

*The commitment of the European Union to the Convention
on the Rights of Persons with Disabilities and the right to live
independently and be included in the community*

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Introduction

- The EU is the only regional organization that has ever acceded a UN human rights treaty.
- The Decision was adopted in 2009 and the Convention on the Rights of Persons with Disabilities (CRPD) **came into force in January 2011.**
- The scope of EU competence is determined in the Decision from 2009 and can be expanded. The list of competences includes **social inclusion, independent living, ESI Funds regulation.**
- The CRPD contains obligations concerning the realization of the right to independent living and community inclusion.
- The main question of the paper is: ***“How the CRPD impacts EU legislation and how EU institutions have interpreted and applied the CRPD, concerning the right to living independently and being included in the community?”***

Why is this question relevant?

Tensions between the CRPD and EU law and actions

- **Very high rates of institutionalization** of children in general and high shares of disabled children in institutions in EU Member States including the Netherlands, France and Austria (Nowak, 2019). The institutionalization of adults with disabilities is widespread, but the prevalence has not been assessed yet.
- CRPD Committee (Concluding observations, 2015) recommended the EU to.
 - **stop funding** the renovation or expansion of residential institutions;
 - **halt any new institutionalization** of disabled children and foster DI.
- CRPD Committee recommended Hungary to **reroute ESIF from the investment in institutional care to family-based care** (Inquiry report, 2020).
- **Large amount of ESIF invested in the expansion of residential institutions'** capacities for children and adults with disabilities in 2007-2013 and 2014-2020 programming periods (data are emerging for the current programming period).
- Those actions are **considered contrary to the CRPD by the CRPD Committee**, many disability scholars and some DPOs and NGOs in the EU.

CRPD and the right to independent living in the community

- Articles 5 (non-discrimination), 19 (independent living and inclusion in the community) and 23 (protection of family life) are key CRPD provisions for this analysis.
- Article 19 obligates states to **ensure the right to live in the community** for all persons with disabilities and to **ensure the provision of services and support** for independent living.
- Article 23 (5) obligation to parties to provide **care for children** primarily in an extended family or in a foster family, and where this fails **in a family setting**.
- Article 5 prohibits any form of discrimination.
- A CRPD Committee's interpretation of the CRPD stipulates that **parties shall:**
 - **ensure the right to choose** where and with whom to live and **stop all investments** into long-term residential care;
 - **ensure family-based care for children with disabilities and never long-term residential care** regardless of the size of institutions (General Comment No. 5, 2017).

Primary sources

- Primary EU law
- ESIF regulation:
 - Common Provisions regulation (2014-2020 and 2021-2027) - these periods are relevant as the CRPD entered into force in the EU in 2011.
 - ERDF, ESF and EAFRD regulation.
- European Court of Justice caselaw:
 - On the interpretation of secondary law in line with international agreements (e.g. Case C-485/20, Council of State, Belgium).
 - On the use of ESIF for residential care (Case T-613/19, Enil Brussels Office and Others V Commission).
- Complaints and responses of the European Commission (EC).
- EC Legal Service communication to DG REGIO.
- CRPD text, CRPD Committee General Comment no. 5.

Secondary sources

- European Court of Auditors report on *ex-ante* conditionalities (2017).
- CRPD Com. Concluding observations on the EU (2014), CRPD Com. inquiry report on Hungary (2020).
- Scholarly works on EU law, CRPD, rights of persons with disabilities.
- ENIL shadow report to the CRPD Committee (2020).

Methodology

- The overall approach to the problem is descriptive and critical.
- Transnational Legal Process School:
 - recognizing the plurality of stakeholders, including non-state actors such as NGOs in creating, interpreting and implementing international (and domestic/regional) law;
 - Interactions – interpretation – internalization are **“agents of internalization”** (Koch, 2017);
 - Interpretation is tantamount to law-making;
 - considering extralegal factors that influence decision-making.
- Vienna Convention on the Law of Treaties rules on treaty interpretation (art. 31 & 32) are taken as a framework for critical analysis of the European Commission’s understanding of the CRPD.

Discussion

- Several complaints were submitted to the EC (2017-2020) for the “misuse” of ESIF in several EU countries (Austria, Estonia, Bulgaria, Romania).
- The EC applied “avoidance techniques” (Mendez, 2013) basing arguments on **dubious interpretations** of the CRPD text and the General Comment no. 5 of the CRPD Committee, and insisting on a **wide margin of appreciation** of Member States.
- Arguably, the EC intended to **avoid arousing much opposition of the Member States** who benefited from ESIF.
- The rule to interpret secondary law in line with the CRPD (as far as possible) appears **futile when the ECJ has not yet interpreted the CRPD**.
- One complaint submitted to the ECJ was found inadmissible due to the lack of *locus standi*. Complainants argued that standing requirements should be interpreted differently when bringing cases in favour of disadvantaged beneficiaries. The case raised an issue of the limited **access to justice for children and adults with disabilities who are institutionalized**.
- Ex-ante conditionalities (2014-2020) were aimed at promoting the transition from institutional to community-based services **with no success or very little success**.
- Enabling conditions (2021-2027) are worded **slightly more specifically** and signal the (limited) success of DPOs advocacy and CRPD Committee’s recommendations.
- Arguably, **the impact of the CRPD in EU law is limited** and can be amplified through the advocacy of DPOs and NGOs by pushing specific CRPD interpretations and drafting new legislation in line with that interpretation.
- TLP scholarship would favor norm-internalization through **strategic litigation before domestic courts** of EU Member States.

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