

COMMUNITY, NOT CONFINEMENT



The Role of the European Union in
Promoting and Protecting the
Right of People with Disabilities
to Live in the Community



OPEN SOCIETY
FOUNDATIONS

COMMUNITY, NOT CONFINEMENT

The Role of the European Union in
Promoting and Protecting the
Right of People with Disabilities
to Live in the Community

This report was written by Dr. Israel Butler.

Copyright © 2015 Open Society Foundations. All rights reserved.

ISBN: 978-1-940983-53-0

Published by:
Open Society Foundations
224 West 57th Street
New York, NY 10019
United States
www.opensocietyfoundations.org

Cover photo: Former residents of a segregated institution for people with intellectual disabilities in Zagreb, Croatia, eat their first lunch in the new apartment they will now share. They receive support to live independently and make personal choices, like when to eat lunch and what to cook.

Copyright © Gral Film

Design and printing by Judit Kovács | Createch

FOREWORD	5
EXECUTIVE SUMMARY	7
ABBREVIATIONS	11
INTRODUCTION	13
I. Defining the Problem.....	14
II. Terminology.....	18
PART ONE	
The UN Convention on the Rights of Persons with Disabilities (CRPD) in EU Law	19
I. Do the UN CRPD and the EU Charter of Fundamental Rights (CFR) Apply to the Implementation of ESIFs?.....	19
II. The Impact of the CRPD in EU Law.....	25
II.A. The Direct Enforceability of the CRPD.....	25
II.B. Enforcement of the CRPD in EU Law by Indirect Means.....	29
II.B.1. Influence of CRPD over rights protected by the CFR and EConvHR.....	29
II.B.2. Direct effect of CFR Article 26.....	32
II.B.3. Alternative routes through Articles 6 and 21 CFR.....	35
The right to liberty.....	36
The meaning of ‘unsound mind’.....	36
The meaning of ‘deprivation of liberty’.....	38
The requirement for detention to be proportionate to a legitimate aim.....	38
Non-discrimination.....	40
Unfavourable treatment based on disability.....	41
Objective justification.....	42
II.C. The Incidental Effect of the CRPD.....	44
II.D. Other Legal Effects of the CRPD in the EU Legal Order.....	45
III. Concluding Remarks.....	46

PART TWO

Applying the European Structural and Investment Funds (ESIFs) in line with the UN Convention on the Rights of Persons with Disabilities (CRPD)

	47
I. The Nature of the Obligations Imposed by Article 19 of the CRPD	48
II. Mapping Article 19 CRPD Obligations onto the ESIFs	52
II.A. Shared Management	52
II.B. The PA, OP and Ex-ante Conditionalities	53
II.C. The Management and Control System	56
II.D. Monitoring and Evaluation Mechanisms	61
II.D.1. Reporting on national structures and procedures	63
Adequacy of reporting	63
The Commission's willingness to use corrective measures	64
II.D.2. Reporting on implementation of the PA and OPs	65
Adequacy of reporting	66
The Commission's willingness to use corrective measures	69
III. Concluding Remarks	72

RECOMMENDATIONS

Recommendations to the European Commission	75
Verifying the Partnership Agreements, Operational Programmes and <i>Ex Ante</i> Conditionalities ...	75
Training and Guidance that is CRPD-compliant	76
Improved Monitoring	76
Using Corrective Powers in Response to Complaints	77

These are challenging times in Europe. We face a migration crisis with no clear end in sight. We are seeing disturbing trends such as rising xenophobia, anti-immigrant sentiment, and populist political movements rooted in nationalism and hate. This invariably amplifies intolerance against anyone perceived as a misfit. It also signals a major crisis in European values, where the focus shifts to politics and raw power, and people are swept to the wayside.

While *Community, Not Confinement* deals with law and policy, it is fundamentally about people, particularly European citizens with disabilities, and the EU's obligation to ensure they can realize their right to live in the community. Securing and promoting the rights of people with disabilities is a basic component of fundamental EU values such as respect for human dignity, liberty, equality, and human rights. As it stands, the fundamental rights of people with disabilities in the European Union are guaranteed under many legally binding documents such as the Charter of Fundamental Rights, the UN Convention on the Rights of People with Disabilities (CRPD), and the European Convention on Human Rights.

The European Union is bound to uphold these fundamental rights when implementing programs and policies such as the EU structural funds, which make up approximately two-thirds of the annual EU budget and are financed by European taxpayers. In the last structural funds programming period (2008–2013), a number of EU member states invested structural funds into the renovation or construction of residential institutions for people with disabilities, instead of investing in projects that would help people with disabilities live in the community. The continued detention of people with disabilities in institutions results in a denial of their fundamental human rights. Civil society organizations responded to these investments and rights violations by successfully advocating for the inclusion of basic human rights safeguards in the current structural funds legislation. In the 2014–2020 programming period, structural funds must support projects that facilitate the transition from institutional to community-based care, and member states must meet an ex-ante conditionality requiring them to introduce progress toward deinstitutionalization. While we applaud these positive developments, we remain concerned about the very real danger that some member states will continue to invest structural funds in institutions that segregate Europeans with disabilities from the rest of society.

Community, Not Confinement is focused on how the European Commission can use the powers available to it under the shared management principle to ensure that structural funds support independent living. To make that happen, the Commission needs to give Member States better guidance on how EU law requires them to implement the CRPD, it and it needs to improve the level of information it receives about how Member States are using Structural Funds. Both the European Commission and the member states need to make investment information transparent and accessible so that the investments can be monitored and member states can be held accountable. If member states invest structural funds in contravention of European law, the European Commission must make effective use of the sanctions it has available to it, including suspension and reimbursement of misused funds.

The Open Society Mental Health Initiative has spent the last 20 years investing in community-based alternatives to institutions for people with disabilities across a number of new EU member states. This experience has shown that it is possible to establish person-centered, cost-effective, and sustainable models that promote human rights. It also has shown that if governments receive technical assistance and bridge financing, they can, with the necessary political will, replicate these models at the national level and eliminate the need for long-stay residential institutions.

There is no time like the present for the European Commission and the member states to ensure that structural funds investments do not result in the social exclusion of any European citizen. There are many inspiring models of good practice in community-based services for people with disabilities across the European Union, and the structural funds are a critical resource for scaling up those programs. We now have an opportunity to recapture the spirit of solidarity and equal rights for all Europeans that once inspired the European Union. We hope that the European Commission will seize this moment and take the necessary steps to ensure that no European citizen is forced to live in a dehumanizing institution, where they are stripped of privacy, choices, and control of their lives.

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

October 2015

EXECUTIVE SUMMARY

The UN Convention on the Rights of Persons with Disabilities (CRPD) is a legally binding international agreement. When the European Union joined the CRPD in 2010 it became an integral part of EU law. As such, it is legally binding on the European Union and on member states when they implement EU law.

The CRPD obliges the European Union to protect the rights of persons with disabilities, including the right to independent living. This right guarantees persons with disabilities a choice over where and with whom they live. It prohibits authorities from investing in institutions and instead obliges them to invest in community-based services that allow persons with disabilities to be included in society and live independently with support according to their needs.

Many countries in Central and Eastern Europe have a long-established practice of placing persons with disabilities in long-stay residential institutions, often against their will. A person in institutional care has no choice over where or with whom they live, is cut off from his or her community, is unable to build friendships and relationships, has no freedom to pursue an education or a job, and has no control over his or her everyday routine, such as when to wake or eat.

Between 2007 and 2013, millions of euros of EU structural funds were invested in institutions. When member states make decisions over how to spend EU structural funds, they are implementing EU law. Because of this, the European Union has to ensure that member states comply with the CRPD and do not use EU funds to build or renovate institutions, but instead invest funds in community-based services.

Improvements have been made to the regulations governing EU structural funds between 2014 and 2020: support for the transition from institutional to community-based care is now a goal of structural funds; member states are required to fulfil an *ex ante* conditionality requiring them to introduce measures on deinstitutionalisation as part of a strategic framework on poverty reduction; and civil society organisations are to be included in decision-making. However, there remains a real risk that EU funds will continue to be invested in institutions.

There are several reasons for this:

- **Problematic framework:** in their Operational Programmes – which set out how they will spend EU funds – most member states commit to use funding to develop community-based services. However, several member states intend simply to invest in scaled-down or congregate facilities like group homes. In reality these are simply smaller institutions that fail to provide people with the choices needed to live as independently as possible. In addition, where member states have set out deinstitutionalisation plans to fulfil the *ex ante* conditionality, these do not conform to the requirements of the CRPD to include all residential institutions, to set a timeline with a reasonable deadline for complete deinstitutionalisation, and to have clear benchmarks.

- **Lack of awareness:** national authorities are not aware that EU law obliges them to comply with the CRPD when spending EU structural funds. Although the Commission intends to offer guidance to member states, this will only refer to the European Union Charter of Fundamental Rights.
- **Inadequate monitoring:** the Commission has not requested sufficiently detailed information from national authorities about how they will ensure compliance with the CRPD when they formulate selection criteria and carry out internal checks that projects comply with EU law. Similarly, when member states report to the Commission on how they are spending EU funds, this will not give the Commission enough detail to spot projects that violate the right to independent living.
- **Weak enforcement:** the new legislation on structural funds has made monitoring even weaker than before. Under the old rules, the Commission was willing to deal directly with complaints about how EU structural funds were being used. Under the current rules, it intends to refer these complaints back to national authorities to deal with and it will not check whether the outcome of complaints ensures compliance with the CRPD.
- **Weak participation:** many member states have failed to adequately include civil society organisations representing persons with disabilities in decision-making. This makes it less likely that civil society organisations can help to prevent the selection of projects that violate the right to independent living.

The CRPD Committee, which monitors whether the European Union is properly implementing the CRPD, recently expressed its concern that EU funds have been used to finance institutions, in violation of the right to independent living. It has issued recommendations to the European Union outlining that to comply with its obligations on the right to independent living the European Union must offer proper guidance to national authorities, improve how it monitors spending of EU funds, and use its powers to apply financial corrections, or interrupt or suspend payments to member states when they violate the CRPD. Based on analysis of the Commission's powers and practices under current rules on EU structural funds, **it is recommended that the Commission take the following measures to avoid violating its obligations under the CRPD.**

- **Verify the framework:** the Commission should check the Operational Programmes and fulfilment of *ex ante* conditionalities by member states in light of the requirements of the CRPD on independent living.
- **Proper guidance:** the Commission should make clear to national authorities that when they select projects, perform internal checks for compliance with EU law and handle complaints about structural funds, they must ensure compliance with the CRPD.
- **Effective monitoring:** the Commission should ensure it has enough information at its disposal to spot problematic projects by providing funding for civil society organisations to monitor how member states are using EU funds.

- **Enforcement:** the Commission should open accessible and transparent channels for complaints from civil society organisations concerning misuse of EU funds, and investigate such complaints and take corrective measures, including the application of financial corrections and the interruption and/or suspension of payments when national authorities are violating the CRPD. When complaints are referred back to national level, the Commission should check that national authorities deliver a remedy that ensures compliance with the CRPD.
- **Participation:** the Commission should ensure that member states interpret their obligation to include civil society organisations in the implementation phase of the structural funds in line with the CRPD.

ABBREVIATIONS

AA	Audit authority
CA	Certifying authority
CJEU	Court of Justice of the European Union
CPR	Common Provisions Regulation
CRPD	United Nations Convention on the Rights of Persons with Disabilities
EConvHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ERDF	European Regional Development Fund
ESF	European Social Fund
ESIFs	European Structural and Investment Funds
MA	Managing authority
OP	Operational programme
PA	Partnership agreement

The European Union has been party to the UN Convention on the Rights of Persons with Disabilities (CRPD) since 2010.¹ Article 19 of the CRPD guarantees the right to independent living and contains both negative and positive obligations: a negative obligation to refrain from further financial investment in institutions for persons with disabilities; a positive obligation to instead direct investment toward the provision of community-based services that allow persons with disabilities to be included in society and live independently.²

In its Concluding Observations on the European Union, following discussion with the European Union of its report on measures taken to implement the CRPD, the CRPD Committee found that the European Union was failing to meet its obligations under Article 19 of the CRPD. The committee expressed concern that:

‘(A)cross the European Union persons with disabilities, especially persons with intellectual and/or psychosocial disabilities still live in institutions rather than in local communities. It further notes that in spite of changes in regulations, in different Member States the ESI Funds continue being used for maintenance of residential institutions rather than for development of support services for persons with disabilities in local communities.’

The CRPD Committee recommended to the European Union that it:

‘develop an approach to guide and foster deinstitutionalisation, to strengthen the monitoring of the use of ESI Funds – to ensure they are being used strictly for the development of support services for persons with disabilities in local communities and not the re-development or expansion of institutions. It further recommends that the European Union suspend, withdraw and recover payments if the obligation to respect fundamental rights is breached.’³

The CRPD Committee recommends three measures. The European Union should offer adequate guidance to member states, engage in effective monitoring, and use corrective action in case of breach of the CRPD.

This report intends to support the European Union, in particular the European Commission, to give effect to its obligations under the CRPD. Despite improvements in EU rules governing the use of European Structural and

1. 2515 UNTS 3.

2. The content of Article 19 is analysed in part two.

3. CRPD Committee, Concluding observations on the initial report of the European Union, UN Doc CRPD/C/EU/CO/1, 4 September 2015, paras. 50–51.

Investment Funds (ESIFs),⁴ there is a real risk that EU funds will be used by member states to perpetuate the institutionalisation of persons with disabilities rather than to support genuine community-based services that give effect to the right to independent living guaranteed by Article 19 of the CRPD and Article 26 of the EU Charter of Fundamental Rights (CFR).⁵ This report examines the extent to which the CRPD creates obligations for the European Union and its member states when implementing the ESIFs' regulations. It then explores how the Commission could deploy its existing powers, within the framework of shared management, to ensure that the ESIFs are used in line with Article 19 of the CRPD.

I. Defining the Problem

It is estimated that between 2007 and 2013, at least 150 million euros of ESIFs were invested in renovating or building new institutions for persons with disabilities in Bulgaria, Hungary, Latvia, Lithuania, Romania, and the Slovak Republic.⁶ It is likely that EU funds were also invested in institutional care during the same period in the Czech Republic, Estonia, and Poland.⁷

The new rules governing the ESIFs between 2014 and 2020 contain several positive measures that reduce the risk of investment in institutional care and increase the likelihood of investment in community-based services. First, the new rules expressly include the transition from institutional to community-based care as a priority for funding under the European Social Fund (ESF) and the European Regional Development Fund (ERDF), under the thematic objective of promoting social inclusion and combating poverty and discrimination.⁸ Second, the Common Provisions Regulation (CPR) requires member states to elaborate measures to support the transition from institutional to community-based care as a condition of receiving ESIFs.⁹ Third, the CPR and Code of Conduct on partnership (CoC) strengthen the involvement of civil society organisations working in the field of disability in the elaboration

4. The Common Provisions Regulation (CPR): Regulation 1303/2013 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 and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Regulation (EC) No 1083/2006 (OJ L 347, 20.12.2013, 320). The European Regional Development Fund (ERDF) Regulation: Regulation 1301/2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation 1080/2006 (OJ L 347, 20.12.2013, 289). The European Social Fund (ESF) Regulation: Regulation 1304/2013 on the European Social Fund and repealing Regulation 1081/2006 (OJ L 347, 20.12.2013, 470).

5. OJ C 326 26.10.2012, 391.

6. ENIL-ECCL, 'Briefing on Structural Funds Investments for People with Disabilities: Achieving the Transition from Institutional Care to Community Living', December 2013, 11–12. Available on: <http://www.enil.eu/wp-content/uploads/2013/11/Structural-Fund- Briefing-final-WEB.pdf>.

7. Response by ENIL-ECCL, incorporating comments from the Open Society Mental Health Initiative to European Ombudsman own-initiative inquiry OI/8/2014/AN concerning the respect for fundamental rights in the implementation of the EU cohesion policy, 25 February 2015, 3. Available on: <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/59845/html.bookmark>.

8. Article 9 CPR, Article 5(9)(a) ERDF, Article 3(1)(b)(iii) read together with Article 8 ESF. See also preambular para. 19 ESF.

9. The 'ex ante conditionalities': Article 19 and Annex XI CPR.

of Partnership Agreements (PAs) and Operational Programmes (OPs) as well as the implementation of the ESIFs.¹⁰ Fourth, the Commission has endorsed guidance, guidelines, and a toolkit to assist national and Commission decision-makers to implement the transition from institutional to community-based care, and has stated its intention to issue further guidance and training for national authorities on how to ensure that the ESIFs are implemented in conformity with the CFR.¹¹ As a result of these measures, many of the PAs and relevant OPs explicitly state that they will support the transition from institutional to community-based care.

Furthermore, the Commission has made clear that:

‘The ERDF should as a basic principle not be used for building new residential institutions or the renovation and modernisation of existing ones. Targeted investments in existing institutions can be justified in exceptional cases where urgent and life-threatening risks to residents linked to poor material conditions need to be addressed, but only as transitional measures within the context of a de-institutionalisation strategy.’¹²

The Commissioner for Regional Policy, Corina Crețu has also stated that:

‘in case a Member State fails to ensure the respect of the rights and principles enshrined in the Charter, the Commission may launch infringement procedures, suspend payments or apply financial corrections.’¹³

Despite these positive developments, there remains a real risk that the ESIFs will continue to be used in the current programming period to perpetuate institutionalisation of persons with disabilities. The assessment of EU member states by the CRPD Committee shows that many national authorities have a strong tradition of institutionalising persons with mental disabilities and a poor track record of investing in community-based services.¹⁴ If the Commission is to meet its obligations under the CRPD and comply with the CRPD Committee’s recommendations on Article 19, it will need to take three measures: issue appropriate guidance, improve monitoring, and use its corrective powers in response to problematic project selection. The Commission’s interpretation of the ESIFs regulations is problematic in each of these three regards.

10. Articles 5 and 47–49 CPR, Commission Delegated Regulation 240/2014 on the European code of conduct on partnership in the framework of the European Structural and Investment Funds (OJ L 74, 14.3.2014, 1).

11. European expert group on the transition from institutional to community based care, ‘Common European guidelines on the transition from institutional to community based care’, and ‘Toolkit on the use of European Union funds for the transition from institutional to community based care’, 2012, available on: <http://deinstitutionalisationguide.eu>; Draft thematic guidance fiche for desk officers, Transition from institutional to community-based care (de-institutionalisation – DI) Version 2, 27 January 2014. Available on: http://ec.europa.eu/regional_policy/sources/docgener/informat/2014/guidance_deinstitutionalisation.pdf.

12. Initial report of States parties due in 2012, European Union, UN Doc CRPD/C/EU/1, 3 December 2014, para. 99.

13. Corina Crețu, Announcements, ‘We won’t compromise with the respect of fundamental rights in Cohesion policy’, 20 May 2015, available on: https://ec.europa.eu/commission/2014-2019/cretu/announcements/we-wont-compromise-respect-fundamental-rights-cohesion-policy_en.

14. See sources cited in part two.

First, the Commission has not made clear to national authorities that the CRPD forms an integral part of EU law that member states are obliged to observe when implementing the ESIFs. Indeed, the Commission itself has not clarified whether it considers that the selection of projects by national authorities amounts to the ‘implementation’ of EU law. Further, although it has stated its intention to issue guidance to member states on their obligations to observe the CFR when implementing the ESIFs, the Commission has not stated whether this will also include guidance on the CRPD.

Second, if the Commission is to monitor how the ESIFs are spent so as to ensure that funds are used in conformity with Article 19 of the CRPD, it will need to obtain sufficiently detailed information on specific projects. The regular reporting mechanisms stipulated by the ESIFs rely almost entirely on information provided by national authorities and do not provide sufficient depth that would allow the Commission to spot problematic projects. If the Commission does not have knowledge of problems, it will be unable to correct them.

Third, unless the CRPD is to be deprived of its effectiveness, the Commission should be willing to use its corrective powers if the member states breach their obligations when implementing the ESIFs. However, the Commission has stated that it will refer complaints that it receives concerning the ESIFs back to national authorities, rather than deal with these directly. The Commission may follow up on a complaint that it has referred back to national authorities. But it will only do so to check that the national complaint mechanism followed the correct procedure. It will not follow up on specific complaints to check whether the outcome ensures compliance with the CRPD, and it will only take corrective measures where complaints mechanisms show continued failure to function properly. Thus, it seems that the Commission would never find itself in a position to take corrective action and prevent EU funding from supporting projects that perpetuate deinstitutionalisation. Under the old rules, the Commission was willing to deal directly with complaints that EU structural funds were being used in a way that breached EU law. The Commission’s intention to refer all complaints back to national authorities will result in a system of monitoring that is even weaker than that in place under the previous programming period. This runs contrary to the recommendations of the CRPD to strengthen monitoring, and it is highly questionable given the Commission’s failure to prevent investments being made in institutions under the previous legislation, despite complaints it received.¹⁵

Although the involvement of Commission representatives, as well as civil society organisations as partners in the elaboration of the PAs, Ops, and in monitoring of implementation of the ESIFs through the monitoring committees (MCs) may help to mitigate the risk that problematic projects are selected, this measure of itself is not an adequate safeguard. The degree of involvement of civil society organisations in the elaboration of the PAs and OPs has been highly variable, and the most relevant organisations do not necessarily have a voice in the MCs. Further, the Commission’s involvement in the MC in an advisory capacity, does not allow it to block the elaboration of problematic selection criteria or the selection of problematic projects. Nor does it prevent problematic projects from being selected further along in the selection process, for instance for reasons of maladministration, lack of awareness

15. ENIL-ECCL, Response by ENIL-ECCL, incorporating comments from the Open Society Mental Health Initiative, 25 February 2015, available on: <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/59845/html.bookmark>; MDAC, Response to the European Ombudsperson in relation to the own-initiative inquiry on respect for fundamental rights in the implementation of the EU cohesion policy, 14 March 2015, 6, available on: <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/59842/html.bookmark>; Open Society Foundations, Main risks of misusing EU funding in the field of Roma inclusion, 2015, available on: <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/59844/html.bookmark>.

among decision-makers or corruption. Finally, while the guidance and training offered by the Commission to its own staff and national authorities is an important and welcome step, its effectiveness will depend on how widely this is distributed and how well it is internalised by national authorities. To ensure compliance with Article 19 of the CRPD, the Commission will need to complement these measures with: guidance that makes clear that the CRPD forms part of EU law; improved monitoring; and use of its corrective powers in response to complaints it receives.

II. Terminology

This report understands the term institution to refer to a particular living regime, rather than the size or designation of a given facility. Based on understandings of the term ‘institution’ shared by the Council of Europe,¹⁶ United Nations,¹⁷ and civil society organisations,¹⁸ this report adopts the following interpretation:

‘Institutions are long-stay residential facilities that segregate and confine people with mental, intellectual, and physical disabilities. They are characterized by a regimented culture. Institutions process people in groups and discourage individuality, impose mass treatment, and rely on a status imbalance between staff and residents. Institutions limit personal possessions, and have fixed timetables for activities like eating and walking – irrespective of residents’ preferences or needs.

