

# 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

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*The European Union (EU) 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 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.*

### **1. The European Union Acquires a Human Face: EU Ratification of the United Nations Convention on the Rights of Persons with Disabilities**

The EU is a formidable engine for economic integration. But from the outset its economic mission has been tied to a larger social and political mission. Famously, the founders foresaw a “spill-over” effect from economic integration into the evolution of a deeper union – a union with a human face. To a certain extent, the steady accretion of legal competence in the field of human rights by the EU mirrors this ambition and carries it forward. By happenstance one of the early beneficiar-

ies of this evolution has been Europe’s estimated 80 million citizens with disabilities. It is the (potential) marriage of power with principle that, unlike the Council of Europe, marks the EU apart as a force for good as well as a voice for good.

Partly because of the inspiration of the Americans with Disabilities Act (1990) the EU had switched dramatically away from welfare to a human rights and equal opportunities perspective on disability from the mid-1990s. A qualitative leap forward took place in late 2010 when the EU ratified (technically “confirmed” – this paper uses the two terms interchangeably) the UN Convention on the Rights of Persons with Disabilities (CRPD). This was a landmark event generally for the EU since it is the first international human rights convention to which it is a Party. Due to its status as a legally binding treaty, confirmation of the Convention has the potential to drive the evolution of a much more focused and robust set of EU-level responses in the form of legislation and policy change on disability. More to the point, all relevant EU financial instruments will have to be calibrated to ensure that they do not lead to results which cannot be squared with Convention obligations and which should, instead, play a much more constructive role in achieving its objectives.

The Council Decision to confirm CRPD was made on 26 November 2009 (the Decision to Confirm).<sup>2</sup> The actual instrument of confirmation was deposited over a year later in December 2010 after the Council adopted a Code of Conduct on the modalities by which the EU and its member states would appear before the UN on the Convention.<sup>3</sup>

In practical terms confirmation of the Convention ought to mean that a thorough review of legislation, policies and funding instruments should take place on an on-going basis to ensure conformity. It ought to mean that legislation, etc., found to be incompatible should be repealed or amended. It ought to mean that poor political processes that brought about such laws in the first place (largely through the absence of the voice of persons with disabilities) will have to be expanded to ensure that active – and meaningful – consultation takes place.

This essay focuses on one of the most important financial instruments of the EU and its relationship to the CRPD – the Structural Funds. The current debate about the need to radically amend the Regulations governing the EU Structural Funds to ensure compliance with the CRPD is rightly seen as a major test of EU commitment to the Convention. Considerable disquiet has been expressed at the way the Funds have been used in the past to fund the creation of new residential institutions for persons with disabilities (especially those with intellectual disabilities) in several recipient countries. Those who advocate for a radical change from the past argue that, at a minimum, the Funds should no longer be used (as they once were) to build new institutions to warehouse people with disabilities and that new innovative ways of transitioning people to community living should be found using the Funds as a spur. It is hard to characterise the building of institu-

tions as a “misuse” of the Funds in the past since the underlying Regulations were in fact permissive toward this kind of use. So the focus of attention is to change the underlying Regulations to make it plain that EU monies cannot be spent to open new institutions and that they should, ideally, be spent to enable transitions to community living to occur.

Many fine-sounding policy instruments on disability had been adopted by the EU before. Relying on them one might have made a cogent moral argument in the past that such expenditures should desist. The difference now is that the CRPD is a legally binding international treaty. So the arguments for change in the underlying Regulations have a lot more traction.

EU law is to the effect that “[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States” (Article 216(2) of the Treaty on the Functioning of the European Union). It has been held by the Court of Justice of the EU (CJEU) that while international agreements concluded by the EU are inferior to the EU Treaties they nonetheless rank superior to secondary EU law (which includes Regulations and Directives).<sup>4</sup> In practical terms this ought to mean that such agreements have some form of lexical priority – secondary law should be interpreted in such a way as would optimise the possibility of compliance. More to the point, fidelity to such agreements ought to be the controlling factor when it comes to amending secondary legislation. This is of particular relevance in the context of the EU Structural Funds which are governed by Regulations and which are periodically renewed every seven years. At a minimum such Regulations must be drafted and interpreted in a manner that is consistent with the EU’s obligations under the CRPD.<sup>5</sup>

Of course, the EU did not confirm the Convention in a vacuum. It did so alongside its member states, all of which have signed the CRPD and the majority of which have ratified it. Such agreements are generally known as “mixed agreements” in the sense that they engage the often overlapping legal competences of the Union and its member states.<sup>6</sup> It has been commented that its confirmation by the EU confers on it a quasi-constitutional status since it hovers somewhere between EU treaty law and secondary legislation.<sup>7</sup> Therefore, “post-confirmation” EU legislative proposals must be self-consciously crafted not only to fit with, but also help to advance, the goals of the CRPD.

It is accepted practice that in the case of such “mixed agreements” both the EU and its member states will step up cooperation in order to ensure coherence and thus avoid needless legal entanglement and embarrassment at the international level. This desideratum of coherence and cooperation is reflected in the preamble to the Decision to Confirm, which states that:

“Both the Community and its Member States have competence in the fields covered by the [CRPD]. 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 [CRPD] and exercise the rights invested in them, in situations of mixed competence in a coherent manner.”

Naturally, the EU as such is answerable to the relevant international monitoring mechanism for matters that lie within its sphere of competence. But interestingly its member states also have an EU law obligation to implement the treaty to the extent that its provisions are “within the scope of Community competence”.<sup>8</sup> Therefore, member states

which do not comply with the relevant obligations arising from such mixed agreements may be held in violation both of the Convention and EU law as such.

The tangled skein of EU competence and member state competence has long vexed commentators and judges alike. One thing is clear. Based on the reasoning in the European Court of Justice’s decision in *Kadi*,<sup>9</sup> the CRPD cannot create any new EU competence where one did not exist before – nor can it expand any existing competence. But of course it can and should animate how such competences are to be used – which is directly relevant to the re-drafting of the Structural Funds Regulations.

