autonomy is nurtured and they are given choices. Programs from around the world have shown that all types of support needs can be answered, and are better answered, in community settings, which allow for expression of individuality and closer scrutiny to prevent abuse.”¹⁹

The Prevalence of Institutionalization

The inappropriate and unjustified institutionalization of people with disabilities remains prevalent across CEE. While the exact number of residents in institutions in CEE is not known, on the basis of findings of a study published in 2007, they exceed 300,000.²⁰ This study, *Deinstitutionalisation and community living—outcomes and costs* (‘the DECLOC report’), estimated that across Europe there are almost 1.2 million people with disabilities living in ‘residential establishments’ housing 30 people or more, with the two largest groups being people with mental health problems and people with intellectual disabilities.²¹ This is likely to be an underestimate given that the study also found that there were no ‘exist-

18. For further information see: www.brickcourt.co.uk/silks/richard-gordon-qc.asp.

19. *The Right of People with Disabilities to Live Independently and be Included in the Community*, 13 March 2012 (p. 7): <https://wcd.coe.int/ViewDoc.jsp?id=1917847>.

20. The number for each country: Bulgaria (13,269), Czech Republic (66,865), Estonia (22,421), Hungary (24,390), Latvia (10,053), Lithuania (45,464), Poland (73,741), Romania (32,783), Slovakia (12,252) and Slovenia (821).

21. The study covered the EU Member States plus Turkey, see: Mansell, J., Knapp, M., Beadle-Brown, J. and Beecham, J. (2007) *Deinstitutionalisation and community living—outcomes and costs: report of a European Study. Volume 2: Main Report*. Canterbury: Tizard Centre, University of Kent (further referred to as ‘the DECLOC report’), p. 29.

ing sources providing comprehensive information about the number and characteristics for people in residential institutions in Europe.²²

While the DECLOC report shows that institutional care is not unique to the Central and Eastern European Member States—there are many other Member States where people with disabilities live in residential institutions²³—it is the poor quality of care and human rights abuses prevalent in institutions across CEE that highlights this region as one of significant concern. Traditionally, institutionalizing people with disabilities has been the predominant, if not the only, form of ‘care’ in CEE, with large, long-stay institutions housing hundreds, sometimes thousands, of people.

Institutionalization: A Violation of Human Rights

In the last decade or so, numerous reports concerning institutions in this region have depicted appalling living conditions—such as poorly maintained buildings, lack of heating, malnutrition, inadequate clothing and unhygienic sanitation, physical and sexual abuse, lack of privacy, and little to no rehabilitative or therapeutic activities—as well the failure to provide procedural safeguards such as the review of involuntary placements.²⁴ Many such institutions are located in remote areas and residents have little to no contact with the outside world. The rigid regime in such institutions takes no account of individual needs or preferences.

An instinctive and common response by governments presented with such concerns is to attempt to improve living conditions, principally by renovating the institution. This may improve the physical environment, but it does nothing to address the fundamental issue that the segregation of individuals from society solely on the basis of a disability label is in itself a serious violation of their fundamental human rights. This is because forcing people with disabilities to live in institutions, prevents them from developing and maintaining relationships with their family, friends and the wider community, and is in direct conflict with the right to community living as set out in CRPD Article 19 (and discussed in more detail in Chapter 3).

What Is Meant by ‘Institution’

There is a tendency for debates about the institutionalization of people with disabilities and the action required to address it to focus on the size of the building. While the size of institutions can be useful for framing a research study, for example, the DECLOC report collected information on institutions with

22. *Ibid*, p. 11. The study also found that 16 countries have institutions for 100 or more residents.

23. For example the study found that there are 129,548 people living in residential establishments in the UK, 48,781 of whom are in facilities with 30 places or more.

24. See for example: Mental Disability Advocacy Center *Cage Beds, Inhuman and Degrading Treatment in Four Accession Countries* (2003) (The countries were: Czech Republic, Hungary, Slovakia and Slovenia) and A/63/175—Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, paras 37–41, 28/7/2008.

30 or more places, it is only one factor. The following descriptions provide a better sense of what institutions are from the perspective of the residents:

- ‘...the provision of care in “traditional” long-stay institutions i.e. premises in which residents have little, if any, control over their lives and day-to-day decisions. While such premises often house large numbers of people, the size of the building is only one of a number of factors that create a culture of institutionalization. Others include rigidity of routine, such as fixed timetables for waking, eating and activity, irrespective of individuals’ personal preferences or needs.’²⁵
- ‘An institution is any place in which people who have been labelled as having a disability are isolated, segregated and/or compelled to live together. An institution is also any place in which people do not have, or are not allowed to exercise control over their lives and their day-to-day decisions. An institution is not defined by its size.’²⁶

Both definitions highlight the need to address the culture within services as well as the physical environment, since small community-based services can function as ‘mini-institutions’ if residents have no choices or control over their lives. Thus, simply building smaller facilities is not enough. The manner in which services and support are delivered must be based upon each individual’s own needs, wishes and aspirations and be geared towards enabling people with disabilities to participate in their communities as equal members of society.

These points are crucial to the question of whether investing Structural Funds in projects to build new, or renovate existing, long-stay institutions for people with disabilities, rather than develop alternative services that would promote community living, is contrary to EU law. They make clear that reducing the number of places in institutions is insufficient. A more holistic approach is required, one that is focused on the rights of the residents and avoids the creation of ‘mini-institutions.’ As the European Coalition for Community Living (ECCL) points out:

‘It is widely recognised that the institutional culture can be replicated in services based in the community.’²⁷ It is therefore essential that those engaged in developing alternatives to institutionalisation address how to change the culture as well as the physical environment. For example, while the types of residential services that are required will need to be considered, the focus of any such services must be on enabling disabled people to live and participate in society. The involvement of disabled people and their families will be essential.’²⁸

25. C. Parker (2011) *Forgotten Europeans—Forgotten Rights: The Human Rights of Persons Placed in Institutions* (‘Forgotten Europeans—Forgotten Rights’), United Nations Office of the High Commissioner for Human Rights, Europe Regional Office, p. 5.

26. ECCL, *Wasted Time, Wasted Money, Wasted Lives—A Wasted Opportunity?* 2010 (<http://community-living.info/documents/ECCL-StructuralFundsReport-final-WEB.pdf>) p. 78.

27. Jim Mansell et al, Deinstitutionalisation and Community living: Position Statement of the Comparative Policy and Practice Special Interest Research Group of International Association for the Scientific Study of Intellectual Disabilities, *Journal of Intellectual Disability Research*, Vol. 54, Part 2, 104–112, February 2010; p. 105.

28. ECCL, *Wasted Time, Wasted Money, Wasted Lives—A Wasted Opportunity?* 2010, p. 18.

Summary of the Report's Findings

For the reasons examined herein, it is argued that using Structural Funds to build new, or renovate existing, long-stay institutions for people with disabilities, rather than developing alternative services that would promote community living, is contrary to EU law. In essence, the report argues that investing Structural Funds in this manner would:

- Constitute a breach of the EU's international legal obligations (in particular the CRPD and the European Convention on Human Rights ('ECHR')); and
- Amount to disability discrimination under EU law.²⁹

These two points are inter-related given the significant influence of the CRPD on EU law. Accordingly, the legal analysis set out in Chapters 3–6 start with a review of the general impact of the CRPD, including an explanation as to why the CRPD is applicable to the use of Structural Funds. This is followed by consideration of the legal framework relevant to Structural Funds and the impact of the CRPD (Chapter 4), the extent to which the inappropriate institutionalization of people with disabilities constitutes unlawful discrimination under EU law (Chapter 5) and the specific actions that the European Commission and Member States must take to protect individuals against disability discrimination and promote the right of people with disabilities to community living (Chapter 6).

Chapter 7 provides specific conclusions and recommendations. It emphasises that in the next financing period, the regulations governing the use of Structural Funds must make clear that they can only be used to support the development of community-based alternatives to institutionalization, thereby promoting the rights of people with disabilities to community living.

The following chapter provides the context for this report. It provides an overview of the situation of people with disabilities in CEE and explains why the use of Structural Funds to invest in institutional care rather than to develop community-based alternatives is of such significant concern.

29. While in very limited circumstances Structural Funds might be capable of being used to ameliorate the poor living conditions in institutions these are restricted to cases in which: (a) there is a clearly identified and competing case to take limited action (for example to prevent an urgent and life threatening risk to the resident); and (b) their use forms part of a wider strategic program for community living. This is discussed in Chapter 6.

Moving from Institutionalization to Community Living: The Role of Structural Funds

This chapter considers the current situation of people with disabilities in CEE. It highlights that while there is widespread acknowledgement that the institutionalization of people with disabilities is a serious human rights violation, is an outmoded and an unacceptable form of ‘care’ in the 21st Century, and that more must be done by governments to deinstitutionalize people with disabilities.

Crucially, there needs to be a fundamental change in the approach to the development and/or amendment of relevant law and policy so that it supports the right of people with disabilities to live and participate in the community. The types of necessary services are wide-ranging and include housing (including supported housing), care in the family home, social work support, and supported employment, as well as access to mainstream services such as health care.

Structural Funds have the potential to be the catalyst for this much needed change by providing the funding and technical support for the development of community-based services. However, in some Member States, Structural Funds have been used to maintain the system of institutional ‘care’ by financing the renovation of existing institutions or the building of new institutions.

Deinstitutionalization: The Policy Context

The imperative for action to put an end to the institutionalization of people with disabilities, by shifting the provision of care from institutions to community-based services (‘deinstitutionalization’), has been highlighted both at international³⁰ and European levels. As illustrated by the following examples, the

30. See for example: Commission on Human Rights resolution 2005/24, para. 7 in which the Commission called upon States “to introduce, as far as possible, community-based care and support for persons with disabilities related to mental disorders, in order to ensure their access to medical and social services that promote their independence and autonomy and support their social integration” (E-CN_4-RES-2005-24).

importance of ensuring respect for the rights of people with disabilities and promoting their social inclusion is a significant and consistent theme in both Council of Europe and EU policies.

Council of Europe Initiatives and Concerns

- In 2006, the Council of Europe's 'Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006–2015' includes 'Community living' as one of its fourteen 'key action lines.' It explains that this action line:

*'...focuses on enabling people with disabilities to live as independently as possible, empowering them to make choices on how and where they live. This requires strategic policies which support the move from institutional care to community-based settings ranging from independent living arrangements to small group homes.'*³¹

- The Parliamentary Assembly of the Council of Europe commented in 2008:

*'The practice of placing children and adults with disabilities into institutions undermines their inclusion as they are kept segregated from the rest of society and suffer serious damage to their healthy development and obstruction of the exercise of other rights. Deinstitutionalisation is a prerequisite to enabling people with disabilities to become as independent as possible and take their place as full citizens with the opportunity to access education and employment, and a whole range of other services.'*³²

- In the following year the Parliamentary Assembly noted in its resolution on 'Access to rights for people with disabilities and their full and active participation in society' that the ECHR protects everyone, including people with disabilities and that Article 15 (the right of persons with disabilities to independence, social integration and participation in the life of the community) of the European Social Charter 1961, (revised in 1996):

*'...explicitly guarantees to persons with disabilities the effective exercise of the right to independence, social integration and participation in the life of the community.'*³³

- As the Council of Europe's Commissioner for Human Rights, Thomas Hammarberg, raised his concerns about the situation of people with disabilities in institutions a number of times.

- In October 2010 the Commissioner stated:

'In Europe today, thousands of people with disabilities are still kept in large, segregated and often remote institutions. In a number of cases they live in substandard conditions, suffering abject neglect and severe human rights abuses. In too many cases, premature deaths are not investigated or even reported.'

31. Recommendation Rec(2006)5 3.8.1 www.coe.int/t/e/social_cohesion/socsp/Rec_2006_5%20Disability%20Action%20Plan.pdf.

32. Access to rights for people with disabilities and their full and active participation in society, 8 August 2008, paragraph 44, <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11694.htm>.

33. Resolution 1642 (2009) para. 2. <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta09/ERES1642.htm>.

*Caged beds and other restraints are still used in a number of Council of Europe member states to keep persons with disabilities “under control.” Too little has been done to prevent this and other kinds of abuse and inadequate care in institutions, hidden from public scrutiny. There is an atmosphere of impunity surrounding these violations.*³⁴

- In March 2012 the Commissioner issued an Issue Paper on *The Right of People with Disabilities to Live Independently and be Included in the Community* (referred to in this report as ‘the Article 19 Issue Paper’). This provides a detailed analysis of the right to community living, drawing on CRPD Article 19. It also includes ‘a sample of indicators and guidance questions to help assess whether a country is transitioning from violation to implementation of the right to live in the community.’³⁵

EU Initiatives and Concerns

- Since 2003, one of the EU’s overall objectives has been ‘to make equal opportunities for disabled people a reality.’³⁶ This continues to be regarded as a significant area of concern, as evidenced by the European Commission’s most recent disability strategy, ‘*European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe*’ (‘the EU Disability Strategy’)³⁷
- The recognition that there is a need to address the discrimination faced by people with disabilities and break down ‘the barriers that prevent 80 million Europeans with disabilities from participating in society on an equal basis’³⁸ is linked to the European Commission’s more general objectives for promoting economic growth, as set out in ‘*Europe 2020: A strategy for smart, sustainable and inclusive growth*’ (‘Europe 2020’).³⁹
- One of the aims of Europe 2020 is to ensure ‘economic, social and territorial cohesion’ by raising awareness and recognizing ‘the fundamental rights of people experiencing poverty and social exclusion, enabling them to live in dignity and take an active part in society.’ This is set out in the ‘*European Platform against Poverty and Social Exclusion: A European framework for social and territorial cohesion.*’⁴⁰ As part of this work, the European Commission aims to ensure that there is greater

34. Posted 21st October 2010 http://commissioner.cws.coe.int/tiki-view_blog.php?blogId=1&bl=y&offset=30.

35. 13 March 2012: <https://wcd.coe.int/ViewDoc.jsp?id=1917847>.

36. Communication from the Commission to the Council, the European Parliament, the European and Economic and Social Committee and the Committee of the Regions, Situation of disabled people in the European Union: the European Action Plan 2008–2009, COM(2007) 738 final, 26 November 2007.