Residents of institutions have no privacy or personal space, must live with people they have not chosen and may not like, and cannot pursue personal interests or relationships. An institution is not defined by size: even small-scale facilities can perpetuate these conditions.’¹⁹

Institutionalisation of persons with disabilities violates the right to live independently in the community, protected by Articles 19 of the CRPD and 26 of the CFR. Institutionalisation, of itself, also deprives residents of their fundamental rights including: liberty, since residents are prevented from entering and leaving as they please; privacy, because it interferes with their ability to form and maintain friendships and relationships, and prevents them from

-
16. See Council of Europe Commissioner for Human Rights, ‘The right of people with disabilities to live independently and be included in the community’, Issue paper, 2012, 18–19.
 17. The CRPD Committee has not given a definition of the term ‘institution’, but it appears that its understanding of ‘institution’ is broad, and relates to the nature of the regime in place in the context of residential care, rather than on the size or designation of a facility as an ‘institution’. For example, in its Concluding Observations on the periodic report of Croatia, the CRPD Committee stated that the state’s deinstitutionalization plan should cover ‘all residential institutions, such as small private institutions, wards for long-term care in psychiatric institutions and foster homes’. CRPD Committee, Concluding Observations on the initial report of Croatia, UN Doc CRPD/C/HRV/CO/1, 15 May 2015, para. 29. See also: Quinn, Gerard and Doyle, Suzanne, ‘Getting a life, Living independently and being included in the community’, OHCHR Regional Office for Europe, 2012, 30; Parker, Camilla, ‘Forgotten Europeans – forgotten rights: The human rights of persons placed in institutions’, OHCHR Europe Regional Office, 2011, 5.
 18. ECCL, ‘Wasted Time, Wasted Money, Wasted Lives - A Wasted Opportunity?’, 2010, available on: <http://community-living.info/wp-content/uploads/2014/02/ECCL-StructuralFundsReport-final-WEB.pdf>, 78; Parker, Camilla and Clements, Luke, ‘The European Union and the Right to Community Living’, Open Society Foundations, 2012, available on: <https://www.opensocietyfoundations.org/sites/default/files/europe-community-living-20120507.pdf>, 21–22.
 19. Open Society Foundations, ‘What is deinstitutionalisation?’, April 2015, available on: <https://www.opensocietyfoundations.org/explainers/what-deinstitutionalization>.

having control over basic living choices, such as with whom they live, as well as their access to education, employment, and participation in social, cultural, and political life; and equality, as placing persons with disabilities in institutions amounts to unfavourable treatment based on disability that is not objectively justifiable.²⁰

III. Structure of the Report

Part one of this report will examine whether the CRPD creates obligations on the European Union and its member states via EU law. This question is distinct from exploring the obligations of the European Union or its member states under public international law. Once a member state is party to the CRPD it is legally bound by its provisions. In fields of law and policy that still fall under the authority of national governments and are not governed by EU law, the source of the parties' obligations is public international law. In those areas that are governed by EU law, which the report argues includes the implementation of the ESIFs, national authorities must comply with the CRPD because following the EU's accession to this treaty, the CRPD forms an integral part of EU law. Accordingly, when this report makes reference to the obligations of the European Union or of the member states under the CRPD, it refers to the obligation to abide by the CRPD that is incumbent on the European Union and its member states via EU law.

Part two will examine the powers available to the Commission under the ESIFs and suggest how these should be used if the Commission is to implement Article 19 of the CRPD while respecting the principle of shared management in the ESIFs regulations. The report ends with a synthesis of the recommendations made during the analysis in part two.

20. Discussed in further detail in part two.

The UN Convention on the Rights of Persons with Disabilities (CRPD) in EU Law

Part one examines whether the CRPD imposes obligations on the European Union and its member states when these are implementing the European Structural and Investment Funds (ESIFs) regulations. The chapter addresses two questions: first, whether the acts of national authorities relating to the selection and approval of projects to be funded under the ESIFs amounts to the implementation of EU law; second, whether the CRPD forms part of EU law and, if so, to what extent it creates legal obligations that bind the European Union and member states when implementing the ESIFs.

I. Do the UN CRPD and the EU Charter of Fundamental Rights (CFR) Apply to the Implementation of ESIFs?

The Commission maintains that member states cannot automatically be regarded as implementing EU law ‘when they hand out support under the ESIF Funds, regardless of the “national measure” or “national legislation”’ under which funds are being disbursed.¹ That is, just because an activity at national level is supported by EU funds, this does not of itself mean that this activity constitutes the ‘implementation’ of EU law.² This report does not need to address whether all activities supported by EU funds amount to the implementation of EU law. This report is concerned with a more specific issue. That is, whether the acts of national authorities – namely the managing authority (MA), certifying authority (CA), audit authority (AA), and monitoring committee (MC) – related to the selection of projects amount to the implementation of EU law.³

-
1. Comments of the Commission on the European Ombudsman’s Own-initiative inquiry – Ref. OI/8/2014/AN, available on: <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/58451/html.bookmark>, 3.
 2. CJEU, Case C-117/14 *Nisttahuz Pochvava*, 5 February 2015, para. 42: ‘the fact that the employment contract of indefinite duration to support entrepreneurs may be financed by structural funds is not sufficient, in itself, to support the conclusion that the situation at issue in the main proceedings involves the implementation of EU law’.
 3. For a thorough examination of the CJEU case law on this question see: Vița, Viorica and Podstawa, Karolina, ‘When the EU Funds meet the Charter: on the applicability of the Charter to the EU Funds at national level’, FRAME working paper (forthcoming), available on: <http://www.fp7-frame.eu/working-papers/>.

Where member states are implementing secondary legislation, such as the ESIFs regulations, they need to ensure that they act in conformity with their obligations under higher rules of EU law. This includes the CFR, but also international agreements to which the European Union is party. Article 216(2) of the Treaty on the Functioning of the European Union (TFEU) provides that '[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States.'⁴ The Court of Justice of the European Union (CJEU) has confirmed that because the European Union is party to the CRPD, the 'provisions of the convention are thus, from the time of its entry into force, an integral part of the European Union legal order.'⁵ The CJEU has further confirmed 'the primacy of international agreements concluded by the European Union over instruments of secondary law'.⁶ As such, the CRPD, in the same way as EU law in general, binds the European Union and binds the member states when the latter are interpreting and applying EU legislation. Thus, although the CRPD does not have the status of primary law, unlike the CFR, its impact on rules of secondary law is similar, in that secondary legislation and the way it is implemented must conform to the CRPD.

If the activities of national authorities relating to the selection of projects under the ESIF regulations cannot be considered to constitute the implementation of EU law, the CRPD will not apply.⁷ The body with primary responsibility under the ESIFs for the formulation and application of selection criteria for projects to be funded by the ESIFs is the MA. It is unclear⁸ whether the Commission considers that the

4. Consolidated version of the Treaty on the Functioning of the European Union, OJ C 83, 30.3.2010, 47. Although the CRPD is a 'mixed' agreement this does not alter the reach of the CRPD as part of the Union's legal order. CJEU, Case C-239/03 *Commission v. France*, 7 October 2004, para. 25: 'mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements in so far as the provisions fall within the scope of Community competence'. In the cases where the CJEU has discussed the CRPD's applicability in the European Union, it has not even given consideration to the issue of whether it constitutes a 'mixed agreement' for the purposes of defining the extent of the obligations it imposes. See: CJEU, Joined Cases C-335/11 and C-337/11 *HK Danmark*, 11 April 2013; CJEU, Case C-363/12 Z, 18 March 2014; C-356/12 *Glatzel*, 22 May 2014.

5. CJEU, Joined Cases C-335/11 and C-337/11 *HK Danmark*, 11 April 2013, para. 30; CJEU, Case C-363/12 Z, 18 March 2014, para. 73; CJEU, Case C-356/12 *Glatzel*, 22 May 2014, para. 68.

6. CJEU, Joined Cases C-335/11 and C-337/11 *HK Danmark*, 11 April 2013, para. 29. See also CJEU, Case C-61/94 *Commission v. Germany*, 10 September 1996, para. 52; CJEU, Case C-240/09 *Lesoochránárske zoskupenie*, 8 March 2011, para. 30.

7. Of course, the member state is not exempted from its obligations under the CRPD under public international law as a party in its own right in those areas that are not regulated by EU law.

8. Commissioner for Regional Policy, Corina Crețu, seems to have taken a less restrictive stance, stating that: 'According to the shared management principle which governs Cohesion Policy, Member States are the first responsible [*sic*] for the respect of EU law. However, in case a Member State fails to ensure the respect of the rights and principles enshrined in the Charter, the Commission may launch infringement procedures, suspend payments or apply financial corrections.' Corina Crețu, Announcements, 'We won't compromise with the respect of fundamental rights in Cohesion policy', 20 May 2015, available on: https://ec.europa.eu/commission/2014-2019/cretu/announcements/we-wont-compromise-respect-fundamental-rights-cohesion-policy_en. The Commission's 2014 report on the implementation of the CFR reiterates the more restrictive interpretation while at the same time citing an example of where the Commission refused to reimburse costs associated with a project that resulted in a breach of the CFR. See European Commission, '2014 report on the application of the EU Charter of Fundamental Rights', 2015, 8.

selection of projects by an MA to constitute the ‘implementation’ of EU law.⁹ To substantiate its position that member states are not ‘automatically implementing Union law when they hand out support under the ESIF Funds’, the Commission points to CJEU case law, which establishes that to be considered to be implementing EU law there must be:

*‘a degree of connection between the measure of EU law and the national measure at issue which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other... [T]he mere fact that a national measure comes within an area in which the European Union has powers cannot bring it within the scope of EU law, and, therefore, cannot render the Charter applicable’.*¹⁰

The CJEU further explains that it must determine:

*‘whether that national legislation is intended to implement a provision of EU law; the nature of the legislation at issue and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or rules which are capable of affecting it’.*¹¹

In this particular case, the claimants challenged the validity of Spanish legislation which allowed a worker to claim unpaid wages directly from the government in case of the employer’s insolvency, but only if their dismissal was found to be ‘unfair’ rather than ‘invalid’. The claimants argued that such a distinction was contrary to Article 20 CFR, which provides for equality before the law. Directive 2008/94 set minimum rules guaranteeing payment of workers in cases of the insolvency of the employer. The directive did not oblige member states to allow such employees to claim unpaid wages directly from national authorities. The directive did, however, allow Member States to provide for more generous rules of protection, which is what the Spanish government had done with the national legislation in question. The CJEU found that the directive merely ‘recognises the power that member states enjoy under national law’ to adopt more generous measures. Accordingly, the Spanish legislation in question was not ‘implementing’ EU law, it was merely national legislation in a field of national competence, which had been left untouched by Directive 2008/94.¹² Thus, in a situation where EU legislation expressly leaves a particular matter within the scope of national law, national legislation governing this particular matter

9. Articles 65–67, 79, 84, 85, and 125 of Regulation 1303/2013 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 and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006 (the Common Provisions Regulation, or CPR) (Official Journal L 347, 20.12.2013, 320).

10. CJEU, Case C-198/13, *Hernández and others v. Spain*, 10 July 2014, paras. 34, 36.

11. CJEU, Case C-198/13, *Hernández and others v. Spain*, 10 July 2014, para. 37. The *Hernández* case appears to qualify a potentially broader interpretation of what constitutes the ‘implementation’ of EU law for the purposes of applying the CFR set out in the case of CJEU, Case C-617/10 Åkerberg Fransson, 26 February 2013, paras. 28–29.

12. CJEU, Case C-198/13 *Hernández and others v. Spain*, 10 July 2014, para. 44.

will not be considered to be implementing EU law. The remainder of this section will consider a number of cases that clarify when national authorities will be considered to be implementing EU law for the purposes of applying the CFR.

In the case of *Siragusa* the claimant had built property without planning permission and was subsequently ordered to destroy the construction because national legislation did not allow for planning permission to be granted retrospectively.¹³ The aim of the national legislation at issue was the protection of the landscape. The claimant argued that total destruction of the property was a breach of the principle of proportionality protected by Article 17 of the CFR. He argued that the case involved the ‘implementation’ of EU law because of the existence of several pieces of EU legislation that had as their general purpose the protection of the landscape, such as rules relating to the preservation of the environment. However, the national legislation in question was not implementing any of the EU rules to which the claimant referred. They merely related to the same broad policy area and goals of environmental protection. The measure taken by the national authorities therefore did not amount to the implementation of EU law.

In the case of *Korota*, the claimant was an employee of an insolvent company.¹⁴ As noted above, EU law guarantees employees of insolvent companies the right to unpaid wages, and obliges member states to establish bodies responsible for guaranteeing that these wages will be paid where the employer lacks funds to do so. However, the employer must have been first officially declared insolvent. The claimant had been awarded compensation and unpaid wages by order of a national court. Because the company did not execute the court order, the claimant subsequently took court proceedings to enforce this ruling. The court granted, but then stayed the enforcement action on the grounds that insolvency proceedings against the employer had not been completed. The claimant wished to appeal against this decision and have the employer declared insolvent by the national court. However, to lodge an appeal the claimant would have to pay court fees, which the claimant was unwilling or unable to pay. The claimant argued that this was a violation of the right to a remedy under Article 47 of the CFR. The CJEU found that the question fell outside the scope of EU law. Although EU law guaranteed the claimant the unpaid wages and compensation, these EU rules only applied once an employer had been officially declared insolvent. However, EU law did not cover the rules or procedures for declaring an employer insolvent. Therefore, the claimant’s appeal requesting that their employer be found insolvent did not amount to the implementation of EU law.¹⁵

In another recent case decided by the CJEU, the latter found that just because an employment contract was funded in part by the ESF, this did not of itself constitute an implementation of EU law for the purposes of the application of the CFR.¹⁶ However, the CJEU did not give any explanation as to when the

13. CJEU, Case C206/13 *Siragusa*, 6 March 2014.

14. CJEU, Case C265/13 *Marcos v. Korota*, 27 March 2014.

15. For further discussion see: Fontanelli, Filippo, ‘Implementation of EU Law through domestic measures after Fransson: the Court of Justice buys time and “non-preclusion” troubles loom large’, [2014] *European Law Review* 682.

16. CJEU, Case C-117/14 *Nisttahuz Pochlavai*, 5 February 2015, para. 42. This case is discussed at length in: Vita, Viorica and Podstawa, Karolina, ‘When the EU Funds meet the Charter: on the applicability of the Charter to the EU Funds at national level’, FRAME working paper (forthcoming), available on: <http://www.fp7-frame.eu/working-papers/>.

CFR would apply in the context of the ESIFs, and no Advocate General opinion (which could have helped to explain the reasoning) was given in this case. This case does support the Commission's position that not every situation involving the use of EU funds will amount to the implementation of EU law. It does not, however, shed any light on whether the selection of projects by an MA under the ESIFs regulations constitutes the implementation of EU law.

It is argued that the situation of national authorities implementing the ESIFs regulations is substantially different from all of the cases considered above. The ESIFs regulations oblige member states to establish an MA.¹⁷ The same regulations oblige the MA to draw up and apply selection criteria for projects under each Operational Programme (OP).¹⁸ Article 6 of the Common Provisions Regulation (CPR) states that '[o]perations supported by the ESI Funds shall comply with applicable union law'. The CPR requires the MA to ensure compliance with the 'applicable law'.¹⁹

The judgment of the CJEU in the case of *Liivimaa Lihaveis MTÜ* unequivocally supports the conclusion that measures taken by national authorities in execution of express obligations contained in EU legislation regulating the ESIFs amount to the implementation of EU law.²⁰ This case related to the former General Regulation and European Regional Development Fund (ERDF) Regulation, according to which member states were to designate a monitoring committee responsible for the selection of projects under the OPs agreed pursuant to those regulations.²¹ The OP, which was adopted by Commission decision in accordance with the provisions of the former ERDF regulation, established a monitoring committee, as required by the General Regulation, and specified that the monitoring committee would supplement the rules relating to its operation in a separate 'Programme Manual'. The latter document stated that decisions on financing applications made by the monitoring committee were final and not subject to appeal. The claimant's application for financing for a project under the Estonia-Latvia OP was rejected by the designated monitoring committee. During the claimant's case at national level, the national court requested the CJEU for clarification as to whether a provision of the programme manual that did not allow for appeals was compatible with the General Regulation read in conjunction with Article 47 of the CFR which guarantees the right to an effective remedy. The CJEU reasoned as follows:

'In the present case, it is sufficient to note that EU law required the two Member States involved in the Estonia–Latvia operational programme to implement that programme... firstly, those Member States were required to institute a monitoring committee, pursuant to Article 63(1) and (2) of Regulation No 1083/2006. Secondly, all the measures intended to apply that operational programme, which

17. Article 123 CPR.

18. Article 125(3) CPR.

19. Article 125(4)(a) CPR.

20. CJEU, Case C-562/12 *Liivimaa Lihaveis MTÜ*, 17 September 2014.

21. Articles 63 and 65 of Regulation 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No. 1260/1999 (OJ L 210, 31.7.2006, 25); Article 19 of Regulation 1080/2006 on the European Regional Development Fund and repealing Regulation (EC) No. 1783/1999 (OJ L 210, 31.7.2006, 1). Under the current rules the equivalent tasks are assigned to the MA (Article 125 CPR).

*include the programme manual, had to comply with the provisions of Regulations Nos 1083/2006 and 1080/2006. ... Accordingly, it must be held that the adoption of the programme manual by the monitoring committee implements EU law within the meaning of Article 51(1) of the Charter. Consequently, when it adopted that manual, the Monitoring Commission [sic.] was required to comply with the provisions of the Charter.'*²²

In light of the conclusion reached by the CJEU, it would excessively strain credulity to argue that the selection of a project by an MA does not amount to implementing EU law, since all the elements in play in this process have been brought into existence at national level and are applying rules that are regulated and stipulated by the ESIFs regulations. The reasoning of the CJEU means that all of the following activities that are related to the selection of projects by the MA, which are expressly stipulated in the ESIFs regulations, constitute the implementation of EU law: the elaboration of selection criteria by MAs,²³ the meaning of the 'applicable law' which both the MA and CA are obliged to verify, the creation and operation of complaints procedures by the MA and CA, the audits carried out by the AA, reporting by the MA to the Commission, the selection of MC members and the involvement of the MC in monitoring.²⁴ Furthermore, it also seems beyond question that a Commission measure to release funds in response to a request for payment from a CA amounts to the implementation of EU law.²⁵ Not only is this an act of an EU institution, it is also a procedure that is expressly stipulated in EU legislation.²⁶

22. CJEU, Case C-562/12 *Liivimaa Lihaveis MTÜ*, 17 September 2014, paras. 63–66.

23. In its reply to the inquiry of the ombudsman concerning cohesion policy the Commission stated that '[w]ith respect to individual beneficiaries, it is the responsibility of Member States to fix the conditions of support from the programme to beneficiaries in line with their obligations deriving from the Regulation and from all applicable legislation, including the Charter.' European Commission, Comments of the Commission on the European Ombudsman's own-initiative inquiry – Ref. OI/8/2014/AN, available on: <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/58451/html.bookmark>, 7. See also, CJEU, Case C-135/13 *Malom*, 15 May 2015, paras. 56, 65–71, where the CJEU found that although Regulation 1698/2005 on the European Agricultural Fund for Rural Development (OJ L 277, 21.10.2005, 1), stated that conditions of eligibility for funding were to be determined at national level, this still amounted to the implementation of EU law and should comply with the CFR.

24. Even where EU law grants member states discretion over how to implement legislation, this must be exercised consistently with higher rules of EU law: 'Member States are... required to use the margin of appreciation conferred on them... in a manner which is consistent with the requirements flowing from that article of the Charter... [A]ll authorities of the Member States, including the administrative and judicial bodies, must ensure the observance of the rules of EU law within their respective spheres of competence'. CJEU, Case C-329/13 *Stefan* (Order), 8 May 2014, paras. 34–35. Implicitly recognizing this position, the CJEU found EU law on family reunification compatible with fundamental rights provisions because while it did not incorporate those fundamental rights standards within its provisions, it did allow member states sufficient room to apply the directive in question in conformity with those fundamental rights standards. See: CJEU, Case C-540/03 *Parliament v. Council*, 27 June 2006, para. 104. See also Joined Cases C-411/10 and C-493/10 *NS*, 21 December 2011.

25. Articles 41 and 126 CPR.

26. Articles 79 CPR and 68 of Regulation 966/2012 on the financial rules applicable to the general budget of the Union (OJ L 298, 26.10.2012, 1).

II. The Impact of the CRPD in EU Law

Having found that acts of national authorities relating to project selection under the ESIFs fall within the scope of EU law, this section will examine the place of the CRPD in the EU's internal legal order. This gives rise to two questions. First, if the CRPD is part of the EU's internal legal order, what obligations does it place on the European Union and the member states? Second, if the European Union or the member states violate the provisions of the CRPD, how can individuals enforce their rights under the CRPD? This section will address the second question first, since most of the CJEU case law exploring the impact of treaties binding on the European Union arises in the context of cases brought by private parties.

II.A. The Direct Enforceability of the CRPD

As noted above, Article 216(2) of the TFEU specifies that treaties to which the European Union is party are legally binding on the European Union and its member states, that they form an integral part of the EU's internal legal order and that their provisions have 'primacy' over secondary acts of EU law. Accordingly, the CJEU accepts that international agreements to which the European Union is a party may invalidate incompatible EU acts:

[T]he validity of an act of the European Union may be affected by the fact that it is incompatible with rules of international law.²⁷

However, when a case is brought by a private party, the CJEU must first decide whether the international agreement's provisions can have 'direct effect', that is, whether an individual can rely on them directly as a cause of action. To determine this question, the CJEU has tended to apply a double test. It examines whether 'the nature and the broad logic' of the agreement prevent it from being used as a cause of action by private parties. By this, the CJEU means whether the agreement is more a traditional inter-state agreement that confers reciprocal rights and obligations on states or whether it is intended to confer rights on individuals. The CJEU also examines whether the wording of the particular provision being invoked is sufficiently clear and precise.²⁸

In the case of Z, the CJEU held that the entirety of the CRPD could not have direct effect.²⁹ That is, an individual will not be able to bring a claim before a national court that relies on the CRPD to challenge an EU act, or the act of a member state implementing EU law, for incompatibility with the CRPD. The CJEU reasoned that the CRPD's provisions are not 'unconditional and sufficiently precise' because Article 4(1) of the CRPD requires parties to the treaty to give effect to its provisions through legislative,

27. CJEU, Case C-363/12 Z, 18 March 2014, para. 84.

28. See: CJEU, Case C-366/10 *Air Transport Association of America and Others*, 21 December 2011, paras. 51–55; CJEU, Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others v. Council and Commission*, 9 September 2008, para. 110; CJEU, Case C-308/06 *Intertanko*, 3 June 2008, paras. 42–45, 54–65; CJEU, Case C-377/98 *Netherlands v. Parliament and Council*, 9 October 2001, paras. 52–53. For a full discussion, see Martines, Francesca, 'Direct Effect of International Agreements of the European Union', 25 *European Journal of International Law* (2014), 129.

29. CJEU, Case C-363/12 Z, 18 March 2014, paras. 87–90. The CJEU repeated this position in CJEU, Case C-356/12 *Glatzel*, 22 May 2014, para. 69.

administrative, and other measures. Thus, in the CJEU's opinion, the CRPD contains obligations 'addressed to Contracting Parties', and these obligations are necessarily 'programmatic' in nature because their exact scope and meaning will depend on how national authorities implement them.³⁰ The CJEU did not address whether the CRPD satisfied the other test, relating to the nature and broad logic of the treaty.

The approach of the CJEU in the *Z* case is inconsistent with its established approach to analysing the direct effect of international agreements. Reasons of judicial economy can justify the CJEU's decision not to apply both tests, since it need not waste effort completing its analysis of the CRPD's 'nature and... broad logic' if the provision in question has already failed on the grounds of not being sufficiently precise and unconditional. However, its analysis as to whether the CRPD is sufficiently precise and unconditional, the CJEU deviated from its approach in both previous and subsequent cases. The CJEU has examined (once before and twice after the *Z* case) whether provisions of a treaty of a similar nature to the CRPD were capable of having direct effect. The Aarhus Convention grants rights to individuals concerning access to information, public participation in decision-making, and the right of access to justice in the field of environmental protection, and also contains a general provision that obliges parties to take measures of implementation at national level to give effect to the rights it contains.³¹ Despite these similarities, the CJEU stated that the Aarhus Convention could have direct effect, although the provisions in question that were invoked by the parties were not themselves sufficiently unconditional and precise.³² The fact that the Aarhus Convention contains general implementing obligations was never even considered by the CJEU.