As the Decision to Confirm makes plain, two sets of EU competences were put forward to justify or provide a legal base for EU confirmation: the internal market and non-discrimination. EU competence in the area of non-discrimination has been re-emphasised by Article 10 of the TFEU which states that:

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

The first big test of EU ratification has to do with the reform of the Structural Funds which impacts very visibly and very directly on the right of Europeans to live independently and be included in the community. One might say that a special onus falls on the EU in the eyes of the world since it took such a prominent part in the drafting of the Convention.<sup>10</sup> If it fails this first big test many fingers will point to the EU as a body that does not practice what it preaches, which of course undermines its credibility (especially as it criticises others) and invites cynicism

about its motives. What is this big test and how can the EU successfully navigate it?

## **2. Home Sweet Home: The Centrality of the Right to Live Independently and be Included in the Community**

Why is the right to live independently and be included in the community so important? Why is this seen as the first big test of EU sincerity and commitment to the CRPD? This is a good question since there are many other pressing issues such as inhuman and degrading treatment as well as employment and inclusive education.

Part of the answer lies in the nature of the right itself. The right (contained in Article 19 CRPD) is seen as emblematic of the much-vaunted “paradigm shift” in the Convention.<sup>11</sup> This paradigm shift is away from treating people with disabilities as “objects” to be managed or pitied and towards treating them as “subjects” and rights holders capable of directing their own personal destinies. It gives “voice” to people and forces others to respect their will and preferences. The edifice of the Convention is built atop this logic. It gives “voice” to persons with disabilities to form their own preferences, to express them and to have their will and preferences respected by third parties. It gives “choice” to persons with disabilities especially in how to live their own lives and particularly with respect to decisions having to do with personal living arrangements. And it opens up life “chances” by removing barriers to inclusion which can be tangible as well as intangible. Furthermore, it re-images welfare supports to ensure that they do not entrap people and to ensure that inclusion and community engagement is accentuated. This latter emphasis is entirely in keeping with EU2020 strategy toward a “smart, sustainable and inclusive” economy<sup>12</sup> and society which calls for

innovation with respect to the future of our social model.

Article 19 of the CRPD is much celebrated since it is the one that delivers on “choice” where it matters most to people – where to live and with whom. It reads:

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

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

Where you live – and whom you live with – is about so much more than bricks and mortar. It is foundational to identity – to a viable sense of self. Human personhood is something to be shared – it is through that sharing that we see “ourselves”. And it is through the intimate social connectedness that this facilitates that we build bridges into the community. This is why having the right to choose where to live and with whom is so

central. In a way it is the key portal to living a fuller life.<sup>13</sup>

Ensuring that this choice exists requires the affirmation of a number of other rights contained within the CRPD, primarily Article 12 which places an obligation on states parties to ensure that the necessary supports are put in place to ensure that individuals can exercise their inherent legal capacity and make their own decisions, such as those regarding their residence. Article 9 on accessibility is also implicated since there is no point choosing where to live – which is a bridge into the lifeworld – if all aspects of the lifeworld are not open and accessible.

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 is to get 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 made fully inclusive of, and accessible to persons with disabilities. This requires a transition away from institutions (and locking away scarce public money in institutions) and unbundling resources to enable genuine community living to occur. In many poorer EU member states this is precisely the facilitating role one might expect of the Structural Funds. Institutionalisation affects all persons with disabilities. But it particularly affects persons with intellectual disabilities. There is a paradox here. As institutionalisation sets in people become progressively stripped of their capacities to engage in the community. A self-fulfilling cycle kicks in to rationalise their exclusion. That cycle needs to be broken. Lying behind Article 19 is a faith in the evolutive nature of human capacities – espe-

cially the capacity of even persons with profound intellectual disabilities – to respond to social stimuli and to live more fulfilling lives – lives they choose.

The very novelty of Article 19 has prompted many authoritative commentaries. Chief among them is an Issue Paper published in March 2012 by the former Council of Europe Commissioner for Human Rights, Thomas Hammarberg, entitled “The Right of People with Disabilities to Live Independently and Be Included in the Community”.<sup>14</sup> This is of course not an official interpretation of the Convention and it could not, in any event, bind the European Union. But it is worth quoting for illustrative purposes. In it Commissioner Hammarberg summarises the core elements of the right as follows:

“Article 19 of the CRPD embodies a positive philosophy, which is about enabling people to live their lives to their fullest, within society. The core of the right, which is not covered by the sum of the other rights, is about neutralising the devastating isolation and loss of control over one’s life, wrought on people with disabilities because of their need for support against the background of an inaccessible society. ‘Neutralising’ is understood as both removing the barriers to community access in housing and other domains, and providing access to individualised disability-related supports on which enjoyment of this right depends for many individuals.”<sup>15</sup>

In his view, Article 19 requires states parties to the CRPD to not only cease placing persons with disabilities in an institutional environment but also to actively ensure the vindication of the rights of persons with disabilities to live independently and be included in the community. In particular, the Commissioner has warned of the

dangers of replacing one form of institution with another:

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

This is not merely a theoretical concern. Countries which have already closed down large-scale institutions are showing worrying trends of grouping apartments into residential compounds, comprised of dozens of units targeted exclusively to people with disabilities. (...) Such a solution compromises the individual’s ability to choose or to interact with and be included in the community.”<sup>16</sup>

Other bodies closer to the European Union such as the European Union Agency for Fundamental Rights (FRA) have also made their views on Article 19 known. FRA published a report in June 2012 entitled: *Choice and Control: the Right to Independent Living*.<sup>17</sup> The FRA report contained the findings of interview-based research carried out in nine EU member states with persons with mental health problems and persons with intellectual disabilities. The research examined how they experience the principles of autonomy, inclusion and participation in their day-to-day lives. The report also sought to provide some examples of promising practices regarding independent living. Crucially, the FRA noted that:

“While Article 19 codifies the right to independent living, to be made meaningful in its fullest sense it must be read in conjunction with a number the convention’s other

articles, because the concept of independent living brings together many aspects of an individual’s life, and thus requires the realisation of many other human rights.”<sup>18</sup>

The interaction of Article 19 with other provisions in the Convention gives rise to interesting conundrums. Does the exercise of the right depend on a prior finding that the person possesses sufficient legal capacity to “choose”? The formulation used in Article 19 does give rise to the impression that one has to first wait to be declared capable of choosing before exercising Article 19 rights. Article 12 itself moves traditional analysis of legal capacity away from deficits and focuses instead on decision-making supports. It is therefore possible to view community living as a support necessary to enable a person to exercise his/her legal capacity under Article 12.3. In other words, there is no need to wait for a formal declaration of competence. This, at any rate, is the view taken by Commissioner Hammerberg:

