

Marrying Principle with Power in the EU – the Test Case of the EU Structural Funds Negotiations: Update

Gerard Quinn and Suzanne Doyle¹

1. Introduction

In a previous article in this journal in 2012, we wrote that:

“[The] European Union is facing a major test of its sincerity and commitment to the UN Convention on the Rights of Persons with Disabilities (CRPD). Current and positive proposals from the European Commission designed to bring the EU Structural Funds into alignment with the CRPD are under pressure from Council. Failure to take the CRPD seriously will needlessly expose the EU – and its member states – to international legal liability if the Funds are used to build new institutions. And such failure will amount to a wasted opportunity to harness the Funds to ease a major process of transition needed to embed the right to community living for all.”²

Our language was stark only because of the imperative to move the EU’s professed commitment to human rights away from the level of polite mythology to reach into and transform the sinews of EU power – especially its financial power. Unless and until human rights inform, shape and control these operations systems, they will remain mired at the level of myth and breed even further cynicism about the European project. That is why so much turns on the current negotia-

tions over the next programming period in the EU Structural Funds (the Funds) which have the potential to do great good especially for marginalised groups such as persons with disabilities. What makes disability an especially interesting case is the fact that the EU, in addition to the majority of its member states, has actually ratified (technically “confirmed”) the CRPD.

This update recounts the latest developments in the negotiations which are, overall, trending positively. A final climatic vote is expected at a plenary session of the European Parliament in October 2013. Our view is that there is still room for improvement in the draft text. This is, in no way, to decry the outstanding contribution of the European Parliament thus far. Instead, our observations aim to give better effect to the intentions of Parliament which will have a dramatic effect on the shape of social Europe into the next decade.

2. Backstory

One of the core rights in the CRPD is the right to live independently and be included in the community (Article 19). This involves three related elements: the right to choose with

whom to live and where; the right to personalised services; and the right to have community based services made accessible to persons with disabilities in the community. The core principle at play is that of human flourishing in community and connected with others – precisely what has been denied to so many citizens with disabilities in the past (as well as to others). Note the relevant provision is crafted with a positive philosophy in mind – flourishing through choice as well as connectedness in the community. The word “deinstitutionalisation” is not expressly mentioned. But it is obvious that the positive philosophy implies its converse – namely the need to transition away from congregated or institutional setting to enable community living to happen – and to release the massive amount of funds tied up in institutions to invest in community-based resources.

This transition has not been helped by the fact that the Funds have been used in the past to refurbish and even build new institutions. The underlying Structural Fund Regulations (the Regulations) governing the Funds were lax enough to permit this to happen in the recent past. Put more positively, the transition could be massively eased for many member states in difficult financial circumstances if the Funds were channelled positively to move the recipient states in the right direction.

There is no doubt that the relevant obligations of the CRPD touch the Funds and that the EU will be held to account at some point. Indeed, to put the matter beyond doubt, the instrument of ratification (“confirmation”),³ which the EU lodged with the UN, outlined several areas in which the EU recognised that it had competence relevant to the treaty. Explicitly included within this list were the Regulations.⁴ The Regulations are renegotiated at the outset of new programming

periods which generally last seven years. The current set is due for renewal by the end of 2013, with partnership contracts between the European Commission and member states already being negotiated and finalised in anticipation of the 2014-2020 programming period.

The European Commission’s original proposals for the new set of Regulations contained a number of elements which were extremely positive in the context of disability rights, both within the overarching common provisions regulations and the individual regulations intended to govern the European Social Fund and the European Regional Development Fund. Of particular importance was the inclusion of *ex ante* conditionalities which are basically requirements which recipient member states must comply with in order to be in a position to access funding. These provisions were outlined and analysed in detail in our previous article.⁵

However; at the time of writing our previous article, we noted that on 24 April 2012, the EU General Affairs Council adopted a “partial general approach” which saw the member states adopt an amended version of the original text.⁶ The Council text purported to remove key *ex ante* conditionalities, including the general conditionalities on anti-discrimination, gender equality and disability, as well as the thematic conditionality entitled “Promoting social inclusion and combating poverty” which required member states to demonstrate the “existence and the implementation of a national strategy for poverty reduction”. A “criteria for fulfilment” for this strategy would be the inclusion of “measures for the shift from residential to community based care”. It should be noted that this criterion is not limited to persons with disabilities and applies to all groups who are, or are at risk of being placed in institutions rather

than provided with support and services in the community. This would apply equally to children as well as older people.

In our previous article, we stated that:

“Removing the *ex ante* conditionalities will inevitably and predictably lead to a use of the Funds that cannot be squared with core obligations under the CRPD and hence merely stores up needless international legal exposure for the Union and its member states. It would be much better – and much more prudent from the perspective of avoiding international legal liability – to restore the conditionalities and other similar safeguards.”⁷

Indeed, the Concluding Observations of the UN Committee on the Rights of Persons with Disabilities have already alluded to the manner by which the Funds have been spent in one recipient EU country⁸ – thus setting the stage for the examination of the EU’s first or initial report to that Committee due by the end of 2013.