The CJEU's approach in the *Z* case is also inconsistent with its approach to the direct effect of directives. Even though directives, by definition, require measures of implementation by member states, their provisions may still be invoked before a national court if they are sufficiently precise and unconditional.³³

It should be noted that the requirement that a provision be sufficiently precise and unconditional is effectively a criterion of justiciability. If a court has to rule on the compatibility of an act with a particular provision, it must first be clear what that provision requires. In effect, the CJEU reasoned that if all the provisions of the CRPD are subject to implementing measures by national authorities, then the exact shape of the obligations it contains could not, by definition, be clear.

30. CJEU, Case C-363/12 *Z*, 18 March 2014, paras. 88–89.

31. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 UNTS p. 447, Articles 3(1), 4 and 6–9. The European Union has been party to this treaty since 2005.

32. CJEU, Case C-240/09 *Lesoochránárske Zoskupenie*, 8 March 2011, para. 44: 'a provision in an agreement concluded by the European Union with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure'. In the event, the CJEU held that the provisions in question did not contain 'any clear and precise obligation capable of directly regulating the legal position of individuals'. See also: CJEU, Joined Cases C-401/12 P to C-403/12 P *Council and Others v. Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, 13 January 2015, paras. 54–55; CJEU, Case C-404/12 P *Council of the European Union and European Commission v. Stichting Natuur en Milieu and Pesticide Action Network Europe*, 13 January 2015, paras. 46–47.

33. See: CJEU, Case 41/74 *Van Duyn*, 4 December 1974; CJEU, Case C-131/97 *Carbonari*, 25 February 1999.

However, this is at odds with the understanding of every other regional and global judicial and quasi-judicial dispute settlement body dealing with human rights treaties, including the European Court of Human Rights (ECtHR), which will eventually have jurisdiction over the European Union.³⁴ A general implementing obligation is a standard feature of human rights treaties, including the European Convention on Human Rights (EConvHR),³⁵ and this has never prevented the responsible bodies from adjudicating on alleged rights violations.³⁶ Justiciability can be problematic in relation to aspects of particular rights, where these are phrased in such a way that parties are supposed to implement them in a progressive manner. However, this does not mean that all aspects of such rights will not be justiciable. For example, where a party adopts retrogressive measures or measures which run contrary to the goal expressed in a programmatically-phrased right, this will violate the duty to implement a right progressively.³⁷ Similarly, the requirement not to discriminate in the delivery of particular rights also constitutes a clear and precise obligation.³⁸ The ECtHR adjudicates on similar obligations regarding the delivery of social and health services under Article 8 of the EConvHR. Rather than regard such questions as non-

-
34. Article 6(2) of the Treaty on European Union (TEU) obliges the European Union to accede to the European Convention on Human Rights (Consolidated version of the Treaty on European Union, OJ C 236 26.10.2012, 10). All the member states of the European Union are party to the majority of the 'core' human rights treaties elaborated under the aegis of the UN, all of which contain a similar provision to the CRPD on national implementation measures: the International Covenant on Civil and Political Rights (999 UNTS 171), the International Covenant on Economic Social and Cultural Rights (993 UNTS 3), the Convention on the Elimination of All Forms of Racial Discrimination (660 UNTS 195), the Convention on the Elimination of Discrimination Against Women (1249 UNTS 13), the Convention Against Torture (1465 UNTS 85) and the Convention on the Rights of the Child (1577 UNTS 3).
 35. See Articles 1 and 52 EConvHR. See also analysis of ECtHR case law in: Akandji-Kombe, Jean-Francois, 'Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights', Council of Europe Human Rights Handbooks, No. 7, 2007.
 36. Several of the UN human rights treaties to which all the member states are party have established quasi-judicial bodies that decide on complaints brought by individuals against national authorities concerning violations of the rights contained in these treaties. See Butler, Israel, 'Unravelling sovereignty: human rights actors and the structure of international law', 2007, chapter four.
 37. Committee on Economic Social and Cultural Rights, General Comment 3, The nature of States parties' obligations, in OHCHR, *Compilation of General Comments Adopted by Human Rights Treaty Bodies*, 27 May 2008, UN Doc HRI/GEN/1/Rev.9 (Vol. I).
 38. The Committee on Economic Social and Cultural Rights has stated: 'It is important in this regard to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are selfexecuting (capable of being applied by courts without further elaboration). While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society'. Committee on Economic Social and Cultural Rights, General Comment 9, The domestic application of the Covenant, para. 10, in OHCHR, *Compilation of General Comments Adopted by Human Rights Treaty Bodies*, 27 May 2008, UN Doc HRI/GEN/1/Rev.9 (Vol I). See further, Baderin, Mashood and McCorquodale, Robert, (eds.), 'Economic, Social, and Cultural Rights in Action', 2007. It should be noted that several EU member states have authorized the UN Committee on Economic Social and Cultural Rights to adjudicate on individual complaints.

justiciable the ECtHR will allow the state a broad margin of appreciation and apply a lighter level of review, verifying that the state is pursuing a legitimate aim and has given adequate weight to the rights of the applicant in arriving at its decision.³⁹ In any case, not all the obligations imposed by the CRPD are progressive in nature; rather, many provisions impose immediate, clear and precise rights on individuals and obligations on parties.⁴⁰

Furthermore, it should be noted that the stance of the CJEU will be difficult to maintain once the European Union joins the EConvHR, and if the European Union joins the Optional Protocol to the CRPD (to which 21 EU member states are already party),⁴¹ which authorises the CRPD Committee to adjudicate on individual complaints alleging violations by states parties of the treaty's substantive articles.⁴²

The CJEU's reasoning in relation to direct effect before national courts appears to apply not just in the context of review of EU acts before national courts (including the preliminary reference procedure), but also the action for annulment directly before the CJEU.⁴³ These are the two principal means open to an individual to obtain a remedy under EU law. In practice, therefore, it is impossible for an individual to enforce the provisions of the CRPD directly before a national court or the CJEU. This does not mean that the CRPD is not binding on the European Union or the member states when the latter implement EU law. The limitation on individuals being able to rely directly on the CRPD as a cause of action is a barrier to its enforcement. It is essentially a procedural restriction relating to rules of legal standing. It does not mean that the CRPD does not impose legal obligations on the European Union and its member states. The forum for enforcement by private parties, however, will be confined to the CRPD Committee itself,⁴⁴ rather than the CJEU, except in circumstances where an individual can rely on the CRPD indirectly through the CFR (discussed in the next section). The Commission, of course, remains free to enforce the CRPD's obligations against member states as the guardian of the treaties (discussed further below).

39. ECtHR, *McDonald v. UK*, App. no. 4241/12, 20 May 2014, para. 54: 'In conducting the balancing act required by Article 8(2) the Court has to have regard to the wide margin of appreciation afforded to States in issues of general policy, including social, economic and health-care policies... The margin is particularly wide when, as in the present case, the issues involve an assessment of priorities in the context of the allocation of limited State resources... In view of their familiarity with the demands made on the health care system as well as with the funds available to meet those demands, the national authorities are in a better position to carry out this assessment than an international court.' Similarly, ECtHR, *Watts v. UK*, App. no. 53586/09, 4 May 2010, paras. 96–101.

40. For example: Article 5, 'States Parties shall prohibit all discrimination on the basis of disability'; Article 13, 'States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others'; Article 18, 'States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others'.

41. List of issues in relation to the initial report of the European Union, Addendum, Replies of the European Union to the list of issues, UN Doc CRPD/C/EU/Q/1/Add.1, 8 July 2015, 4.

42. Optional Protocol to the Convention on the Rights of Persons with Disabilities, UN Doc A/61/611, 6 December 2006.

43. CJEU, Joined Cases C-401/12 P to C-403/12 P *Council and Others v. Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, 13 January 2015.

44. Either through the EU's periodic reporting before the CRPD Committee, or through individual complaints received under the Optional Protocol to the CRPD, to which the European Union has not yet become party.

II.B. Enforcement of the CRPD in EU Law by Indirect Means

II.B.1. Influence of CRPD over rights protected by the CFR and EConvHR

Although the CRPD cannot be used by individuals directly before a national court or the CJEU to challenge the compatibility of acts by member states when implementing the ESIFs, the CJEU has stated that when dealing with cases brought by private parties ‘instruments of secondary law... must as far as possible be interpreted in a manner that is consistent with those agreements’.⁴⁵ That is, in cases brought by private parties, the CJEU will interpret EU law in line with the CRPD. In view of this, it is likely that, in addition to the CRPD forming an integral part of EU law in its own right, elements of the CRPD will become part of EU law indirectly due to its influence over the CFR and secondary EU law.

Putting this principle into practice, the CJEU has effectively imported the definition of ‘disability’ in Article 1 of the CRPD into EU secondary legislation. In several cases the CJEU has established that the term ‘disability’ (which the Employment Equality Directive lists as a prohibited ground of discrimination, but does not define)⁴⁶ has the same meaning as the definition given in Article 1 of the CRPD.⁴⁷ The CJEU has also interpreted the concept of ‘reasonable accommodation’ in the same directive to include the definition of the term set out in Article 2 of the CRPD.⁴⁸

Aside from relying on the CRPD indirectly, through a duty of consistent interpretation with provisions of secondary legislation, private parties may also rely on it via the CFR and the EConvHR. Article 53 of the CFR states that the CFR shall not be interpreted as ‘restricting or adversely affecting’ fundamental rights recognised by ‘international law and by international agreements to which the Union or all the Member States are party’.⁴⁹ The CJEU has not always paid great deference to UN human rights treaties when interpreting fundamental rights standards.⁵⁰ In contrast, it seems prepared to accord the CRPD

45. CJEU, Joined Cases C-335/11 and C-337/11 *HK Danmark*, 11 April 2013, para. 29; CJEU, Joined Cases C-288/09 and C-298/09 *British Sky Broadcasting Group v. Commissioners for HMRC*, 14 April 2011, para. 83; CJEU, Case C-240/09 *Lesoochranské Zoskupenie*, 8 March 2011, para. 30. See also CJEU, Case C-61/94 *Commission v. Germany*, 10 September 1996, para. 52.

46. Directive 2000/78 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000, 16).

47. CJEU, Joined Cases C-335/11 and C-337/11 *HK Danmark*, 11 April 2013, paras. 34–39; CJEU, Case C-312/11 *Commission v. Italy*, 4 July 2013, para. 56. CJEU, Case C-363/12 *Z*, 18 March 2014, paras. 71–77; CJEU, Case C-354/13, *FOA*, 18 December 2014, para. 51.

48. CJEU, Joined Cases C-335/11 and C-337/11 *HK Danmark*, 11 April 2013, paras. 53–55; CJEU, Case C-312/11 *Commission v. Italy*, 4 July 2013, para. 58.

49. See also, European Commission, ‘2014 report on the application of the EU Charter of Fundamental Rights’, 2015, 15–16: ‘Whereas there is no legal obligation in the Charter to align interpretation with United Nations treaties [unlike with regard to the EConvHR], the CJEU does refer to UN instruments for interpretation of rights under EU law.’ Article 53 CFR suggests that consistent interpretation of the CFR with UN instruments is more than just a practice. The provision suggests that the CFR cannot be interpreted in a way that would give a lower standard of protection than that accorded by UN treaties.

50. See: CJEU, Case C-540/03 *Parliament v. Council* 27 June 2006; CJEU, Case C-244/06 *Dynamic Medien* 14 February 2008.

the same privileged treatment as the EConvHR. It is likely that this is because the European Union itself is party to the CRPD, unlike other UN human rights treaties. Thus, in the case of *Glatzel* the CJEU relied directly on Article 1 of the CRPD, to define the term ‘disability’ in Article 21 of the CFR, which does not contain a definition.⁵¹

As well as reading the CRPD into the CFR, the CRPD will also indirectly influence the interpretation of the CFR through the EConvHR. Although the European Union has not yet become party to the EConvHR, it has traditionally drawn on this instrument when identifying which fundamental rights form part of the ‘general principles’ of EU law, and in defining their scope.⁵² TEU Article 6(3) codifies the privileged status of the EConvHR in the EU’s legal order:

‘Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.’⁵³

In practice, since the CFR has become legally binding, the CJEU continues to rely on the EConvHR and the case law of the ECtHR in interpreting the CFR. Further, Article 52(3) of the CFR states that ‘[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.’

Unlike the CJEU, the ECtHR routinely draws on UN treaties when interpreting the provisions of the EConvHR, even to the extent of interpreting rights into the EConvHR that are not expressly mentioned. Because of this practice, it is likely that as cases relating to disability are brought to the ECtHR, the CRPD will influence the interpretation given to the EConvHR. This in turn can be expected to influence the interpretation given to the CFR by the CJEU.

The ECtHR has stated that in interpreting the EConvHR ‘[a]ccount must... be taken of any relevant rules and principles of international law applicable in relations between the Contracting Parties and the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part.’⁵⁴ In this particular case, the ECtHR found that a prohibition on trafficking could be

51. CJEU, Case C-356/12 *Glatzel*, 22 May 2014, paras. 45–46.

52. For analysis of the role of the ECtHR as inspiration for the CJEU in developing the ‘general principles’ of EU law see: De Schutter, Olivier, ‘L’influence de la Cour européenne des droits de l’homme sur la Cour de justice des Communautés européennes’, in Cohen-Jonathan, Gérard and Flauss, Jean-François (eds.), ‘Le rayonnement international de la jurisprudence de la Cour européenne des droits de l’homme’, 2005, 189; Guild, Elspeth and Lesieur, Guillaume, ‘The European Court of Justice on the European Convention on Human Rights: Who Said What, When?’, 1998; Trimidas, Takis, ‘The General Principles of EU Law’, 2007; Usher, John, ‘General Principles of EC Law’, 1998.

53. According to the CJEU Article 6(3) of the TEU ‘reflects the settled case-law of the Court according to which fundamental rights form an integral part of the general principles of law the observance of which the Court ensures’. CJEU, Case C-571/10 *Kamberaj*, 24 April 2012, para. 61.

54. ECtHR, *Rantsev v. Cyprus and Russia*, App. no. 25965/04, 7 January 2010, paras. 274, 282.

read into Article 4 EConvHR which prohibits slavery, based on the provisions of UN instruments prohibiting trafficking, including the UN Convention on the Elimination of Discrimination against Women and the ‘Palermo Protocol’.⁵⁵ It has also drawn on the former instrument and the interpretation given to it by the UN Committee on the Elimination of Discrimination against Women to find that gender-based violence constitutes a form of discrimination.⁵⁶ The latter practice is significant, since it shows that the ECtHR does not just draw on the provisions of UN treaties, but also follows the interpretation given to those treaties by the monitoring committees (such as the CRPD Committee) responsible for overseeing their interpretation.⁵⁷

Since the entry into force of the CRPD, the ECtHR has drawn on various provisions of the CRPD to interpret Article 5 EConvHR on the right to liberty and security, Article 6 of the EConvHR on the right to a fair trial and Article 8 of the EConvHR on the right to family and private life, and has found that certain elements of Article 19 of the CRPD on independent living can be read into Article 8 of the EConvHR.⁵⁸ In this way, the CRPD will also enter EU law indirectly via the interpretation given to the EConvHR by the ECtHR. That is, when the CJEU turns to the case law of the ECtHR to clarify the interpretation of the CFR in the area of disability, over time it will more frequently be drawing on ECtHR cases that have read provisions of the CRPD into the EConvHR. Once the European Union joins the EConvHR, this practice will bring the CJEU into direct conflict with the ECtHR’s interpretation of fundamental right standards, if the CJEU does not continue to interpret the CFR consistently with the CRPD.

The CFR guarantees the rights of persons with disabilities in Article 21 (which prohibits discrimination on the basis of disability) and Article 26 (which protects the right to independent living and social inclusion for persons with disabilities). While the CJEU has already stated that the term ‘disability’ in Article 21 of the CFR will be given the same meaning as CRPD Article 1, it has not had occasion to examine the substantive content of Article 26 of the CFR on the right to independent living.⁵⁹ However, in light of the practice of the CJEU in drawing on the CRPD, as well as on the ECtHR’s case law (which also draws on the CRPD), the CJEU can reasonably be expected to give Article 26 of the CFR the same meaning as

55. Convention on the Elimination of All Forms of Discrimination against Women, 1979, (1249 UNTS 13); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, UN General Assembly resolution 55/25, 15 November 2000.

56. ECtHR, *Opuz v. Turkey*, App. no. 33401/02, 9 June 2009, paras. 74, 164, 184–191.

57. To the extent that the CJEU does not interpret the CFR consistently with the CRPD, it is likely to find itself in direct conflict with the interpretation given to fundamental rights by ECtHR once the EU joins the EConvHR.

58. *MS v. Croatia*, App. no. 75450/12, 19 February 2015, paras. 157, 159; ECtHR, *Stanev v. Bulgaria*, App. no. 36760/06, 17 January 2012, para. 244; ECtHR, *DD v. Lithuania*, App. no. 13469/06, 14 February 2012, para. 84; ECtHR, On Article 5 ECHR see *MH v. UK*, App. no. 11577/06, 22 October 2013, para. 93; ECtHR, *Lashin v. Russia*, App. no. 33117/02, 22 January 2013, para. 97; ECtHR, *RP v. UK*, App. no. 38245/08, 9 October 2012, paras. 65 and 67; ECtHR, *McDonald v. UK*, App. no. 4241/12, 20 May 2014, paras. 30–58.

59. Although the CJEU has discussed Article 26 CRPD, this was limited to examining whether it was capable of having direct effect in a case before a national court, rather than the substantive obligations flowing from this right. See CJEU, Case C-356/12 *Glatzel*, 22 May 2014.

Article 19 of the CRPD, at least as regards the content of that right.⁶⁰ The following section will consider whether, based on this analysis, an individual will be able to invoke Article 19 of the CRPD indirectly by relying on Article 26 of the CFR as a means of challenging the validity of acts taken by national authorities when implementing EU law.

II.B.2. Direct effect of CFR Article 26

As discussed above, it appears that EU law will not allow individuals to enforce the CRPD directly against the European Union or its member states through the national courts or before the CJEU. However, the rights contained in the CFR do tend to have direct effect. To the extent that the CJEU interprets the CFR consistently with the CRPD, it may be able to mitigate the impact of its restrictive stance on the direct effect of the CRPD. This has already occurred in practice in that the CJEU has defined the terms ‘disability’ and ‘reasonable accommodation’ in accordance with the CRPD.

However, it may be more difficult for individuals to invoke the right to independent living contained in Article 26 of the CFR. The Explanations relating to the Charter of Fundamental Rights, consider Article 26 of the CFR to constitute a ‘principle’, rather than a ‘right’.⁶¹ Article 52(5) of the CFR confirms that the ‘principles’ in the CFR ‘shall be judicially cognisable... in the interpretation... and in the ruling on [the] legality of’ European Union and member state acts that implement a principle listed in the CFR. However, the CJEU has clarified that Article 26 cannot have direct effect, because it does not confer rights on individuals:

[A]lthough Article 26 of the Charter requires the European Union to respect and recognise the right of persons with disabilities to benefit from integration measures, the principle enshrined by that article does not require the EU legislature to adopt any specific measure. In order for that article to be fully effective, it must be given more specific expression in European Union or national law. Accordingly, that article cannot by itself confer on individuals a subjective right which they may invoke as such.’⁶²

The approach of the CJEU is questionable and unclear. Even if Article 26 of the CFR does not expressly impose positive obligations on the European Union, it does impose a negative obligation to ‘respect’ independent living. That is, the European Union should refrain from taking measures that interfere with the right to independent living. The CJEU has generally accepted that negatively phrased obligations are

60. It may be that the nature of the obligations differs, however. Article 26 requires the EU to ‘respect and recognise’ the right, which suggests merely a negative duty of non-interference with the right to independent living, rather than a positive duty to take steps to give it effect. In contrast, Article 19 CRPD unambiguously imposes both negative and positive duties on parties. See part two.

61. Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, 17, 35: ‘Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union’s institutions or Member States authorities.’

62. CJEU, Case C-356/12 *Glatzel*, 22 May 2014, para. 78.

precise enough to have direct effect, while those that are phrased positively⁶³ – particularly when these are ‘programmatic’ in that they spell out a policy direction rather than specific rights – will not have direct effect.⁶⁴ Had the CJEU been willing to explore the substantive content of the right, it would have examined Article 19 of the CRPD and the interpretation given to this provision by the CRPD Committee, which makes clear that the right to independent living imposes both negative and positive obligations.⁶⁵

While an individual will not be able to rely directly on Article 26 of the CFR to review action by member states when implementing EU law, this does not of itself mean that it is without legal effect. As stated in Article 52(5) of the CFR, Article 26 of the CFR ‘shall be judicially cognisable... in the interpretation... and in the ruling on [the] legality of’ EU acts and the acts of member states when they are implementing EU rules that implement the principle in question. This means that Article 26 of the CFR does apply the acts of the European Union or of member states when applying EU law that implements the principle of independent living.

In the *Glatzel* and *Association de médiation sociale* cases, the CJEU adopted a broad interpretation of the meaning of acts implementing a principle of the CFR. It appears sufficient for the act in question to pursue the same general purpose as the principle in the CFR that is being invoked.⁶⁶ It is highly likely that the CJEU would consider the ESIFs to fall under the scope of Article 26 of the CFR. First, the overall objective of the ESIFs, as stated in the CPR, is ‘to deliver the Union strategy for smart, sustainable and inclusive growth’.⁶⁷ The Council guidelines that give expression to the strategy explain that this includes the reduction of social exclusion and promotion of social inclusion by ensuring accessibility and strengthening of social services and active inclusion policies for persons with disabilities.⁶⁸ Second, thematic objective nine of the CPR (Article 9(9) CPR) is ‘promoting social inclusion, combating poverty and any discrimination’. This objective is translated into priorities by the ESF and ERDF regulations to include ‘the transition from institutional to community-based services’.⁶⁹ The Commission’s periodic

63. Case 26/62 *Van Gend en Loos*, 5 February 1963; Case 6/64 *Costa v. ENEL*, 15 July 1964.

64. CJEU, Case 126/86 *Zaera*, 29 September 1987, paras. 10–18. Positive obligations are likely to have direct effect only if the phrasing is particularly tight and unambiguous: CJEU, Case 41/74 *Van Duyn v. Home Office*, 4 December 1974, paras. 4–7.

65. See discussion below and in part two.

66. See also, CJEU, Case C-356/12 *Glatzel*, 22 May 2014, para. 76; CJEU, Case C-176/12 *Association de médiation sociale*, 15 January 2014, para. 43. In *Glatzel* (para. 75) it was sufficient for the directive in question to have the general aim of making it ‘easier for physically disabled persons to drive vehicles’ for it to fall within the scope of Article 26 CFR. In *Association de médiation sociale*, the directive in question was intended to set out a framework on the minimum requirements for the right to information and consultation of employees. This brought the directive within the scope of Article 27 CFR, which guarantees the right to consultation for employees and trade unions.

67. Article 4(1) CPR.

68. See: Article 2(1) CPR; European Council Conclusions of 17 June 2010, EUCO 13/10, Annex I (New strategy for jobs and growth, EU headline targets), and the Europe 2020 Integrated guidelines (Council Recommendation 2010/410/EU on broad guidelines for the economic policies of the Member States and of the Union (OJ L 191, 23.7.2010, 28), preambular para. 10; Council Decision 2010/707/EU on guidelines for the employment policies of the Member States (OJ L 308, 24.11.2010, 46), preambular para. 11 and Guideline 10.

