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Report of the Special Rapporteur on the rights of persons with disabilities, Gerard Quinn, on his visit to the European Union

Comments by the European Union*

* The present document is being issued without formal editing.

Introduction

- Comments below are to be published in an appropriate form as an annex to the Special Rapporteur's final report to the extent that the previous comments sent to the Draft Report were not adequately addressed by the Special Rapporteur in his final report. The comments reflect certain errors of fact and errors of law affecting the Draft Report.

- The previous comments have also been shortened in order to remain within the word limit. This concerns in particular terminological errors flagged in earlier exchanges that have not been corrected, as well as explanations of the mission and role of the Legal Service of the Commission.

1. It should be noted that, in line with the functions of the Legal Service as an internal service of the Commission, notes of the Legal Service are purely internal and available only to the College and the services of the Commission, and are not intended for public dissemination and debate.

2. In paragraph 5 of the draft report, reference is made to "ongoing ambiguity over the legal status of the Convention in European Union law and policy". However, this is not correct, as there is no such ambiguity over the legal status of the Convention on the Rights of Persons with Disabilities ('CRPD' or 'the Convention') in EU law and policy. The following formulation is thus suggested: "But it is perhaps undercut somewhat by the complexity of the fact that both the Union and its Member States have competences in the fields covered by the CRPD, […]". Moreover, in the same paragraph, a "lack of consistent approach in using EU funds to advance the CRPD especially in the field of independent living" is deplored. It should be underlined that the EU structural funds are used in shared management with the Member States. It is for the Member States to select and implement operations, in compliance with the relevant EU legislation. The Commission has no possibility to require Member States to adopt a consistent approach in using EU funds to advance the CRPD, as long as the operations selected comply with the relevant Union legislation.

3. In paragraph 16, it is stated that: "The use of European Union funds constitutes an important contribution to the implementation of the Convention". This should be replaced by "The use of EU Funds may contribute significantly to the implementation of the CRPD".

4. The first sentence of paragraph 17 is incorrect, given that the Legal Service has never expressed doubts about the legal status of the CRPD in EU law, but rather a [disputed] legal interpretation of certain CRPD provisions and the status of General Comments to the CRPD under EU law.

5. As regards paragraphs 19 and 23, it is worth mentioning that the sole authentic interpreter of EU law is the Court of Justice of the EU. Its interpretation binds all the EU institutions as well as Member States. In this regard, the Legal Service reminds that the Court has held, on several occasions, that "*as is clear from the case-law of the Court, since the provisions of the UN Convention on Disabilities are subject, in their implementation or their effects, to the adoption of subsequent acts of the contracting parties, the provisions of that convention do not constitute, from the point of view of their content, unconditional and sufficiently precise conditions which allow a review of the validity of the measure of EU law in the light of the provisions of that convention*".

6. The Commission is bound by that case-law. Therefore, whatever third countries' national courts and the CRPD Committee may have held as regards the binding effect of provisions of the CRPD (i.e. paragraphs 19 and 23), the Legal Service may not make those prevail over the Court of Justice's interpretation.

7. In the same context, the Commission would like to recall that it is also settled case-law by the Court of Justice that international conventions form an integral part of EU law so

that their implementation must comply with the principle of proportionality, as a general principle of EU law[1].

8. Paragraph 18 contains an allegation that the relevant Legal Service note "asserted that the relevant regulations did not contain any explicit prohibition on institutionalization". This is an over-simplification and should be replaced by the following: "It explains that Member States can choose to co-finance infrastructures and services concerning long-stay residential institutions with ESI Funds, but that they are however required to progress in general on ensuring independent living arrangements and deinstitutionalization". In the same paragraph, the Legal Service opinion is misinterpreted in the following terms: "This seems curious as one set of key imperatives (human rights) could be made to subserve another set of policy goals". This is a misleading representation of the content of the note, which expresses no such hierarchy between rights and policy goals. The note merely explains that under EU law, Member States should aim for and promote the transition from institutional to community-based services, but that EU law does not establish a general and absolute prohibition to support long-stay residential institutions. Once it is established that EU law does not prohibit the funding of long-stay care homes, the note moves on to a different subject, namely potentially applicable thematic objectives for such funding, including supporting the shift to a carbon-neutral economy and promoting climate change adaptation. This sentence should therefore be deleted.