37. http://ec.europa.eu/news/justice/101115_en.htm.

38. The European Platform against Poverty and Social Exclusion: A European framework for social and territorial cohesion’ COM(2010) 758 final (‘the European Platform’) page 10 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0758:EN:NOT>.

39. COM(2010) 2020: http://europa.eu/press_room/pdf/complet_en_barroso___007_-_europe_2020_-_en_version.pdf.

40. COM(2010) 758 final (see footnote 38).

and more effective use of the Structural Funds to support social inclusion. This includes promoting ‘the targeted use of Structural Funds (ESF⁴¹ and ERDF⁴²) to support the shift from institutional to community-based care in the areas of parentless children, disabled people and the elderly.’⁴³

- The EU’s Disability Strategy states that the European Commission will 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.’⁴⁴

- An area of work identified under the heading of ‘social inclusion and antidiscrimination’ in the European Platform states that the European Commission will:

‘Ensure appropriate follow up to the European Disability Strategy 2010–2020, targeting in particular circumstances and barriers that prevent people with disabilities from enjoying their rights fully. This includes the development of a quality framework for community-based services responsive to the needs of people with disabilities.’⁴⁵

Potential Role of Structural Funds

Structural Funds provide the financial support for the implementation of the EU’s Cohesion Policy.⁴⁶ The objectives for the current financing period (2007–2013) are to promote sustainable development by strengthening growth, competitiveness, employment and social inclusion and by protecting and improving the quality of the environment.⁴⁷

The Structural Funds budget is large—€347.410 billion (around €50 billion per annum and a third of the EU budget)⁴⁸—the bulk of which is awarded to regions with a per capita GDP below 75% of the EU average. The impact of such large sums on the smaller economies of CEE countries is dramatic—and of

41. European Social Fund.

42. European Regional Development Fund.

43. See SEC(2010) 1564 final at page 7 (this is the list of key initiatives in relation to the European Platform against Poverty and Social Exclusion): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:1564:FIN:EN:PDF>.

44. See also the Council of the European Union, 20 June 2011, Soc 585 COHOM 174 MI 317, confirming its support for the Disability Strategy. It invited the European Commission and Member States to take steps to progress the areas identified in the Disability Strategy.

45. COM(2010) 758 final, page 4 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0758:EN:NOT>

46. This is the European Union’s strategy to promote and support the “overall harmonious development” of its Member States and regions.

47. See the General Regulations Article 3 (Objectives).

48. See European Union, *The Control System for Cohesion Policy—How It Works in the 2007–2013 Budget Period*, October 2009, p. 5.

course it is intended to be. It is anticipated that the Structural Funds budget will increase by about 8% for the next financing period (2014–2020).⁴⁹

The two funds that can be used to support the development of community-based services are the European Regional Development Fund (ERDF) and European Social Fund (ESF). The ERDF can finance ‘investments in health and social infrastructure which contribute to regional and local development and increasing the quality of life.’⁵⁰ The ESF assists EU Member States to achieve goals established in the European employment strategy and disability action plan.⁵¹ It can also be used to train staff who work with people with disabilities.

A primary reason for the institutionalization of people with disabilities is the severe lack of support in local communities that would enable them to live in their own homes. The lack of community-based services also impacts upon people with disabilities who live with their family. Often they fare little better than those in institutions because their relatives are likely to have little to no support in caring for them. Thus, unless and until action is taken to develop community-based alternatives, including the provision of support to people with disabilities and their families, people with disabilities will continue to be placed in institutions or isolated in their own homes.

Structural Funds provide the opportunity to introduce the necessary reforms. They can be invested in financial and technical support to assist Governments in planning and implementing their deinstitutionalization strategies and in developing the community-based alternatives. This would enable people with disabilities to live and participate in the community, as required by the CRPD and other international and European human rights standards. However, as outlined below, the opportunity presented by Structural Funds to facilitate change is being squandered and, in some cases, the use of Structural Funds hinders reform.

Problems with the Use of Structural Funds

In 2010 the European Coalition for Community Living (‘ECCL’) published a report *‘Wasted Time, Wasted Money, Wasted Lives—A Wasted Opportunity?’* (referred to in this report as *Wasted Time...*).⁵² Based upon the findings of research undertaken by ECCL and its partners in Hungary and Romania on the use of Structural Funds, the report highlighted a range of concerns about the use of Structural Funds in relation to services for people with disabilities in CEE. The problems identified relate to both the operation of the system at the level of the European Commission, as well to investments of Structural Funds made

49. This figure was referred to in the briefing ‘EU Structural and Cohesion Funds.’ <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/428-xli/42803.htm>.

50. Article 4 of the 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, 31 July 2006.

51. 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.

52. See footnote 26.

by the Member State. These problems can be grouped into three broad categories: systemic, substantive and interpretative. Each of these is summarized below:

- **Systemic: How the EU institutions operate Structural Funds**

- *The lack of clarity on the scope and purpose of the programs being financed:* Recipient Members States must submit to the European Commission for approval an ‘Operational Programme’ which outlines how they will use the Structural Funds. The wording of the Operational Programmes is often imprecise, leaving the Member State wide discretion on how to invest the Structural Funds. This lack of precision creates a problem for the European Commission as to what action it can take to challenge the investment of the funds in institutions if it has approved the Operational Programme and it is not directly contravened by the Member States’ action plan.

Such a difficulty has arisen in Hungary. Although the Operational Programme for Social Infra-structure is explicit on the need to close the large institutions, the action plans do not reflect this. Despite strong objections from civil society, the government’s strategy includes the provision of 50 bed ‘residential centres.’ The government argues that these will be for people with more severe and complex needs, but researchers and advocates working in this area are concerned that in practice this will mean that the current institutions will simply be downsized to 50 bedded units i.e. without reference to the ability of the residents to live in the community with support. In any event, this does not accord with the principle that all disabled people have the right to live in the community—and can do so with the appropriate level of support.⁵³

- *Absence of a proper monitoring system or evaluation of Structural Funds:* In addition to the difficulties in obtaining information about how Structural Funds are invested, ECCL’s report noted that while disability groups are represented on the Monitoring Committees,⁵⁴ they have little opportunity to influence decisions.⁵⁵ Another problem raised was the lack of coherent efforts to evaluate the impact of projects realized with Structural Funds investments.

Ensuring adequate mechanisms for monitoring and evaluation of projects financed with Structural Funds is the responsibility of both Member States and the European Commission. Counsel notes that the failure to monitor and evaluate may constitute a breach of EU law by Member States but it may:

‘...also constitute a separate breach of EU law on the part of the EU institution (in casu the EU Commission) concerned if the Commission is not itself monitoring how EU Structural Funds are being used. These issues go hand in hand with an asserted lack of transparency as to the operation of Structural Funds experienced by ECCL in its investigation as to how funds are being operated in practice.’

53. Similar concerns are raised in the Article 19 Issue Paper, p. 9—see footnote 35.

54. Monitoring Committees monitor the effectiveness and quality of implementation of Operational Programmes.

55. *Wasted Time...* pp. 35–36.

- **Substantive: The Investment of Structural Funds by Member States**

This category highlights the problems arising from the way Member States use Structural Funds. *Wasted Time...* provides two key aspects of this concern. They are related:

- *Maintaining institutional care—existing unsuitable residential institutions are either being reconstructed, expanded or built from scratch:* For example in Romania, the ‘Regional Operational Programme 2007–2013’ not only made no reference to the need to develop community-based services but referred specifically to the ‘modernization’ of institutions.

The concern that this would lead to investments in institutions was raised with the European Commission by a national organization and European non-governmental organizations that also pointed out that the Structural Funds could be used to address the lack of community-based services. Despite such comments, the Romanian government’s Operational Programme was approved by the European Commission without revision.⁵⁶

It is often argued by the European Commission and by the Member States that it is appropriate for Structural Funds to be used to improve the appalling living conditions in institutions. Clearly Governments are responsible for taking immediate remedial action to address human rights abuses and failures to provide appropriate care. However, the question remains as to whether this is a proper use of Structural Funds. In relation to the European Commission’s responsibilities, Counsel comments:

‘Intuitively, it is not difficult to sympathise with the Commission’s point that short term improvement may be better than nothing. However, such response obscures the underlying breaches of EU law that may have occurred if: (i) the promotion of continued institutionalisation is not a use to which Structural Funds may legitimately be put and (ii) such funds are in fact being used by the member state concerned to promote institutionalisation rather than as part of a more wide ranging provision of community-based services.’

- *Domestic barriers to deinstitutionalization:* ECCL’s report highlighted problems such as the absence of a coherent legal framework that enables the provision of community-based services, restrictive domestic regulations that promote institutionalization, and resistance from within institutions to the development of community-based services.⁵⁷

- **Interpretative: provision(s) of the Structural Funds regulations misinterpreted by a Member State**

The third category of concern raised by *Wasted Time...* are problems arising from lack of clarity on what certain provisions of regulations concerning Structural Funds mean. For example, under the current Structural Funds regulations there are strict eligibility criteria for contributions from the ERDF to projects involving housing. Even where a project is eligible, the percentage of the ERDF allocation that can be invested in housing is very small.

56. *Wasted Time...* pp. 25–26.

57. These are discussed in Chapter 3 of *Wasted Time...*

The relevant provision of the ERDF regulations,⁵⁸ Article 7, refers to ‘the purchase of land’ but it is not clear whether it allows for the purchase of buildings. If it does not (and this is the Hungarian government’s interpretation), ECCL’s view is that this ‘will be a severe impediment to projects that wish to enable disabled people to live in family-like homes in their communities.’⁵⁹ Counsel makes two general points:

‘First, the correct interpretation is likely to depend upon the over-arching Treaty obligations in relation to structural fund moneys. So, that is the primary question that must be addressed. Secondly, if and to the extent that a regulation cannot be interpreted other than as being inconsistent with EU law then the regulation itself would be unlawful. Thus, I can well see that the text of a regulation may cause practical problems if it is either ambiguous or simply unlawful, but the real issue will always be ‘what does the Treaty mandate (if anything) in the context of the proper use of structural fund moneys?’

- **Systemic, Substantive and Interpretative**

This systemic, substantive and interpretative analysis highlights important questions about the nature of the Treaty obligations that arise in relation to the use of Structural Funds. Counsel notes:

‘Consideration of the nature of the relevant Treaty obligations is, necessarily, informed by the general principles of EU law including, most notably for present purposes, the principal of equal treatment and non-discrimination. My attention has also rightly been drawn to the relevant provisions of the CRPD and, especially, to Article 19. The CRPD raises additional issues as to, amongst other things, its status as a source of obligation and/or interpretation and its relationship to the specific Treaty obligations relating to the Structural Funds.’

The nature of the relevant Treaty obligations is considered in Chapter 4. Chapter 3 examines the obligations introduced by the CRPD, in particular the obligations to promote community living under Article 19.

58. Regulation (EC) No. 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Development Fund and repealing Regulation (EC) No. 1783/1999 (referred to in this report as ‘the ERDF regulations’).

59. *Wasted Time...* p. 32.

The Convention on the Rights of Persons with Disabilities and Community Living

This chapter considers the Convention of the Rights of Persons with Disabilities (CRPD) and its implications on the right to community living.

Overview

The CRPD sets out a wide range of rights that address all aspects of life, such as respect for home and the family, education, employment, health, participation in political and public life, participation in cultural life, recreation, leisure and sport, the right to life, freedom from torture or cruel, inhuman or degrading treatment or punishment, and the right to equal protection and equal benefit of the law. States Parties to the convention may also ratify the Optional Protocol to the CRPD which allows the Committee on the Rights of Persons with Disabilities (“the CRPD Committee”) to examine individual complaints and to conduct inquiries in relation to that State.⁶⁰

The adoption of the CRPD is the culmination of a growing acknowledgement and concern about the lack of attention given to the rights of people with disabilities.⁶¹

Key Principles of Non-discrimination and Equality of Opportunity

Article 3 of the CRPD lists the general principles of the Convention. These include non-discrimination and equality of opportunity. Article 4 establishes general obligations for State parties. These include the obligation to ‘*take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise.*’ Article 2 defines ‘*discrimination on the basis of disability*’ very broadly, stating that it includes ‘*all forms of discrimination, including denial of reasonable accommodation.*’

60. The CRPD and its Optional Protocol can be found on the United Nations Enable website at: <http://www.un.org/disabilities/>.

61. See for example Gerard Quinn, Theresa Degener et al., ‘Human Rights and Disability- the current use and future potential of United Nations human rights instruments in the context of disability’—February 2002, UN Human Rights Commission, <http://www.unhcr.ch/html/menu6/2/disability.doc>.

Article 5 provides for, among other things (see Article 5(2)), a state guarantee to persons with disabilities ‘of equal and effective legal protection against discrimination on all grounds.’ There is also the requirement that State Parties take all appropriate steps to ensure that reasonable accommodation is provided. However, Article 5(4) provides that ‘[m]easures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination.’

Impact of the CRPD

In the relatively short time since it came into force (May 2008), the CRPD has taken on a significant role at the European level. The EU, which took part in the negotiations on the drafting of the CRPD, was the first supranational body to ratify it on 23rd December 2010.⁶²

The CRPD is a ‘mixed agreement’ signed and concluded by the EU and Member States with a third party, the United Nations. Part of the agreement falls within the scope of EU powers and part of it falls within the scope of the powers of the Member States. The preamble to this decision states at paragraph 7:

‘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 and exercise the rights invested in them, in situations of mixed competence in a coherent manner.’

All Member States of the EU have signed the CRPD, with 20 having ratified it (internationally the ratifications stand at 112 states⁶³). In *Glor v Switzerland* (2009)⁶⁴ the European Court of Human Rights (‘ECtHR’) emphasized the importance of the CRPD, noting that it reflects the international recognition of the need to protect the rights of disabled people.

For those States that have a ‘monist’ approach (such as Croatia, Hungary and Slovenia), the treaty provisions become part of domestic law upon their ratification. For the Member States that have as yet only signed the CRPD, the Vienna Convention on the Law of Treaties 1969 makes clear that they cannot act in a manner which defeats the object and purpose of the CRPD.⁶⁵ In any event, in the light of the EU’s ratification of the CRPD, these States would be required to comply with CRPD treaty obligations in so far as these impact upon EU law—and as was evident in *Glor*, the fact that a state had not ratified the

62. Council Decision 2010/48 EC on 26 November 2009 permitted the EU to conclude the Convention, following adoption, by the Council, of a Code of Conduct and the submission of an instrument of formal confirmation at the United Nations.