“Curtailing the overall ability of individuals to make choices or have them respected naturally compromises opportunities to make more specific choices about where to live and how one’s life will look in relation to the community. At the same time, exclusion from life within the community increases the risk of legal capacity being denied. Little opportunity exists in the strictly controlled lifestyle, and lack of choice, inherent to institutional life, for an individual to voice his or her will.”<sup>19</sup>

Another interesting conundrum arises again from the concept of the right to “choose” where to live and with whom. What if a person genuinely chooses to live in a large institution or even a smaller one that effectively precludes genuine community engagement and inclusion? At one

level there seems to be a contradiction between the right to live independently (and one might choose to live as a hermit on an island) and the right to be included in the community. Surely we must give pride of place to individual preferences? What of the argument that the only way to genuinely respect the right to choose (which may entail choosing to remain in an institution or to go into one) is to ensure the continued existence of such institutions and a reasonable spread of them throughout the jurisdiction? This might be another way of saying that institutions should continue to exist and have a role – only this time the role is directly (albeit notionally) referable back to the wishes and preferences of the individual.

This is important for it would appear to leave some space (and therefore some national discretion) for the preservation of institutionalisation. If that were so, it would be permissible for the Regulations of the EU Structural Funds to allow recipient states to use the Funds to open new institutions and refurbish old ones. However, there would appear to be at least three strong countervailing arguments.

The first is that the autonomy to choose should be set against the general context of a right to inclusion and community engagement. This is apparent on its face in the opening narrative of Article 19 and is immanent in the general logic of the Convention. The second is that Article 19 has to be viewed against Article 8 (awareness raising) and especially the obligations of states parties to “nurture receptiveness” to the rights of persons with disabilities. That is highly unlikely to happen if popular prejudice about disability is reinforced by the continued existence of institutions. In a sense, the short term preference of the individual has to be set against the long

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

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. For another thing, the services – or their manner of delivery – may well have met need but tended to do so in a way that accentuated isolation and exclusion from the community.<sup>20</sup>

So Article 19 is not just about a home of one's own – it is about the social services needed to enable individuals to imagine and lead the lives they want. And that increasingly calls for not just a new philosophy of services that is clearly animated in the 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. Article 19(c) sets out the right of persons with disabilities to equal access to mainstream services that are tailored to the individual's requirements. This element not only requires that community services and facilities for the general public are available to persons with disabilities on an equal basis with others but are in addition responsive to their needs. In countries that have expended a large percentage of their resources on institutions, this will be particularly hard to achieve. To make it happen will require forethought, deliberation, planning, and active involvement and consultation with civil society groups. And it will need to be done in a way that gives confidence to family members and others concerned with the welfare of the affected population.

So one reason for the focus on the right to live independently and be included in the community is the centrality of the right to

the lives of persons with disabilities. A second reason is the reality that here, at least, the EU can make a real difference. Many important issues and rights lie beyond the scope of competence of the EU. Most issues under the Convention reside within the more or less exclusive jurisdiction of its member states. Yet the Structural Funds are a classic example of an issue which, in a “mixed agreement”, engages the legal and moral responsibility of both the EU and its member states. Member states will not be spending monies unless and until the Structural Funds provide those monies. And the EU has at its disposal a powerful instrument to sculpt the right results – results which bring both itself and its member states into alignment with the CRPD. That is not to say that other issues are not important or indeed urgent. It is simply to say that in this domain the EU has a huge potential (as well as a legal obligation) to do good. This potential will not be achieved overnight – but, curiously enough, “progressive achievement” is what the CRPD demands and is also what the Structural Funds are peculiarly suited to.

### **3. Progressive Achievement and the EU Structural Funds – Rome Was Not Built in a Day – But It Was Built**

International law distinguishes between obligations that take effect immediately and those that can be “progressively achieved”. The general prohibition against discrimination (which pervades the entirety of the CRPD) falls in the former category. It is at least arguable that the construction of new institutions (whether using EU monies or otherwise) is itself a form of discrimination. This is certainly the thinking of the US Supreme Court in its famous decision of *Olmstead*.<sup>21</sup> In that case the Supreme Court held that in cases where it was determined that the persons in question could live indepen-



dently and wished to do so, institutionalisation of those persons was unlawful discrimination in the provision of public services.<sup>22</sup>

It can certainly be argued that if, through silence in the underlying Regulations, the EU failed to condition the receipt of funds on compliance with Article 19, it could be found to have engaged in unlawful discrimination under the CRPD. A thorny issue arises with respect to the use of Structural Funds to refurbish existing institutions in order to make their living conditions more humane and tolerable. A purist answer would be that such a development would be similarly objectionable (to building new institutions) since refurbishment is likely to take the pressure off the need to develop genuine community alternatives and, in any event, does not satisfactorily address the overriding need to build bridges between the individual and the community. Furthermore, this class of violation is usually due to state action. Presumably the member state is individually and separately answerable to the UN monitoring process for these “violations”. However, since the EU has the means to mitigate the violations at its disposal, it might be reasonable to expect some ameliorative use of the Funds. In this instance, one might countenance a limited use of the funds to eliminate egregious conditions. However, in order to meet the spirit if not the letter of the Convention, such a use of the Funds should be made dependent on the recipient state demonstrating a deep and sincere commitment to move resources out of institutions and into the community. An extremely heavy onus of proof should be placed on the state to show that any such investment in institutions is strictly temporary (although it is never felt that way to the “residents”) and for the overriding purpose of eliminating inhumane and degrading treatment.

In general terms, it would be better for EU resources to be expended exclusively on a transition process away from institutions altogether and toward community living since primary responsibility and legal liability for existing human rights violations rests with the member states. If this is not possible, funding for improving conditions should be allowed only as part of a genuine plan (with a heavy onus on the state to demonstrate that it has one) for dismantling the institution and transitioning residents to settings with support in the community.