3. The Negotiations since 2012

Events have moved on since we wrote in 2012. Trilogue negotiations between the Council, Parliament and Commission took place from late 2012 into mid-2013 based on the established mandates of those institutions. Such negotiations are informal tripartite negotiations between the Council, the European Commission and the European Parliament. They are used to broker compromises where an impasse has been reached. These negotiations sought to address points of divergence on the content of the proposed regulations. The question concerning the retention (or reinstatement) of the aforementioned conditionalities was one of the issues under discussion.

To its immense credit, the European Parliament delegation in the Trilogue process held its ground and insisted on retention of the relevant *ex ante* conditionality. Following the outcome of these negotiations (presumably agreed to by Council negotiators) the European Parliament Regional Development Committee received a report⁹ from its Rapporteurs which proposed that the Committee adopt a thematic conditionality along the following lines:

[Draft Headline *Ex Ante* Conditionality]
(...) existence and the implementation of a national strategic policy framework for poverty reduction (...)“which”(...)

[Draft Criterion of Fulfilment]
“*depending on the identified needs*, includes measures for the shift from institutional to community based care(...)”.¹⁰
[Emphasis added.]

The Regional Development Committee voted to adopt the reports and the amended language as agreed at Trilogue on 10 July 2013.¹¹ The Common Provisions Regulation is tabled for a first reading and plenary vote at the European Parliament. At the time of writing this update the vote is scheduled to take place on 22 October 2013.¹²

4. Adequacy of the Draft Text

It is obvious that the insistence of the European Parliament delegation on the retention of the relevant *ex ante* conditionality and criterion of fulfilment has paid dividends in the Trilogue negotiations. This is hugely to the credit of the Parliament. The final vote on 22 October 2013 is awaited with eagerness, especially in recipient member states. There is still space for proposals for amendments that would both clarify and strengthen the relevant criterion of fulfilment.

More specifically, a number of improvements could still be made to the language of the relevant criterion of fulfilment in order to narrow down the possibility for any use of the Funds that could potentially violate the CRPD and, more positively, to ensure the Funds generate real European added-value in helping recipient states transition away from institutions and towards a community living model for all.

Firstly, it must be noted that the phrase “depending on the identified needs” may have been meant to suggest that subvention may only be needed in some recipient member states and not in others. However, if so, then the phrase is a tautology. It serves no meaningful purpose and is apt to give rise to the impression that the legal obligation under the CRPD to engage in a process of transition away from institutions and towards community based living is somehow contingent on some examination of actual needs on the ground. This is certainly not in conformity with Article 19 of the CRPD which foresees no such contingency. Since it is obvious that the relevant criterion applies to those recipient member states with institutions, the phrase can be deleted with no adverse impact on the intention of the framers.

Secondly, the new element of contingency in the phrase “depending on the identified needs” does not easily coexist alongside existing EU policy which is itself framed more categorically. For example, the EU has committed itself, in its *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe*¹³ under the action line of “Participation”, to work to:

“[P]romote the transition from institutional to community-based care by: using Structural Funds and the Rural Development Fund to support the development of commu-

nity-based services and raising awareness of the situation of people with disabilities living in residential institutions, in particular children and elderly people.”¹⁴

It goes on to state that the EU will support national activities to:

“[A]chieve the transition from institutional to community-based care, including use of Structural Funds and the Rural Development Fund for training human resources and adapting social infrastructure, developing personal assistance funding schemes, promoting sound working conditions for professional carers and support for families and informal carers.”¹⁵

Thirdly, the new element of conditionality introduces a new layer of problems which simply cloud the relatively straightforward legal implications of Article 19 of the CRPD. Who (or what) is to identify needs? What exactly are these needs and how do they intersect with the rights under Article 19? Which criteria or assessment tools are to be used? Who (or what) will police the process? Are member states to be judges in their own case?

Due to these ambiguities, it seems likely that the question of “identifying the need” for transition from institutional care to services provided in the community will be a matter which member states should themselves adjudicate upon. The result of such discretion being afforded to countries, which have in the past, demonstrated less than strident efforts to carry out this process,¹⁶ will inevitably be more delays and obfuscation, with vulnerable social groups counting the cost. It would be better to eliminate the element of contingency in the first place.

Fourthly, the phrase “measures for the shift from institutional to community based care”

is itself subtly paternalistic. It will be recalled that the underlying philosophy of Article 19 of the CRPD is not “care”. Rather, it is to empower people make their own choices, to ensure that services are increasingly personalised, to optimise the chances that personal choices will actually be respected and to open up and make generally available community services more accessible. It would therefore be preferable to delete the word “care” and to reflect in the draft language some sense of the right (not need) of the person to live in the community, the transition needed to develop personalised services and the related need to make generally available services in the community more accessible. The services are there to give efficacy to a right – they are not there as ends in themselves or as an aspect of care.