63. As at 23rd April 2012—see: <http://www.un.org/disabilities> The EU Member States yet to ratify are: Estonia, Finland, Greece, Ireland, Malta, Netherlands and Poland.

64. Application No. 13444/04 30th April 2009. In this case the applicant had been deemed medically unfit to perform his military service due to his disabilities but the authorities decided that his diabetes was not severe enough for him to be relieved from paying the military exemption tax.

65. Article 18.

Convention (Switzerland has not even signed it) was not considered to be a material factor in limiting its relevance for the purpose of the ECHR.

The Right to Community Living and the CRPD

It has been stated repeatedly that the CRPD created no new rights.⁶⁶ While this may be true, there are elements of the CRPD that are recognized as taking human rights concepts further forward. A European Commission funded report, *Study on challenges and good practices in the implementation of the UN Convention on the Rights of Persons with Disabilities*, (‘the EFC report’)⁶⁷ describes this as a ‘progressive development of those existing standards,’ giving as one example ‘the explicit inclusion of “reasonable accommodation” as a core element of non-discrimination.’

Article 19 CRPD (‘Living independently and being included in the community’) is an example of a newly articulated right, providing ‘the equal right of all persons with disabilities to live in the community, with choices equal to others’—referred to in this report as the ‘right to community living.’

The genesis of the right to community living can be traced back to various reports, comments by treaty bodies, and resolutions⁶⁸ and is supported by rights, such as Article 26 of the European Union Charter of Fundamental Freedoms (Integration of People with Disabilities) and Article 15 of the revised European Social Charter (the right of persons with disabilities to independence social integration and participation in the life of the community).

However, CRPD Article 19 is the first example of such an explicit right being included in a human rights treaty. It places obligations on States Parties to take action to enable disabled people to realize this right. The right to live and participate in the community is integral to the CRPD. In addition to being included as a specific right in Article 19, the themes of inclusion and participation run throughout the text of the CRPD. For example, one of the general principles of the CRPD is the “full and effective participation and inclusion in society” (see Article 3) of people with disabilities. Article 26 (Habilitation and rehabilitation) is about supporting people with disabilities to attain and maintain “full inclusion and participation in all aspects of life.”

66. See for example United Nations, Office of the High Commissioner for Human Rights and Inter-Parliamentary Union, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities. Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (HR/PUB/07/6) (Geneva, 2007), p. 5: ‘[the CRPD] does not recognize any new rights of persons with disabilities.’

67. Professor Gerard Quinn et al., VC/2008/1214, European Foundation Centre, October 2012 page 24 <http://www.efc.be/Networking/InterestGroupsAndFora/Disability/Pages/Study.aspx>.

68. See for example Committee on the Rights of the Child general comment No. 7 (2006) on implementing the rights of the child in early childhood, para. 36(b); Committee on Economic Social and Cultural Rights (CESR) general comment No. 6 (1995) on the economic, social and cultural rights of older persons, para 33, and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 1993. See also the Article 19 Issue Paper pp. 14–19. See footnote 35.

Participation in Legal and Policy Development

By ratifying the CRPD, States Parties have committed to ensuring that their citizens can exercise their rights as they are set out in the CRPD. Article 4 requires that Governments:

- Ensure that their laws and practice are consistent with the CRPD. They must take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities (Article 4(1)(b)).
- ‘consult closely’ with, and actively involve, people with disabilities in the development and implementation of legislation and policies and in other decision-making processes that relate to them (Article 4(3)).

Article 33 requires States Parties to establish a range of mechanisms for the implementation and monitoring of the CRPD. These include one or more focal points within government (for the coordination of the CRPD’s implementation) and an independent mechanism to promote, protect and monitor implementation of the CRPD. Article 33(3) also highlights the importance of participation in relation to monitoring the implementation of the CRPD:

‘Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.’

Thus, Member States, as well as the European Commission, will need to consider their laws, policies and practices, as well as their financial and strategic planning (such as how they allocate their budgets) to ensure that the obligations set out in the CRPD are reflected in their ‘national legal framework, development planning and budgeting, and in related policies.’⁶⁹ Importantly, they must ensure that people with disabilities are included in reviews and planning processes.

An Overview of Article 19

Article 19 is very broad in scope. It provides the equal right of all persons with disabilities to live in the community, with choices equal to others. States are required to take effective and appropriate measures to facilitate the right to live in the community and to promote full inclusion and participation in the community. This right applies to all persons with disabilities, regardless of the degree of the disability or the level of support necessary. The full text of Article 19 is in the box on page 37. It requires States to:

- Recognize the right of people with disabilities to live in the community,
- Take effective and appropriate measures to facilitate their full enjoyment of that right, with choices equal to others, and

69. See United Nations, Handbook for Parliamentarians—From Exclusion to Equality: Realizing the Rights of Persons with Disabilities, 2007, p. 7.

- Take effective and appropriate measures to facilitate people with disabilities' full participation and inclusion in the community.

Article 19 (Living independently and being included in the community)

State 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.

In paragraphs (a)–(c), Article 19 sets out an illustrative but non-exhaustive list of the effective and appropriate measures States are required to take. Accordingly, States are required to ensure that people with disabilities have:

- **Choice of residence:** In meeting this aspect of Article 19, States Parties will also need to consider the work necessary to implement Article 12 (Equal recognition before the law) of the CRPD. Article 12 requires States Parties to recognize that people with disabilities *'enjoy legal capacity on an equal basis with other'* and that they *'take appropriate measures to provide access by persons with disabilities to the support that they may require in exercising their legal capacity.'* This is of particular importance for those countries that maintain a guardianship system that prevents people from making personal decisions in a wide range of areas such as employment, marriage, voting, and where to live.⁷⁰

70. The Office of the High Commissioner for Human Rights emphasizes that guardianships laws should be reviewed as a matter of priority. See: 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, January 2009, A/HRC/10/48, para. 45 (Referred to as 'A/HRC/10/48').

- **Access to a range of community support services:** The development of community-based services as alternatives to institutional care is crucial to States Parties' compliance with Article 19. Without such services, people with disabilities have no real choice about their place of residence. This aspect of Article 19 links with Article 26, which requires States Parties to facilitate the provision of services and programs to support participation and inclusion in the community.
- **Equal access to mainstream community services:** For many people with disabilities, ensuring that they can enjoy their right to equal access to mainstream community services will require that they receive support to do so. This aspect of Article 19 links to Article 9 (Accessibility) requiring States Parties to take measures to ensure that people with disabilities have access, *'on an equal basis with others, to the physical environment, to transportation, to information and communications technologies and systems, and to other facilities and services open, or provided to the public.'*

The concept of 'reasonable accommodation' is relevant to this aspect of Article 19. The *Handbook for Parliamentarians—From Exclusion to Equality: Realizing the Rights of Persons with Disabilities* notes that under the CRPD "a failure to afford a person 'reasonable accommodation' amounts to discrimination on the basis of disability." It explains:

*'To afford a person 'reasonable accommodation' means for example, making adaptations to the organization of a work environment, an educational establishment, a health care facility or transport service in order to remove the barriers that prevent a person with a disability from participating in an activity or receiving services on an equal basis with others.'*⁷¹

Article 19 and the Closure of Long-Stay Institutions

The emphasis of Article 19, and indeed the whole CRPD, is on the full inclusion and participation of people with disabilities in the community. Deinstitutionalization and the development of community-based services that lead to the closure of long-stay institutions is necessary if people are to realize their rights under Article 19. Accordingly, although Article 19 makes no specific reference to closing institutions, its provisions make clear that their closure is required. The Article 19 requirement that States Parties ensure that persons with disabilities have access to community services that support their social inclusion and *'prevent isolation or segregation from the community'* cannot be achieved if people with disabilities continue to be placed in institutions, preventing them from developing and maintaining relationships with their family, friends, and the wider community.

Irrespective of the quality of care in long-stay institutions, the practice of isolating and segregating people with disabilities in institutions is in itself a violation of their human rights under Article 19. It also engages other rights such as Article 14 (Liberty and security of the person), Article 22 (Respect for privacy) and Article 23 (Respect for home and the family).

71. United Nations, 2007 at 60. Available at: <http://www.ohchr.org/Documents/Publications/training14en.pdf>.

The Nature and Extent of the Obligations under Article 19

Article 19 has strong links to rights that are traditionally called ‘civil and political rights.’ For example, the requirement in 19(a) that people with disabilities ‘have the opportunity to choose their place of residence’ is linked to Article 12 (Equal recognition before the law) and that they are ‘not obliged to live in a particular living arrangement’ links to Article 14, (Right to liberty and security of the person). However, much of what is expected of States Parties under Article 19 falls into the category of ‘economic, social and cultural rights.’ For example, States Parties are required to put into place a range of community-based services and supports that are both geared towards the specific needs of disabled people (19(b)) and are mainstream services that are made accessible to disabled people (19(c)).

Both sets of rights—civil and political rights and economic, social and cultural rights—require States Parties to take positive action to ensure that they are realized in practice. This is emphasised in Article 4(1)(a) which requires States Parties to adopt all appropriate measures for the implementation of rights under the CRPD. The provisions of Article 19 illustrate the connection between these two sets of rights:

- Where the obligation to ‘recognize the equal right of all persons with disabilities to live in the community, with choices equal to others’ can be fulfilled in part by formal recognition, such as legislation, in reality this is meaningless if people continue to be placed in long-stay institutions, due to a lack of community-based alternatives.⁷² While explicit legal recognition will undoubtedly be valuable,⁷³ States’ obligations will extend beyond such formal recognition.⁷⁴
- The right not to be ‘obliged to live in a particular living arrangement’ is linked to CRPD Article 14 (Liberty and security of person). Compliance with this important right will, in many cases, also be linked to the availability of community-based services and support.

Those aspects of Article 19 that are ‘economic, social and cultural rights’ are subject to the concept of ‘progressive realization,’ as described in CRPD Article 4(2), that takes into account that the arrangements necessary to meet the realization of such rights may take time to put into place and be subject to resource constraints.

For example, it may take time for some States Parties to meet the requirement under Article 19 that people with disabilities have access to the full range of community support services, particularly in those countries that have few or no community-based services and limited resources. However, the

72. The Office of the High Commissioner for Human Rights (‘the OHCHR’) suggests that this should be in the form of legislation, providing a legal right to independent living. See 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, January 2009, A/HRC/10/48, para. 50 (Referred to as ‘A/HRC/10/48’) Available at: www.un.org/disabilities/default.asp?navid=48&pid=101.

73. For example, it would have the benefit of providing a legal underpinning of the work to transfer the provision of care from an institution based system to one that is focused on providing people with the support that they need to enable them to live and participate in society.

74. By way of comparison note CESCR General Comment 3 which notes at para 4 that the adoption of legislation is ‘by no means exhaustive of the obligations of States Parties.’

lack of resources does not mean that governments can justify doing nothing to promote realization of these rights, as CRPD Article 4(2) makes clear that States Parties need to take measures with a view “to achieving progressively the full realization of these rights” (hence the term “progressive realization”). Article 4(2) 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 co-operation, 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.’

Progressive Realization and the Development of Community Based Services

Although the development of community-based services is subject to the concept of progressive realization, as the United Nations notes in its guide ‘Monitoring the Convention on the Rights of Persons with Disabilities’⁷⁵:

‘The recognition that the full realization of economic, social and cultural rights may be constrained by limited resources is balanced by the requirement that measures should be taken to the maximum of a State’s available resources and, where needed, within the framework of international cooperation (Convention on the Rights of Persons with Disabilities, arts.4(2) and 32).’

In this context, the guidance mirrors General Comment 3 (1990) issued by the United Nations Committee on Economic, Social and Cultural Rights paragraph 9⁷⁶ that the word ‘progressively’ ‘should not be misinterpreted as depriving the obligation of all meaningful content’ ... that:

‘the phrase must be read in the light of the overall objective, indeed the raison d’être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.’

The concept of progressive realization also makes clear that some obligations take immediate effect, such as the duty to ensure that rights can be exercised without discrimination, and that minimum core obligations are met (for example States Parties are failing to discharge their duties “if any significant number of individuals is deprived of essential food stuffs, or essential primary health care, of basic shelter and housing, or the most basic forms of education”⁷⁷).

75. 2010, p. 28. Available at: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>.

76. Cited with approval by the Constitutional Court of South Africa in *Government of South Africa v. Grootboom* (2000) (11) BCLR 1169 (CC) (para 45).

77. See General Comment 3 (The nature of States Parties obligations) of the Committee of the International Covenant of Economic, Social and Cultural Rights).

Analogy with Obligations under the Right to Health

Paul Hunt, the former UN Special Rapporteur on the Right to the highest attainable standard of physical and mental health, analyzed what obligations flow from the right to health under Article 12 of the International Covenant on Economic, Social and Cultural Rights ('ICESCR').⁷⁸ This provides some insight into what might be expected of States Parties in meeting their obligations under CRPD Article 19. Professor Hunt argues that the concept of progressive realization in relation to the right to health means that:

- (i) A State must have a comprehensive, national plan, encompassing both the public and private sectors, for the development of its health system.
- (ii) An effective health system must include appropriate indicators and benchmarks; 'otherwise, there is no way of knowing whether or not the State is improving its health system and progressively realizing the right to the highest attainable standard of health.'
- (iii) At least the present level of enjoyment of the right to the highest attainable standard of health must be maintained (non-retrogression)—'Although rebuttable in certain limited circumstances, there is a strong presumption that measures lowering the present enjoyment of the right to health are impermissible.'
 - A State is not 'free to choose whatever measures it wishes to take so long as they reflect some degree of progress'—the State 'has a duty to adopt those measures that are most effective, while taking into account resource availability and other human rights considerations.'

In Professor Hunt's view, the right to health under the ICESCR entails States Parties the core obligations to:

- Prepare a comprehensive, national plan for the development of the health system;
- Ensure access to health-related services and facilities on a non-discriminatory basis, especially for disadvantaged individuals, communities and populations;
- Ensure the equitable distribution of health-related services and facilities, e.g. a fair balance between rural and urban areas;
- Establish effective, transparent, accessible and independent mechanisms of accountability in relation to duties arising from the right to the highest attainable standard of health.