No matter how potent the non-discrimination weapon is, it will not drive the kinds of structural change needed to bring about substantive change. Indeed, the US Supreme Court could not order the re-allocation of funds. That had to await Congressional action. Twelve years later (in 2012) the US Congress established the US Federal Administration for Community Living – a body which oversees not just independent living for persons with disabilities but also independent living for older people.<sup>23</sup> The point is that the judgment of the Supreme Court was not self-executing. Europe doesn’t have to wait twelve years – it already has the Structural Funds to hand – provided they are animated appropriately.

It turns out that quite a lot of the change required by Article 19 will need to be “progressively realised”. States are therefore required to take all possible steps, using the resources available to them to their maximum ability, to fully realise the rights of persons with disabilities to live independently and be included in the community. Much therefore turns on what is meant by “progressive realisation” and whether, as a concept, it is robust enough to drive the change needed to transition to community living.

The concept of “progressive realisation” appears in Article 2.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It has no counterpart in the International Covenant on Civil and Political Rights (ICCPR). Long thought of as a weasel-like provision that undercut the status of economic and social rights as “real” rights, it lay in disuse until famously expounded by the UN Committee on Economic, Social and Cultural Rights in its General Comment No. 3 on the nature of states parties’ obligations. There the Committee stated:

“[W]hile the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the [ICESCR’s] entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the [ICESCR].”<sup>24</sup>

So just because change is long term does not absolve states from taking steps toward realisation. At a minimum that requires foresight, analysis and planning. In the context of securing the long term sustainability of a right to community living this requires a strategic vision – one in which due consideration is given to the optimisation of the Structural Funds.

The UN Committee amplified its position in relation to the progressive realisation of economic, social and cultural rights in the specific context of persons with disabilities when it stated in its General Comment No. 5 that:

“The obligation of States parties to the [ICESCR] to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely

abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required.”<sup>25</sup>

Of course, the additional resources referred to here may come, at least in part, from the Structural Funds.

Implicit in the concept of “progressive realization” is some sort of balancing between a sense of the priority of the right and the state’s resource constraints. Resource constraints can take many forms. There may be resource constraints in terms of monies available for allocation. There may be resource constraints in terms of an underdeveloped public service capable of crafting new strategies and implementing them. There may be resource constraints that arise through the complexity of change and the need to reinvent budgetary and administrative processes. All such constraints apply especially in countries that have yet to acknowledge institutionalisation as in need of replacement. In a sense this places a premium on forward-planning.

Some states will be naturally tempted to delay a transition and progress toward achieving a transition plan because of the economic dislocation experienced across Europe since the on-going economic downturn that started in 2008. Of considerable relevance in this context are the findings of recent research

concerning the overall cost-benefit equation involved in any transition toward community living. Mansell et al,<sup>26</sup> in their comprehensive analysis of 2007 of the economic implications of the transition from institutional to community-based services, conclude that:

“There is no evidence that community-based models of care are inherently more costly than institutions, once the comparison is made on the basis of comparable needs of residents and comparable quality of care. Community-based systems of independent and supported living, when properly set up and managed, should deliver better outcomes than institutions.”<sup>27</sup>

The authors also note that:

“In a good care system, the costs of supporting people with substantial disabilities are usually high, wherever those people live. Policy makers must not expect [these] costs to be low in community settings, even if the institutional services they are intended to replace appear to be inexpensive. Low-cost institutional services are almost always delivering low-quality care.”<sup>28</sup>

The key point, however, is that the Structural Funds represent a major tool in ensuring that EU member states progressively achieve the requirements of Article 19. Rather than relying solely on national budgets to fund the transition from institutional to community-based resources and services, qualifying member states can use the Funds in a targeted manner in order to ensure a shift in policy and practice in line with the requirements of Article 19. This approach should be supported at an EU level by strong guidance on the use of the Funds in a manner consistent with the obligations of the CRPD. There is no inconsistency between the concept of “progressive achievement” and the appro-

priate use of the EU Structural Funds. To the contrary, the Structural Funds are precisely the kind of tool needed to “progressively achieve” the transition to community living and represent the very best added-value of the Union in a social policy field where innovation is key.

#### **4. Anatomy of the EU Structural Funds – Key Tools for Social and Economic Innovation and Change**

What are the Structural Funds and what purpose(s) are they intended to serve? How serviceable are they in the quest for ways to implement the CRPD?

The EU Structural Funds were created in order to address barriers to economic activity which might affect the functioning of the common market. It is hard to imagine an efficient – let alone a fair – common market that allows all losses to lie where they fall and that fails to correct for systemic or accumulated economic disadvantage.<sup>29</sup> The market alone will not correct for its “blind spots” and if no correction is found then the European market or economic integration project might itself be in jeopardy. Likewise, if wide disparities of the social situation in the member states are not corrected then the advantages of increased economic activity will continue to flow unevenly. Thus, for a combination of both economic and social reasons, the EU Structural Funds would have to be invented if they did not already exist.

The Structural Funds are distributed to (some) member states over a set programming period – usually seven years. Such programming periods are long enough to enable real change to occur and short enough to allow for appropriate adjustment as EU strategic priorities change. The Structural Funds are in fact part of the wider EU Cohe-

sion Budget reflecting EU Cohesion Policy during a particular programming period. Cohesion policy during the current period which is due to come to an end soon (2007-2013) had been focused on three priority objectives: convergence, regional competitiveness and employment. The convergence objective aims to help the least developed member states and regions that are lagging behind. The main fields of action are infrastructure (transport, environment, and energy), employment (training), innovation (research and development), information and communication technologies and improving the administrative efficiency of public administrations.<sup>30</sup>

The strategic priorities for the next programming period (2014-2020) are taken directly from EU2020 strategy<sup>31</sup> – something that dovetails very well with the CRPD. The Funds themselves are considerable. Approximately 35.7% of the EU budget 2007-2013 (equivalent to €347.41 billion over seven years at 2008 prices) was allocated to the various financial instruments which support Cohesion Policy.<sup>32</sup>

From a legal point of view, the Structural Funds are traditionally governed by Regulations. A General Regulation is adopted which sets out the strategic priorities as well as management mechanisms and monitoring machinery. Fund-specific Regulations are then enacted to govern the relevant financial instrument in question. For our purposes there are two such relevant Regulations: Regulation of the European Regional Development Fund (ERDF) and Regulation of the European Social Fund (ESF). Unfortunately, legal literature and commentary on the Structural Funds is sparse which no doubt reflects their highly technical nature.<sup>33</sup> That is probably about to change as controversy over the (mis)-use of the Funds grows.