69. Article 9 CPR, Article 5(9)(a) ERDF, Article 3(1)(b)(iii) read together with Article 8 ESF. See also preambular para. 19 ESF.

report to the CRPD also shows that the ESIFs are the primary vehicle through which the European Union gives effect to the right to inclusion in the community and independent living for persons with disabilities.⁷⁰ Furthermore, EU legislation governing the previous programming period of the ESIFs is expressly listed among the ‘Community acts which refer to matters governed by the convention’ listed in the Appendix to the Council Decision approving EU accession to the CRPD.⁷¹

This means that although an individual wishing to contest the legality of a project selected by national authorities under the ESIFs cannot rely on Article 26 of the CFR of itself as a cause of action, the claimant might be able to use a provision of the PA or OP or on the ESIFs regulations themselves as a cause of action, and then the national court could use Article 26 of the CFR (interpreted in line with Article 19 of the CRPD) to examine the validity of the national decision selecting the contested project.

However, an individual wishing to rely on the terms of an OP, PA or the ESIFs regulations will need to satisfy the conditions required for direct effect. Although EU regulations by their nature are generally considered to have immediate effect at national level (and therefore have direct effect),⁷² the CJEU has held that if provisions of a regulation require ‘for their implementation, the adoption of measures of application’ by national authorities, these may not have direct effect.⁷³ It is unlikely that the CJEU would consider the thematic objectives of the ESIFs to have direct effect, given that they do rely on measures of implementation by the member states. The same reasoning would also apply in relation to PAs and OPs that merely restate the general goal of supporting the transition from institutional to community-based care.

It is also unlikely that a private party could attack the selection of a project through an action for annulment that contests the validity of a decision of the Commission to authorise reimbursement of costs to national authorities for the project in question. This is because of particularly restrictive rules of standing that would require a private party to show that the Commission’s decision to authorise payment of EU funds was of ‘direct and individual concern’ to them.⁷⁴

Thus, it seems highly unlikely, if not impossible, that an individual would be able to rely on Article 26 of the CFR, alone or in conjunction with the provisions of a PA, OP or the ESIFs regulations, to either challenge an MA or the Commission for taking measures that conflict with the right to independent living. This leaves individuals without a judicial remedy to enforce the right to independent living guaranteed by Article 19 of the CRPD.

70. Initial report of States parties due in 2012, European Union, UN Doc CRPD/C/EU/1, 3 December 2014, paras. 93–108.

71. Council Decision 2010/48 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, Annex II (OJ L 23, 27.01.2010, 55).

72. CJEU, Case 93/71 *Leonesio*, 17 May 1972, para. 5.

73. CJEU, Case C-403/98 *Monte Arcosu*, 11 January 2001, paras. 26–28.

74. Article 263 TFEU. CJEU, Case 25/62 *Plaumann*, 15 July 1963; CJEU, Case C-274/12 P *Telefonica v. Commission*, 19 December 2013, para. 46.

II.B.3. Alternative routes through Articles 6 and 21 CFR

A final possibility is that elements of the right to independent living could be read into other rights guaranteed by the CFR that do have direct effect, namely Articles 6 (on liberty) and 21 (on nondiscrimination). The CRPD Committee has clarified that Article 19 of the CRPD imposes both negative and positive obligations. This section will examine whether the negative obligations contained in Article 19 of the CRPD could be enforced through the rights to liberty and nondiscrimination.⁷⁵

The CRPD Committee has interpreted Article 19 to include a prohibition on the investment of funds in institutions for persons with disabilities.⁷⁶ As will be discussed below, the CRPD Committee has also underlined the interrelationship between the right to independent living, liberty, and nondiscrimination and found that placement of individuals in institutions on the basis of their disability amounts both to an arbitrary deprivation of liberty and to discrimination.⁷⁷ There have also been a number of cases brought by individuals before the ECtHR relating to placement in institutions.

This section will examine whether institutionalisation of persons with disabilities of itself amounts to a violation of the rights to liberty (Article 6 of the CFR) and non-discrimination (Article 21 of the CFR). It will do so by examining the case law of the ECtHR on Articles 5(1) and Article 14 of the EConvHR, the

75. Although the ECtHR has accepted that positive obligations relating to independent living can flow from Article 8 EConvHR on the right to family and private life, the case law is too undeveloped to allow for meaningful exploration here. See e.g. ECtHR, *McDonald v. UK*, App. no. 4241/12, 20 May 2014, para. 48.

76. See: CRPD Committee, Concluding Observations on the initial report of Austria, UN Doc CRPD/C/AUT/CO/1, 30 September 2013, paras. 29–31, 36; CRPD Committee, Concluding Observations on the initial report of Belgium, UN Doc CRPD/C/BEL/CO/1, 28 October 2014, paras. 25–26, 32–33; CRPD Committee, Concluding Observations on the initial report of Croatia, UN Doc CRPD/C/HRV/CO/1, 15 May 2015, paras. 19–20; CRPD Committee, Concluding Observations on the initial report of the Czech Republic, UN Doc CRPD/C/CZE/CO/1, 15 May 2015, paras. 26–27, 38–39; CRPD Committee, Concluding observations on the initial report of Denmark, UN Doc CRPD/C/DNK/CO/1, 30 October 2014, paras. 36–37, 42–43; CRPD Committee, Concluding Observations on the initial report of the European Union, UN Doc CRPD/C/EU/CO/1, 4 September 2015, paras. 50–51; CRPD Committee, Concluding Observations on the initial report of Germany, UN Doc CRPD/C/DEU/CO/1, 13 May 2015, paras. 29–30, 41–42; CRPD Committee, Concluding Observations on the initial periodic report of Hungary, UN Doc CRPD/C/HUN/CO/1, 22 October 2012, paras. 27–28, 33–34; CRPD Committee, Consideration of reports submitted by States parties under Article 35 of the Convention, Spain, UN Doc CRPD/C/ESP/CO/1, 19 October 2011, paras. 35–36, 39–40; CRPD Committee, Concluding Observations on the initial report of Sweden, UN Doc CRPD/C/SWE/CO/1, 12 May 2014, paras. 35–36, 43–44.

77. CRPD Committee, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities, The right to liberty and security of persons with disabilities, adopted during the Committee's 14th session, September 2015, paras. 4, 8, 9: 'Article 14 of the... [CRPD] [protecting the right to liberty and security] is in essence a non-discrimination provision. It specifies the scope of the right to liberty and security of the person in relation to persons with disabilities, prohibiting all discrimination based on disability in its exercise... parties should refrain from the practice of denying legal capacity of persons with disabilities and detaining them in institutions against their will, either without their consent or with the consent of a substitute decision-maker, as this practice constitutes arbitrary deprivation of liberty... Enjoyment of the right to liberty and security of the person is central to the implementation of article 19 on the right to live independently and be included in the community.'

CJEU's interpretation of the EU's equality legislation and the interpretation given by the CRPD Committee to Article 14 of the CRDP.⁷⁸

The right to liberty

Deprivation of liberty is prohibited unless it is a proportionate measure designed to meet a legitimate aim, and takes place with particular safeguards. Article 5 of the EConvHR prohibits the deprivation of liberty with the exception of certain cases, such as the detention of an individual who is convicted of a criminal offence.⁷⁹ The right to liberty is also articulated in Article 14 of the CRPD. The existence of a mental disability is not listed as a ground capable of justifying the deprivation of liberty in Article 5(1) of the EConvHR. Further, Article 14 of the CRPD expressly states that 'the existence of a disability shall in no case justify a deprivation of liberty'. The ECtHR has considered cases of detention of individuals in facilities that hold persons with mental disabilities under an exception to Article 5(1) (e) which allows for 'lawful detention of persons... of unsound mind'.

The meaning of 'unsound mind'

According to the ECtHR's case-law, Article 5(1) (e) may apply if:

'[T]he individual concerned [is]... reliably shown to be of unsound mind, that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder'.⁸⁰

Although the ECtHR did not give a definition of 'unsound mind', it did state that this must be 'interpreted narrowly', and therefore 'a mental condition must be of a certain gravity in order to be considered as a "true" mental disorder'. The ECtHR further found that in order to be serious enough to fall within Article 5(1) (e), 'the mental disorder must be so serious as to necessitate treatment' in a 'hospital, clinic, or other appropriate institution'.⁸¹ This should be read together with the ECtHR's consideration that:

78. CJEU, Case C-237/15 PPU *Lanigan*, 16 July 2015 suggests that Article 6 of the CFR has direct effect. The implication of the Explanations relating to the Charter of Fundamental Rights, (OJ C 303, 14.12.2007, 17, 35) is that the rights listed in the CFR will always have direct effect. It would seem that unless the CJEU considers that a provision in the CFR does not give rise to direct effect, it will not raise the issue. Compare how the CJEU reviews EU legislation for compatibility with Article 21 of the CFR (nondiscrimination) without questioning its direct effect, while it does discuss the direct effect of the 'principle' of independent living in Article 26, in CJEU, Case C-356/12 *Glatzel*, 22 May 2014, paras. 41-79. See definition of discrimination given in Directive 2000/78 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000, 16), Article 2(2)(a); Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ L 204, 26.7.2006, 23), Article 2(1)(a); Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ L 373, 21.12.2004, 37), Article 2(a); Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19.7.2000, 22), Article 2(2).

79. Explanations relation to the Charter of Fundamental Rights, C 303, 14 December 2007, 19-20.

80. ECtHR, *Glien v. Germany*, App. no. 7345/12, 28 November 2013, paras. 71, 85.

81. ECtHR, *Glien v. Germany*, App. no. 7345/12, 28 November 2013, paras. 71, 85.

‘The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained.’⁸²

The ECtHR’s approach suggests mental disability of itself cannot be equated with the term ‘unsound mind’ for the purposes of justifying detention under Article 5(1) (e).⁸³

Similarly, the CRPD Committee has stated that detention on the grounds of ‘actual or perceived impairment’, amounts to a violation of Article 14 of the CRPD on liberty and security. The CRPD Committee defines ‘impairment’ as ‘a physical, psycho-social, intellectual or sensory health condition, which may or may not come with functional limitations of the body, mind or senses.’⁸⁴ As noted below, this would most probably apply to the majority of persons placed in institutions in many Central and Eastern European states.

The conclusion that a mental disability cannot be equated with the term ‘unsound mind’ is reinforced by the fact that the ECtHR has found that applying restrictions on persons with disabilities as a category, rather than looking at an individual’s condition, is unacceptable:

‘if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State’s margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question... The reason for this approach, which questions certain classifications per se, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs.’⁸⁵

82. ECtHR, *M. v. Ukraine*, App. no. 2452/04, 19 April 2012, para. 57.

83. Data on the number of persons held in institutions in the European Union and their classification into a ‘disability group’ is incomplete. Research suggests that, based on available information, the two largest groups of persons held in long-term residential care are persons with intellectual disabilities and persons with mental health problems. Mansell, Jim, et al., ‘Deinstitutionalisation and community living – outcomes and costs’, Vol. 2, 2007, 29.

84. CRPD Committee, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities, The right to liberty and security of persons with disabilities, adopted during the Committee’s 14th session, September 2015, para. 6 (footnotes omitted): ‘There are still practices in which States parties allow for the deprivation of liberty on the grounds of actual or perceived impairment. In this regard the Committee has established that article 14 does not permit any exceptions whereby persons may be detained on the grounds of their actual or perceived impairment. However, legislation of several States parties, including mental health laws, still provide instances in which persons may be detained on the grounds of their actual or perceived impairment, provided there are other reasons for their detention, including that they are deemed dangerous to themselves or to others. This practice is incompatible with article 14 as interpreted by the jurisprudence of the CRPD committee. It is discriminatory in nature and amounts to arbitrary deprivation of liberty.’ This analysis is in part based on the travaux préparatoires of the CRPD. See para. 7 of the same document.

85. ECtHR, *Alajos Kiss v. Hungary*, App. no. 38832/06, 20 May 2010, para. 42.

The meaning of 'deprivation of liberty'

The ECtHR has defined a deprivation of liberty, in the context of institutionalisation, to entail 'complete and effective control' by the facility over the individual. The ECtHR places particular importance on whether an individual is free, without permission, to leave the premises, receive visitors or enjoy correspondence. Whether an individual is physically locked up, is not a determining factor.⁸⁶ Thus, by definition, institutional regimes, as defined in the introduction to this report, will entail a deprivation of liberty.

Where an individual has not consented to placement in an institutional setting, this will constitute an arbitrary deprivation of liberty, unless it can be proved that this is necessary to achieve a legitimate aim. Individuals must be considered capable of giving consent even if they lack legal capacity, and the individual's consent cannot be substituted by that of their family. This consent must be present for the entire time of the deprivation of liberty.⁸⁷

The requirement for detention to be proportionate to a legitimate aim

In cases where an individual does not consent, the ECtHR's past case law has found that detention may be justified if it pursues one of two legitimate aims: first, 'where the person needs therapy, medication or other clinical treatment to cure or alleviate his condition'; second, where 'the person needs control and supervision to prevent him... causing harm to himself or other persons'.⁸⁸ With regard to the legitimate aim of delivering 'therapy, medication or other clinical treatment to cure or alleviate' a condition, it is unlikely that in the cases of institutions for persons with mental disabilities, that the former can be considered even to pursue this aim. Research into institutions in Central and Eastern Europe has found that 'apart from the provision of psychiatric medication there was little treatment or therapy in these institutions... Residents are not being treated so much as controlled.'⁸⁹

Furthermore, there is likely to be a shift in the case law of the ECtHR, in light of the recent interpretation given to the CRPD by the CRPD Committee. As noted, the ECtHR routinely uses UN human rights treaties as well as the interpretation given to these by UN monitoring committees charged with their interpretation. The ECtHR decided upon the cases setting out the two acceptable legitimate aims discussed

86. ECtHR, *DD v. Lithuania*, App. no. 13469/06, 14 February 2012, paras. 146–150; ECtHR, *Stanev v. Bulgaria*, App. no. 36760/06, 17 January 2012, paras. 124–128.

87. Thus, the ECtHR has considered that detention becomes involuntary if an individual subsequently withdraws consent by requesting or attempting to leave. See ECtHR, *Stanev v. Bulgaria*, App. no. 36760/06, 17 January 2012, paras. 118, 130; ECtHR, *DD v. Lithuania*, App. no. 13469/06, 14 February 2012, para. 150. Similarly, the CRPD Committee has stated: 'The denial of the legal capacity of persons with disabilities and their detention in institutions against their will, either without their consent or with the consent of a substitute decision-maker, is an ongoing problem. This practice constitutes arbitrary deprivation of liberty and violates articles 12 [equality before the law] and 14 [liberty and security] of the Convention. States parties must refrain from such practices and establish a mechanism to review cases whereby persons with disabilities have been placed in a residential setting without their specific consent.' CRPD Committee, General Comment No. 1, Article 12: Equal recognition before the law, UN Doc CRPD/C/GC/1, 19 May 2014, para. 40.

88. ECtHR, *Stanev v. Bulgaria*, App. no. 36760/06, 17 January 2012, para. 146.

89. ECCL, 'Wasted time, wasted money, wasted lives: a wasted opportunity?', 2010, 16–17.

above before the CRPD Committee had issued comprehensive guidance on Article 14 of the CRPD. The CRPD Committee has found that the ground of delivering health care for a person with disability cannot be considered a legitimate aim justifying detention of a person with a disability:

‘Involuntary commitment of persons with disabilities on health care grounds contradicts the absolute ban on deprivation of liberty on the basis of impairments (article 14(1)(b)) and the principle of free and informed consent for health care (article 25). The Committee has repeatedly stated that States parties should repeal provisions which allow for involuntary commitment of persons with disabilities in mental health institutions based on actual or perceived impairments. Involuntary commitment in mental health facilities carries with it the denial of the person’s legal capacity to decide about care, treatment, and admission to a hospital or institution, and therefore violates article 12 [the right to equality before the law] in conjunction with article 14.’⁹⁰

The CRPD Committee has also found that the ground that a person with disabilities constitutes a danger to themselves or others cannot be considered to be a legitimate aim capable of justifying the deprivation of liberty:

‘Through all the reviews of State party reports, the Committee has established that it is contrary to article 14 to allow for the detention of persons with disabilities based on the perceived danger of persons to themselves or to others. The involuntary detention of persons with disabilities based on risk or dangerousness, alleged need of care or treatment or other reasons tied to impairment or health diagnosis is contrary to the right to liberty, and amounts to arbitrary deprivation of liberty.’⁹¹

It is, of course, not the CRPD Committee’s view that a person with a disability can never constitute a danger to themselves or others. Rather, its view is that if it proves necessary to detain a person because they constitute a danger to themselves or others, detention should be based on this consideration only and using general provisions of criminal law, rather than mental health law. Detention should not be based on the automatic equation, made by many states, between the presence of a mental disability and the assumption that such an individual therefore poses such a danger to themselves or others.⁹²

90. CRPD Committee, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities, The right to liberty and security of persons with disabilities, adopted during the Committee’s 14th session, September 2015, para. 10 (footnotes omitted).

91. CRPD Committee, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities, The right to liberty and security of persons with disabilities, adopted during the Committee’s 14th session, September 2015, para. 13.

92. CRPD Committee, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities, The right to liberty and security of persons with disabilities, adopted during the Committee’s 14th session, September 2015, para. 14: ‘Persons with intellectual or psychosocial impairments are frequently considered dangerous to themselves and to others when they do not consent to and/or resist medical or therapeutic treatment. Like persons without disabilities, persons with disabilities are not entitled to pose danger to others. Legal systems based on the rule of law have criminal and other laws in place to deal with those matters. Persons with disabilities are frequently denied equal protection under these laws by being derogated to a separate track of law, mental health laws. These laws commonly have a lower standard when it comes to human rights protection, and are incompatible with article 14 of the Convention.’

When assessing whether the deprivation of liberty is ‘necessary’, the ECtHR will have regard both as to whether less intrusive measures are available to achieve these aims and whether the claimant has been able to express a choice over how care or treatment will be delivered:

*‘[T]he objective need for accommodation and social assistance must not automatically lead to the imposition of measures involving deprivation of liberty. The Court considers that any protective measure should reflect as far as possible the wishes of persons capable of expressing their will.’*⁹³

In the vast majority of cases it is likely that community-based care is a more suitable method of delivering care. Even if deprivation of liberty could be justified, the ECtHR applies a strong presumption against long-term placement in an institution. For this reason the ECtHR requires regular independent review of whether detention remains necessary to achieve one of the legitimate aims – both by professional staff, but also before a court.⁹⁴

Based on the foregoing analysis, it is highly likely that long-term institutionalisation of persons with mental disabilities will amount to the unlawful deprivation of liberty. First, it is unlikely that the majority of those persons with mental disabilities placed in institutions can be considered of ‘unsound mind’, as understood by the ECtHR, particularly in light of the finding by the CRPD Committee that actual or perceived impairment cannot justify a deprivation of liberty. Second, by definition, institutional regimes result in a deprivation of liberty, which can only be justified in limited circumstances and only when less restrictive measures are not appropriate. Third, the CRPD Committee considers that delivery of health care, or the protection of an individual from danger to themselves or others cannot be accepted as legitimate aims capable of justifying detention in an institution for persons with mental disabilities. This is likely to have a direct impact on the future interpretation of Article 5 by the ECtHR. Fourth, the requirement for regular review by independent professional staff and the judiciary suggests that such detention should be limited in time, and not long-term.

On the basis of these considerations, selection of projects under the ESIFs that entail the construction of new or the renovation of existing institutions intended to provide long-term residential care for persons with mental disabilities would breach Article 6 of the CFR, as would a decision by the Commission to authorise disbursement of EU funds for such a project.

Non-discrimination

Aside from violating Article 6 of the CFR, institutionalisation is also likely to violate Article 21 of the CFR, which prohibits discrimination on the grounds of disability.⁹⁵ Case law on the question of discrimi-

93. ECtHR, *Stanev v. Bulgaria*, App. no. 36760/06, 17 January 2012, para. 153.

94. ECtHR, *Stanev v. Bulgaria*, App. no. 36760/06, 17 January 2012, paras. 158, 171. ECtHR, *DD v. Lithuania*, App. no. 13469/06, 14 February 2012, paras. 156–157, 163. ECtHR, *M. v. Ukraine*, App. no. 2452/04, 19 April 2012, paras. 63–66. Similarly, CRPD Committee, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities, adopted during the Committee’s 14th session, September 2015, para. 24.

95. It should be noted that Article 7 of the CRP also obliges the Commission and member states to take appropriate steps to prevent discrimination based on disability.

nation in the context of institutionalisation is, unfortunately, sparse. The CJEU has had no opportunity to rule on this issue since the Employment Equality Directive applies only in the context of employment, while the ECtHR has rarely addressed the question, in part because of the parasitic nature of Article 14 of the EConvHR, and the fact that the ECtHR will not go on to examine a claim of discrimination if it considers that it does not raise separate issues to those already examined in relation to other substantive rights.⁹⁶ Nevertheless, the principles surrounding the meaning and application of rules of nondiscrimination are well established.

Direct discrimination will be taken to have occurred where: firstly, an individual has received treatment that is unfavourable – the treatment is deemed ‘unfavourable’ by comparison to others in a similar situation; secondly, the reason for this differential treatment is based on a particular characteristic that is protected by law (in this case, disability); and finally, the differential treatment cannot be justified objectively.⁹⁷

Unfavourable treatment based on disability

Institutionalisation, by definition, constitutes unfavourable treatment. Even in a nonabusive environment, as demonstrated above, institutionalisation is characterised by the deprivation of liberty. Because institutionalisation results in the imposition of a regime, it also deprives individuals of choice over with whom they live, severely limits opportunities for socialising, building and preserving relationships, and will usually interfere with access to employment, education, and the ability to establish a family.⁹⁸ While the ECtHR has not pronounced on whether the regime of institutionalisation of itself constitutes a violation of other substantive EConvHR rights, this is not a prerequisite for making a finding of discrimination under EU law.⁹⁹ EU law requires unfavourable treatment, rather than discrimination in the delivery of a particular right.¹⁰⁰

96. For a rare occurrence of this in relation to the institutionalisation of a child see: ECtHR, *DG v. Ireland*, App. no. 39474/98, 16 May 2002, paras. 111–116.

97. ECtHR, *Carson and Others v. UK*, App. no. 42184/05, 16 March 2010; para. 61. Similarly: ECtHR, *DH and others v. The Czech Republic* App. no. 57325/00, 13 November 2007, para. 175; ECtHR, *Burden v. UK*, App. no. 13378/05, 29 April 2008, para. 60.

98. ECtHR, *Stanev v. Bulgaria*, App. no. 36760/06, 17 January 2012. European Union Agency for Fundamental Rights, ‘Choice and control: the right to independent living’, 2013; European Union Agency for Fundamental Rights, ‘Legal capacity of persons with intellectual disabilities and persons with mental health problems’, 2013, chapters two and three. Council of Europe Commissioner for Human Rights, ‘The right of people with disabilities to live independently and be included in the community’, Issue Paper, 2012, chapter two. See also: CPT, *Poland: Visit 2009*, CPT/Inf (201) 20, 30 July 2010, paras. 160–168; CPT, *Bulgaria: Visit 2010*, CPT/Inf (2012) 9, 31 March 2011, paras. 204–208; CPT, *Estonia: Visit 2012*, CPT/Inf (2014) 1, 23 November 2012, paras. 136–142, CPT, *Latvia: Visit 2011*, CPT/Inf (2013) 20, 28 March 2012, paras. 165–170; CPT, *Lithuania: Visit 2008*, 18 December 2008, CPT/Inf (2009) 22, paras. 125–127.

99. ECtHR, *DD v. Lithuania*, App. no. 13469/06, 14 February 2012, paras. 177–190; ECtHR, *Stanev v. Bulgaria*, App. no. 36760/06, 17 January 2012, paras. 249–252.

100. The CJEU found that national legislation which defined ‘unfavourable treatment’ as ‘prejudice to rights or legitimate interests’ was too narrow. Rather EU law prohibits ‘any’ unfavourable treatment. CJEU, Case C-83/14 *CHEZ Razpredelnice*, 16 July 2015, paras. 64–69.