78. Promotion and protection of all human Rights, civil, political, economic, social and cultural rights—Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt A/HRC/7/11, 31 January 2008.

- Ensure a minimum “basket” of health-related services and facilities (for example, essential food to ensure freedom from hunger, basic sanitation and adequate water, and essential medicines).

Adopting the Approach of Special Rapporteur on the Right to Health to Article 19

In essence, Article 19 requires States Parties to demonstrate that they are taking concrete and targeted steps towards realizing the right to community living as it articulates. The details of what action will be required to be taken by States Parties will vary, depending on the country context. However, it is argued that the following will be required of all States Parties:⁷⁹

- (i) Recognise the right to community living (Article 19);
- (ii) Initiate an action plan (Article 19);
- (iii) Review and amend laws, policies and practice (see Article 4(1));
- (iv) Establish mechanisms for the participation of disabled people and civil society (see Article 4(3)); and
- (v) Establish systems for national monitoring of the implementation of the CRPD (see Article 33).

The implementation of Article 19 obligations is subject to monitoring by the Committee on the CRPD at Member State and EU levels.⁸⁰ It follows that the European Commission will need to ensure that Structural Funds are not being invested in a manner that conflicts with the rights guaranteed by the CRPD. This analysis strongly suggests that the ‘progressive realization’ obligation requires every States Party, including the European Commission, to elaborate a ‘community living’ plan, by which it can ensure that it acts rationally and purposefully when developing and implementing policies. The plan must include a strategy and action plan for the closure of long-stay institutions and set out how the comprehensive review of law, policy and practice in relation to matters covered by Article 19 is to be conducted (see Article 4(1)). Based on the approach taken by the former Special Rapporteur on the right to health, MHI has developed a checklist,⁸¹ suggesting a range of measures that will need to be taken by States Parties to implement Article 19.

79. Items (iii)–(v) reflect the general obligations on States Parties of the CRPD but they are of direct relevance to Article 19. Given the inter-dependence of Article 19 and other CRPD rights, such as the right to Equal Recognition before the law (Article 12), the right to Liberty and security (Article 14), the right to Right to Education (Article 24), the right to Work and Employment (Article 27), the right to Habilitation and Rehabilitation (Article 26) and the right to Participation in cultural life, recreation, leisure and sport (Article 30), a wide range of law, policy and practice will be relevant to the realization of Article 19.

80. Under CRPD Article 35 States Parties are required to submit periodic reports to the Committee on the CRPD detailing their progress in implementing the CRPD.

81. See *A Community for All: Implementing Article 19—A Guide for Monitoring the Implementation of Article 19 of the Convention on the Rights of Disabilities*, December 2011. See also the Article 19 Issue Paper, pp. 29–38.

The checklist focuses on action that should be taken by governments of countries in which people with disabilities continues to be institutionalized. The ten action points for this checklist are as follows:

1. Commit to transforming the system from institutional services to community- based services
2. Provide explicit recognition of the right to community living for all (the right of all persons with disabilities to live in the community, ‘with choices equal to others’).
3. Develop a national strategy for transforming the system from institutional placements to community-based services
4. Establish mechanisms to enable the participation of civil society, in particular, people with disabilities and their families
5. Develop links with experts (international and national)
6. Review legislation, policies and practices relevant to the implementation of Article 19
7. Review existing services for people with disabilities
8. Ensure transparency and accountability in the use of public funds
9. Establish mechanisms for data collection
10. Establish mechanisms for periodic review of the action plan and national strategy.

The implications of the EU’s ratification of the CRPD on Structural Funds investments are considered in the next chapter.

The Legal Framework for Structural Funds Investments and the Implications of the Convention on the Rights of People with Disabilities

This chapter considers the legal framework for Structural Funds, noting that human rights principles form a core dimension of it.

General Legal Framework

When considering the obligations on the European Commission and Member States in relation to Structural Funds investments, Counsel emphasises that:

‘The hierarchy of sources of EU obligation is no different in terms of the operation of the structural fund than to that in relation to any other aspect of EU law.’

Of key importance is that *‘Treaty obligations trump everything else.’* Accordingly, the relevant treaty provisions must be considered first, then international agreements (such as the CRPD), followed by secondary legislation, such as the regulations governing Structural Funds. This hierarchy is set out in more detail below:

- a) **Treaties:** The fundamental source of obligation is a relevant Treaty obligation. The proper interpretation of Treaties is informed by general principles of EU law (as elucidated by the Court of Justice of the European Union (‘the CJEU’), formerly the European Court of Justice (‘ECJ’) which include, amongst other things:
 - Recognition of fundamental rights as enshrined in the ECHR, and
 - Recognition of the EU general principle of equal treatment.

- b) **International Agreements:** Below the Treaty are relevant international agreements, such as the CRPD.
- c) **EU Secondary Legislation (including regulations):** As with provisions of the Treaty, other sources of EU law are interpreted consistently with general principles of EU law.
 - Secondary legislation that conflicts with Treaty obligations (as interpreted consistently with EU general principles of law) are unlawful.

Thus, the proper governance of Structural Funds will require Member States and the European Commission to not only adhere to the regulations for their use, but also to their wider obligations under relevant Treaties and the general principles of EU law (which include the recognition of fundamental human rights), as well as international agreements. These points are discussed in more detail below.

As discussed in Chapter 5, the obligations on both the European Commission and Member States to challenge disability discrimination are central to Structural Funds investments.

Structural Funds Framework

Treaty Obligations

For Structural Funds, the relevant Treaty obligations (and the ways in which powers should be exercised) are set out in Articles 174 and 175 of the Treaty of the Functioning of the European Union ('TFEU'). These address the EU's social cohesion policy and state:

- *'In order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion.'* (Article 174)
- Article 175 TFEU stipulates that the EU shall:
 - '...support the achievement of these objectives⁸² by the action it takes through the Structural Funds (European Agricultural Guidance and Guarantee Fund, Guidance Section; European Social Fund; European Regional Development Fund), the European Investment Bank and the other existing Financial Instruments.'*

The 'General regulations' for the Structural Funds were elaborated pursuant to Article 174.⁸³ The regulations set out general provisions for the ERDF, ESF and the Cohesion Fund. Separate regulations have been issued for each of these funds in which specific tasks and governance provisions for the relevant fund are set out.⁸⁴ These are:

82. That is, the objectives of the EU's Cohesion Policy.

83. See also Articles 174–178. 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—(referred to in this report as 'the General regulations').

84. See ERDF Regulations (Regulation (EC) No. 1080/2006) and ESF Regulations (Regulation (EC) No. 1081/2006).

- 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—‘the ESF regulations.’
- 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—‘the ERDF regulations.’

Fundamental Human Rights

In addition to the Treaty provisions that are the legal basis for Structural Funds, there are complementary Treaty provisions that reflect general principles of fundamental rights. Counsel cites the following examples:

- Article 2 of the Treaty of Lisbon states that the EU is founded on *‘the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’ and that 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.’*
- Article 9 of the TFEU states that:
‘In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of social protection, the fight against social exclusion, and a high level of education, training and protection of human health.’
- Article 19 of the TFEU (previously Article 13 of the Treaty of Amsterdam) authorises the EU to *‘take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.’*⁸⁵

The Rights of Persons with Disabilities

The fundamental rights of persons with disabilities have gained greater recognition in EU law over the past fifteen years or so with the consequence that, as Counsel advises:

‘There can be little doubt that as a matter of general principle the fundamental rights of persons with disabilities are now well recognised in EU law (and ... are likely, therefore, to inform the content of the relevant EU provisions regulating obligations with respect to the operation of Structural Funds).’

While Treaty obligations trump everything else, Counsel notes:

‘Importantly, however, the various Treaty provisions to which I have drawn attention are entirely consistent, once interpreted as a whole and with reference to the applicable general principles of EU

85. See also Article 3 of the Treaty of Lisbon and Article 10 of the TFEU.

law, with the proposition that EU law now accords a very high degree of legal protection to persons with disabilities.'

The genesis and reinforcement of the fundamental rights of people with disabilities has greatly accelerated since 1996 when the European Commission adopted the 'Communication on Equality of Opportunity for people with disabilities,' which launched the European Community Disability Strategy. Counsel identifies the following subsequent significant milestones:

- The Treaty of Amsterdam restated the principle of non-discrimination in stronger terms adding Article 13 of the Treaty Establishing the European Community (EC) (now Article 19 TFEU). Moreover, the Intergovernmental Conference that drew up the Treaty of Amsterdam included a declaration in the Final Act stating that the Community institutions must take account of the needs of persons with a disability when adopting measures under the former Article 95 EC to approximate Member States' legislation.
- On the basis of Article 13 EC a non-discrimination package was adopted consisting of two non-discrimination directives⁸⁶ and a non-discrimination action programme. This was the predecessor to the European Commission's most recent disability strategy, namely *'European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe.'*
- The EU Charter of Fundamental Rights, which was proclaimed in December 2000 and became binding in December 2009 when the Lisbon Treaty came into force (Article 6 TFEU) included two express references to disability and marked an even stronger legislative commitment to protecting the rights of persons with disabilities (see Articles 21 and 26). Article 21 specifically listed disability as one of the grounds on which discrimination must be prohibited. Other significant rights were also introduced [(note, especially, Article 3 (right to respect for physical and mental integrity), Article 25 (rights of the elderly)].
- Since December 2009 *'the Charter has become the reference text and the starting point for the CJEU's assessment of the fundamental rights which that legal instrument recognises.'*⁸⁷

The Significance of the European Convention on Human Rights

The content of the fundamental rights recognized in the EU Charter overlaps to a considerable extent with the fundamental rights recognized in the ECHR which enjoys a special position in EU law and informs much of the jurisprudence of the CJEU.⁸⁸ Indeed, the EU is soon likely to accede to the ECHR. Much of the case law of the CJEU refers expressly to the ECHR.⁸⁹ Counsel notes:

86. The main one is Council Directive 2000/78 EC establishing a general framework for equal treatment in employment and occupation.

87. Case C-92/09 and C-93/09 *Volker and Markus Schecke*; Case C-236/09 *Association belge des Consommateurs Test-Achats*.

88. See for example *Opinion 2/94 on Accession by the Community to the ECHR*.

89. For a detailed account with numerous examples see Richard Gordon *EC Law in Judicial Review* (2007, OUP) at Chapter 12.

‘In practice, the CJEU seeks to make its judgments consistent with those of the European Court of Human Rights in Strasbourg although differences sometimes occur.’⁹⁰

It is notable that with the CRPD in force, the European Court of Human Rights decided two important cases that have implications for the relationship between the rights of people with disabilities and the EU’s ratification of the CRPD. These cases [*Glor v Switzerland* (Application No. 13444/04 30 April 2009) and *Alajos Kiss v Hungary* (Application No. 38832/06 20 May 2010)] are discussed in Chapter 5.

International Agreements: The Implications of the EU’s Ratification of the CRPD

In accordance with the hierarchy of the EU legal framework discussed above, investments of Structural Funds must accord with any relevant international agreement. As highlighted in Chapters 2 and 3, the CRPD is directly relevant to community living, and Structural Funds have a strong link to community living because they can finance community living. However, the CRPD can only be applied to the governance of Structural Funds if this issue falls under the EU’s competence. This is because while Article 43 and Article 44 of the CRPD provide that a ‘regional integration organization’ (such as the EU) can become a States Party to the CRPD, this only applies to their areas of ‘competence.’

For the reasons explained below, the regulations governing the use of Structural Funds do fall within EU competence and therefore need to be interpreted in light of the CRPD.

The Conclusion of the CRPD

The EU’s competence to conclude (i.e. ratify) the CRPD, was, among other things, in exercise of its competence to combat disability discrimination.⁹¹ Pursuant to CRPD Article 44, a declaration of competence was annexed to the Council of the EU’s decision on the conclusion of the CRPD.⁹² This declaration is of great significance because its purpose is to identify the areas in which the EU has exclusive competence (i.e. responsibility for compliance with the obligations under the CRPD) and those areas in which it shares competence with Member States.

Areas Covered by the CRPD: EU Competence

Annex II of the Council of the EU’s decision on the conclusion of the CRPD refers to the areas in which the EU has exclusive competence and where it shares competence with Member States. Point 1 of Annex II lists the areas in which the EU has exclusive competence, such as ‘the compatibility of State aid with the common market and the Common Custom Tariff.’ Point 2 sets out a range of areas in which the EU and Member States share competence which includes ‘*action to combat discrimination on the ground of disability.*’ It then states:

90. Richard Gordon *EC Law in Judicial Review* (2007, OUP) at Chapter 12.

91. Article 19 Treaty on the Functioning of the European Union (TFEU). See also Article 95 EC Treaty.

92. 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) permitted the EU to conclude the Convention, following adoption, by the Council, of a Code of Conduct and the submission of an instrument of formal confirmation at the United Nations.

‘The European Community has exclusive competence to enter into this Convention in respect of those matters only to the extent that provisions of the Convention or legal instruments adopted in implementation thereof affect common rules previously established by the European Community. When Community rules exist but are not affected, in particular in cases of Community provisions establishing only minimum standards, the Member States have competence, without prejudice to the competence of the European Community to act in this field. Otherwise competence rests with the Member States. A list of relevant acts adopted by the European Community appears in the Appendix hereto.’

However, a comprehensive explanation of the extent of the EU’s competency is not given in the appendix. Rather the appendix lists ‘Community acts’ which ‘illustrate the extent of the area of competence.’ The list does not distinguish between areas in which the EC has exclusive competence and those that are shared with Member States. The introductory paragraph indicates that the extent of the EU’s competence has to be assessed in relation to the particular issue being considered:

‘[it] must be assessed by reference to the precise provisions of each measure, and in particular, the extent to which these provisions establish common rules that are affected by the provisions of the Convention.’