The retention of the concept of an *ex ante* conditionality and the relevant criterion of fulfilment is to the immense credit of the European Parliament. But we submit that somewhat more space is needed to reflect on whether the draft language is fully fit for purpose. This requires a careful marriage of EU law with the underlying philosophy of the CRPD. At the risk of repetition, we summarised this philosophy as follows:

“Article 19 requires putting in place a web of personalised supports to meet the personal circumstances of the person. This is not so much about needs and services, it is more about the silent revolution in traditional understandings of welfare which should move away from gross proxies of need (with equally gross services) and to focus instead on the life plans and ambitions of the person. And Article 19 requires that community services be fully inclusive of, and accessible to persons with disabilities. This requires a transition away from institutions (and locking away scarce pub-

lic money in institutions) and unbundling resources to enable genuine community living to occur.”¹⁷

We continued:

“Article 19(b) provides for the right of persons with disabilities to access a range of community-support services. The design and delivery of social services in the past left much to be desired throughout the world and particularly in developed countries that could afford an elaborate social security safety net. For one thing, they were largely crafted around proxies of ‘need’ – ideal images or categories of need that paid scant regard to individual circumstances. The result of these practices has been services that fail to address the myriad of extremely personal factors that can only be taken into account in more personalised services. The result has also been the provision of costly services that may not map onto actual need but which are held on to by individuals (and their families) out of fear of not having an assured level of access when the need actually arises. (...) So Article 19 is not just about a home of one’s own – it is about the social services needed to enable individuals to imagine and lead the lives they want. And that increasingly calls for not just a new philosophy of services that is clearly animated in the CRPD but also a new kind of personal assistance – a transfer of emphasis onto a new kind of social support that takes the individuals’ preferences seriously.”¹⁸

The language contained in this conditionality should therefore speak more explicitly of rights, not needs. This is not only consistent with the requirements of the CRPD but is also a coherent continuation of the EU’s stated policy in this area and its commitments to smart, sustainable and inclusive growth as outlined in Europe 2020.¹⁹

5. Conclusion

There is still an opportunity for the European Parliament to clarify and strengthen the relevant criterion of fulfilment. Amendments are still possible during the plenary session in October. This is in no way to deny or decry the laudable work done by the Parliament already. But a clarification and strengthening of the criterion of fulfilment

would ensure a lasting legacy for the Funds as a real agent of change in Europe and to give better expression to the intention of Parliament. Nothing is lost by eliminating a tautology. One final push is needed to get the optimal result – the correct mix between power and principle – and to generate the added value from EU financial instruments that citizens are entitled to demand, especially in times where every cent counts.

1 Gerard Quinn is Director of the Centre for Disability Law and Policy at the National University of Ireland Galway. Suzanne Doyle is Research Associate at the same Centre (www.nuigalway.ie/cdlp).

2 Quinn, G. and Doyle, S., "Taking the UN Convention on the Rights of Persons with Disabilities Seriously: The Past and Future of the EU Structural Funds as a Tool to Achieve Community Living", *The Equal Rights Review*, Vol. 9, 2012, p. 69.

3 Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC), OJ L 23, 27 January 2010.

4 *Ibid.*, p. 58.

5 See above, note 2, pp. 81-91.

6 *Ibid.*, p. 85.

7 *Ibid.*, p. 86.

8 UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial periodic report of Hungary*, adopted by the Committee at its eighth session (17-28 September 2012), 22 October 2012, CRPD/C/HUN/CO/1, Paras 33-35.

9 Amendment 544 – Draft Report – Lambert Van Nistelrooij, Constanze Angela Krehl (PE487.740v04-00) on the amended proposal for a regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation Criterion of Fulfilment on (EC) No 1083/2006, 2011/0276(COD).

10 *Ibid.*, p. 40.

11 European Parliament, Committee on Regional Development, Minute Meetings, 10 July 2013, from 09.00 to 12.30 and from 15.00 to 18.30, and 11 July 2013, from 9.00 to 12.30 Brussels, REGI_PV(2013)0710_1, p. 3., available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONSGML%2bCOMPARL%2bPE-516.638%2b01%2bDOC%2bPDF%2bV0%2F%2FEN> (last accessed 30 August 2013).

12 *Procedure File: Structural instruments: common provisions for ERDF, ESF, Cohesion Fund, EAFRD and EMFF; general provisions applicable to ERDF, ESF and Cohesion Fund*, 2011/0276(COD).

13 *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe*, COM (2010) 636.

14 *Ibid.*, p. 6.

15 *Ibid.*

16 See, for example, European Coalition for Community Living, *Wasted Time, Wasted Money, Wasted Lives ... A Wasted Opportunity? – A Focus Report on how the current use of Structural Funds perpetuates the social exclusion of disabled people in Central and Eastern Europe by failing to support the transition from institutional care to community-based services*, March 2010.

17 See above, note 2, pp. 73.

18 *Ibid.*, pp. 75-76.

19 Communication from the Commission, *Europe 2020 – A strategy for smart, sustainable and inclusive growth*, COM (2010) 2020 final.