The second question in the test for determining the existence of discrimination is whether others in a materially similar or comparable situation have received this treatment. The question of who constitutes a relevant comparator is generally uncomplicated. It is simply a hypothetical individual who does not possess the characteristic in question, that is, a person without a disability.¹⁰¹

The third question is whether the differential treatment is indeed based on the protected characteristic. It is sufficient for that person's disability to constitute the main reason for their institutionalisation, even if this is not expressly stated by relevant national legislation or during the process of institutionalising an individual.¹⁰² Thus, where an individual's actual or perceived impairment is a key factor behind the decision to institutionalise them (i.e., were it not for their disability they would not have been institutionalised), then their disability can be taken to constitute the basis for their unfavourable treatment. The interpretation given to Article 14 of the CRPD by the CRPD Committee suggests that use of other grounds for detention such as the need to provide health care and treatment or to safeguard the public or the individual himself or herself will be regarded as proxies for disability.¹⁰³

Objective justification

The next question to be addressed is whether the unfavourable treatment inherent in institutionalisation can be justified objectively. According to the ECtHR:

*'[A] difference in the treatment of persons in relevantly similar situations... is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.'*¹⁰⁴

The only in-depth analysis applying a test of proportionality to the situation of institutionalisation by the ECtHR is that discussed above in relation to Article 5 of the EConvHR.¹⁰⁵ Nevertheless, on the basis of

101. E.g. CJEU, Case C-303/06, *Coleman* 17 July 2008, para. 56: 'Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a).' Similarly, CJEU, Case C-363/12 Z, 18 March 2014, para. 52.

102. See analogously, CJEU, Case C-267/06 *Maruko*, 1 April 2008; ECtHR, *Timishev v. Russia*, App. no. 55762/00, 13 December 2005 para. 5; ECtHR *Abdulaziz, Cabales and Balkandali v. UK*, App. no. 9214/80, 28 May 1985, para. 78. See also on this question: UN HRC *Rosalind Williams Lecraft v. Spain*, Comm no. 1493/2006, 30 July 2009, para. 7.2.

103. CRPD Committee, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities, The right to liberty and security of persons with disabilities, adopted during the Committee's 14th session, September 2015, paras. 10 and 13.

104. ECtHR, *Burden v. UK*, App. no. 13378/05, 29 April 2008, para. 60.

105. The CRPD committee characterizes Article 14 CRPD on the right to liberty and security as an articulation of the principle of nondiscrimination: 'Article 14 of the Convention is in essence a non-discrimination provision. It specifies the scope of the right to liberty and security of the person in relation to persons with disabilities, prohibiting all discrimination based on disability in its exercise.' CRPD Committee, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities, adopted during the Committee's 14th session, September 2015, para. 4.

the cases relating to Article 5 of the EConvHR and the interpretation given to Article 14 of the CRPD by the CRPD Committee discussed above, it is unlikely that the unfavourable treatment inherent in institutionalisation could be justifiable. First, because, as discussed above, institutionalisation of persons with mental disabilities as a broad group is unlikely to be aimed in practice at meeting the ‘legitimate aims’ of providing therapeutic care or preventing harm to an individual or members of the public. Rather, as noted above, research suggests that institutionalisation is a form of ‘control’ rather than treatment. Second, because the ECtHR is likely to follow the CRPD Committee’s interpretation of Article 14 of the CRPD, which finds that the grounds of delivering health care or preventing harm to an individual or the public cannot constitute legitimate aims capable of justifying institutionalisation. Third, even if these could be accepted as legitimate aims, it is unlikely that institutionalisation would meet the test of proportionality, since community-based services better meet the aim of delivering care without causing the unfavourable treatment inherent in institutionalisation.¹⁰⁶ Further, as noted, the ECtHR stated in the *Alajos Kiss* case that where unfavourable treatment is applied to persons with disabilities as a category, it would be extremely difficult for the state to justify this treatment as proportionate.

One potential difficulty may arise in relation to the question of the availability of less intrusive alternatives to institutionalisation. Many member states have done little to invest in infrastructure or appropriately trained personnel to support community-based care. This appears to have influenced the ECtHR in *DD v Lithuania* where the ECtHR’s finding that the interference with the applicant’s liberty was justified and was influenced in part by the fact that the only alternative to her confinement in an institution was allowing her to stay in her adoptive father’s apartment under his care, which had proved unworkable when tried.¹⁰⁷ It also appears to have played an important role in the ECtHR’s finding that institutionalisation in the case of *Stanev* was disproportionate, because community-based care was available in practice.¹⁰⁸

However, it is submitted that it would be extremely difficult for a member state to argue successfully that institutionalisation is appropriate by relying on its own failure to develop community-based alternatives. This appears to be the view of the CRPD Committee, which finds that deprivation of liberty on grounds of real or perceived impairment is discriminatory and unjustifiable, regardless of the existence or not of community based-services.¹⁰⁹

Article 54 of the CFR prevents a provision of the CFR from being interpreted in such a way as to undermine another provision.¹¹⁰ If a court were to accept that institutionalisation was a proportionate measure on the basis that no less intrusive measures existed in practice, it would effectively amount to sanction-

106. ECtHR, *M. v. Ukraine*, App. no. 2452/04, 19 April 2012, paras. 57, 59–63; ECtHR, *DD v. Lithuania*, App. no. 13469/06, 14 February 2012, paras. 29, 154–158.

107. *DD v. Lithuania*, App. no. 13469/06, 14 February 2012, paras. 154–158.

108. ECtHR, *Stanev v. Bulgaria*, App. no. 36760/06, 17 January 2012, paras. 153–160.

109. CRPD Committee, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities, ‘The right to liberty and security of persons with disabilities’, adopted during the Committee’s 14th session, September 2015 paras. 6 and 9.

110. ‘Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.’

ing a failure to implement the obligations under Articles 26 of the CFR and 19 of the CRPD. Such a finding would also run contrary to the concept of progressive achievement of the rights guaranteed by the CRPD, because it would act as a disincentive on authorities to take measures moving away from institutionalisation. It would, furthermore, be difficult to justify in light of the availability of EU funds under the ERDF and the ESF for the express purpose of facilitating the transition from institutional to community-based care. In these circumstances, as the Commission has acknowledged, EU funding for the renovation of existing institutions may only be justified where repairs are required to address ‘urgent and life-threatening risks to residents linked to poor material conditions... but only as transitional measures within the context of a deinstitutionalisation strategy.’¹¹¹

According to the above analysis, it can be concluded that institutionalisation of persons with disabilities, when this is based principally on a person’s perceived or actual disability, constitutes unfavourable differential treatment that cannot be justified and so will constitute discrimination. While the ECtHR has not yet made such a clear finding, analysis of its existing case law, the guidance recently issued by the CRPD Committee, and the influence that this is likely to have on the ECtHR’s interpretation of Article 5 of the EConvHR, strongly supports this conclusion.

Thus, while individuals cannot rely directly on Article 26 of the CFR or Article of the 19 CRPD, they may be able to get a remedy before a national court or the CJEU on the basis of Articles 6 and 21 of the CFR, read in conjunction with Article 26 of the CFR and Articles 14 and 19 of the CRPD. This would allow private parties to enforce the negative obligation contained in Article 19 of the CRPD, which prohibits the investment of funds in institutional care. This is significant, because although the Commission has stated that in principle it will not fund the building of new facilities or the renovation of existing institutions, several OPs do include provision to fund smaller residential facilities that most probably constitute institutions according to the definition set out in the introduction to this report.¹¹²

II.C. *The Incidental Effect of the CRPD*

As discussed, while individuals may not use the CRPD directly as a cause of action, they may rely on the CRPD indirectly via a duty of consistent interpretation in the application of EU law. CJEU case law also suggests that during the course of legal proceedings brought by private parties, the CRPD may also have ‘incidental’ effect. That is, if an individual brings a case before a national court or the CJEU based on a cause of action other than the CRPD, a national court or the CJEU might still apply the CRPD to address a prior legal question that needs to be answered before the dispute can be settled. In the case of *Racke*, an individual wished to enforce his rights as an importer of goods benefiting from a trade treaty. The treaty was suspended by virtue of an EU regulation. The claimant argued that suspension of the trade agreement violated a rule of customary international law, which only allows treaties to be revoked in

111. Initial report of States parties due in 2012, European Union, UN Doc CRPD/C/EU/1, 3 December 2014, para. 99.

112. ENIL–ECCL, ‘Briefing on the use of European Structural and Investment Funds to support the transition from institutional care to community living for people with disabilities’, 2015, available on: http://www.enil.eu/wp-content/uploads/2015/05/ENILECCL_Briefing_SF_300415.pdf.

limited circumstances. The CJEU found that this rule of customary international law did not have direct effect. However, the CJEU could not determine whether the claimant could invoke his rights under the trade treaty without first deciding whether the EU regulation suspending this agreement complied with customary international law.¹¹³

Applying this case law to the situation under consideration in the present report, an individual might be able to rely on the CRPD when trying to enforce Article 19 of the CRPD's positive obligations. As noted, Article 19 of the CRPD's negative obligations can be enforced indirectly via Articles 6 and 21 of the CFR. Article 19 of the CRPD's positive obligations cannot be enforced using the same legal device. However, it may be possible to enforce Article 19 of the CRPD's positive obligations using incidental effect if an individual could rely on a cause of action such as a claim that the MA has committed a manifest error of law, for instance, by deciding to reject a deinstitutionalisation project proposal, or by adopting calls for proposals that do not include deinstitutionalisation projects.

In considering whether the MA had made a manifest error of law, a national court might consider whether the MA had given adequate weight to its obligations under the CRPD in the way it was implementing and interpreting the ESIFs. However, this will depend on national rules relating to judicial review and administrative law. As such, it cannot be considered to constitute a reliable remedy available across all member states.

11.D. Other Legal Effects of the CRPD in the EU Legal Order

Direct effect is not a requirement when the CJEU decides on claims between states or the EU institutions.¹¹⁴ Accordingly, in the case of *Netherlands v Parliament and Council*, the CJEU stated that even where international agreements do not have direct effect, they still create legal obligations on the European Union.¹¹⁵ In this case, the Netherlands argued that the provisions of the Directive on Biotechnological Inventions¹¹⁶ were contrary to the terms of the Convention on Biological Diversity, to which the European Union is party. In the event, the CJEU found that the directive was sufficiently permissive as to allow member states to comply with the Convention on Biological Diversity by not making use of certain

113. CJEU, Case C-162/96 *Racke*, 16 June 1998, para. 45: 'It should be noted in that... the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country.'

114. Traditionally, international law has always been aimed at conferring reciprocal rights and obligations on states. As such, only states were capable of bringing claims in international law, to enforce the binding promises of their peers. Direct effect was introduced into EU law to allow private parties, who were the beneficiaries of many rules of EU law, to be able to enforce their rights without relying the state to take a case for them.

115. CJEU, Case C-377/98 *Netherlands v. Parliament and Council*, 9 October 2001, para. 54: 'Even if, as the Council maintains, the CBD [Convention on Biological Diversity] contains provisions which do not have direct effect, in the sense that they do not create rights which individuals can rely on directly before the courts, that fact does not preclude review by the courts of compliance with the obligations incumbent on the Community as a party to that agreement'.

116. Directive 98/44 on the legal protection of biotechnological inventions (OJ L 213, 30.7.1998, 13).

rights that the directive granted to them.¹¹⁷ Nevertheless, the case affirms that the European Union and the member states have to abide by treaties to which the European Union is party when the latter implement EU law.

In practice, it is difficult to imagine a situation in which member states might enforce the CRPD against each other or against the Commission where these fail to implement the CRPD. It is rare for governments to jeopardise friendly diplomatic relations by intervening altruistically in favour of a vulnerable group in another member state. However, were the Commission failing in its duties to take appropriate and effective measures to ensure implementation of Article 19 of the CRPD by the member states, it would be open to another EU institution to enforce the CRPD against the Commission before the CJEU.¹¹⁸

These cases make clear that although it is difficult or impossible for private parties to enforce the CRPD, the European Union and its member states are still obliged to conform to the provisions of the CRPD when implementing EU law.

III. Concluding Remarks

Even though individuals will not be able to enforce the CRPD directly before national courts or the CJEU, the CRPD does still give rise to legal obligations. In the cases discussed above, the CJEU affirmed that the European Union and its member states are bound by treaties to which the European Union is party and that these treaties form an integral part of the EU's legal order. The fact that the CRPD cannot have direct effect deprives private parties of the ability to directly enforce the CRPD via EU law. However, the question of whether a private party can enforce an obligation is distinct from the question of whether that obligation exists or not.

First, as discussed, in cases brought by private parties based on provisions of EU law that do have direct effect (such as the 'rights' contained in the CFR), national courts and the CJEU will still ensure that secondary EU legislation, such as the ESIFs, as well as the CFR, are interpreted consistently with the CRPD. Second, private parties may still benefit from the protection of the CRPD where it becomes necessary to apply the CRPD in order to resolve a case brought on another cause of action. Third, because the CRPD forms an integral part of EU law that has primacy over rules of secondary EU law, the European Union and its member states when implementing EU law, are bound to give effect to its obligations. As will be discussed in the following part, the CRPD obliges the Commission to take appropriate and effective measures to ensure that the member states comply with the CRPD when they implement the ESIFs. This can include measures to support the member states, but also monitoring and corrective measures. If the Commission fails to perform its obligations, it will open itself to legal action by the other institutions. Even if political considerations make it unlikely that another institution would open a case against the Commission before the CJEU, the Commission would ultimately be held accountable before the CRPD Committee.

117. CJEU, Case C-377/98 *Netherlands v. Parliament and Council*, 9 October 2001, paras. 50–58 and 61–68.

118. Articles 263 and 265 of the TFEU.

Applying the European Structural and Investment Funds (ESIFs) in line with the UN Convention on the Rights of Persons with Disabilities (CRPD)

As discussed in Part One, the European Union and its member states, when implementing EU law, are under an obligation to comply with the CRPD because, as an international agreement that is binding on the European Union, it forms an integral part of the EU's internal legal order and has primacy over secondary EU legislation. This principle is restated in Article 6 of the Common Provisions Regulation (CPR):

'Operations supported by the ESI Funds shall comply with applicable Union law and the national law relating to its application ("applicable law")'.

Part two will examine what the European Union needs to do to comply with its obligations under Article 19 of the CRPD. This is not quite the same question as asking what the European Union would need to do to ensure that the ESIFs are implemented consistently with Article 26 of the EU Charter of Fundamental Rights (CFR). Part One showed that the right to independent living protected by Article 26 of the CFR most likely has the same substantive content as Article 19 of the CRPD.¹ However, because Article 26 of the CFR 'recognises and respects' the right to independent living, the Court of Justice of the European Union (CJEU) may well be inclined to find that it merely imposes a negative obligation on the European Union and the member states when implementing EU law. That is, Article 26 of the CFR certainly imposes a duty on the European Union and member states to refrain from taking action that would interfere with the right to independent living, such as funding projects that give rise to institutional regimes. But Article 26 of the CFR by itself might not oblige the European Union and member states to take steps to promote independent living.² However, the CRPD unambiguously does impose positive obligations.

1. That is, if the CJEU were called on to define the meaning of 'independence, social and occupational integration and participation in the life of the community' in Article 26 of the CFR, it would most probably draw on the substantive elements of Article 19 of the CRPD relating to choice over living arrangements, place of residence and co-residents, access to community-based services, prohibition on segregation and accessibility of services for the general population.

Part two will focus discussion on Article 19 of the CRPD, rather than Article 26 of the CFR. Given that the CRPD has primacy over secondary EU law and is directly binding on the European Union and its member states in so far as they are implementing EU law, there is little point in distinguishing which obligations flow from the CFR and which flow from the CRPD. Regardless of whether the source of the obligations is the CFR or the CRPD, the European Union and its member states are obliged to give effect to the right to independent living when implementing relevant EU law.

I. The Nature of the Obligations Imposed by Article 19 of the CRPD

Article 4(1) of the CRPD sets out general obligations that parties must take to implement all the rights in the CRPD. This provision obliges parties to ‘adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention’. ‘[O]ther measures’ include the requirement for effective domestic (both administrative and judicial) remedies to enforce the rights in the CRPD. Although this obligation to provide a domestic remedy is not made express by the CRPD, the CRPD Committee has adopted the approach of its fellow UN committees responsible for interpreting and monitoring implementation of the UN Convention on the Rights of the Child and the International Covenant on Economic Social and Cultural Rights – the texts of which similarly do not expressly mention domestic remedies.³ The Committee on Economic Social and Cultural Rights has explained that:

‘Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decisionmaking. Any such administrative remedies should be accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate. By the same token,

2. Though the ECtHR has not ruled out that Article 8 applied in a context of the provision of services in the community for persons with disabilities may impose positive obligations, despite being phrased negatively as a duty on the state to ‘respect’ family and private life. See: ECtHR, *McDonald v. UK* App. no. 4241/12, 20 May 2014, para. 48. See further: Mowbray, Alister, ‘The Development of Positive Obligations under the European Court of Human Rights’, 2004, 221. For discussion on the content of Article 26 CFR see: O’Brien, Charlotte, ‘Article 26’, in Peers, Steve et al. (eds.), ‘The EU Charter of Fundamental Rights: A Commentary’, 2014, 709.
3. The various monitoring committees that oversee the implementation of the UN treaties to which all member states are party ensure that they give the same interpretation to human rights obligations across the treaties. Thus, the CRPD Committee follows the findings of sister UN committees when interpreting this treaty. See: CRPD Committee, Guidelines on treaty-specific document to be submitted by states parties under article 35, paragraph 1, of the Convention on the Rights of Persons with Disabilities, UN Doc CRPD/C/2/3, 18 November 2009, para. A.3.2(f); CRPD Committee, Concluding Observations on the initial report of Denmark, UN Doc CRPD/C/DNK/CO/1, 30 October 2014, paras. 14–15; CRPD Committee, Concluding observations on the initial report of Germany, UN Doc CRPD/C/DEU/CO/1, 13 May 2015, paras. 11–12; OHCHR, Compilation of guidelines on the form and content of reports to be submitted by States parties to the international human rights treaties, 3 June 2009, UN Doc HRI/GEN/2/Rev.6, 3 June 2009, 4; Committee on Economic Social and Cultural Rights, General Comment 3, The nature of States parties’ obligations, para. 5 and General Comment 9, The domestic application of the Covenant, paras. 3, 9–11; Committee on the Convention on the Rights of the Child, General Comment 5, General measures of implementation of the Convention on the Rights of the Child, paras. 24–25. General Comments reprinted in: OHCHR, Compilation of General Comments Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.9 (Vol. I & II), 27 May 2008.

*there are some obligations, such as (but by no means limited to) those concerning nondiscrimination, in relation to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the requirements of the Covenant. In other words, whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.*⁴

Accordingly, the measures of implementation required by Article 4(1) of the CRPD must, taken as a whole, be capable of giving effect to the rights guaranteed by the treaty, and these measures must include the right to a remedy for individuals of an administrative and/or judicial nature.⁵

According to Article 19 of the CRPD, the legislative, administrative and judicial measures chosen by the party, should also be ‘effective and appropriate’ to ‘facilitate... full inclusion and participation in the community’, for persons with disabilities. Article 19 spells out that in order to achieve full inclusion and participation in the community, parties must ‘ensure’ the three elements of Article 19, which are that persons with disabilities: first, can ‘choose their place of residence and where and with whom they live... and are not obliged to live in a particular living arrangement’; second, to ensure that persons with disabilities ‘have access to a range of in-home, residential and other community support services... and to prevent isolation or segregation from the community’; third, to ensure ‘[c]ommunity services and facilities for the general population are available on an equal basis to persons with disabilities’.

Thus, Article 19 of the CRPD contains both negative and positive obligations. The CRPD Committee has interpreted this provision to include a negative obligation that parties may not further invest in institutions. This should be read together with the CRPD’s interpretation of Article 14 of the CRPD (liberty and security of the person), which the CRPD Committee considers imposes a prohibition on the deprivation of liberty by placement in institutions on the grounds of disability.⁶

-
4. Committee on Economic Social and Cultural Rights, General Comment 9, The domestic application of the Covenant, para. 9, reprinted in: OHCHR, ‘Compilation of General Comments Adopted by Human Rights Treaty Bodies’, UN Doc HRI/GEN/1/Rev.9 (Vol. I), 27 May 2008.
 5. Committee on Economic Social and Cultural Rights, General Comment 3, The nature of States parties’ obligations, reprinted in: OHCHR, ‘Compilation of General Comments Adopted by Human Rights Treaty Bodies’, UN Doc HRI/GEN/1/Rev.9 (Vol. I), 27 May 2008.
 6. See: CRPD Committee, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities, The right to liberty and security of persons with disabilities, adopted during the Committee’s 14th session, September 2015; CRPD Committee, Concluding Observations on the initial report of Austria, UN Doc CRPD/C/AUT/CO/1, 30 September 2013, paras. 29–31, 36; CRPD Committee, Concluding Observations on the initial report of Belgium, UN Doc CRPD/C/BEL/CO/1, 28 October 2014, paras. 25–26, 32–33; CRPD Committee, Concluding Observations on the initial report of Croatia, UN Doc CRPD/C/HRV/CO/1, 15 May 2015, paras. 19–20; CRPD Committee, Concluding Observations on the initial report of the Czech Republic, UN Doc CRPD/C/CZE/CO/1, 15 May 2015, paras. 26–27, 38–39; CRPD Committee, Concluding Observations on the initial report of Denmark, UN Doc CRPD/C/DNK/CO/1, 30 October 2014, paras. 36–37, 42–43; CRPD Committee, Concluding Observations on the initial report of the European Union, UN Doc CRPD/C/EU/CO/1, 4 September 2015, paras. 50–51; CRPD Committee, Concluding Observations on the initial report of Germany, UN Doc CRPD/C/DEU/CO/1, 13 May 2015, paras. 29–30, 41–42; CRPD Committee, Concluding Observations on the initial periodic report of Hungary, UN Doc CRPD/C/HUN/CO/1, 22 October 2012, paras. 27–28, 33–34; CRPD Committee, Consideration of reports submitted by States parties under Article 35 of the Convention, Spain, UN Doc CRPD/C/ESP/CO/1, 19 October 2011, paras. 35–36, 39–40; CRPD Committee, Concluding Observations on the initial report of Sweden, UN Doc CRPD/C/SWE/CO/1, 12 May 2014, paras. 35–36, 43–44.

Article 19 also imposes a number of positive obligations. Those obligations relating to economic and social rights that implicate significant resources, such as the provision of services, are to be implemented progressively.⁷ This does not relieve parties from taking immediate and concrete steps. The Committee on Economic Social and Cultural Rights, which monitors the implementation of the International Covenant on Economic Social and Cultural Rights, to which all EU member states are party, has clarified that:

‘while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.’⁸

Furthermore, elements of social and economic rights that do not implicate significant resources will impose duties of immediate application.⁹ Over the course of reviewing implementation of the CRPD by EU member states, the CRPD Committee has explained that to implement the three elements of Article 19 noted above, parties must: create a deinstitutionalisation plan (covering all residential institutions including small institutions and foster homes) with a clear timeline (that does not fix the endpoint of deinstitutionalisation excessively far in the future), concrete benchmarks and effective monitoring;¹⁰ formulate and implement a process through which services are made accessible to persons with disabilities (including through the allocation of sufficient resources to support services in local communities);¹¹

7. Article 4(2) of the CRPD states that those rights in the treaty that are ‘economic, social and cultural’ should be implemented according to a state’s maximum available resources ‘with a view to achieving progressively the full realization of these rights’. The phrasing mirrors that in International Covenant on Economic Social and Cultural Rights Article 2(1), (993 UNTS 3).