Significantly, the appendix to Annex II includes legislation that is of relevance to deinstitutionalization and Structural Funds investments, namely the Structural Funds General Regulations (set out under the heading ‘accessibility’).⁹³

It is also relevant to consider the *Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities*—(‘the Code of Conduct’). This is about the division of tasks based on competencies. No specific reference is made to deinstitutionalization or Structural Funds investments. However, two areas of direct relevance are referred to in Paragraph 5:

‘On matters falling within the shared competence and on matters where the Union coordinates, supports and/or supplements the actions of the Member States, the Union and the Member States will aim at elaborating common positions, in particular in relation to...’

The two areas are then described (respectively) as:

- Action to combat discrimination on the ground of disability (Article 19 TFEU, ex Article 13 EC) is about shared competence (see under 5(a)—‘legislative acts included in the Appendix to the Declaration of Competence annexed to Decision 2010/48/EC...’).
- The sphere of ‘economic and social cohesion (Articles 174-178 TFEU, ex Articles 158-162 EC)’ (see under 5(b)—‘Union legal acts or policy measures, where there is close and substantial connection with the implementation of the Convention’).

93. 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) page L 23/58.

Effect of the EU's Conclusion (Ratification) of the CRPD

The EFC report⁹⁴ considers that the effect of the EU's conclusion of the CRPD is that it would be:

'...placed below the Treaties (primary EC/EU law) and above secondary EC/EU law (Regulations, Directives, Decisions, Recommendations or Opinions). In other words, the UN CRPD cannot breach the constitutional principles of the Treaty establishing the European Community (which has now been renamed the "Treaty on the Functioning of the European Union"), but following its official conclusion by the EU, it will provide the basis for consistent interpretation of EC (now EU) secondary law.'

In reaching this conclusion the EFC report⁹⁵ referred to Case C-61/94:

'...the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements. It can therefore be concluded that accession to the UN CRPD creates an obligation to interpret EU law in a manner that is consistent with the Convention. To this end, if the wording of EU law legislation is open to more than one interpretation, the ECJ should adhere, as far as possible, to the interpretation that renders the provision most consistent with the UN CRPD. Similarly, and in line with Article 300(7) TEC, all European institutions and the Member States (for matters falling within EU competence) are required to apply EU law in a manner that is consistent with the UN CRPD.'

Counsel agrees with this analysis and adds:

'It is also consistent with Article 216(2) TFEU (former Article 300(7) EC) which provides that international agreements concluded by the EU are binding for the EU institutions as well as for Member States.'

The analysis holds true for mixed agreements (such as CRPD). As the CJEU has observed in relation to these types of agreements (see Case C-239/03 Etang de Berre at paragraph 25):

'In accordance with case-law, mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements in so far as the provisions fall within the scope of Community competence (see, to that effect, Case 12/86 Demirel [1987] ECR 3719, paragraph 9, and Case C-13/00 Commission v. Ireland [2002] ECR I-2943, paragraph 14).'

Thus, as a consequence of the EU's ratification of the CRPD, the CRPD is binding on the European Commission as an EU institution as well as on the Member States. It is an agreement that reflects shared competence, which means that Member States are under an EU legal obligation to implement

94. See footnote 67, p. 35.

95. See footnote 67.

the CRPD insofar as its provisions are within the scope of EU competence.⁹⁶ In addition, Member States and EU institutions are required to cooperate in relation to such ‘mixed agreements.’⁹⁷ In its Opinion of 1/94 the ECJ stated that:

‘[...] it is essential to ensure close co-operation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into.’

Accordingly:

‘This means, amongst other things, that regulations governing the use of Structural Funds must (to be lawful) be interpreted consistently with the requirements of the CRPD.’

The Implications of the CRPD on Structural Funds

In conclusion, the CRPD has a strong and clear relevance to the use of Structural Funds. This is because, taking into account the general legal framework discussed in this chapter, the European Commission and Member States are required to do all within their power to ensure that relevant EU law is applied. Supplementing these obligations with the requirements of the CRPD, Counsel notes:

‘... it becomes clear that the CRPD considerably strengthens legal protection for persons with disabilities. Indeed, that process of increased protection has, in substance, been developing for the past 15 years or so. The CRPD is itself a reflection of the EU’s policy of combating discrimination.’

Counsel emphasises that Structural Funds must be applied in a manner which reflects the protection afforded to the rights of people with disabilities.

‘It is also relevant to bear in mind that fundamental rights relevant to persons with disabilities as interpreted and applied by the Strasbourg Court are highly likely in practice to be interpreted and applied in the same way by the CJEU in Luxembourg. To the extent that the Structural Funds regulations are inconsistent with the requisite degree of protection, the regulations would themselves be unlawful.’

To the extent that the regulations are not inconsistent with the requisite degree of protection they must be interpreted and given effect to so as to achieve the requisite degree of disability discrimination protection.’

96. As the CJEU observed at paragraph 25 of its judgment in Case-239/03 Etang de Berre (see also Case C-459/03 Commission v. Ireland): ‘In ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement.’

97. See Article 4(3) TEU.

Interpretation of Structural Funds Regulations

As discussed in Chapter 2, one of the problems identified by ECCL in its report, *Wasted Time...*, related to the interpretation of Article 7 of the general regulations, concerning restrictions on the purchase of housing. ECCL highlighted that the lack of clarity about the extent to which Structural Funds can be used to purchase property would hinder projects that aimed to help people with disabilities live in family-like homes.⁹⁸ It is worth noting that Article 59 (specific eligibility rules for grants) of the proposed general regulations for Structural Funds, includes a similar provision. Article 59(3)(b) states that ‘the purchase of land not built on and land built on in the amount exceeding 10% of the total eligible expenditure for the operation concerned’ shall not be eligible for a contribution from Structural Funds.

Regarding this problem, Counsel advises:

‘...if an interpretation has to be adopted, one should be adopted which is not regressive to the EU’s obligations under CRPD Article 19 and which gives effect to the requirements of the CRPD which trump the regulations in any event as discussed above. On that basis any restrictions on eligibility contained in Article 7 would be read as being subject to expenditure being eligible by reason of the CRPD applying. It is, however, important to ensure that the Commission is asked to devise new Regulations that give specific and express effect to the CRPD and that permit existing housing to be purchased as homes for persons with disabilities.’

98. *Wasted Time...*, p. 32.

Structural Funds, Institutionalization, and EU Obligations to Combat Discrimination and Social Exclusion

This chapter considers the extent to which the inappropriate institutionalization of people with disabilities constitutes unlawful discrimination for the purposes of EU law. In light of the general principles discussed in Chapter 4, it examines more closely the requirements of EU law regarding disability discrimination and assesses whether Structural Funds are being invested in breach of EU law in Central and Eastern Europe.

General Obligations on Member States and the European Commission

While the Structural Funds regulations are predominantly concerned with technical and administrative matters (such as the management and monitoring of the funds), they also contain measures relating to discrimination and the promotion of social inclusion. As discussed in Chapter 4, the regulations for Structural Funds must be implemented in accordance with relevant Treaty obligations, general principles of EU law and relevant international agreements, which in this case is the CRPD. Specific examples of obligations under the regulations are considered in the next section.

Equality and non-discrimination are important principles of EU law and are supported by provisions highlighting the need to combat social exclusion. These principles are reflected in the regulations governing the use of Structural Funds, which are part of the national law of Member States. The EU institutions, including the European Commission will also be required to comply with the EU Charter on Fundamental Freedoms which is also legally binding on Member States when implementing EU law. As discussed above, the development of ECHR case law is another factor influencing EU law.

Obligations to Combat Discrimination

Both the European Commission and the Member States are required to comply with the General Regulations on Structural Funds,⁹⁹ which govern the use of the funds. The regulations make clear that in determining the scope and purpose of programs to be financed by Structural Funds, the European Commission and Member States must take into account their obligations to ‘combat discrimination.’ This is reiterated in Article 16 (Equality between men and women and non-discrimination) of the general regulations which states:

‘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. 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.’

The need for Member States and the European Commission to take action to prevent discrimination is also emphasised in the regulations for the ERDF and the ESF. The Preamble (paragraph 8) to the regulations for the ERDF,¹⁰⁰ (requires them to ‘ensure that there is no discrimination based on [a range of aspects including disability] during the stages of implementation of the operational programmes¹⁰¹ co-financed by the ERDF.’ The importance of combating discrimination is referred to a number of times in the regulations for the ESF,¹⁰² including the Preamble (paragraph 7) and Article 2(2).

The European Disability Strategy¹⁰³ states:

‘EU action will support and supplement national efforts to improve accessibility and combat discrimination through mainstream funding, proper application of Article 16 of the Structural Funds General Regulations, and by maximising requirements regarding accessibility in public procurement. All measures should be implemented in accordance with European competition law, in particular State aid rules.’

99. Council Regulation (EC) No. 1083/2006. The full reference is given in footnote 83.

100. 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—‘the ERDF regulations.’

101. Operational programmes are the documents submitted to Member States and approved by the European Commission which set out the Member State’s strategy, together with a set of priorities, for how Structural Funds will be used.

102. 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 ‘the ESF regulations.’

103. At p. 10.

Obligations to Promote Social Inclusion

The Structural Funds regulations also state that the funds should be used to promote social inclusion. For example:

- ‘The action taken under the Funds shall incorporate, at national and regional level, the Community’s priorities in favour of sustainable development by strengthening growth, competitiveness, employment and social inclusion and by protecting and improving the quality of the environment.’ (Article 3 of the General Regulations.)
- The ERDF ‘shall focus its assistance on supporting sustainable integrated regional and local economic development and employment’ and sets out a range of priorities, including ‘investments in health and social infrastructure which contribute to regional and local development and increasing the quality of life.’ (Article 4 of the ERDF Regulations.)
- Paragraph 9 of the Preamble and Article 3(1)(c)(i) of the ESF regulations refer to reinforcing the social inclusion of disadvantaged people, including people with disabilities. Article 2 states that the ESF shall contribute to the aims of strengthening economic and social cohesion and one of the ways in which it shall do so is by promoting social inclusion. Article 2(2) refers to combating social exclusion ‘especially that of disadvantaged groups such as people with disabilities.’

Obligations to Protect Against Disability Discrimination

In light of the EU’s ratification of the CRPD, Counsel advises:

‘EU law requires Member States and the institutions of the EU to ensure the highest protection for persons with disabilities and to interpret and give effect to EU law accordingly.’

This conclusion is based on a number of factors, but in particular it is due to:

- (i) the accelerating protection of disability discrimination in the EU over the past 15 years,
- (ii) the EU’s accession to the CRPD,
- (iii) the recognition in fundamental rights law (against the background of the widespread ratification by Contracting States of the CRPD) of the special need for high measures of judicial scrutiny to ensure the protection of persons with disability and
- (iv) the breadth and strength of the CRPD provisions read as a whole.

Counsel adds that *‘This obligation includes one that is sometimes called a positive obligation in ECHR law.’* The concept of ‘positive obligations’ has developed in the jurisprudence of the ECtHR, over the last decade or so. It derives from Article 1 of the ECHR, that requires States to ‘secure’ the rights set out under

the ECHR. In some circumstances this will require the State to take specific measures to ensure the effective protection of an individual's rights. For example, it is argued that ECtHR case-law in relation to Article 8 (right to private and family life) of the ECHR has shown that this right:

'...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,"¹⁰⁴ a state obligation to avoid interferences with a person's development of their "social identity,"¹⁰⁵ and a right (where the state bears responsibility for the applicants predicament,¹⁰⁶ or the applicant has significant impairments¹⁰⁷), to positive measures to address inappropriate living conditions.'¹⁰⁸

Counsel points out that:

'...the EU general principle of effectiveness (now enshrined in Article 4(3) TEU) is also relevant here; its parallel in ECHR law is the need to make Convention rights practical and effective. That principle, expressed shortly, mandates those giving effect to EU law "to take any appropriate measure ...to ensure fulfilment of the obligations arising out of the Treaties or resulting from action taken by the institution 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."

Accordingly, both the European Commission and its Member States must give careful consideration to the planning and implementation of projects funded by Structural Funds to ensure that they comply with the CRPD, and, in particular, do not give rise to discrimination against people with disabilities. This is because:

'... to the extent that the use of Structural Funds amounts to disability discrimination within the meaning of CRPD (considered below), there could be separate breaches by Member States and by the Commission.'

What Is Meant by Discrimination towards Persons with Disabilities?

This is another area in which the CRPD is likely to be highly influential, particularly given the lack of definition of either 'disability' or 'discrimination' in the Structural Funds regulations.

104. *Botta v Italy* (1998) 26 E.H.R.R. 241.

105. *Mikulic v Croatia* [2002] 1 F.C.R. 720.

106. *Moldovan v Romania* (No. 2) (2007) 44 EHRR 16 [105].

107. App. No. 36448/97, *Marzari v Italy*, 4 May 1999.

108. Parker, C. and Clements, L., *The UN Convention on the Rights of Persons with Disabilities: a New Right to Independent Living?*, *European Human Rights Law Review*, Issue 4(2008) 508–523; pp. 516–517.

The Meaning of Disability

Before the adoption of the CRPD, the CJEU (then the European Court of Justice—‘ECJ’) had applied a somewhat restrictive definition of disability and, arguably, a medical model approach to disability. In a 2006 Grand Chamber judgment concerning the Equal Treatment in Employment Directive 2000/78/EC it considered (in the context of that Directive) that disability must be understood as:

‘referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.’¹⁰⁹

However, the European Commission has emphasised that it applies a ‘social approach to disability’ which ‘puts much stronger emphasis on identifying and removing the various barriers to equal opportunities and full participation in all aspects of life for people with disabilities.’¹¹⁰ This is more in line with the approach taken by the CRPD. Although it does not provide a definition of disability as such, Article 1 of the CRPD provides a general description of ‘persons with disabilities’ as including:

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

As the EFC report notes, this description reflects the social model of disability, stating:

‘the major obstacle in the realisation of rights for persons with disabilities relates to attitudinal, physical, communication, legal and other barriers that inhibit the full participation of persons with disabilities in society.’¹¹¹

Given the scope and purpose of the provisions of the CRPD, Counsel comments:

‘In my view the EU’s ratification of the CRPD makes it overwhelmingly likely that the CJEU will take a much broader approach to this definition...the CRPD introduces a social model of disability. Moreover, both Article 5 (the requirement of reasonable accommodation) and Article 19 (community living) are, plainly, complementary provisions and must be read together rather than atomistically having regard to the overall purpose of the CRPD...