The Funds are not disbursed directly by the European Commission. Instead, qualifying states (mainly Eastern European states at this stage) put together national plans (Operational Programmes) which are reviewed and adjusted by the European Commission before the Funds are disbursed. The state then issues successive waves of calls to tender which are responded to nationally. The Funds are expected to bring “additionality” to bear on state action. That is to say, they are not intended as a replacement for state action that should otherwise occur. Further, they are designed to respect the principle of “subsidiarity”. So the strategic priorities of the EU must always be tailored to the circumstances of the state in question.

Despite the insertion of a novel provision prohibiting non-discrimination in the previous programming period (2007-2013), many commentators have noted that the Structural Funds have been used to open institutions, undermining the right to live independently and be included in the community.<sup>34</sup> The applicable generic non-discrimination provision is Article 16 of the General Regulation (2007-2013), which states that:

“The Member States and the Commission shall take appropriate steps to prevent any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation during the various stages of implementation of the Funds and, in particular, in the access to them. 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 limits of such generic provisions were graphically highlighted by a 2009 Study commissioned by the European Commis-

sion: *Study on the Translation of Article 16 of Regulation EC 1083/2006 for Cohesion Policy Programmes 2007-2013*, co-financed by the ERDF and the Cohesion Fund.<sup>35</sup> The Study was conducted by the Public Policy and Management Institute (PPMI, Lithuania) in partnership with Net Effect (Finland) and Racine (France). It concluded that there was a good overall awareness of the Article 16 requirements in programmes supported by the ERDF (explicit reference to it was made in 64% of the programmes analysed).<sup>36</sup> However, the study found that in most cases (70%), member states consider equal opportunities as horizontal or general priorities and do not devote attention to them in separate ground-specific strategies. In 22% of the examined programmes, the three examined themes (gender equality, non-discrimination and accessibility) appeared as declarative statements without clear targets, relevant selection criteria or obligations in terms of monitoring. Only 8% of the programmes integrated the three themes in a comprehensive strategy with clear identification of problems and quantified targets.<sup>37</sup> There has, therefore, been a lack of clear goal-setting and benchmarking by member states for the achievement of the non-discrimination requirements of Article 16 of the General Regulation.

In addition, the target groups for “non-discrimination” differed across member states: in EU12 (the 12 countries that became members of the EU by way of the enlargement on 1 May 2004) it was targeted mostly towards ethnic minority groups, particularly the Roma, while in EU15 (the 15 countries that were members of the EU before the enlargement on 1 May 2004) it was more about women, migrants and the elderly.<sup>38</sup> It is clear that this discrepancy in the understanding and application of the non-discrimination provision at member state level is something

which impedes the achievement of universal goals in relation to Article 19 of the CRPD.

Something more is needed to underpin the generic provision on non-discrimination to bring state behaviour in line with the CRPD. It is, therefore, clear that for the forthcoming programming period, a much more direct reference to the CRPD within the Regulations is needed both to avoid expenditures that create colourable violations of the CRPD and to optimise the positive potential of the Funds in enabling a genuine transition to take place. In all likelihood, this means building on but going beyond generic non-discrimination provisions.

#### **4. Taking the CRPD Seriously – The European Commission’s Proposed Structural Fund Regulations for 2014-2020**

Conscious of the ongoing criticism of the record of the Structural Funds in the field of disability and equally conscious of the need to bring the Funds into closer alignment with the only international human rights instrument the Union has ratified, the European Commission presented its long-awaited proposals for a new set of Regulations to govern the next programming period in October 2011.

Since the final regulations are to be adopted in the co-decision procedure, this means that the Commission’s draft will be the subject of intensive negotiations with the Council and the European Parliament. They are expected to emerge in final form in late 2012 or 2013. The European Commission’s proposals were quite strong. The Council has made it plain that it rejects some of the more positive elements in the Commission’s proposals. It remains to be seen if some of the more positive elements will survive. What follows is a brief description and analysis of the new elements.

*(a) The Proposed General Regulation (2014-2020)*

The proposed General Regulation gives explicit effect to the new EU strategic priorities as set out in EU 2020 (Article 4(1)).<sup>39</sup> Consequently, a set of eleven thematic priority objectives are set out in the draft Regulation. These rest on top of a transversal priority which is to avoid discrimination. Each Fund is expected to advance these thematic priorities in order to advance the goals of EU 2020 (Article 9).

Article 7 (within the rubric of “Principles of Union Support for CSF Funds”) sets out the overarching norm of equality and non-discrimination to suffuse all programming. It is to the effect that the member states and the Commission shall take appropriate steps to prevent any discrimination based on a number of grounds including disability. No specific mention is made of the CRPD.

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

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

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

Crucially, the proposed General Regulation contains new general ex-ante conditionalities which are essential pre-conditions for the receipt of Structural Funds. While they existed in the past (e.g., under a general rubric of avoiding discrimination), they are now systematised and given prominence in the draft General Regulation. They are set out in detail in Annex IV of the draft General Regulation entitled “Ex ante conditionalities”, which contains both thematic and general ex ante conditionalities. They are enumerated and aligned with the eleven strategic priorities of the new programming period (Article 9), with non-discrimination as an overarching priority (Article 7). In the table that sets out the eleven thematic goals (alongside the general non-discrimination criterion), a list of “fulfilment criteria” are specified and attached to each thematic priority to give an indication of the kinds of steps that should be taken by the member states.

In explaining the rationale for the inclusion of more particularised ex ante conditions for the next programming period of cohesion policy, the EU Commission stated that it must be ensured:

“[T]hat the conditions necessary for [the] effective support [of the funds]

are in place. Past experience suggests that the effectiveness of investments financed by the funds have in some instances been undermined by weaknesses in national policy, and regulatory and institutional frameworks. The Commission therefore proposes a number of ex ante conditionalities, which are laid down together with the criteria for their fulfilment in the General Regulation.”<sup>40</sup>

In other words, the addition of the conditions is a way of reverse engineering into the architecture of state law and practice to optimise the chances that the Funds will meet their stated purpose. Member states are to assess whether the ex ante conditions are being met (Article 17(2)). They are expected to set out in their Operational Programmes “the detailed actions relating to the fulfilment of ex ante conditionalities including the timetable for their implementation”.<sup>41</sup>

If the conditions are not met at the time of the conclusion of their Partnership Contracts, the member states in question will set out clearly the actions to be taken to bring them into compliance within two years of the Contract (Article 17(3)).