8. Committee on Economic Social and Cultural Rights, General Comment 3, The nature of the States parties’ obligations, para. 2, reprinted in: OHCHR, Compilation of General Comments Adopted by Human Rights Treaty Bodies’, UN Doc HRI/GEN/1/Rev.9 (Vol. I) , 27 May 2008.

9. ‘General Comment 3, The nature of the States’ parties’ obligations’, para. 9, reprinted in: OHCHR, Compilation of General Comments Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.9 (Vol. I), 27 May 2008, para. 11: ‘even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the nonrealization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints.’

10. CRPD Committee, Concluding Observations on the initial report of Croatia, UN Doc CRPD/C/HRV/CO/1, 15 May 2015, paras. 29–30; CRPD Committee, Concluding Observations on the initial report of the Czech Republic, UN Doc CRPD/C/CZE/CO/1, 15 May 2015, paras. 38–40; CRPD Committee, Concluding Observations on the initial report of Belgium, UN Doc CRPD/C/BEL/CO/1, 28 October 2014, para. 33. The CRPD Committee expressed concern at the fact that Hungary’s deinstitutionalisation plan had an excessive 30-year time frame: CRPD Committee, Concluding Observations on the initial periodic report of Hungary, UN Doc CRPD/C/HUN/CO/1, 22 October 2012, para. 33.

11. CRPD Committee, Concluding Observations on the initial report of Belgium, UN Doc CRPD/C/BEL/CO/1, 28 October 2014, para. 33; CRPD Committee, Concluding Observations on the initial report of Croatia, UN Doc CRPD/C/HRV/CO/1, 15 May 2015, paras. 29–30; Concluding observations on Czech Republic, para. 39; CRPD Committee, Concluding Observations on the initial report of Germany, UN Doc CRPD/C/DEU/CO/1, 13 May 2015, paras. 42(b) and (c); CRPD Committee, Concluding Observations on the initial periodic report of Hungary, UN Doc CRPD/C/HUN/CO/1, 22 October 2012, paras. 34–35; CRPD Committee, Consideration of reports submitted by States parties under Article 35 of the Convention, Spain, UN Doc CRPD/C/ESP/CO/1, 19 October 2011, paras. 39–40.

adopt a legal framework that entitles persons with disabilities to adequately funded personal assistance services and guarantees them choice over where and with whom they live.¹²

The implementation of a deinstitutionalisation plan, investment in community based services and the creation of adequately funded personal assistance services implicate significant state resources, and so can be regarded as obligations to be fulfilled progressively by the parties. However, an obligation to implement rights progressively still requires a state to take positive steps of implementation.¹³ The creation of a deinstitutionalisation plan and the formulation of a process to create services in the community do not implicate significant resources and would therefore be subject to a duty of immediate, rather than progressive, implementation.

For the purposes of this report's examination of the duties incumbent on the European Union, the distinction between obligations of progressive and immediate implementation under the CRPD is not particularly significant. The report examines the obligations of the European Union in terms of monitoring, enforcement, and supporting measures such as guidance and training for the member states, which take place within the EU's existing budget and exercise of powers, and are not analogous to duties of progressive implementation that involve the delivery of services such as health care or education.

As noted in the introduction to this report, the CRPD Committee has stated that to fulfil its obligations under Article 19 the Commission will need to use the powers available to it in three ways: first, to 'guide and foster deinstitutionalisation'; second, to 'strengthen the monitoring of the use of ESI Funds – to ensure they are being used strictly for the development of support services for persons with disabilities in local communities and not the redevelopment or expansion of institutions'; and third, to use its corrective powers to 'suspend, withdraw and recover payments' where national authorities fail to implement their obligations under Article 19 of the CRPD. The remainder of the chapter will examine the Commis-

12. CRPD Committee, Concluding Observations on the initial report of Austria, UN Doc CRPD/C/AUT/CO/1, 30 September 2013, paras. 38–39; CRPD Committee, Concluding Observations on the initial report of Belgium, UN Doc CRPD/C/BEL/CO/1, 28 October 2014, para. 33; CRPD Committee, Concluding Observations on the initial report of Croatia, UN Doc CRPD/C/HRV/CO/1, 15 May 2015, paras. 29–30; CRPD Committee, Concluding observations on the initial report of Denmark, UN Doc CRPD/C/DNK/CO/1, 30 October 2014, para. 43; CRPD Committee, Concluding Observations on the initial report of Germany, UN Doc CRPD/C/DEU/CO/1, 13 May 2015, para. 42(a); CRPD Committee, Consideration of reports submitted by States parties under Article 35 of the Convention, Spain, UN Doc CRPD/C/ESP/CO/1, 19 October 2011, paras. 41–42; CRPD Committee, Concluding Observations on the initial report of Sweden, UN Doc CRPD/C/SWE/CO/1, 12 May 2014, paras. 43–44.

13. Interpreting the equivalent provision in the International Covenant on Economic Social and Cultural Rights, the Committee on Economic Social and Cultural Rights has stated that 'the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content... [T]he phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'. General Comment 3, The nature of the States' parties' obligations, para. 9, reprinted in: OHCHR, 'Compilation of General Comments Adopted by Human Rights Treaty Bodies', UN Doc HRI/GEN/1/Rev.9 (Vol. I), 27 May 2008.

sion's available powers, analyse whether these are 'appropriate' to give effect to Article 19 and how they can be made 'effective'.¹⁴

II. Mapping Article 19 CRPD Obligations onto the ESIFs

The European Union has the authority to adopt a range of measures within its areas of competence that would allow it to execute its obligations under the CRPD. For the purposes of this report, this part will focus on the ESIFs regulations, as legislative measures through which the European Union can give effect to the right to independent living under Article 19 of the CRPD.¹⁵ Given that the ESIFs regulations entered into force relatively recently and are due to remain in effect until the end of 2020, this section will refrain from assessing the compliance of the ESIFs regulations themselves with the CRPD.¹⁶ Rather, this part will focus on how the European Union is obliged to use its powers to implement the ESIFs in a way that gives effect to Article 19 of the CRPD. Clearly, not all of the elements of Article 19 of the CRPD are capable of being implemented directly by the European Union under the scope of the ESIFs. Further, for many elements of the CRPD, the European Union lacks legislative competence to create harmonised standards, for instance in relation to national social security regimes.¹⁷ However, the European Union does have other powers at its disposal to meet its obligations under Article 19 of the CRPD through the way that the ESIFs regulations are implemented, by issuing appropriate guidance and offering training, properly monitoring implementation and taking corrective measures.

II.A. Shared Management

The ESIFs regulations provide for a split between the responsibilities of the Commission and the member states ('shared management').¹⁸ According to this division of tasks, the Commission's responsibilities focus on ensuring that the correct framework is in place at national level: agreeing the content of the Partnership Agreements (PAs), Operational Programmes (OPs), and checking that member states set up adequate national structures and processes to execute these agreements ('management and control' systems). Once the Commission is satisfied that the necessary national safeguards are in place, the member states are entrusted with implementation. For the most part, monitoring activities are shared

14. CRPD Committee, Concluding observations on the initial report of the European Union, UN Doc CRPD/C/EU/CO/1, 4 September 2015, paras. 50–51.

15. EU legislation governing the previous programming period of the ESIFs is expressly listed among the 'Community acts which refer to matters governed by the convention' listed in the Appendix to the Council Decision approving EU accession to the CRPD. Council Decision 2010/48 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, Annex II (OJ L 23, 27.01.2010, 55).

16. Arguably, the European Union has already gone some way to fulfilling its obligation to take legislative measures by ensuring that the ERDF and ESF regulations include the transition from institutional to community-based care as thematic priorities.

17. Article 153 of the Treaty on the Functioning of the European Union (TFEU).

18. Article 4(7) CPR and Article 59 of Regulation 966/2012 on the financial rules applicable to the general budget of the Union (OJ L 298, 26.10.2012, 1) (the Financial Regulation).

between the Commission and the member states.¹⁹ The Commission's monitoring role is primarily based on information it receives from national authorities and is geared towards verifying that national management and control mechanisms are adequate, and that progress is being made towards the objectives of the OPs and PAs. The Commission has powers to support national authorities with technical assistance and guidance, and is also empowered to use corrective powers to correct problematic implementation where national structures and processes show serious failings.

The shared management principle is not, of itself, a barrier to the proper implementation of Article 19 of the CRPD. However, to discharge its obligation to take appropriate and effective measures to implement Article 19 of the CRPD, the Commission would need to take a number of steps. First, it must ensure that the PA and relevant OP agreed with the member states make adequate reference to the transition from institutional to community-based care. Second, it must ensure that the *ex-ante* conditionalities relating to the transition from institutional to community-based care are interpreted consistently with the obligations in Article 19 of the CRPD.

Once an adequate PA and OP is in place, and *ex ante* conditionalities have been satisfied, Article 19 of the CRPD's obligation to take effective and appropriate measures require the Commission to ensure that member states implement the ESIFs according to their obligations. It is argued here that, as recommended by the CRPD Committee, this would require a three-pronged approach during the implementation of the ESIFs: awareness, monitoring, and enforcement. First, for obligations to be effective, they should be enforceable. Thus, the Commission should be prepared to take corrective action when member states fail to implement the ESIFs in line with Article 19 of the CRPD. For enforcement to be effective, the Commission will need to have adequate channels at its disposal to receive information about the selection of projects. Otherwise it will not be aware of when member states are failing to implement Article 19 of the CRPD, and will not be in a position to use its enforcement powers. Finally, it is argued that preventive measures, such as issuing proper guidance and training to national authorities, is an appropriate and potentially effective means of avoiding violations of Article 19 of the CRPD, if certain conditions are met, when taken in conjunction with proper monitoring and enforcement measures.

II.B. *The PA, OP and Ex-ante Conditionalities*

It is beyond the scope of this report to examine the PAs, OPs and *ex-ante* conditionalities in relation to each member state. This section will confine itself to explaining what the CRPD would require of the European Union and its member states in relation to these elements of the ESIFs.

In order to implement Article 19 of the CRPD, the PAs and the OPs, in so far as the latter relate to measures dealing with persons with disabilities, should contain commitments to support the transition

19. In the words of the Commission, in its report to the CRPD Committee on the implementation of the CRPD: 'the Commission has the responsibility to ensure that the Member States' operational programmes comply with EU law, including EU legislation and the CRPD, and their strategies are in line with EU strategies and policies, including the Disability Strategy. Implementation, on the other hand, lies with the Member States.' Initial report of States parties due in 2012, European Union, UN Doc CRPD/C/EU/1, 3 December 2014, para. 100.

from institutional to community-based care. In practice, most PAs and OPs in countries of concern do contain such a commitment.²⁰ These agreements, which implement the ESIFs regulations and therefore amount to the implementation of EU law, should also reflect an interpretation of deinstitutionalisation that is consistent with Article 19 of the CRPD.

To fulfil the negative obligation in Article 19 of the CRPD, the PAs and the OPs should not contain commitments to support projects that would perpetuate institutionalisation – ideally the PAs and the OPs should include express prohibition on measures of this nature.²¹ This includes not only refraining from investing in large-scale institutions, but also in smaller residential facilities that replicate institutional culture and regimes. Research suggests that some OPs are inconsistent with Article 19 of the CRPD in this regard because, for instance, they support the construction of ‘small group homes’, that are highly likely to constitute institutions according to the understanding of this term set out in the introduction.²²

To fulfil the positive obligations in Article 19 of the CRPD, the PAs and the OPs should contain commitments to support projects that facilitate independent living. This is not to say that the Commission is legally entitled to impose such requirements on a member state directly. However, Article 4(3) of the TFEU does impose a duty on member states of ‘sincere cooperation’ in implementing EU law. This imposes ‘reciprocal duties of genuine cooperation’ on the member states and the Commission to ‘work together in good faith’ to meet the CRPD’s obligations.²³ Where EU law imposes progressive obligations on a member state, the CJEU has interpreted this to mean that, at the very least, national authorities should be taking these obligations into consideration during the decision-making process.²⁴ Accordingly, the OPs should contain some kind of commitment – albeit that one cannot prescribe its exact content – to invest resources towards fulfilling elements of Article 19 of the CRPD’s positive obligations.

To the extent that the PAs and the OPs fail to meet the negative and positive obligations of Article 19 of the CRPD, they are in breach of the CRPD as an integral part of EU law. The Commission and the

20. ENIL–ECCL, ‘Briefing on the use of European Structural and Investment Funds to support the transition from institutional care to community living for people with disabilities’, 2015, available on: http://www.enil.eu/wp-content/uploads/2015/05/ENILECCL_Briefing_SF_300415.pdf, 2.

21. In this sense, the Commission has stated that the ‘ERDF should as a basic principle not be used for building new residential institutions or the renovation and modernisation of existing ones.’ Initial report of States parties due in 2012, European Union, UN Doc CRPD/C/EU/I, 3 December 2014, para. 99.

22. ENIL–ECCL, ‘Briefing on the use of European Structural and Investment Funds to support the transition from institutional care to community living for people with disabilities’, 2015, available on: http://www.enil.eu/wp-content/uploads/2015/05/ENILECCL_Briefing_SF_300415.pdf.

23. CJEU, Case C-507/08 *Commission v. Slovak Republic*, 22 December 2010, para. 44. Similarly, CJEU, Case C-411/12 *Commission v. Italy*, 12 December 2013, para. 38; CJEU, Case C-344/12 *Commission v. Italy*, 17 October 2013, para. 50; CJEU, Case C-613/11 *Commission v. Italy*, 21 March 2013, para. 38.

24. See CJEU, Case C-53/10 *Land Hessen*, 15 September 2011, concerning the interpretation of Article 12(1) Directive 96/82 in light of the duty of ‘sincere cooperation’: ‘Member States shall ensure that their land-use and/or other relevant policies and the procedures for implementing those policies take account of the need, in the long term, to maintain appropriate distances between establishments covered by this Directive.’ Council Directive 96/82 on the control of major-accident hazards involving dangerous substances (OJ L 10, 14 January 1997, 13), as amended by Directive 2003/105 (OJ L 345, 31.12.2003, 97).

member states have available to them an effective and appropriate measure to ensure that Article 19 of the CRPD is implemented in this regard; namely, amendment of these agreements.²⁵

Where member states have agreed to an OP relating to thematic objective 9 on social inclusion, and this includes a commitment to take measures to support the transition from institutional to community-based care, national authorities are required to meet the *ex ante* conditionality of creating a strategic framework for poverty reduction. This strategy is to include measures on deinstitutionalisation.²⁶ As noted above, the CRPD Committee has stated that Article 19 of the CRPD obliges parties to establish a deinstitutionalisation plan that covers all residential institutions, including small institutions and foster homes, with a clear timeline, concrete benchmarks, and effective monitoring.²⁷ Where EU law requires member states to create a poverty reduction strategic framework that includes a component on deinstitutionalisation, this obligation must be interpreted in line with Article 19 of the CRPD. Where a member state fails to fulfil this requirement by failing to develop a deinstitutionalisation plan with a clear timeline and concrete benchmarks, the Commission may suspend payments under the ESIFs.²⁸ Providing guidance to national authorities to clarify how Article 19 of the CRPD applies to the satisfaction of the *ex ante* conditionalities, would constitute an appropriate measure for the implementation of Article 19 of the CRPD. To make the *ex ante* conditionalities effective as a means of implementing Article 19 of the CRPD, the Commission will need to assess compliance by member states with the conditionalities in light of Article 19 of the CRPD, and take corrective measures when member states fall short.

A further measure required by the ESIFs that could be considered as appropriate to implement Article 19 of the CRPD is the inclusion of ‘partners’ in the process of elaborating the PA and the OPs. Article 5(1)(c) of the CPR obliges the member states to ‘organise a partnership’ with regional and local authorities, which should include:

‘relevant bodies representing civil society, including... non-governmental organisations, and bodies responsible for promoting social inclusion... and non-discrimination.’²⁹

Articles 5 of the CPR and 7 and 8 of the Code of Conduct on partnership (CoC) require national authorities to involve the partners in the preparation of the PAs and the OPs. According to the CoC, national authorities must identify ‘the most representative of the relevant stakeholders... taking into consideration their competence, capacity to participate actively and appropriate level of representation.’

25. Articles 30 and 96 of the CPR.

26. Annex XI of the CPR. It would appear that the Commission expects member states to have a national deinstitutionalization strategy in place as part of its EU law obligations: ‘Targeted investments in existing institutions can be justified in exceptional cases where urgent and life-threatening risks to residents linked to poor material conditions need to be addressed, but only as transitional measures within the context of a de-institutionalisation strategy.’ Initial report of States parties due in 2012, European Union, UN Doc CRPD/C/EU/1, 3 December 2014, para. 99.

27. CRPD Committee, Concluding Observations on the initial report of Belgium, UN Doc CRPD/C/BEL/CO/1, 28 October 2014, para. 33; CRPD Committee, Concluding Observations on the initial report of Croatia, UN Doc CRPD/C/HRV/CO/1, 15 May 2015, paras. 29–30; CRPD Committee, Concluding Observations on the initial report of the Czech Republic, UN Doc CRPD/C/CZE/CO/1, 15 May 2015, paras. 38–40. As noted, this obligation is subject to immediate, rather than progressive, implementation.

28. Article 142(1)(e) of the CPR.

29. This is repeated in Articles 3(1)(c) and 4(1)(c) of the Code of conduct on partnership (CoC).

Research reveals a mixed picture of involvement of civil society organisations across the European Union. Those member states that have ensured adequate levels of participation for civil society organisations with expertise in deinstitutionalisation have tended to produce PAs and OPs that are close to meeting the requirements of Article 19 of the CRPD. As such, inclusion of relevant partners can be considered to be appropriate. However, the effectiveness of this measure is limited because many member states have failed to include these organisations, which seems to have contributed to problematic PAs and OPs.³⁰

Violation of the partnership principle or of the CoC cannot constitute an ‘irregularity leading to a financial correction’.³¹ In the absence of express wording to the contrary in the CPR, presumably violation of the CoC could lead, however, to interruption or suspension of funds, or infringement proceedings. Given that Article 4(3) of the CRPD requires the involvement of organisations representing persons with disabilities in the elaboration of measures to implement the CRPD, failure of the member states to adequately involve these bodies amounts to a violation of EU law.³² Although the Commission may not use its powers to make a financial correction, the CPR does not prevent it from treating the failure to interpret the CoC consistently with the CRPD as grounds for taking other corrective measures.

II.C. The Management and Control System

Once the Commission has agreed to the broader framework for the ESIFs through the PAs and the OPs, the ESIFs regulations largely leave implementation, monitoring, and evaluation to the member states, with the Commission exercising a secondary role. Member states are obliged to establish a management and control system that includes: a managing authority (MA), a certifying authority (CA) and an audit authority (AA). The MA is responsible for, among other things, issuing calls for proposals, drawing up appropriate selection criteria for projects and ensuring that these projects comply with the ‘applicable law’.³³ In exercising these functions, the MA is to be supported by the monitoring committee (MC, discussed further below). The CA’s responsibilities include making applications for payment from the Commission, based on requests it receives from the MA. The CA is obliged to verify that the projects in question comply with the applicable law.³⁴ Both the MA and the CA are also obliged to establish pro-

30. Opening doors for Europe’s Children, ‘An assessment of the attention for deinstitutionalisation for children and the involvement of children’s organisations in the ESIF implementation process across eight EU Member States’, 2015, available on: <http://www.openingdoors.eu/wp-content/uploads/2015/03/Opening-Doors-Esif-Report-lowres-.pdf>; Bankwatch, ‘Partners’ involvement during EU funds programming: left out on crucial questions’, 2014, available on: <http://bankwatch.org/sites/default/files/briefing-partnership-implementation-19Dec2014.pdf>; ENIL–ECCL, ‘Briefing on the use of European Structural and Investment Funds to support the transition from institutional care to community living for people with disabilities’, 2015, available on: http://www.enil.eu/wp-content/uploads/2015/05/ENILECCL_Briefing_SF_300415.pdf.

31. Article 5(5) of the CPR.

32. Article 4(3) of the CRPD states: ‘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.’

33. Articles 125(3) and 125(4) of the CPR.

34. Article 126 of the CPR.

cedures for examining complaints relating to the ESIFs.³⁵ The AA's role includes an initial check that the MA and the CA have been established in line with the ESIFs regulations, and subsequent audits to ensure that the management and certifying authorities are working properly.³⁶

As can be seen, the tasks of selecting projects and ensuring that the applicable law is complied with primarily reside at national level. Broadly speaking, the safeguards capable of ensuring compliance with the CRPD are *ex ante* and *ex post*: the MA should draw up and apply appropriate calls for proposals and selection criteria and should not approve projects that breach the applicable law, while the CA should verify that projects for which it requests reimbursement from the Commission do not breach the applicable law, and both the MA and the CA should have complaints procedures available for individuals who wish to contest, among other things, that the applicable law has been breached. The AA's role is to verify that the system as a whole works properly.

National management and control mechanisms have the potential to ensure proper implementation of Article 19 of the CRPD, and can therefore be considered an appropriate measure. However, unless the calls for proposals and selection criteria chosen by the MA reflect both the negative and positive obligations imposed by Article 19 of the CRPD, and unless the MA, the CA, and the AA are aware that the applicable law should include the CRPD, national management and control mechanisms will not be 'effective' in practice. It is unlikely that these national bodies are adequately aware of the relevance of the CRPD to their work. It is a well-recognised problem that public officials are largely unaware of how European and international rules protecting fundamental rights apply across European, national, regional, and local policy-making.³⁷ Furthermore, all EU member states reviewed by the CRPD Committee have been subject to strong criticism over their implementation of Article 19 of the CRPD, which suggests that national decision-makers are failing to pay due attention to the CRPD.³⁸

35. Article 74(3) of the CPR, and Points 2.2.3.16 and 3.2.2.4 of Annex III Implementing Regulation 1011/2014.

36. Articles 124 and 127 of the CPR.

37. Council of Europe Commissioner for Human Rights, Recommendation on systematic work for implementing human rights at the national level, CommDH (2009) 3, 18 February 2009; European Union Agency for Fundamental Rights, 'Joining up fundamental rights, Toolkit for local, regional and national public officials', available on: <http://fra.europa.eu/en/joinedup/home>; on how this problem affects the European Union see: Butler, Israel, 'Ensuring compliance with the Charter of Fundamental Rights in legislative drafting: the practice of the European Commission', 37 *European Law Review* (2012), 397.

38. CRPD Committee, Concluding Observations on the initial report of Austria, UN Doc CRPD/C/AUT/CO/1, 30 September 2013, paras. 29–31, 36; CRPD Committee, Concluding Observations on the initial report of Belgium, UN Doc CRPD/C/BEL/CO/1, 28 October 2014, paras. 25–26, 32–33; CRPD Committee, Concluding Observations on the initial report of Croatia, UN Doc CRPD/C/HRV/CO/1, 15 May 2015, paras. 19–20; CRPD Committee, Concluding Observations on the initial report of the Czech Republic, UN Doc CRPD/C/CZE/CO/1, paras. 26–27, 38–39; CRPD Committee, Concluding Observations on the initial report of Denmark, UN Doc CRPD/C/DNK/CO/1, 30 October 2014, paras. 36–37 and 42–43; CRPD Committee, Concluding Observations on the initial report of the European Union, UN Doc CRPD/C/EU/CO/1, 4 September 2015, paras. 50–51; CRPD Committee, Concluding Observations on the initial report of Germany, UN Doc CRPD/C/DEU/CO/1, 13 May 2015, paras. 29–30 and 41–42; CRPD Committee, Concluding Observations on the initial periodic report of Hungary, UN Doc CRPD/C/HUN/CO/1, 22 October 2012, paras. 27–28, 33–34; CRPD Committee, Consideration of reports submitted by States parties under Article 35 of the Convention, Spain, UN Doc CRPD/C/ESP/CO/1, 19 October 2011, paras. 35–36, 39–40; CRPD Committee, Concluding Observations on the initial report of Sweden, UN Doc CRPD/C/SWE/CO/1, 12 May 2014, 35–36, 43–44.