...To my mind there is no tension between the CRPD and the Employment Directive. The latter contained only a medical model of disability and its case-law cannot, sensibly, be read as curtailing the breadth of the social model introduced in CRPD.’

109. *Sonia Chacón Navas v. Eurest Colectividades* (2006) C-13/05 paragraph 43.

110. European Commission, Communication from the Commission to the Council and the European Parliament—Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities COM 2003 16 final p 7.

111. EFC Report, 42.

The Meaning of Discrimination

Article 16 of the General Regulations requires the European Commission and Member States to take appropriate steps to prevent discrimination, *inter alia* on the grounds of disability, though no definition of discrimination is provided.¹¹² Discrimination in other areas is considered to include different forms of discrimination. For example, Article 2 of the Employment Directive includes ‘direct discrimination,’ ‘indirect discrimination’ and ‘harassment.’ The Directive also recognizes that, in relation to people with disabilities, the failure to provide ‘reasonable accommodation’ can constitute discrimination (Article 5). The European Commission’s ‘Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation,’ at page 7, provides definitions of ‘direct discrimination,’ ‘harassment,’ ‘reasonable accommodation’ as well as ‘indirect discrimination.’

The CRPD includes a broad definition of disability discrimination. Article 2 defines ‘discrimination on the basis of disability’ 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. It includes all forms of discrimination, including denial of reasonable accommodation.’

The principles of equality and non-discrimination are integral to the CRPD, being included in Article 3 of the CRPD (General Principles) and running through the CRPD like a ‘red thread.’¹¹³

The CRPD makes clear that simply avoiding acts of discrimination is not enough. States Parties are required to take ‘*all appropriate measures*’ to address disability discrimination,¹¹⁴ to ‘*prohibit all discrimination on the basis of disability*’¹¹⁵ and ‘*take all appropriate steps to ensure that reasonable accommodation is provided*’ in their work to promote equality and eliminate discrimination.¹¹⁶ Counsel observes:

‘...there is, in my opinion, no room for doubting that both direct and indirect discrimination are encompassed in CRPD. The breadth of its requirements and its concentrated focus on the rights of persons with disability cannot be interpreted as confining CRPD to direct forms of discrimination.’

112. For a discussion on how Article 16 was transposed into Member States operational programmes see: Study on the Translation of Article 16 of the Regulation EC/1083/2006, on the promotion of gender equality, non-discrimination and accessibility for disabled persons into Cohesion policy programmes 2007–2013 co-financed by the ERDF and Cohesion Fund’ No. 2008.CE.16.0.AT.053, September 2009 Public Policy and Management Institute in partnership with Net Effect and Racine at the request of the European Commission.

113. Professor Lisa Waddington, A New Era in Human Rights Protection in the European Community: The Implications the United Nations’ Convention on the Rights of Persons with Disabilities for the European Community, Maastricht Faculty of Law 2007, at 4.

114. Article 4(b).

115. Article 5(2).

116. Article 5 (3).

The EFC report examines this issue closely.¹¹⁷ It considers that disability discrimination under the CRPD includes ‘direct, indirect, structural, multiple or other, as well as discrimination by association and discrimination based on assumed or future disability’ as well as ‘an unjustified denial of reasonable accommodation is a form of discrimination.’¹¹⁸

Reasonable accommodation is defined in the CRPD (Article 2) as:

‘...necessary and appropriate modifications 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.’

The obligation to ensure that persons with disabilities can exercise their rights ‘without discrimination of any kind on the basis of disability,’ including ‘reasonable accommodation,’ takes immediate effect.¹¹⁹

The ECtHR’s Approach to Discrimination

As discussed in Chapter 4, the ECtHR’s decisions also influence the CJEU. Counsel notes that

‘...fundamental rights relevant to persons with disabilities as interpreted and applied by the Strasbourg Court are highly likely in practice to be interpreted and applied in the same way by the CJEU in Luxembourg.’

Accordingly, when considering how the concept of disability discrimination is likely to develop in the context of EU law and in light of the CRPD, it is important to consider ECtHR rulings. This is particularly relevant given that the ECtHR has highlighted the importance of the CRPD in the protection of the rights of persons with disabilities (discussed below).

In recent years the ECtHR has taken a strong line on what might amount to discrimination, and on what is expected of States to address discriminatory practices. In *D.H. and Others v. the Czech Republic* (2008)¹²⁰ for example, it held that:

‘...discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations. However, Article 14 does not prohibit a member State from treating groups differently in order to correct “factual inequalities” between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article. The Court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory

117. EFC Report, p. 54.

118. Defined in Article 2 CRPD.

119. EFC Report, p. 55, referring to: see Anna Lawson, *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* 19 (2009).

120. (2008) 47 E.H.R.R. 3 § 175.

notwithstanding that it is not specifically aimed at that group and that discrimination potentially contrary to the Convention may result from a de facto situation. [case citations removed]

The ECtHR has commented that ‘the authorities must use all available means to combat racism.’¹²¹ Similarly, in relation to sex discrimination, it has held that: ‘... very weighty reasons would have to be put forward before such a difference of treatment [on grounds of sex] could be regarded as compatible with the Convention.’¹²²

The CRPD has already made a significant impact on the approach taken by the ECtHR to disability discrimination, with the Court referring to the important role played by this Convention in clarifying the protection afforded by the ECHR to disabled people. Jarleth Clifford notes in his article considering the CRPD and its impact on European equality law,¹²³ that the ECtHR ‘has pushed the issue of discrimination and intolerance against persons with disabilities into focus,’ setting an example ‘which the ECJ should look to follow.’

Thus, in *Glor v. Switzerland* (2009)¹²⁴ the ECtHR confirmed that for the purposes of Article 14 (freedom from discrimination) and having regard to the ‘necessity to fight against discrimination towards disabled persons and to promote their full participation and integration into society’ that the ‘margin of appreciation’ for States to establish different legal treatment for disabled persons is significantly reduced.¹²⁵ In this context Counsel comments:

‘Prior to this case, the Strasbourg Court had never found a violation of the right to non-discrimination on the basis of disability. In its ruling the Court was highly critical of the disability discrimination committed by the Swiss authorities through failing to provide reasonable accommodation to Mr Glor by finding a solution which responded to his individual circumstances. The Court also observed that the CRPD signalled the existence of a European and universal consensus on the need to protect persons with disabilities from discriminatory treatment. Tellingly, perhaps, this observation was made in spite of the fact that Switzerland had not signed the CRPD.’

The Court took a similar approach in *Alajos Kiss v. Hungary*.¹²⁶ In this case the applicant had been diagnosed as having ‘manic depression’ (and was therefore considered to ‘suffer from a mental disability’) and had for that reason been placed under partial guardianship. Whilst acknowledging that States should enjoy a wide margin of appreciation in relation to determining whether restrictions on voting can be justified, the Court considered that an absolute bar, irrespective of the person’s ‘actual faculties’ was not accept-

121. *D.H. and Others v. the Czech Republic* [GC] (2008) 47 E.H.R.R. 3 para 176.

122. *Schuler-Zgraggen v. Switzerland* 16 E.H.R.R. 405 para 68.

123. ‘The UN Disability Convention and its Impact on European Equality Law’ *The Equal Rights Review* Vol. Six (2011) 19.

124. Application No. 13444/04 30th April 2009.

125. Para 84.

126. Application No. 38832/06, 20th May 2010; [2010] M.H.L.R. 245.

able. The Court held unanimously that such an absolute ban violated the right to free elections of Article 3 of Protocol 1 ECHR. At paragraph 42 the Court observed that:

‘... if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State’s margin of appreciation is substantially narrower and it must have very weighty reasons for the discrimination in question.’

Counsel draws attention to the comments by the ECtHR in relation to the protection of the rights of people with disabilities:

‘In reaching its decision the court also stated (at paragraph 44) as follows:

“The Court further considers that the treatment as a single class of those with intellectual or mental disabilities is a questionable classification and the curtailment of their rights must be subject to strict scrutiny. This approach is reflected in other instruments of international law (...). The Court therefore concludes that an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote. (Emphasis added)”

By imposing a legal requirement that the curtailment of the rights of persons with intellectual or mental disabilities must be subject to strict scrutiny, the Strasbourg Court implicitly indicated that a very high threshold must be met in order for it to be justified.

At paragraph 95 of its ruling, the Court highlighted the underlying dangers of not adopting highly protective safeguards for persons with disabilities:

“ ... such groups were historically subject to prejudice with lasting consequences resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs.”

I should stress that in both cases the CRPD was highly influential in the rulings that were given.’

Institutionalization as Discrimination

As highlighted in the discussions above, Counsel considers that there is now, not just due to the adoption of the CRPD but also in light of developments in EU law and jurisprudence emanating from the ECtHR, a requirement to provide a high measure of protection of people with disabilities from discrimination. This section considers the specific arguments for stating that the use of Structural Funds to maintain a system that institutionalizes people with disabilities amounts to both (indirect) discrimination and that investing such funds in institutions rather than developing community-based alternatives, amounts to a denial of reasonable accommodation.

The comments by the ECtHR in *Alajos Kiss* are relevant to the question whether the institutionalization of disabled people is discriminatory in itself. Arguably, the Court's view that consideration needs to be given to the history of prejudice and discrimination towards a group of people and the requirement in such cases for States to 'have very weighty reasons for the restrictions in question' could be applied to situations where governments have decided to use available resources (such as Structural Funds) to maintain institutional care for people with disabilities, rather than develop community-based alternatives.

Even in the absence of serious concerns about the poor living conditions and lack of care in institutions in CEE (as described in Chapter 2), placement in an institution leads to substantial restrictions of a person's rights and freedoms. It may entail a deprivation of liberty, especially in cases where the decision to place a person in an institution is purported to be made by their 'guardian' irrespective of the person's wishes,¹²⁷ as illustrated by the ECtHR's decision in *Shtukaturov v. Russia* (2010).¹²⁸ However, even if there is no deprivation of liberty, the right to private and family life will be engaged. This is because the characteristics of institutions constitute a significant interference with social interaction, the ability to establish relationships, educational and other personal opportunities, as well as those that impair an individual's 'physical or psychological wellbeing.'¹²⁹ These factors have all been recognised by the ECtHR as being important components of Article 8 (the right to private and family life).

Further support for identifying institutionalization in itself as a serious infringement of a person's rights is found in CRPD Article 19. While it does not prohibit 'institutions' *per se*, the range and manner of support expected under Article 19 is in direct contrast to the culture and environment found in institutions. Thus, irrespective of the living conditions in institutions, if their effect is to exclude disabled people from the rest of society and prevent them from participating in community life, this conflicts with Article 19 which requires, not only that disabled people are not forced to live in particular living arrangements or in segregated / excluded settings, but also that States Parties 'take effective and appropriate measures' (including the provision of community services and facilities) to facilitate the full inclusion and participation of people with disabilities.

Additionally, Article 19 requires that States Parties recognise 'the **equal** right of all persons with disabilities to live in the community, with choices **equal** to others...' [emphasis added]. Thus, CRPD Article 5 (Equality and non-discrimination) is also relevant.

The European Commission has emphasised the importance of Article 16 of the Structural Funds General Regulations in addressing social exclusion and disability discrimination, stating that the Article 'offers an opportunity and a positive framework for the promotion of equality, non-discrimination.'¹³⁰

127. In many countries of Central and Eastern Europe and the former Soviet Union, a system of guardianship is still applied under which a guardian is appointed to make decisions on behalf of the person deemed to be incapacitated. Those subject to guardianship are prevented from making personal decisions in a wide range of areas such as employment, marriage, voting, and where to live.

128. Application No. 44009/05, 27th March 2008; (2008) 11 C.C.L. Rep. 440; [2008] M.H.L.R. 238. See also *HL v UK* (2005) 40 EHRR 32 and *Stanev v Bulgaria* Application No. 36760/06.

129. See for example *Tysiac v Poland* (2007) 45 EHRR 42 [107].

130. *Ensuring accessibility and non-discrimination of people with disabilities: Toolkit for using EU Structural and Cohesion Funds* ('the Toolkit') p. 14.

The Commission has also expressed the opinion that Structural Funds should not be used to invest in institutions as this exacerbates the exclusion of people with disabilities:

‘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, 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...as well as all human rights and equal opportunities.’¹³¹

Indirect Discrimination

Two common reasons for the institutionalization of disabled people in CEE are the lack of community-based alternatives, and that in many parts of this region, the legal and financial systems are barriers to the development of services that are outside the institutional system.

These factors raise the question of whether this amounts to indirect discrimination by the Member State, particularly in circumstances where Structural Funds are available. This would arise where the State’s allocation of resources to health and social welfare systems (and in relation to children, education) are geared towards placing people with disabilities in institutions rather than making appropriate support available in the community, and that this has a disproportionate impact on disabled people, (the placement in an institution constituting a severe restriction on their rights and freedoms which other non-disabled citizens do not face).

This argument is strengthened by:

- The widespread ratification of the CRPD, containing as it does an explicit obligation (in Article 19) to develop community-based alternatives.
- The ECtHR’s comments on discrimination generally, and in relation to disability discrimination in particular, and its strong statements on the need to take action to protect the rights of people with disabilities.
- Considering the impact of a Member State having access to Structural Funds, particularly when the regulations require that this (substantial) additional funding is invested to prevent and combat discrimination.

For these reasons, it is argued that Structural Funds investments in maintaining the institutionalization of people with disabilities constitutes indirect disability discrimination on the basis that there is no objective (for example economic or social) justification for the disproportionate numbers of certain

¹³¹. *Ibid*, p. 7.

categories of disabled people living in institutions compared to non-disabled people. While a state might be able to point to historic reasons for this difference, such an excuse would be difficult to sustain if it could be shown that additional external funding (such as Structural Funds) was being invested in perpetuating this form of care rather than developing an alternative system that does not lead to such restrictions, namely community-based services.

This situation is similar to the circumstances considered by the U.S. Supreme Court, in *Olmstead v LC* (1999).¹³² That case concerned the State of Georgia's funding arrangements that favoured institutional placements, rather than community-based independent living. Although the Supreme Court acknowledged that the financial resources of states were relevant factors in determining their policies, it held that the arrangements in question contravened the Americans with Disabilities Act (1990) that includes the prohibition of discrimination in the provision of public services. The Court commented:

'The identification of unjustified segregation as discrimination reflects two evident judgments: Institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life...confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.'