Crucially, according to the draft Regulation, the European Commission shall assess information connected with the fulfilment of the ex ante conditions and:

“[M]ay decide to suspend all or part of interim payments to the programme pending the satisfactory completion of actions to fulfil an ex ante conditionality.

The failure to complete actions to fulfil an ex ante conditionality by the deadline set out in the programme shall constitute a basis for suspending payments by the Commission.”<sup>42</sup>

This does no more than to just give reality to the ex ante conditionalities – something beyond rhetoric turns on their fulfilment which should concentrate the minds of national authorities.

Two sets of ex ante conditionalities are particularly important in the context of Article 19 of the CRPD.

The first important ex ante condition for our purposes focuses on the transversal thematic priority of combating discrimination. Within that rubric and in the specific context of disability (following the general provision as well as the provision on gender), this ex ante condition is to the effect of requiring member states to create “a mechanism which ensures effective implementation and application of [CRPD]”.<sup>43</sup>

The reiteration of the need for Governments to set up these bodies is greatly welcomed in the draft ex ante conditionality. It is assumed that the overarching obligation to involve and consult with persons with disabilities will also be respected (and monitored in the relevant monitoring programme). It is also assumed that the national “focal point” and “coordinating” mechanism will explicitly bring the operation of the Structural Funds in their jurisdiction under their remit.

The “criteria for fulfilment” of this ex ante condition are highly specific and are stated to be:

“Effective implementation and application of the [CRPD] is ensured through:

- implementation of measures in line with Article 9 of the [CRPD] to prevent, identify and eliminate obstacles and barriers to accessibility of persons with disabilities;
- institutional arrangements for the imple-

mentation and supervision of the [CRPD] in line with Article 33 of the [CRPD];

– a plan for training and dissemination of information for staff involved in the implementation of the funds;

– measures to strengthen administrative capacity for implementation and application of the [CRPD] including appropriate arrangements for monitoring compliance with accessibility requirements.”

The reference to accessibility is quite important for the purposes of achieving the right to live independently and be included in the community. It applies particularly to infrastructural projects under the ERDF. Using the Structural Funds to ensure and enhance accessibility plays a major role in giving life to the right to live independently and be included in the community. The reference to institutional arrangements for the implementation and supervision of the CRPD is also greatly welcomed. Supervision in this context must be understood as including the monitoring requirements under Article 33(2) of the CRPD which, recall, has to contain a framework with one or more independent elements for the “protection, promotion and monitoring” of the Convention. Again, recall that Article 33(3) of the CRPD specifically requires the active involvement of persons with disabilities in this process.

The reference to training is also useful and most welcome. It stands to reason that, in any serious process of transition, the (re) training of human personnel is going to be a critical success factor. This applies both to staff involved in the administration of the Funds as well as personnel more generally in the field. As indicated earlier, the culture shift needed within services more generally will be quite significant. It will entail service providers seeing themselves less as meeting needs and more as building bridges into the

community and mending gaps in social connectedness. A mind-set change is needed and the Funds can play an enormously significant role in nudging this culture shift into place.

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

The second draft ex ante conditionality of relevance falls under the 9th thematic priority of “Promoting Social Inclusion and Combating Poverty”. Rather confusingly this becomes the 10th “thematic objective” in the Annex (the 10th becoming the 9th). Falling thereunder there is an ex ante condition dealing with “active inclusion – integration of marginalised communities such as the Roma”. This calls for the existence of a national anti-poverty reduction strategy as well as a strategy for Roma inclusion. However, with respect to the relevant “criteria for fulfilment” covering the national strategy for poverty reduction there is a criterion that specifically calls for “measures for the shift from residential to community based care”.<sup>44</sup> This is very welcome as it sets the overall frame for the specific Funds and particularly the Social Fund, where social innovation is particularly required. Recall, this is an ex ante condition. In other words, it must exist in order to qualify a member state to receive funding.

In sum, the proposed inclusion of ex ante conditionality in the draft General Regulation is a welcome step forward. Indeed, it is hard to see how the EU could avoid ex ante conditionality if only to minimise its legal liability to the UN Committee on the Rights of Persons with Disabilities for member state actions that it could have avoided through better regulation of the Structural Funds. And the Declaration of Competence accompanying its “confirmation” of



the Convention made it inevitable that the ex ante conditions would include an express reference to the CRPD.

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

On 24 April 2012, the General Affairs Council reacted strongly and negatively to the draft proposed by the European Commission. At that meeting the member states agreed on a “partial general approach” and adopted its own text. A “general approach” is a political agreement of the Council pending the adoption of a first reading position by the European Parliament. The general approach in this case is “partial” since some elements have not been broached including the exact sums to be devoted to cohesion policy and the eligibility of different regions which will be decided at a later stage in the process.

The Council text purports to remove all ex ante conditionalities. In the absence of such

robust conditionalities it is extremely hard to see how generic provisions on non-discrimination can do an adequate enough job of ensuring compliance with the CRPD. Furthermore, the Council’s text significantly weakens the role of the European Commission in monitoring compliance and withholding funds. Without the conditions the roadmap is gone. And without robust European Commission supervision the stick is gone.

The nature of the co-decision process means that further opportunities will arise to return to the position adopted in Council.<sup>45</sup> At the time of writing, the General Regulation is awaiting its first reading by the European Parliament.<sup>46</sup> It is understood that the European Parliament has presented over 4,000 amendments and is anxious to restore the relevant ex ante conditionalities. It is understood that some Members of the European Parliament (MEPs) have also tabled amendments that would expressly mention the CRPD in the recitals and also in draft Article 7 (the headline article on “Promotion of Equality between Men and Women and Non-discrimination”). It is unclear if the reference to the CRPD will (or can) be retained since it would give perhaps too much particularity to a headline norm on equality and non-discrimination and unbalance it in favour of disability. Against this, the additional and specific reference to the CRPD in draft Article 7 is defensible since this is the only international non-discrimination treaty that the European Union has ratified. It might also be said that the addition of the reference to the CRPD in a headline norm like Article 7 might prove problematical to the CJEU which cannot, as such, rule on such instruments since it is not a source of EU law. On the other hand, ratification by the EU has arguably conferred on the Convention a “quasi-constitutional” status hovering somewhere between primary treaty law

and secondary law. So although it does not – because it cannot – expand EU competence (and the law determining such), it is available to the CJEU as an interpretive tool. And it is certainly available to the Institutions as a source of norms according to which secondary law can be, and should be, developed.