The Commission could help to make national management and control mechanisms an effective means of implementing Article 19 of the CRPD by providing guidance and training to staff of the MAs, the CAs, and the AAs. The Commission has stated that it:

*'will formally write to Member States to remind them of their obligations as regard the respect of the Charter of Fundamental Rights when Member States implement EU law. The Commission will also issue a guidance document addressed to the Member States as regards the respect of the Charter of Fundamental Rights when Member States implement EU law in the context of the disbursement of ESI funds and provide training in the Member States on the Charter.'*³⁹

Issuing guidance and offering training to the member states could be considered to constitute an effective measure to implement the CRPD, depending on the content.⁴⁰ Guidance and training given to those involved in selecting projects should make clear that calls for proposals and selection criteria for projects under the relevant OP are formulated in a way that takes due account of national authorities' obligations to ensure compliance with the CRPD. A first problem is that the Commission only makes mention of its intention to issue guidance concerning the CFR. As discussed in the previous part, EU law does not merely impose an obligation to interpret the CFR consistently with the CRPD. The CRPD also forms an integral part of the EU's internal legal order and has primacy over secondary legislation. This means that the ESIFs must be implemented in a manner that is consistent with the CRPD's obligations, similarly to the CFR.

Accordingly, the Commission's guidance to national authorities should inform them of the following obligations. First, that calls for proposals and selection criteria elaborated by the MAs should be such as to prevent the selection of projects that perpetuate institutionalisation (Article 19 of the CRPD's negative obligation). Second, selection criteria and calls for proposals should take due account of Article 19 of the CRPD's positive obligations. As noted, this does not mean that the Commission can impose a given project on the member states. However, the duty of 'sincere cooperation' does require the Commission and member states to work in good faith towards an agreement that complies with EU law.⁴¹ As such the MAs should take the CRPD's positive obligations into consideration during the decision-making process.⁴² Thus, guidance issued by the Commission should make clear that there is a tangible obliga-

39. European Commission, Comments of the Commission on the European Ombudsman's own-initiative inquiry – Ref. OI/8/2014/AN, available on: <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/58451/html.bookmark>, 8–9.

40. Article 58 of the CPR allows the Commission to offer technical assistance to support the implementation of the ESIFs. For example, that Commission has stated that 'Member States could use ESI Funds to support technical assistance including arrangements for complaints resolution.' European Commission, Comments of the Commission on the European Ombudsman's own-initiative inquiry – Ref. OI/8/2014/AN, available on: <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/58451/html.bookmark>, 8.

41. CJEU, Case C-507/08 *Commission v. Slovak Republic*, 22 December 2010, para. 44. Similarly, CJEU, Case C-411/12 *Commission v. Italy*, 12 December 2013, para. 38; CJEU, Case C-344/12 *Commission v. Italy*, 17 October 2013, para. 50; CJEU, Case C-613/11 *Commission v. Italy*, 21 March 2013, para. 38.

42. See CJEU, Case C-53/10 *Land Hessen*, 15 September 2011 concerning the interpretation of Article 12(1) Directive 96/82 in light of the duty of 'sincere cooperation': 'Member States shall ensure that their land-use and/or other relevant policies and the procedures for implementing those policies take account of the need, in the long term, to maintain appropriate distances between establishments covered by this Directive.' Council Directive 96/82 on the control of major-accident hazards involving dangerous substances (OJ L 10, 14.1.1997, 13), as amended by Directive 2003/105 (OJ L 345, 31.12.2003, 97).

tion under EU law on the MAs to consider Article 19's positive obligations when formulating calls for proposals and elaborating selection criteria under the relevant OP.⁴³ If the Commission has ensured that a proper deinstitutionalisation plan (with a timeline and benchmarks) is in place as part of satisfaction by national authorities of the *ex ante* conditionalities, then failure to implement Article 19 of the CRPD's positive obligations by funding community-based services would mean that the member state would probably be failing to meet its goals under the OP, which might subsequently give rise to corrective measures (discussed below).

Furthermore, Commission guidance should make it clear to the MAs and the CAs that the CRPD must form part of their understanding of the term 'applicable law'. This would reduce the risk of problematic projects being selected (Article 19 of the CRPD's negative obligation), and increase the likelihood of projects that progressively implement Article 19 of the CRPD (the latter's positive obligations) are selected.

In addition to offering guidance to the MAs and the CAs on selection criteria and their understanding of the applicable law, the Commission should offer guidance to member states in relation to the complaints procedures established by these bodies.

As discussed in Part One, the CJEU has found that the CRPD as a whole cannot have direct effect. This finding removes a potentially important appropriate and effective measure for giving effect to the CRPD from the range of measures available to the European Union. As discussed above, although there is no absolute obligation on a party to the CRPD to make judicial remedies available for all rights in the treaty, where judicial remedies are not available, individuals should be able to access administrative remedies.

The Commission could mitigate the impact of the fact that Article 19 of the CRPD cannot have direct effect by making it clear to national authorities that complaints-handling procedures must interpret the CFR consistently with the CRPD, in line with the CJEU's case law. However, this is more complicated in relation to the right to independent living, because the CJEU has found that Article 26 of the CFR is not capable of having direct effect by itself. It is difficult to envisage that the Commission would address this gap in protection by instructing the MAs, the CAs, and ultimately national courts, to allow individuals to bring claims based directly on the CRPD, given that this would run contrary to the CJEU's findings on direct effect.⁴⁴ Nevertheless, the Commission could issue two points of guidance to the MAs and the CAs in this regard.

First, that elements of Articles 26 of the CFR and 19 of the CRPD (taken together with Article 14 of the CRPD on liberty and security) can be read into other directly effective rights; namely, the right to liberty (Article 6 of the CFR) and the prohibition on discrimination on grounds of disability (Article 21 of the

43. Committee on Economic Social and Cultural Rights, General Comment 9, The domestic application of the Covenant, para. 9, in: OHCHR, *Compilation of General Comments Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.9 (Vol. I) 27 May 2008.

44. Though CJEU case law does suggest that national courts should interpret their rules on admissibility and standing so as to allow individuals to bring cases to enforce rights of EU law originating in an international agreement which are not capable of having direct effect in order to guarantee individuals the right to effective enforcement of their EU-law derived rights. See: CJEU, Case C-240/09 *Lesoochránárske Zoskupenie*, 8 March 2011.

CFR), as discussed in Part One. This would allow individuals to invoke directly effective provisions of the CFR before complaints mechanisms to prevent the approval of projects that perpetuate institutionalisation (Article 19 of the CRPD's negative obligation).

Second, that even if Articles 26 and 19 of the CRPD cannot be invoked directly, the obligation on member states to offer an effective remedy to individuals to enforce the rights they derive from EU law does impose an obligation on the MA and the CA complaints mechanisms to verify that consideration of the member states' obligations under the CRPD and the CFR have formed part of the decision-making process in selecting projects and issuing calls for project proposals.⁴⁵ This would allow complaints mechanisms to verify that member states are implementing their duty of 'sincere cooperation' with the European Union by not blocking implementation of their progressive obligations under the CRPD. In this way, the Commission can ensure that member states are at least giving consideration to using the ESIFs to fulfil their positive obligations under Article 19 of the CRPD.

In addition to the guidance and training that the Commission intends to offer regarding how the ESIFs must be executed in compliance with the CFR, the Commission, together with civil society organisations, has also developed specific guidance for its own staff and decision-makers at the national level on how to implement the transition from institutional to community-based care.⁴⁶ Depending on how well the Commission promotes this guidance, it could be considered both an appropriate and effective measure to implement Article 19 of the CRPD.

Finally, a further appropriate measure to ensure compliance with Article 19 of the CRPD is the involvement of the MC in the elaboration of selection criteria for projects. The tasks of the MC include examination and approval of 'the methodology and criteria used for selection of operations'.⁴⁷ MC membership is to include civil society organisations (the 'partners', discussed above), as well as a Commission representative who participates in an advisory capacity.⁴⁸

Participation of civil society organisations in the MC can be considered an appropriate measure to implement the CRPD. However, it is unlikely to be an effective step. As noted, many member states failed to include relevant organisations with expertise in the creation of the PA and the OPs. Even where organisations with the correct expertise are involved, there is no obligation to give all MC members a right to vote, which limits their ability to influence decision-making.⁴⁹ There is evidence to suggest that when

45. 'Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decisionmaking.' Committee on Economic Social and Cultural Rights, General Comment 9, The domestic application of the Covenant, para. 9, in: OHCHR, 'Compilation of General Comments Adopted by Human Rights Treaty Bodies', UN Doc HRI/GEN/1/Rev.9 (Vol. I), 27 May 2008.

46. European expert group on the transition from institutional to community based care, 'Common European guidelines on the transition from institutional to community based care', and 'Toolkit on the use of European Union funds for the transition from institutional to community based care', 2012, available on: <http://deinstitutionalisationguide.eu>.

47. Article 110(2)(a) of the CPR.

48. Articles 5(2), 48(1) and (3) of the CPR.

49. Article 38 of the CPR.

civil society organisations have been present in the MCs under the previous programming period, they were included as a mere formality and their views were not taken into account in decision-making.⁵⁰

Commission participation in deciding the selection criteria is an appropriate and potentially effective measure to give effect to the CRPD. The Commission has taken steps to ensure that desk officers are sufficiently aware of the kinds of projects that should be funded under Article 19 of the CRPD.⁵¹ At the same time, this is not a guarantee that the MA will not select problematic projects further along the decision-making process.⁵² As a preventive measure, it is also limited by the fact that the Commission member is present in an advisory capacity only. Finally, it also requires that the desk officer be sufficiently well trained on deinstitutionalisation and be pro-active in making the correct interventions and queries during meetings. Accordingly, participation by the Commission and the partners in the MC needs to be complemented by proper monitoring and corrective measures so that the Commission can intervene when their participation does not manage to prevent the selection of problematic projects.

II.D. Monitoring and Evaluation Mechanisms

Monitoring of member states occurs in relation to two aspects of the ESIFs: first, monitoring and evaluation to check that national structures and procedures and procedures in place are adequate; second, monitoring and evaluation of whether the the PA and the OPs are achieving their objectives during the implementation of the ESIFs. This section will consider the two reporting systems in turn.

If the national management and control systems do not meet the standards required by the European Union, are not functioning properly in practice, or are failing to make adequate progress towards implementing the OPs, the Commission has the option to apply financial corrections or interrupt or suspend payments, and ultimately to open infringement proceedings. The application of financial corrections means the Commission will effectively remove the money that it would have given to the member state from its balance of payments. This may result in requesting repayment from the member state or subtracting the sum from the payments made to the member state to reflect the fact that the project is not eligible for EU funding. A financial correction may apply to all or part of an OP and is used in relation to funds that have already been paid to the member state.⁵³ An interruption of payments means that the Commission will cease making payments altogether for up to nine months but only in relation to the part of the expenditure covered by a payment claim that is problematic.⁵⁴ A suspension of payments

50. ECCL, 'Wasted time, wasted money, wasted lives, a wasted opportunity?', available on: <https://www.opensociety-foundations.org/sites/default/files/wasted-opportunity-20100325.pdf>.

51. Though, as noted, elements of this guidance are considered problematic. European Commission, Draft thematic guidance fiche for desk officers, Transition from institutional to community-based care (de-institutionalisation – DI) Version 2, 27 January 2014, available on: http://ec.europa.eu/regional_policy/sources/docgener/informat/2014/guidance_deinstitutionalisation.pdf.

52. For example, due to a lack of awareness of what constitutes an 'institution', maladministration or corruption.

53. Articles 85 and 144 of the CPR.

54. Article 83 of the CPR.

means that payments relating to an entire priority area or the OP can be halted until the problem in question has been resolved.⁵⁵

To trigger a financial correction, interruption or suspension of payment, certain criteria need to be met. Broadly speaking, these measures can be taken in two situations. First, if there is a serious failing in the national systems for managing and monitoring the use of the ESIFs. These national systems are referred to as ‘management and control’ systems. Second, despite a generally properly functioning system, if EU money has been, or will be, used improperly due to the choice or method of choosing the given project(s).

According to Article 144 of the CPR, a financial correction can be applied where ‘there is a serious deficiency in the effective functioning of the management and control system of an operational programme’, the member state has itself failed to make the necessary correction, or the ‘expenditure contained in a payment application is irregular and has not been corrected by the member state’. Article 85 of the CPR, in addition, states that a financial correction shall be made where there has been a breach of the applicable law which ‘has affected the selection of an operation by the body responsible for support from’ EU funds, and has affected the amount of expenditure declared for reimbursement’ by the European Union.

According to Article 83 of the CPR, to trigger an interruption, there must be ‘clear evidence to suggest a significant deficiency in the function of the management and control system’ provided by a national or EU audit body, or the Commission must receive and verify information showing that ‘expenditure in a request for payment is linked to an irregularity having serious financial consequences’.⁵⁶

According to Article 142, the Commission may suspend payments if ‘there is a serious deficiency in the effective functioning of the management and control system of the operational programme, which has put at risk the Union contribution to the operational programme’, there is an irregularity with ‘serious financial consequences’, ‘there is a serious deficiency in the quality and reliability of the monitoring system’, or ‘there is evidence resulting from the performance review for a priority that there has been a serious failure in achieving that priority’s milestones relating to financial and output indicators and key implementation steps’. A suspension can also result where the problem that gave rise to an interruption has not been resolved by the member state.

Finally, the Commission has open to it the option of using infringement proceedings against the member states when the latter breach EU law. Such a situation might arise where financial correction, interruption or suspension of funds had not succeeded in correcting the behaviour of the member state. According to the case law of the CJEU, it is entirely within the discretion of the Commission as to whether it will open infringement proceedings.⁵⁷

55. Article 142 of the CPR.

56. Article 2(36) of the CPR defines an ‘irregularity’ as ‘any breach of Union law, or of national law relating to its application, resulting from an act or omission by an economic operator involved in the implementation of the ESI Funds, which has, or would have, the effect of prejudicing the budget of the Union by charging an unjustified item of expenditure to the budget of the Union.’

57. Case 247/87 *Star Fruit*, 14 February 1989.

II.D.1. Reporting on national structures and procedures

Member states are to designate the MAs and the CAs and submit a description to the Commission setting out how the MA meets the requirements of Article 125 of the CPR, which sets out the functions and tasks of the MA.⁵⁸ This includes information about the procedures for selecting projects, verifying compliance with the applicable law and examining complaints.⁵⁹ The document is also to include information about the procedures in place allowing the CA to check that expenditure complies with the applicable law, and for examining complaints.⁶⁰

The AA is to submit an initial report and audit opinion to confirm that the MA and the CA's structure and procedures are properly in place, so that the European Union may begin to disburse funds. The AA also submits an annual control report and an audit opinion to the Commission to verify 'whether expenditure for which reimbursement has been requested from the Commission is legal and regular and whether the control systems put in place function properly'.⁶¹ The AA is required to give information on how it carried out its audit, as well as the results of the audit, including whether the MA and the CA comply with the requirement to have procedures in place to ensure compliance with the applicable law and to examine complaints.⁶² Subsequent annual control reports and audit opinions should report on the scope and number of audits conducted, the methodologies used (statistical and non-statistical sampling) and the main results, as well as confirmation that any changes to the management and control systems continue to comply with the CPR.⁶³

Adequacy of reporting

On the basis of the documentation it receives from the national authorities on the designation of the MA and the CA as well as the audit control reports and opinions, the Commission could ascertain whether member states have adequate national procedures and structures in place.⁶⁴ This layer of monitoring of the national management and control mechanisms can be considered an 'appropriate' measure to implement Article 19 of the CRPD. This is because it could allow the Commission to verify that the MA, the CA, and the AA are implementing their obligations under Article 19 of the CRPD by formulating

58. Article 123 and Annex XIII of the CPR and Annex III, Commission Implementing Regulation 1011/2014 (OJ L 286, 30.9.2014, 1).

59. Points 2.2.3.4, 2.2.3.6, 2.2.3.16, Annex III, Commission Implementing Regulation 1011/2014.

60. Points 3.2.2.3, 3.2.2.4, Annex III, Commission Implementing Regulation 1011/2014.

61. Article 127 of the CPR and Article 59(5) Financial Regulation. See also Articles 27-29 of Commission Delegated Regulation 480/2014 supplementing the CPR (OJ L 138 13.5.2014, 5).

62. Annexes IV and V, Commission Implementing Regulation 1011/2014.

63. Annexes VIII and IX, Commission Implementing Regulation 2015/207 (OJ L 38 13.2.2015, 1).

64. Article 71(1) of the CPR: 'The Commission shall satisfy itself, on the basis of available information, including information on the designation of bodies responsible for the management and control, the documents provided each year, in accordance with Article 59(5) of the Financial Regulation, by those designated bodies, control reports, annual implementation reports and audits carried out by national and Union bodies, that the Member States have set up management and control systems that comply with this Regulation and the Fund-specific rules and that those systems function effectively during the implementation of programmes.'

adequate selection criteria and applying the correct applicable law when checking the legality of projects and dealing with complaints. However, this monitoring process cannot be considered ‘effective’ unless the information received by the Commission is sufficiently detailed so as to allow it to make this determination. The Commission has supplied the member states with model (template) documents for the MA, the CA and the AA to complete, but it is not clear from these documents that the Commission will receive sufficiently detailed information.⁶⁵ For example, the relevant guidance documents give no explanation of the term ‘applicable law’, nor do they specify that project selection criteria should comply with the CRPD.⁶⁶

Thus, the Commission could take several measures to ensure that national management and control mechanisms give effect to Article 19 of the CRPD. First, as already discussed, if the Commission offers correct guidance and training to national authorities, these are more likely to adopt the correct procedures. Second, the Commission could ensure that it is able to verify that national management and control mechanisms are capable of implementing the ESIFs in conformity with Article 19 of the CRPD by requiring more detailed information. It could secure adequate information by modifying the reporting templates it has adopted to allow for greater detail. It could also support civil society organisations to gather information as it does in the field of Roma inclusion.⁶⁷ The Commission could follow up on concerns raised by civil society reports with its own audits and evaluations of the management and control mechanisms.⁶⁸

The Commission’s willingness to use corrective measures

Monitoring by itself cannot be considered to be an effective means of implementing Article 19 of the CRPD unless this can be followed up by corrective measures. To determine whether the Commission’s corrective measures are effective to implement the EU’s obligations under the CRPD it has to be determined when the Commission will be prepared to use these powers. The Commission has indicated that deficiencies with regard to the system in place at the national level could trigger use of its corrective powers. This is in line with the recommendations issued to the European Union by the CRPD Committee that the European Union should ‘suspend, withdraw and recover payments if the obligation to respect fundamental rights is breached.’⁶⁹ The Commission has stated that the member states must have *ex ante* and *ex post* checks in place to ensure compliance with the CFR. First, if the member state fails to ensure that the CFR is properly applied in the operation of the ESIFs:

65. Annex XIII of the CPR, Annexes III, IV and V, Commission Implementing Regulation 1011/2014, Annexes VIII and IX, Commission Implementing Regulation 2015/207.

66. In Commission Implementing Regulations 1011/2014 and 2015/207, Guidance for the Commission and Member States on a common methodology for the assessment of management and control systems in the Member States, EGESIF_14-0010-final, 18 December 2014, Annex I, Guidance for Member States on Designation Procedure, ECESIF_14-0013-final, 18 December 2014.

67. Commission Financing Decision, 10 September 2014, C(2014) 6309 provides funding for civil society organisations to monitor implementation of the National Roma Integration Strategies via a pilot project.

68. Articles 56(4), 57(1) and 75 of the CPR.

69. CRPD Committee, Concluding observations on the initial report of the European Union, UN Doc CRPD/C/EU/CO/1, 4 September 2015, para. 51.

*‘Without prejudice of infringement proceedings under Article 258 TFEU, should a Member State not ensure proper application of the Charter when taking acts or measures in the course of implementation of EU law this would constitute an irregularity or even a serious deficiency in the effective functioning of the management and control system of operational programmes which may trigger a suspension of payments or a financial correction’.*⁷⁰

Second, if the member state fails to ensure that it has an adequate complaints procedure in place:

*‘The failure of a Member State to establish a complaints handling procedure could constitute a serious deficiency which would provide the basis for suspension of payments’.*⁷¹

In principle, this shows that if member states have a system in place that would allow projects to be selected and/or implemented that fail to respect the CFR, then the Commission will take action to correct this. However, in the statements quoted above, the Commission only makes reference to the CFR, which is potentially problematic, given that the CRPD contains a much higher level of detail on the rights of persons with disabilities, particularly when comparing Article 19 of the CRPD to Article 26 of the CFR. The Commission should also be prepared to take corrective measures to ensure proper application of the CRPD by national management and control systems.

II.D.2. Reporting on implementation of the PA and OPs

By ensuring that properly functioning mechanisms are in place the Commission will reduce the risk that national authorities select problematic projects. But to eliminate the risk to the greatest extent possible, the Commission will also need to have sufficient information at its disposal to ensure that national authorities are not, in practice, selecting problematic projects during the course of implementing the ESIFs.

There are reporting requirements in place under which the member state must inform the Commission of progress in implementing the ESIFs. The MA is to submit an annual implementation report to the Commission relating to each OP, which ‘shall set out key information on implementation of the programme and its priorities’.⁷² This ‘key information’ should be based on ‘financial data, common and programme-specific indicators and quantified target values’, as well as ‘milestones’.⁷³ Before the report is finalised it is examined and approved by the MC, which, as noted, is to include civil society organisations among its membership.⁷⁴ Member states are to follow the report up with an annual review meeting with

70. European Commission, Comments of the Commission on the European Ombudsman’s own-initiative inquiry – Ref. OI/8/2014/AN, available on: <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/58451/html.bookmark>, 7. See also Article 30 Commission Delegated Regulation 480/2014.

71. European Commission, Comments of the Commission on the European Ombudsman’s own-initiative inquiry – Ref. OI/8/2014/AN, available on: <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/58451/html.bookmark>, 8.

72. Article 50(2) of the CPR.

73. Article 50(2) of the CPR.

74. Article 110(2) of the CPR.

the Commission, following which the Commission can issue comments ‘concerning issues which significantly affect the implementation of the programme’, and may require the member state to respond to within three months.⁷⁵

Adequacy of reporting

The Commission has issued guidance to desk officers to assist them in determining which types of projects, in the context of deinstitutionalisation, should and should not be funded.⁷⁶ This guidance (to the extent that it complies with the CRPD),⁷⁷ together with guidance and training of Commission officials could equip Commission staff with sufficient awareness to spot problematic projects.⁷⁸ However, the Commission cannot take action unless it knows there is a problem. The information submitted to the Commission in the annual implementation reports, as well as the depth of discussions between the Commission and national representatives is not detailed enough to allow analysis of individual projects (unless these projects are specifically raised for discussion during the annual meeting). Neither can the MC be expected to pick out problematic projects when it examines the annual implementation reports before they are approved. Article 49 of the CPR only requires the MC to have regard to ‘financial data, common and programme-specific indicators... and progress towards quantified target values, and ... milestones’. This suggests that the MC’s role is more geared towards gaining an overview of the OP, rather than monitoring in detail by examining projects that have been selected.

Research suggests that in the past, the MCs have focussed on technical and financial questions, rather than substantive issues.⁷⁹ Similarly, informal consultation by the author with Commission officials and statements from civil society organisations confirm that annual implementation reports and annual meetings tend to present an abstract picture, which at most might give the numbers of persons with dis-

75. Article 51 of the CPR. The Commission notes that this as an opportunity to correct problematic national practices, see: European Commission, Comments of the Commission on the European Ombudsman’s own-initiative inquiry – Ref. OI/8/2014/AN, available on: <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/58451/html.bookmark>, 8.