Denial of Reasonable Accommodation

With the availability of additional funds it can be argued that investing Structural Funds in institutions rather than developing community-based alternatives amounts to a denial of reasonable accommodation. This is because, in light of its duty under the CRPD to promote equality and eliminate discrimination (see Article 5(3) and the definition of disability discrimination, which includes the denial of reasonable accommodation), a Member State would be required to provide clear reasons why it decided to invest in maintaining the institutional system rather than developing community-based alternatives.

These points could be considered alongside the obligations on Member States and the European Commission to use Structural Funds to promote social inclusion (Article 3 of the general regulations) and improve quality of life (Article 4 of the ERDF regulations). The EFC report comments:

*'States Parties should (by means of national legislation) extend the **duty to provide reasonable accommodation** to a broad array of social actors, such as national administrations, employers, education providers, health care providers, testing and qualification bodies, providers of goods and services, and private clubs. The duty requires these actors to reasonably adjust policies, practices and premises that impede the inclusion, and participation, of persons with disabilities.'*¹³³

132. US Supreme Court (98-536) 527 US 581 (1999).

133. EFC, p. 55.

The CRPD requires States Parties to take action to provide ‘reasonable accommodation’ when a ‘necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden’ is needed ‘to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.’ While the ECtHR has set limits on the extent to which Article 8 might place obligations on States, particularly where there may be cost implications, requiring ‘a direct and immediate link’ between the measures sought and the person’s predicament and deferring to the State’s ‘margin of appreciation,’¹³⁴ there are at least three reasons why, in the context of Structural Funds, this cautious approach may be deemed inappropriate:

- Structural Funds are additional external funds, not domestic and limited State resources;
- Where a person with disabilities has been institutionalized purely as a consequence of having no suitable services in the community, this has a direct and immediate impact upon that person’s life (interfering as it must with their ‘right to personal development and their relations with other human beings and the outside world’¹³⁵); and
- Even where the margin of appreciation is wide, it is for the Court to determine whether a person’s ECHR rights have been curtailed:

‘...to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate.’¹³⁶

In such circumstances, the ECtHR might well consider it necessary to examine the reasons why a State has not taken reasonable steps to establish community-based alternatives to institutions, especially when it had available funds to do so¹³⁷ and in light of the following:

- the general consensus on the need to move from institutional care to a system of community-based services;¹³⁸
- the international recognition of the need to protect the rights of people with disabilities, as reflected in the adoption of the CRPD¹³⁹ which includes the right to community living as articulated in Article 19 (and all EU Member States have recognized the rights set out in the CRPD, having signed, if not ratified it);

134. See, for example, *Sentges v. The Netherlands* (2003) 7 CCLR 400, 405; Admissibility Application No. 27677/02; 8 July 2003.

135. *Botta v. Italy* (1998) 26 E.H.R.R. 241, paragraph 32.

136. *Hirst v UK* (2006) 42 E.H.R.R. 41; 74025/01; 30 March 2004, paragraph 62.

137. Parker, C. and Clements, L., *The UN Convention on the Rights of Persons with Disabilities: a New Right to Independent Living?*, *European Human Rights Law Review*, Issue 4 (2008) 508–523; p. 516.

138. See for example Report of the Ad Hoc Expert Group on the Transition from Institutional Care to Community-based Care, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, September 2009.

139. *Glor v. Switzerland* (2009) Application No. 13444/04, 30 April 2009, para 53.

- the State has access to funds that would enable it to shift its model of care to community-based services.

Summary: Investing Structural Funds to Maintain Institutional Care Is Contrary to EU Law

In light of the previous discussions, Counsel concludes:

‘My view is clear. The use of Structural Funds that have the effect of perpetuating the institutional conditions in the CEE is manifestly unlawful and in breach of the high measure of protection against discrimination that EU law now accords to persons with disability.’

Counsel notes that the question of whether taking action to temporarily ameliorate conditions within an institution is in breach of EU (and ECHR) law needs to be considered separately. This is discussed in the next chapter. Subject to this point, Counsel gives two reasons why money deployed from Structural Funds in perpetuating institutionalisation would be contrary to EU law. These are:

- **Such action is contrary to the CRPD**

‘A strategy that continues to invest in conditions of institutionalisation is a misuse of the entire purpose of Structural Funds and contrary to the underlying purpose of the CRPD and, in particular, to the terms of CRPD Articles 5 and 19.’

- **Institutional Conditions are contrary to the ECHR**

Counsel notes that as a consequence of people with disabilities being institutionalized:

‘The adverse effects are, perhaps, obvious but include erosion of autonomy and independence, undermining of inclusion within the rest of society, damage to healthy development and consequential violations of many fundamental rights as recognised in international human rights treaties including, most appositely, the European Convention on Human Rights (‘ECHR’).’

In Counsel’s view, such situations ‘seem to me to be clearly in breach of Article 8 ECHR and also of Article 14¹⁴⁰ taken in conjunction with Article 8.’ Furthermore Counsel states:

‘...although the case-law of the Strasbourg Court cannot robotically be transposed to the EU context, there is considerable overlap and I consider that the CJEU or General Court would be highly likely to apply the same considerations in the light of the CRPD requirements outlined above in finding there to be discrimination contrary to the CRPD. In reaching that conclusion I consider that the high level of protection and the limited discretionary area of judgment accorded to Contracting (Member) States is also highly relevant. These considerations in turn are related to the past history of prejudice and discrimination shown to persons with disability.’

140. The term ‘other status’ in Article 14 has sometimes caused a degree of uncertainty but this concept seems now to be relaxed and the focus is on the treatment accorded to the particular grouping. See *Clift v. United Kingdom* App 7205/07.

Protecting the Rights of Persons with Disabilities and Promoting Community Living: The Role of the EU

The previous chapters have argued that in light of its ratification of the CRPD, the European Commission and Member States are required to take steps to promote the right to community living and protect people with disabilities from disability discrimination. Chapter 5 argues that the use of Structural Funds to maintain institutions rather than to develop community-based alternatives amounts to disability discrimination and is therefore contrary to EU law. This chapter considers the specific actions that the European Commission and Member States must take to protect against disability discrimination and to enable people with disabilities to exercise their right to community living.

This report has reflected on the obligations of the European Commission and Member States in promoting community living, as articulated in CRPD Article 19 as well as the human rights violations that are a consequence of the inappropriate institutionalization of people with disabilities. However, as Counsel observes, while distinct, these are two core aspects of the same issue and are inextricably linked:

‘I take the view that the two concepts really go together in terms of that which is required as a matter of EU law. If institutionalisation constitutes a breach of CRPD then, in my view, the consequences of that institutionalisation place a continuing obligation on the Member State to progressively realise a deinstitutionalisation (see also, CRPD Article 4(2)). This is consistent with the EU general principle of effectiveness and Article 4(3) TEU also discussed earlier.’

Counsel confirms that the European Commission and Member States are subject to specific obligations in relation to investments of Structural Funds. These are set out in this chapter.

European Commission's Obligations

a) General obligations

- *'...the [European] Commission has a clear obligation to act in a manner that ensures that the rights of persons with disabilities are respected, protected and fulfilled.'*
- *'It may do this if necessary by instituting infringement proceedings against Member States which have failed to ensure such protection where required or which have themselves been guilty of disability discrimination contrary to their separate obligations under the Treaties.'*
- *'If the Commission fails so to act it may, subject to important procedural requirements being fulfilled, itself be the subject of court action.'*

b) Monitoring obligations under the CRPD

- *'The CRPD in particular compels the [European] Commission to monitor [Member States'] operational plans much more carefully and ensure that moneys spent under them are not used for the purposes of (or with the effect of) institutionalisation [of people with disabilities].'*
- *'The Commission must ensure that the funds are, in this respect, properly defrayed and it is entirely wrong to suppose that Member States have, in this context, a wide margin of appreciation.'*
- *'Where moneys are misused and institutionalisation perpetuated the Commission should take infringement action if unable to prevent continued institutionalisation.'*

c) Protection from disability discrimination under CRPD

- *'It follows in my view, that to the extent that the use of Structural Funds amounts to disability discrimination within the meaning of CRPD...there could be separate breaches [of the CRPD] by Member States and by the Commission.'*

The European Commission could be liable to legal challenge for:

- (i) approving without proper evaluation and/or monitoring over-general operational plans which might be, or were being, used to effect discrimination against persons with disabilities,
 - (ii) failing to take infringement actions against Member States that were contravening the CRPD.
- *'Specifically the European Commission would be required to:*
 - (i) *Ensure that EU funds are not invested in a manner that undermines the rights set out in the CRPD (see for example, the purpose of the CRPD, Article 1 '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 and respect for their inherent dignity' and see also Article 4(1)(d) which requires States Parties to 'refrain from engaging in any act or practice that is inconsistent with the present Convention').¹⁴¹*

141. See also 4(1) (a), (b), (c).

- *Ensure that EU funds are not invested in a manner which conflicts with obligations under Article 9 (Accessibility) which requires State Parties to take measures in relation to a range of areas such as the physical environment, transport and public services to ‘enable persons with disabilities to live independently and participate fully in all aspects of life’ (Article 9 is an area specifically referred to in the Appendix to EU Council’s decision on the conclusion on the CRPD.)*¹⁴²
 - (ii) *Take ‘all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise’ (see Article 4(1)(e) which requires States Parties to ‘take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise’ (this will be relevant as those ultimately receiving the funds are likely to fall into this category) and Article 5(3) which requires States Parties to ‘promote equality and eliminate discrimination.’*¹⁴³
 - (iii) *Consider its duties as a donor of funds—this is relevant to Article 32 (International co-operation), which refers to ‘the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives’ of the CRPD.*
 - (iv) *Make arrangements to monitor investments of Structural Funds as part of its national monitoring requirements under Article 33.’*
- d) Review of law, policies and practices
- *‘Having ratified the CRPD, the European Union, as explained earlier, will have the same obligations as Member States to undertake a review of its law, policies and practices to identify (and address) areas of non-compliance with the CRPD, as required by Article 4(1).’*
 - Similar conclusions have been reached by other experts in EU law:
 - In her analysis of the implications of the CRPD on the European Community (undertaken prior to the EU’s ratification of the treaty), Professor Lisa Waddington identifies the regulations on Structural Funds as an area requiring such a review. In particular, it will be necessary to ensure that EU funding is being used to remove existing barriers for people with disabilities and that such funds are not creating new barriers.¹⁴⁴
 - The EFC report comments:

‘... the argument that the EU has limited competence for matters related to the implementation of the Convention is not sufficient to show that the EU is exempted from the obligation to examine and, if necessary, to modify existing legislation with regard to matters covered by the Convention and falling under EU competence. To argue otherwise would militate against the

142. Council Decision 2010/48 EC on 26 November 2009 permitted the EU to conclude the Convention, following adoption, by the Council, of a Code of Conduct and the submission of an instrument of formal confirmation at the United Nations.

143. See also Article 5(2) and Article 4(1)(e).

144. Professor Lisa Waddington, *A New Era in Human Rights Protection in the European Community: The Implications the United Nations’ Convention on the Rights of Persons with Disabilities for the European Community*, Maastricht Faculty of Law 2007.

plain meaning of the text and frustrate one of the main objects and purpose of the UN CRPD, which is to challenge the legacy of the past.’¹⁴⁵

Member States Obligations

‘For their part Member States (with the EU Commission monitoring what is done and enforcing where it is not done) must ensure the progressive realisation of Structural Funds to ensure that the underlying purposes of the CRPD are fulfilled.’

a) Progressive realization

- *‘Although Article 19 makes no specific reference to the need to close institutions, it is implicit that the closure of the long-stay institutions in CEE (together, with the development of community-based services alternatives)—i.e. a process of ‘deinstitutionalisation’—is a necessary consequence of compliance with its provisions. For example, the community-based services to be provided under Article 19(b) must ‘prevent isolation or segregation from the community’ and the opportunity to choose where and with whom to live (Article 19(a)), access to a range of community support services (Article 19(b)) and equal access to mainstream community services (Article 19(c)) all depend on the availability of community-based services and support.’*
- *‘Some obligations under Article 19 must be addressed by governments immediately, such as the requirement to recognise the right of people with disabilities to live in the community, ‘with choices equal to others,’ while others can be met over time. This is because some of the obligations fall into the category of ‘economic, social and cultural rights,’ for example providing access to a range of community-based support services. As required by Article 4(2) they must undertake measures “to the maximum of its available resources...with a view to achieving progressively the full realization of these rights...” The CRPD Committee expects States Parties to monitor their progress in realizing the rights under the CRPD and report on such progress in their periodic reports.’¹⁴⁶*
- *‘Since receipt of Structural Funds provides State Parties with additional available resources (i.e. the opportunity to increase their maximum resources) there is limited scope for such States to use these funds in any way that would conflict with the Article 19 obligation to develop community-based alternatives to institutionalisation.’*

b) Promoting of equality and non-discrimination

- *‘In all their actions, States Parties must comply with their obligations to promote equality and prevent disability discrimination, see for example Article 5 CRPD. On the basis of the arguments made above, it follows that States Parties should invest Structural Funds to meet their obligations under Article 19.’*

145. EFC, p. 51.

146. See Committee on the Rights of Persons with Disabilities *Guidelines on treaty-specific document to be submitted by States Parties under article 35, paragraph 1, of the Convention on the Rights of Persons with Disabilities (CRPD/C/2/3, 2009)*.