With the support of the Commission (which is assumed) the matter will finally have to be resolved by tri-partite conciliation between the Commission, Council and Parliament.

It is fully appreciated that member states need a wide margin of appreciation in determining what mix of funds would be needed to best translate the majestic generalities of EU2020 into a domestic context. Subsidiarity is more than a slogan. However, it is submitted that the status of the CRPD as a legally binding instrument (binding both on the EU and its member states) converts what would otherwise be a matter of policy discretion into one of categorical imperatives. 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.

*(b) The Proposed European Social Fund Regulation (2014-2020).*

The European Commission's draft Regulation for the European Social Fund is important because it is a core instrument for enabling social innovation and change to occur. The Fund aims to promote, *inter alia*, "social inclusion thereby contributing to economic, social and territorial cohesion".<sup>47</sup>

The focus on social innovation – a key theme of EU2020 – is mirrored in how the draft ESF Regulation references the new EU Programme for Social Change and Innovation (PSCI).<sup>48</sup> This is, in fact, a creative mix of long standing programmes including PROGRESS, EURES and European Progress for Microfinance Facilities.<sup>49</sup> The Programme for Social Change and Innovation will support policy coordination, sharing of best practices, capacity-building and testing of innovative policies, with the aim that the most successful measures could be up-scaled with support from the European Social Fund.

It may well be the case that elements of this new innovation programme can also be harnessed to help fertilise the transition process to community that is clearly needed. It is clearly relevant given that one of the PROGRESS strategies for the period 2007-2013 was ensuring that equality considerations, including disability accessibility requirements, were taken into account in all PROGRESS policy sections and activities.<sup>50</sup>

The Explanatory Memorandum to the draft ESF Regulation specifically references the "European Platform against Poverty" which forms an integral part of Europe 2020 and which calls for social innovation for, *inter alia*, the transformation in the lives of persons with disabilities. Preambular paragraph 11 of the proposed ESF Regulation states:

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

The ESF should support the fulfilment of the obligation under the UN Convention on the Rights of Persons with Disabilities with

regard inter alia to education, work and employment and accessibility. **The ESF should also promote the transition from institutional to community-based care.** [Emphasis added.]<sup>51</sup>

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

Article 2 of the draft ESF Regulation follows through by including within the stated mission of the ESF into the next period the goal of benefiting people “including disadvantaged groups such as (...) people with disabilities (...) with a view to implementing reforms (...) in the fields of (...) social policies”. It also explicitly states that one of the key goals of the ESF in this regard is to:

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

This too is greatly to be welcomed, particularly as it highlights the rights of persons with disabilities at the very outset in the mission statement of the ESF. And the direct mention of supporting adaptation to new challenges

and reform is highly relevant in the context of the transition set to take place in the move to community living.

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

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

“The Member States and the Commission shall promote equal opportunities for all, including accessibility for disabled persons through mainstreaming the principle of non-discrimination (...) and through specific actions within the investment priorities. (...) Such actions shall target people at risk of discrimination and people with disabilities, with a view to increasing their labour market participation, enhancing their social inclusion, reducing inequalities in terms of educational attainment and health status and **facilitating the transition from institutional to community-based care.**” [Emphasis added.]<sup>52</sup>

Again, this draft language is commendable. And the specific reference to the transition from institutional to community-based care – which was already highlighted in the draft preambular language – is greatly welcomed.

Importantly, draft Article 6 deals with the “involvement of partners”. It is to the effect that the involvement of partners, “in par-

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

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

The aforementioned meeting of Council did not remove or threaten to remove the abuse provisions. Hopefully they will survive the co-decision process intact.

(c) *The Proposed European Regional Development Fund Regulation (2014-2020)*.

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

One of the “investment priorities” in the draft ERDF Regulation is stated to be:

“[I]nvesting in health and social infrastructure which contribute to national, regional and local development, reducing inequalities in terms of health status, **and transition from institutional to community-based services**”. [Emphasis added.]<sup>53</sup>

Again, the specific reference to a transition from institutional to community based services is critically important.

Article 5.9(c) goes on to state that “support for social enterprise” is also a priority. This is also relevant in the disability context given that an entirely new social frame of reference will be needed to give life to the right to live independently and be included in the community.

The old 10% cap in the use of ERDF that applied to the purchase of land (with the on-going question mark over whether this also extended to the purchase of property on land) is carried forward in Article 59(3) (b) of the draft General Regulation. This of course applies to the ERDF as well as to the other Funds. This has been criticised by the European Coalition for Community Living.<sup>54</sup> The cap makes some sense on a theory of “additionality” whereby EU funds should

not be used to defray costs that states must themselves normally meet. But perhaps it need not be as inhibiting as suggested since the realisation of capital on the sale of institutions should provide states with sufficient assets to leverage the financial credit to enable more individualised housing options to be built in community settings. Put another way, the initiation of a serious transition process can be planned to successively capitalise on assets to be released from the sale of institutions perhaps aided by the 10% maximum allowable under ERDF.

Again, thankfully, the positive elements above in the European Commissions' draft ERDF Regulation were not displaced by the recent Council meeting.

*(d) The Proposed Common Strategic Framework*

Subsequent to the publication of its Regulation Proposals, the European Commission adopted a communication on a Common Strategic Framework (CSF) 2014-2020. This was published as a staff working document on 14 March 2012.<sup>55</sup> Its objective is to translate the general objectives and targets set out in the draft Regulations into key actions for the use of the cohesion funds. It thus aims to provide concrete direction of assistance to states in the programming.<sup>56</sup>

The CSF will obviously have to reflect (and be consistent with) the content of the finalised Regulations. The Commission will launch a public consultation on the CSF at some point in 2012. Previously, it seemed likely that the finalised CSF would take the legal form of a delegated act after the finalisation of the Structural Fund Regulations in 2013.<sup>57</sup> However, MEPs have been calling for an adoption by co-decision procedure through making it an annex of the General Regulation based on the fact that, in their

opinion, the CSF is an “essential element” which expresses political views.<sup>58</sup> This latter approach seems to have gained more support in recent discussion.<sup>59</sup>

There are many positive elements in the proposed CSF. Its utility, however, is in doubt given the current impasse over the final shape of the Regulations. Naturally, the two would fit better if the Regulations contained solid elements along the lines proposed by the Commission. In the absence of these strong elements (and if the Commission's monitoring role is diluted following the views of Council) it is hard to see how the CSF can gain real traction.