76. Draft thematic guidance fiche for desk officers, Transition from institutional to community-based care (de-institutionalisation - DI) Version 2, 27 January 2014, available on: http://ec.europa.eu/regional_policy/sources/docgener/informat/2014/guidance_deinstitutionalisation.pdf.

77. ENIL-ECCL, ‘Briefing on the use of European Structural and Investment Funds to support the transition from institutional care to community living for people with disabilities’, 2015, available on: http://www.enil.eu/wp-content/uploads/2015/05/ENILECCL_Briefing_SF_300415.pdf, 2: ‘According to the Draft guidance, such investments can still be made if “the persons concerned, given the seriousness of their condition, require constant medical supervision”. This goes against Article 19 of the UN Convention on the Rights of Persons with Disabilities (CRPD), which provides for the right to live independently and to be included in the community for ALL people with disabilities.’

78. European expert group on the transition from institutional to community based care, ‘Common European guidelines on the transition from institutional to community based care’, and ‘Toolkit on the use of European Union funds for the transition from institutional to community based care’, 2012, available on: <http://deinstitutionalisationguide.eu>.

79. ECCL, ‘Wasted time, wasted money, wasted lives, a wasted opportunity?’, available on: <https://www.opensociety-foundations.org/sites/default/files/wasted-opportunity-20100325.pdf>.

abilities as a whole who have been the targets of EU spending under the relevant OP.⁸⁰ This would not enable the Commission to verify whether projects in breach of the CRPD have been selected.⁸¹

For monitoring to be considered effective (which is a pre-requisite for effective enforcement), it should be such as to ensure that the Commission is made aware of problematic projects. To secure more information from national authorities, the Commission could require member states to provide more detail in their annual implementation reports, though this could become extremely onerous for both parties, and defeat the purpose of the process, which appears to be to achieve an overview of implementation. Alternatively, the Commission could encourage member states to conduct evaluations of deinstitutionalisation projects as a means of checking compliance with Article 19 of the CRPD, though for national evaluation to constitute an effective measure, the Commission would need to be convinced that member states have set appropriate parameters for the analysis and are sufficiently impartial.⁸²

However, if the Commission relies principally on information provided by national authorities, monitoring is unlikely to be effective. It is naïve to expect member states to be adequately objective or entirely forthcoming with information that is unfavourable to their own position.⁸³

One option is for the Commission to carry out its own evaluations of projects selected by member states under the goal of facilitating the transition from institutional to community-based care, and/or conduct audits of projects that have been approved,⁸⁴ to examine the extent to which projects are in line with

80. See e.g., Regulation 2015/207, Annex V, ('Model for the annual and final implementation reports for the investment for growth and jobs goal'), Table 4A. Part B of Annex V does give room for more detail for the implementation reports of 2017, 2019 and the final implementation reports, including relating to measures to address groups at risk of social exclusion, including persons with disabilities (Annex V, Part B, point 14.6). However, the character limit (3500 characters) makes it impossible for this section to cover the wide range of issues listed under this section in any depth. See also EDF, 'EDF answer to OI/8/2014/AN – Cohesion Policy consultation', 13. Available on: <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/59846/html.bookmark>.

81. The progress reports on the implementation of the PA are similarly unlikely to give the Commission sufficient information to allow it to detect where problematic projects may have been approved, because the overview of implementation is even more abstract than reporting on the OPs. Article 52 CPR. The model to be used is set out in Annex I of Regulation 2015/207. Given that the report relates to the entirety of the PA, it is unlikely that there would be sufficient detail to gauge the extent to which projects labelled by member states as facilitating the transition from institutional to community-based care were genuine deinstitutionalisation projects in compliance with the CRPD. See for example, the equivalent 'strategic' reports produced under the predecessor to the CPR, under Article 29 of the General Provisions Regulation 1083/2006 (OJ L 210, 31.7.2006, 25), available on: http://ec.europa.eu/regional_policy/en/policy/how/stages-step-by-step/strategic-report/.

82. Articles 55–57 of the CPR.

83. Measures by the Commission to correct infringements of fundamental rights by the member states tend to be sparked into action by information received from private parties, including civil society organisations. See examples cited in successive Commission annual reports on the implementation of the CFR, available on: http://ec.europa.eu/justice/fundamental-rights/document/index_en.htm. The European Union has recognised the value of alternative sources of information as a means to make monitoring more effective in the area of Roma inclusion, where it supports civil society organisations to engage in 'shadow' reporting, as noted above. Similarly, the European Ombudsman and the European Parliament's Committee on Petitions rely on information given by all concerned parties when examining alleged breaches of EU law so that they can offer a balanced and accurate analysis.

84. Article 75(2) of the CPR.

Article 19 of the CRPD.⁸⁵ However, this could prove to be onerous if carried out systematically, given the Commission's relatively limited human resources.

A more sensible option would be for the Commission to make it easier for civil society organisations to monitor and report on the use of ESIFs in relation to the transition from institutional to community-based care. It could, as noted above, provide funding for monitoring activities for civil society organisations, as it has done in the field of Roma inclusion, and establish an accessible and transparent system for dealing with complaints. Without such an alternative source of information, it is difficult to see how the Commission can consider its existing monitoring activities to be effective in practice.

An accessible and transparent channel through which individuals or civil society organisations can make complaints would not only serve to improve the effectiveness of the Commission's regular monitoring activities. Arguably it is also indispensable if the Commission is to comply with its obligations under the CRPD to provide remedies for breaches of CRPD rights. Because the CJEU has determined that the CRPD as a whole cannot have direct effect, the ability of individuals to invoke the rights granted to them under the CRPD through the EU's internal legal order is severely limited.⁸⁶ As the Commission notes in its reply to the Ombudsman's own-initiative inquiry concerning cohesion policy, Article 19 of the Treaty on European Union (TEU) requires member states to provide 'remedies sufficient to ensure effective legal protection in the fields covered by EU law'. The Commission states, this 'provision requires member states to put in place judicial procedures which allow individuals to protect the rights which they derive from the Union's legal order.'⁸⁷ Were the CRPD and Article 26 of the CFR to have direct effect, then the availability of a judicial remedy to enforce one's rights under the CRPD would go some way towards fulfilling the EU's obligations under Article 4(1) of the CRPD to provide 'other appropriate measures' to give effect to the CRPD.

Given this limitation, to fulfil its obligations under the CRPD, the European Union will need to make some other avenue available. As discussed above, the availability of a remedy to enforce the CRPD is part of the general obligations under Article 4 of the CRPD to implement the treaty. In the absence of a judicial remedy or formal EU administrative remedy at EU level, the ability to appeal to the Commission to take binding corrective action constitutes the only available alternative measure capable of ensuring effective implementation of the CRPD.⁸⁸ The Commission is the only EU body with the power to take measures under the ESIFs to ensure that member states comply with the

85. Articles 56, 57 of the CPR.

86. It is doubtful that all the rights contained in the CRPD could be read into directive effective rights in the CFR, particularly to the extent that CRPD rights contain positive obligations.

87. European Commission, Comments of the Commission on the European Ombudsman's own-initiative inquiry – Ref. OI/8/2014/AN, available on: <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/58451/html.bookmark>, 9. Similarly, the CJEU has stated that 'the requirement for judicial review of any decision of a national authority constitutes a general principle of EU law.' CJEU, Case C-562/12 *Liivimaa Lihaveis MTÜ*, 17 September 2014, para. 75.

88. Even though infringement proceedings and other corrective action under the ESIFs by the Commission cannot be considered an 'administrative' remedy in the sense that individuals are sources of information for the Commission, rather than parties to a dispute.

CRPD.⁸⁹ Accordingly, the Commission itself will need to be responsive to complaints that national authorities have failed to ensure compliance with the CRPD and be prepared to use its powers to apply financial corrections, interrupt or suspend payments or take infringement proceedings. In light of this, the recommendation of the Ombudsman that the Commission ‘launch an online platform where civil society... could report abuses of Funds and Charter violations and submit complaints’, could go some way towards ensuring that the European Union is in compliance with its obligations to implement the CRPD.⁹⁰

The Commission’s willingness to use corrective measures

Unfortunately, it appears that the Commission is not prepared to take on the role of dealing with complaints directly. Under the previous rules governing structural funds, the Commission dealt with complaints directly when they alleged a violation of EU law.⁹¹ However, the Commission intends to change this practice. As noted, the CPR obliges member states to establish mechanisms to deal with complaints about the ESIFs.⁹² When complaints are addressed to the Commission, the CPR allows (but does not oblige) the Commission to refer these back to national authorities.⁹³ However, the Commission has stated it will only deal directly with complaints if they allege that the Commission itself has acted inconsistently with the CFR, or that EU legislation is inconsistent with the CFR:

‘The Commission would deal with complaints addressed directly to it and which cannot be transferred to Member States according to Article 74(3) [CPR]... because the complaint concerns either an act (or omission) of the Commission or Union legislation as such (which would allegedly contain provisions in breach of the Charter).’⁹⁴

All other complaints relating to the ESIFs will be referred back to national authorities to resolve:

‘[W]hen the Commission receives a complaint within the scope of these arrangements, as a general rule it will ask the Member State to deal with it.’⁹⁵

89. Although the European Parliament’s Committee on Petitions does deal with complaints relating to breaches of the CRPD by the member states, this is a political, rather than an administrative body, and cannot offer a binding administrative remedy. Further, the European Ombudsman is competent to deal with maladministration by the EU institutions only, not the member states, and does not have power to deliver binding remedies.

90. Decision of the European Ombudsman closing her own-initiative inquiry OI/8/2014/AN concerning the European Commission, 11 May 2015, available on: <http://www.ombudsman.europa.eu/en/cases/decision.faces/en/59836/html.bookmark>.

91. European Commission, Comments of the Commission on the European Ombudsman’s own-initiative inquiry – Ref. OI/8/2014/AN, available on: <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/58451/html.bookmark>, 10.

92. Article 74(3) of the CPR.

93. Article 74(3) of the CPR.

94. European Commission, Comments of the Commission on the European Ombudsman’s own-initiative inquiry – Ref. OI/8/2014/AN, available on: <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/58451/html.bookmark>, 9.

95. European Commission, Comments of the Commission on the European Ombudsman’s own-initiative inquiry – Ref. OI/8/2014/AN, available on: <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/58451/html.bookmark>, 9.

The Commission has discretion to ask the member state to report back to it:

*‘on the follow up given to the complaint, in order for the Commission to be able to check the proper treatment of the complaints received. The Commission will in this case assess whether the Member State has handled the complaint according to the arrangements set up at national or regional level for the examination of the complaints’.*⁹⁶

According to the new approach, the Commission will apply a reduced level of scrutiny. Even if does decide to follow up with national authorities after referring a complaint back to them, it will merely verify that the procedure in place at national level has been followed, rather than checking that the complaint body actually delivered a remedy that ensured compliance with the CRPD. The Commission only foresees corrective action where there are continued failures to handle complaints properly.⁹⁷ It should be further noted that private parties wishing to complain about the selection of problematic projects might not have legal standing to take proceedings at national level. For example, a civil society organisation representing persons with disabilities, wishing to contest the selection of a project to fund the construction of an institution, may not be able to show that it is directly affected by the decision of the MA to support the project.⁹⁸ This could mean that complaints are rejected on admissibility grounds, and even though the complaint is not dealt with, the Commission will not intervene because the procedure leading to rejection of the complaint on admissibility grounds is still deemed to have been handled ‘according to the arrangements... for the examination of the complaints’.

According to this approach, an individual who wishes to make a complaint would presumably proceed before the MA and/or the CA. If the MA and/or the CA do not deliver a remedy that ensures compliance with the CRPD, the individual might attempt to take the matter to a national court. However, the national court might not be able to deliver a remedy because the CRPD does not have direct effect. The individual might then turn to the Commission for assistance, which in turn will refer the complaint back to the national mechanism. As long as the national mechanism is following the national rules in place (which is unlikely to include compliance with the CRPD unless the Commission has required and veri-

96. European Commission, Comments of the Commission on the European Ombudsman’s own-initiative inquiry – Ref. OI/8/2014/AN, available on: <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/58451/html.bookmark>, 9.

97. ‘In case of continued failure by Member States to handle complaints effectively or evidence that the system does not work properly, the Commission will ask the Member States to correct the situation, using all means available including observations in the annual review meeting between the Commission and the Member State for each programme.’ Furthermore, it appears that it will only examine the outcomes of specific complaints handled by national authorities where these feature among samples collected at random: ‘Additionally, Article 74(3) of the Regulation provides for the possibility for the Commission to ask Member States to inform the Commission of the results of their examination and allows the Commission to verify the effectiveness of the arrangements for example by assessing random samples of the results of the examinations and the time needed to finalise replies to complainants.’ European Commission, Comments of the Commission on the European Ombudsman’s own-initiative inquiry – Ref. OI/8/2014/AN, available on: <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/58451/html.bookmark>, 7–8.

98. For example a civil society organisation might complain about a decision of an MA to fund the construction of a new institutions. But rules relating to legal standing might only allow complaints to be brought by parties that are directly negatively affected by the decision.

fied this), the Commission will not intervene further on the substance of particular complaints. Rather, the Commission will only intervene where national complaints mechanisms fail to function continuously. One might ask on how many occasions the complaints bodies need to fail to apply EU law before this will be regarded as a 'continued' failure.

It is difficult to see how such an arrangement could prevent the adoption of problematic projects, given that the Commission will only intervene where there is evidence of repeated failures of a procedural nature by national complaints bodies. This interpretation of the principle of shared management allows member states to undermine the consistent application and the primacy of EU law, and deprives EU citizens of the rights granted to them by EU law.

To comply with its obligations under Article 4(1) of the CRPD, the Commission should be prepared to ensure not only that complaints are handled according to the arrangements established at national level to deal with complaints, but also that these complaints mechanisms secure compliance with the CRPD in practice. Thus, the Commission would need to be prepared to follow up on the substance of complaints. Where the national complaints mechanisms do not deliver a remedy that ensures compliance with the CRPD, the Commission would need to address those complaints directly because it is the only other body capable of ensuring compliance with EU law.

Past practice of the Commission reveals a mixed picture. The Commission's 2014 report on the application of the CFR notes that the Commission refused to disburse EU funds under the External Borders Fund when repayment was requested from it in respect of the rental costs of a detention centre for irregular migrants, because the poor conditions of detention violated the prohibition of degrading treatment and the protection of human dignity (Articles 4 and 1 of the CFR).⁹⁹ However, the Commission's practice is neither consistent nor transparent. Civil society organisations that alerted the Commission to instances of EU funds being used to build new or renovate existing institutions for persons with mental disabilities, or to build settlements that segregate Roma communities, in breach of the CFR and the CRPD, have reported that the Commission has either not taken action and/or failed to give information as to the outcome of dialogue between the Commission and national authorities.¹⁰⁰ The Commission's intention to refer all complaints back to national authorities will result in a system of monitoring that is even weaker than that in place under the previous programming period. This runs contrary to the recommendations of the CRPD to strengthen monitoring, and it is highly questionable given the Commission's failure to prevent investments being made in institutions under the previous legislation, despite complaints it received.

99. European Commission, '2014 report on the application of the EU Charter of Fundamental Rights', 2015, 8; European Court of Auditors, 'The external borders fund has fostered financial solidarity but requires better measurement of results and need to provide further EU added value', Special Report No. 15, 2014, 33.

100. ENIL-ECCL, Response by ENIL-ECCL, incorporating comments from the Open Society Mental Health Initiative, 25 February 2015, available on: <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/59845/html.bookmark>; MDAC, Response to the European Ombudsperson in relation to the own-initiative inquiry on respect for fundamental rights in the implementation of the EU cohesion policy, 14 March 2015, 6, available on: <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/59842/html.bookmark>; Open Society Foundations, Main risks of misusing EU funding in the field of Roma inclusion, 2015, available on: <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/59844/html.bookmark>.

III. Concluding Remarks

The Commission has a range of powers available to it under the ESIFs regulations to ensure that the ESIFs are implemented by the member states in compliance with Article 19 of the CRPD. These include: providing guidance and training to national authorities, monitoring implementation and taking corrective measures. These are all appropriate measures in the sense of Articles 4(1) and 19 of the CRPD, which taken as a whole, could ensure the effective implementation of Article 19 of the CRPD. However, as it stands at present, the Commission's interpretation on the use of these tools is unlikely to secure effective implementation of Article 19 of the CRPD. There are currently excessive gaps in the protection provided by these measures, due to the way the Commission interprets its powers, and this undermines their effectiveness.

In relation to guidance and training, while there is some guidance available to inform member states of how to implement the transition from institutional to community-based care, to be effective this will need to be widely distributed and absorbed across all MAs responsible for OPs in the area of social inclusion. The guidance that the Commission plans to issue to national authorities in the near future seems likely to refer only to the CFR and not the CRPD. Although the Commission's presence on the MC may help to influence the elaboration of selection criteria for projects that are in compliance with Article 19 of the CRPD, there remains a risk that projects in breach of Article 19 of the CRPD will be selected, for several reasons. First, the Commission participates only in an advisory role. Second, Commission desk officers would need to be particularly pro-active. Third, despite appropriate selection criteria, problematic projects could still be adopted further on in the process of project selection. The involvement of the partners in the MC could potentially further mitigate this risk, but this is so variable across different member states that it cannot be considered as a reliable precaution.

In relation to monitoring, even if the Commission offers guidance to the member states on the implementation of Article 19 of the CRPD, the Commission is unlikely to receive adequate information as part of the reporting procedure to indicate whether Article 19 features adequately in the formulation of selection criteria, in the interpretation of the meaning of the 'applicable law' by the MA and the CA, or in the workings of national complaints mechanisms. The Commission is also unlikely to receive information through the monitoring of implementation of the OPs provided for in the CPR of a sufficient level of detail to allow it to determine whether problematic projects have been selected. Furthermore, the Commission appears unwilling to deal directly with complaints about the implementation of the ESIFs, and in referring these complaints back to national authorities, it will only satisfy itself that national complaint mechanisms are acting according to national rules, rather than whether they have delivered a remedy that ensures compliance with Article 19 of the CRPD. In practice, this makes it impossible for the Commission to implement the recommendation of the CRPD that it take corrective action when fundamental rights are breached. This is because regular monitoring procedures under the ESIFs are incapable of informing the Commission that problematic projects have been selected. And when private parties inform the Commission of a problem through a complaint, this is referred back to the national level. The Commission only intends to take action against national authorities that are serial offenders, and even then only based on the incorrect functioning of their complaints procedures rather than their selection of problematic projects.

In relation to the use of corrective measures, while the Commission is willing to apply these where national systems do not allow for the proper application of the CFR, it does not appear to have the same intention with regard to the CRPD. Furthermore, unless adequate guidance on the CRPD is issued to national authorities, problematic projects are likely to be selected. And without adequate information about whether national monitoring and control mechanisms are ensuring compliance with Article 19 of the CRPD, the Commission will not be able to use these corrective measures. Coupled with the fact that individuals cannot use the CRPD as a cause of action before national courts or the CJEU, this leaves the European Union without an effective means of enforcing the rights protected by the CRPD, which is in breach of the general implementation obligations of Article 4(1) of the CRPD.

Based on the analysis above, the report now concludes by setting out recommendations to the Commission as to how it can use its powers to ensure compliance with Articles 4(1) and 19 of the CRPD in the implementation of the ESIFs, while respecting the limits of EU competence and the principle of shared management.

Recommendations to the European Commission

In its Concluding Observations on the European Union, the CRPD Committee recommended that the European Union ‘guide and foster deinstitutionalisation’, ‘strengthen the monitoring of the use of ESI Funds – to ensure they are being used strictly for the development of support services for persons with disabilities in local communities and not the redevelopment or expansion of institutions’, and that it ‘suspend, withdraw and recover payments if the obligation to respect fundamental rights is breached’. The measures set out below would allow the European Commission to implement these recommendations while respecting the principle of shared management in the ESIFs regulations.

Verifying the Partnership Agreements, Operational Programmes and *Ex Ante* Conditionalities

Where it has not already done so, the Commission should review Partnership Agreements (PAs) and Operational Programmes (OPs) to ensure that where they include provision for measures to facilitate the transition from institutional to community-based care, these commitments conform to the requirements of Article 19 of the CRPD. Particular attention should be taken to avoid supporting scaled down residential facilities that appear on the surface to constitute community-based services, but are in substance small institutions. The Commission should amend PAs and OPs if they do not comply with Article 19 of the CRPD.

Where it has not already done so, when verifying compliance with *ex ante* conditionalities, the Commission should ensure that measures relating to the transition from institutional to community-based care that are included by member states as part of their strategic framework on poverty reduction, contain a deinstitutionalisation plan with a clear timeline, concrete benchmarks, and an end-point for complete deinstitutionalisation that is not excessively remote.

Training and Guidance that is CRPD-compliant

Training and guidance issued to national authorities should include the following information about their obligations under the CRPD:

- The managing authority (MA) and certifying authority (CA) should ensure that selection criteria and calls for proposals comply with both negative and positive obligations contained in Article 19 of the CRPD and that the meaning of ‘applicable law’ is taken to include the CRPD.
- Complaints mechanisms established under the MA and the CA should verify compliance with both the negative and positive obligations contained in Article 19 of the CRPD.
- Although Article 19 of the CRPD is not directly enforceable, complaints mechanisms should verify compliance with the negative obligation contained in Article 19 of the CRPD (prohibiting further investment in institutions) via Articles 6 and 21 of the Charter of Fundamental Rights (CFR). With regard to Article 19 of the CRPD’s positive obligations, complaints mechanisms should verify that the MA has given due consideration to these positive obligations in its decisions over the elaboration of selection criteria and selection of projects.

Improved Monitoring

Monitoring activities by the Commission of the national management and control mechanisms and of the implementation of the ESIFs should be such as to furnish the Commission with sufficient information to determine whether project selection complies with Article 19 of the CRPD. The Commission should:

- Provide funding to civil society organisations to monitor whether the management and control systems, the selection criteria, calls for proposals, the interpretation given to the ‘applicable law’, and the selection of projects by MAs comply with Article 19 of the CRPD;
- Establish an accessible and transparent channel for individuals and civil society organisations to lodge complaints with the Commission;
- Pay particular attention to deinstitutionalisation by discussing specific projects during annual implementation meetings, and through Commission audits and evaluations of deinstitutionalisation projects, including on-site visits.

The Commission should ensure that the involvement of the partners, in particular civil society organisations with relevant expertise, in the monitoring of the implementation of the ESIFs through their participation in the monitoring committee, complies with Article 4(3) of the CRPD.

Using Corrective Powers in Response to Complaints

Where the Commission refers complaints back to national authorities, the Commission should ensure that complaints mechanisms properly apply the CRPD. The Commission should follow up complaints with regard to their substantive outcome, and not merely their procedural integrity. Whenever remedies issued by complaints mechanisms do not ensure compliance with Article 19 of the CRPD, the Commission should deal directly with these complaints and require reforms to national complaints mechanisms to prevent future recurrence.

The Commission should make a clear commitment to the effect that it will make use of its corrective powers, including infringement proceedings, where member states fail to give effect to their obligations under the CRPD as they derive from EU law, in the implementation of the ESIFs.

About the Open Society Foundations

The Open Society Foundations work to build vibrant and tolerant democracies whose governments are accountable to their citizens. Working with local communities in more than 100 countries, the Open Society Foundations support justice and human rights, freedom of expression, and access to public health and education.

The Open Society Public Health Program aims to build societies committed to inclusion, human rights, and justice, in which health-related laws, policies, and practices are evidence-based and reflect these values. The program works to advance the health and human rights of marginalized people by building the capacity of civil society leaders and organizations, and by advocating for greater accountability and transparency in health policy and practice.