- c) Possible approach of the Court of Justice of the European Union
- *‘By using Structural Funds to build new or [to] renovate existing institutions instead of developing community-based alternatives, States Parties are not only exacerbating the exclusion of people with disabilities, but are also missing an opportunity to use available funds to help finance the transition from institutional services to community-based supports.¹⁴⁷ This appears to contravene the concept of progressive realisation which requires States to take measures with “to the maximum of its available resources ... with a view to achieving progressively the full realisation of these rights.”’*
 - *‘Whilst the courts will be wary of making firm declarations on the use of public funds it is likely that they will be less circumspect in demanding that the process by which such awards are made is based on rational and legal criteria and pays due regard to any positive obligations on the grant maker or grant recipient. Such a contention gains support from the judgments by the US Supreme Court in *Olmstead*¹⁴⁸ and South African Constitutional Court in *Grootboom*.¹⁴⁹ On the basis of such judgments there would appear to be strong grounds for believing that the CJEU too would be prepared to scrutinise the process by which Structural Funds are allocated (including, for example, the restrictions that should be imposed on their use by Member States).’*

Further Points of Clarification

As stated in Chapter 5, Counsel considers that investing Structural Funds to maintain institutions is contrary to EU law. Within this analysis, Counsel draws attention to two significant factors, both of which require careful consideration. The first relates to the provision of long-stay care and highlights the difficult question of defining what is meant by institutional care. The second concerns the question of whether the use of Structural Funds to renovate institutions rather than facilitate their replacement with community based services can ever be justified.

Long-term Care—Requirements of the CRPD

Counsel points out that not all long-stay care will necessarily contravene the CRPD. Whether the particular form of long-stay care will give rise to a breach of the CRPD will depend on a number of fact-sensitive considerations such as (but not limited to) the following:

- the ‘mix’ of community care and long-stay provision,
- the sensitivity of the culture of the long-stay residential care to the particular needs of the persons with disabilities who reside there and

147. The limited circumstances in which Structural Funds may be used to ameliorate the poor living conditions in institutions are discussed below under Limits to the use of Structural Funds to Ameliorate Poor Living Conditions and in Chapter 7.

148. US Supreme Court (98-536) 527 US 581 (1999).

149. Constitutional Court of South Africa in *Government of South Africa v. Grootboom* (2000) (11) BCLR 1169 (CC).

- whether or not the residential care in question has the effect of cutting off persons with disabilities from the community.

Crucially:

‘It will always be necessary to have regard to factors such as these so as to be in a position to determine whether EU law in general and CRPD Articles 5 and 19 in particular are being violated.’

This again highlights the need for clarity as to the meaning of ‘institution.’ This term should not be restricted to the ‘traditional long-stay institutions’ described in Chapter 2. It can also include the services in which the ‘institutional culture’ (or as Counsel describes, the ‘institutionalizing conditions’) prevail—such as where individuals are subject to strict, impersonal regimes and have no control over their own lives.

Forms of residential care will be necessary as part of the range of community-based services to meet the needs of people with disabilities, but they must accord with Article 19. This requires, amongst other things, that people 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* and *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.* The focus of community based services and supports must be to enable people with disabilities:

‘...to use the same range of accommodation, living arrangements and patterns of living that are available to the rest of the population, and to have a good quality of life, participating as full citizens in social, cultural and economic activities to the extent and in ways the individual chooses.’¹⁵⁰

In his Issue Paper on Article 19, the then Council of Europe’s Commissioner for Human Rights, Thomas Hammarberg, states:

‘Independent living occurs if, in whatever living scheme one chooses to live one’s life, which... about be one within the extended family, separate from it, or some other arrangement, one retains autonomy and control over one’s life and decisions while accessing the individualised supports needed to do so.’¹⁵¹

In addition, the CRPD requires that people with disabilities are involved in the development of policy and legislation relevant to the realization of rights under Article 19, including planning the range of community based services to be developed for people with disabilities (and subsequently the monitoring, and evaluation of such services).

150. Jim Mansell et al., Deinstitutionalisation and Community living: Position Statement of the Comparative Policy and Practice Special Interest Research Group of International Association for the Scientific Study of Intellectual Disabilities, *Journal of Intellectual Disability Research*, Vol. 54, Part 2, 104–112, February 2010; p. 105.

151. Issue paper, pp. 11–12.

These important details require explicit attention in the revised regulations on Structural Funds for 2014–2020. Suggestions on how the proposed regulations might be amended to better reflect this issue are provided in the next chapter.

Limits to the Use of Structural Funds to Ameliorate Poor Living Conditions

Another issue raised by Counsel was the question as to whether Structural Funds can be used to renovate institutions. In his view this might be justified, but only in limited circumstances:

‘...there might, perhaps, be some instances where money spent in ameliorating particularly serious conditions could be considered not to violate EU law but, rather, to be a first step in a progressive realisation programme. This may be especially so where State resources are limited.’

Counsel stresses that the use of Structural Funds for such purposes must be linked to deinstitutionalization strategies (i.e. for the development of community based alternatives):

‘However, merely investing in institutions to make the institutions better without appropriate strategic consideration being given to a programme of community living is a breach of EU law (including Articles 5 and 19 CRPD) and a misuse of Structural Funds if it is all that Structural Funds are being used for.’

While there may be circumstances in which it might be justified to use Structural Funds to ameliorate the poor living conditions in institutions, these are restricted to cases in which:

- a) There is a clearly identified and compelling case to take limited action (for example to prevent an urgent and life threatening risk to the resident); and
- b) Structural Funds are being invested to implement a wider strategic programme for community living, in other words, the Member State is taking specific action to promote community living.

Chapter 3 provides an analysis of the rights under Article 19 and the suggested steps to be taken by Member States to meet their obligations to implement it. This is endorsed by Counsel:

‘...as a way of looking at the kind of positive action that would be required by Member States and monitored by the Commission that might, in conjunction with that kind of positive action, permit use of some Structural Funds moneys to ameliorate appalling conditions of the kind that Wasted Time so graphically describes.’

Conclusions and Recommendations

This chapter summarizes the key legal issues considered in the previous chapters, setting out the relevant principles and conclusions, as confirmed by Counsel. In light of these conclusions, recommendations are made on how the proposed regulations for the governance of Structural Funds during the next financing period should be amended to ensure compliance with the CRPD. The remedies that may be available when breaches of obligation occur are set out in the Appendix to this report.

General Legal Principles

- The rules relating to the availability, provision and monitoring of the use of Structural Funds fall within the area of EU competence.
- The CRPD is applicable to the use of Structural Funds (given the connection between Structural Funds and both the power of the EU to take action to combat discrimination and to promote ‘economic and social cohesion’).
- The use of Structural Funds to build new and/or renovate existing ‘institutions’ is prima facie contrary to EU law on the basis that it would:
 - (a) constitute a breach of the EU’s international legal obligations (in particular the CRPD and the ECHR); and
 - (b) amount to indirect disability discrimination.

While in very limited circumstances Structural Funds might be capable of being used to ameliorate the poor living conditions in institutions these are restricted to cases in which:

- a) There is a clearly identified and compelling case to take limited action (for example to prevent an urgent and life threatening risk to the resident); and
- b) Their use forms part of a wider strategic programme for community living.

It would be *‘a misuse of Structural Funds if it is all that Structural Funds are being used for’*—in other words Structural Funds cannot be used if there is no such community living plan and these funds are only being used to improve the conditions in the institution.

EU Commission Obligations

General

- EU funds should not be invested in a manner that undermines the rights set out in the CRPD.
- EU funds should not be invested in a manner that conflicts with its obligations under CRPD Article 9 (Accessibility).

Specific

- The European Commission has a duty to regulate the allocation of Structural Funds in accordance with its legal obligations to combat discrimination and social exclusion; and in particular a legal duty to ensure that Structural Funds are not invested in a manner that leads (or could lead) to discrimination against people with disabilities.
- The European Commission has a duty to monitor the use of Structural Funds to ensure that they are not invested in a manner that contravenes its obligations to combat discrimination and social exclusion.
- Where there is potential for Structural Funds to be invested in ways that may impact the care facilities and services available to people with disabilities, then there is a duty on the European Commission to ensure that (absent clear, explicit and compelling reasons—see below) Structural Funds are only invested in initiatives that support the development of community-based alternatives to institutionalization.
- In relation to the ‘Operational Programmes’ (that outline how Member States will use the Structural Funds)—the European Commission has a duty to ensure that Member States provide explicit information as to the potential for Structural Funds to be invested in ways that may impact on the care facilities and services available to people with disabilities, and if there is any such potential:
 - (a) to state precisely how these funds will be used; and
 - (b) to provide either a categorical assurance that they will not be used to maintain, or extend, the system of institutional care or alternatively, if they are to be used for the purpose of ameliorating the life threatening living conditions in institutions, to provide clear and compelling reasons as to why this is needed—and a precise account as to how this forms part of a wider concrete program of developing community based alternatives to institutionalization.

Member State Obligations

- Member States must invest Structural Funds in accordance with their obligations to combat discrimination and social exclusion.
- The use by a Member State of EU Structural Funds (constituting as they do ‘additional funding’) to invest in institutions rather than develop community-based alternatives would (prima facie):
 - (a) amount to a breach of its ‘reasonable accommodation’ obligations to people with disabilities, as required by (amongst others) CRPD Article 5(3); and
 - (b) constitute indirect discrimination against people with disabilities.

As stated previously in relation to the general legal principles, while there may be circumstances in which Structural Funds could be used to ameliorate life threatening living conditions in institutions, these are limited to cases in which their use forms part of a wider strategic program for community living. It would be ‘*a misuse of Structural Funds if it is all that Structural Funds are being used for*’—in other words Structural Funds cannot be used if there is no such community living plan and these funds are only being used to improve the conditions in institutions.

- Member States are obliged to;
 - (a) monitor their use of Structural Funds to ensure that they are not invested in a manner that contravenes their obligations to combat discrimination and social exclusion; and
 - (b) publish a detailed record of the evidence that establishes this monitoring has occurred, as well as the results of this monitoring.

The Structural Funds Regulations: Recommendations

This report has considered the general legal principles and legal obligations of the European Commission and Member States that are relevant when Structural Funds are being invested in care facilities and services for people with disabilities. The regulations governing the use of Structural Funds must reflect these legal principles and obligations. They must make clear that Structural Funds can only be used to support the development of community-based alternatives to institutionalization, thereby promoting the rights of people with disabilities to community living. In particular, this report recommends:

- The Structural Funds Regulations should be interpreted in the light of the CRPD.

In light of the EU’s accession to the CRPD, the regulations governing the use of Structural Funds require explicit amendment to prohibit investments in the maintenance or extension of institutional care. This could be achieved by requiring from Member States:

- An explanation of how Structural Funds will be used to prevent discrimination. ((Article 48(3)(l) of the proposed new general regulations concerning the areas covered by the *ex ante*

*conditionalities*¹⁵² is of relevance in this context, requiring as it does, that an evaluation cover the adequacy of planned measures to promote equal opportunities between men and women and to prevent discrimination.)

- A description of the range of community-based services that will be developed and how people with disabilities and civil society were involved in developing these.
 - An explanation as to how any residential services that will be provided or sustained as a result of the use of Structural Funds will comply with Article 19 (for example, referring to issues such as ensuring that all individuals have choice of where to live, they are not obliged to live in particular living arrangements, and have access to other community-based supports as well as to other mainstream services).
- The Commission should devise new regulations that permit existing housing to be purchased as homes for persons with disabilities.

152. See Annex IV of the proposed general regulations Proposal for a Regulation of the European Parliament 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{SEC(2011) 1141 final} {SEC(2011) 1142 final}.

Counsel's Opinion on Remedies

Counsel advised as follows:

- 1) A Member State has an EU law obligation to implement EU law and, in respect of the CRPD, to implement the CRPD as a mixed agreement insofar as its provisions are within the scope of EU competence.
- 2) The EU may bring an infringement action against a defaulting Member State. Subject to quite strict procedural safeguards, an individual may bring an action against the Commission (before the General Court) for a failure to act.
- 3) It is not certain whether or not an individual could bring a case in the domestic courts for a Member State or a direct action before the CJEU for breaching the CRPD. However, it is probable that such individual could do so provided that any questions of interpretation were referred to the CJEU.
- 4) Only the CJEU has jurisdiction to interpret mixed agreements under Article 267 TFEU (see Case 12/86 *Demirel*). The question is likely to be whether or not the provision in question had direct effect. This would, in turn, depend upon whether the provisions relied on were considered to be sufficiently clear, precise and unconditional. In principle this might well be the case with the CRPD having regard to its underlying objectives of conferring rights upon individuals. Even without direct effect there is some case law suggestive of the possibility that an individual could seek to rely on a specific individual obligation that the EU intends to implement within a framework of international rules.
- 5) Whether an individual may bring a claim in the domestic courts or before the CJEU for other breaches of EU law is less important in the present context because in substance the breach claimed would be likely to be an asserted breach of CRPD. Nonetheless, the essential remedial principles are similar.

Open Society Foundations

The Open Society Foundations work to build vibrant and tolerant democracies whose governments are accountable to their citizens. Working with local communities in more than 70 countries, the Open Society Foundations support justice and human rights, freedom of expression, and access to public health and education.

Public Health Program

The Open Society Public Health Program aims to build societies committed to inclusion, human rights, and justice, in which health-related laws, policies, and practices are evidence-based and reflect these values. The program works to advance the health and human rights of marginalized people by building the capacity of civil society leaders and organizations, and by advocating for greater accountability and transparency in health policy and practice. The Public Health Program engages in five core strategies to advance its mission and goals: grantmaking, capacity building, advocacy, strategic convening, and mobilizing and leveraging funding. The Public Health Program works in Central and Eastern Europe, Southern and Eastern Africa, Southeast Asia, and China.

Mental Health Initiative

The Open Society Public Health Program's Mental Health Initiative aims to ensure that people with mental disabilities (mental health problems and/or intellectual disabilities) are able to live as equal citizens in the community and to participate in society with full respect for their human rights. The Mental Health Initiative focuses on ending the unjustified and inappropriate institutionalization of people with mental disabilities by advocating for the closure of institutions and the development of community-based alternatives. The initiative works in Central and Eastern Europe and the former Soviet Union.

www.soros.org

The European Union and its Member States have an obligation to ensure that European taxpayer money in the form of Structural Funds is invested in a manner that respects human rights and fundamental freedoms. These are among the basic values upon which the EU was founded. However, some Member States are acting contrary to EU law by using European money to invest in institutions for people with disabilities rather than developing alternative community based services that promote community living. Such actions contravene the Convention on the Rights of Persons with Disabilities and violates the fundamental human rights of people with disabilities.

Featuring legal analysis from Queen's Counsel Richard Gordon, this report examines how the use of Structural Funds to renovate or build institutions for people with disabilities is contrary to EU law. The European Commission and its Member States should take actions to ensure that Structural Funds are not used to perpetuate the social exclusion of any European citizen.



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