*(e) The European Code of Conduct on Partnership*

A much neglected aspect of the CRPD is its ambition to change process and not just substance. Of particular importance is Article 5(1)(c) of the draft General Regulation which stipulates, inter alia, that each member state will bring together different groups to sit on the partnership body including, specifically, “bodies representing civil society (...) and bodies responsible for promoting equality and non-discrimination”. In line with the “partnership principle” (between states and civil society) contained in Article 5 of the draft General Regulation, the European Commission also published a Commission Staff Working Document in April 2012 on a European Code of Conduct on Partnership (ECCP).<sup>60</sup> It is intended to:

“[H]elp Member States to shape their partnership appropriately during the preparatory work before the regulations are adopted. In particular, it provides some examples of good practice on implementation of the partnership principle, based on the Commission's findings and various enquiries.”<sup>61</sup>

It is further intended to outline:

“[T]he main requirements that the ECCP could contain as a basis for discussion with the European Parliament and the Council, in order to facilitate the on-going legislative procedure and to allow stakeholders to take part in this debate.”<sup>62</sup>

The Commission has recommended that the ECCP be adopted as a delegated Act, as soon as the General Regulation for the period 2014-2020 enters into force.<sup>63</sup>

It will be recalled that Article 4(3) of the CRPD requires that:

“In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.”

The Commission Staff Working Document provides a useful suggestion for ensuring compliance with this provision by recommending that member states:

“[I]dentify, in their national context, the relevant stakeholders in the CSF Funds, the incentives and the legal and administrative barriers to partnership and possibly ways to address these obstacles. Member States are also encouraged to build upon the key existing national/regional/local partnership structures to minimise duplication and save time. Support for capacity-building might be necessary in order to help establish a representative and functioning partnership.”<sup>64</sup>

The Commission goes on to suggest that:

“The ECCP could supplement the Common Provisions Regulation by requiring that the partnership includes the institutions, organisations and groups which can influence or be affected by implementation of the programmes. Specific attention will have to be paid to groups that might be affected by the programmes but find it difficult to influence them, in particular the most vulnerable and marginalised, such as the **persons with disabilities**, migrants, Roma (...) It is important to encourage pluralism in the partnership and to bring in the different relevant parts of the public sector alongside business, community-based and voluntary organisations, covering different types and sizes of organisations and including small innovative players.”<sup>65</sup> [Emphasis added.]

The specific recognition and mention of persons with disabilities as persons who will be affected by programmes financed by Structural Funds but who may not have previously had a voice within the national process is a notable progression and one which it is to be hoped will be maintained within the final ECCP.

Recognising the need to adjust partnerships in light of the programmes being undertaken, the document also states:

“For the ERDF and Cohesion Fund, partnerships will include (...) economic and social partners, representatives of NGOs having developed an expertise for cross-cutting issues, such as gender equality or **accessibility for persons with disabilities**, and for the relevant sectors where the funds are active ...

For the ESF, the involvement of economic and social partners in the partnership is es-

sential. Regional and local authorities will also be key partners, as will the chambers of commerce, business organisations, workers' education associations, education and training institutions, social and health services providers, NGOs and organisations having developed an expertise in the fields of gender equality, non-discrimination and social inclusion that have close ties with disadvantaged groups such as **persons with disabilities**, migrants, Roma ..." [Emphasis added.]<sup>66</sup>

When engaging in this partnership process, member states are also reminded in the document that:

"Accessibility for persons with disabilities to the process both in terms of the physical environment and the information provided will also need to be taken into consideration."<sup>67</sup>

Therefore, if this language is maintained in the final version of the ECCP, EU member states will have clear guidance in relation to the need to specifically structure their partnerships based on the nature of the programmes being undertaken. The potential impact of such an approach in the context of vindicating the rights of persons with disabilities to live independently and be included in the community is immense.

## 5. Conclusions

EU disability law and policy has come a long way since the early 1990s when people with disabilities were famously characterised as "invisible citizens". Advances in non-discrimination which have included both treaty changes and secondary legisla-

tion have anchored the rights-based perspective on disability in EU law. The landmark ratification by the EU of the CRPD copper-fastens this perspective at EU level. It augers well, or poorly, for future EU ratification of other international human rights instruments depending entirely on how the EU deals with this first real test of its sincerity and commitment.

EU commitment to the international rule of law was never going to be tested alone by laws and legislation. For the EU, unlike the Council of Europe, has real power which is transmitted through its various funding programmes. It would be ironic in the extreme if the EU Structural Funds, which are explicitly designed to bring about social innovation and facilitate development in lesser developed regions, were not consciously harnessed to help achieve some of the key goals of the CRPD.

We wrote at the outset of this essay that what really distinguishes the EU is its mix of power and principles. The addition of principles is not meant to simply add a list of side-constraints that, after the fact, can be used to question power. These principles can only be made real if they *inform* the use of the power. At the end of the day it is not really disability alone that is at stake. It is the very possibility of a Union based on the rule of law, human rights and democracy that is at stake. For this reason it is hoped that the EU will not fail its first serious test under the CRPD and that ways will be found to restore the conditionalities (or their equivalent) proposed by the European Commission to the Structural Fund Regulations.

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the authors on behalf of the United Nations Office of the High Commissioner for Human Rights (European Regional Office) entitled *Getting a Life – Living Independently and Being Included in the Community* which was launched at an event in Brussels on 7 May 2012.

2 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.

3 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, Council of the European Union, Legislative Acts and other Instruments, No. 16243/10, Brussels, 29 November 2010.

4 Case C-244/04 *IATA v Department of Transport* [2006] ECR I-403, Para 35.

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