9. In paragraph 20, it is claimed that the Legal Service's note "correctly pointed out that the Charter of Fundamental Rights only applies to member States when they are implementing European Union law, *and it was asserted that this was not the case in the expenditure of European Union monies through the funds*" [emphasis added]. This too amounts to a misunderstanding of the content of the note. It is suggested to replace the words in italics as follows: "and it was asserted that the sheer fact that a given infrastructure has been co-financed by the Union does not in itself mean that the Member State is implementing Union law also with regard to every case of subsequent use of the infrastructure. Whether this is the case is subject to a case-by-case assessment in view of the specific circumstances of the case".

10. Furthermore, paragraph 22 contains an indication that "the Legal Service's opinion did not consider the legal effect of the overarching provision of non-discrimination in the relevant regulations – nor those set out in article 5 of the Convention". The reason why these provisions were not discussed is that they were not the subject of the note. The Legal Service's note dealt with the question whether funding of long-stay care homes would in itself run contrary to EU law, and reached the conclusion that the question whether the operation of such an establishment constitutes implementation of Union law within the meaning of that provision would have to be assessed on a case-by-case basis. An assessment on the basis of the EU Charter of Fundamental Rights is only possible if the answer to that question is in the affirmative. It is therefore more correct to write that "the Legal Opinion did not clarify the conditions under which Article 21 of the EU Charter of Fundamental Rights and Article 5 CRPD are to be applied where a case-by-case analysis demonstrates that EU law is being implemented in the case at hand".

11. In paragraph 26, it should be noted that the figure of 800,000 Union citizens who could have been denied the right to vote in European Parliament elections comes from a report from the European Economic and Social Committee. It is further stated that "the European Parliament has the right of legislative initiative and it appears that reform legislation is being proposed that would eliminate this obvious discrimination". As this formulation is used in connection to the electoral rights of persons with disabilities and the reform of the EU electoral law proposed by the European Parliament in May 2022, it should rather state that "the European Parliament has a right of legislative initiative concerning its election and it appears that reform legislation is being proposed that would address this issue".

[1] See, e.g., order of 9 November 2021, Case C-255/20, Agenzia delle dogane e dei monopoli – Ufficio delle Dogane di Gaeta v. Punto Nautica Srl, para. 33, ECLI:EU:C:2021:926.

12. Concerning paragraph 27 of the report, the Commission would like to point out that, in relation to the ratification by Member States of the Convention on the International Protection of Adults, it was never agreed that the Council Decision should include the "model declaration that States could make when ratifying the Convention on the International Protection of Adults".

This was indeed a proposal made in the context of the study commissioned by the Special Rapporteur on Disability (see footnote 18 of the report), but the Commission services never agreed to include it in the forthcoming proposal for Council Decision. However, we welcomed the clarification in the study of the complementarity in the relationship between the 2000 Hague Convention on the International Protection of Adults and the 2007 UN Convention on the Rights of Persons with Disabilities.

13. Paragraph 37 contains an interpretation of the additionality principle that is not fully correct, namely that "the funds are not to be used to substitute for the regular fiscal responsibilities of the receiving States but to stimulate innovation". The additionality principle is defined in Article 95(2) of Regulation 1303/2013 as follows for the programming period 2014-2020: "Support from the Funds shall not replace public or equivalent structural expenditure by a Member State". There is no equivalent provision in Regulation 2021/1060, which applies to the programming period 2021-2027. Accordingly, the additionality principle in no way requires CPR Funding to stimulate innovation. This sentence should therefore be deleted, in particular since it follows from paragraph 45 that the reason for the reference to the additionality principle is the invocation of the non-existent requirement for funding to be innovative.

14. Paragraph 39 contains an unclear description of so-called 'ex ante conditionalities' that applied for the 2014-2020 programming period: "So-called ex ante conditionalities were added to the regulations in 2012 to the effect that the funds could be spent to assist the transition from institutions to community-based care (although the use of the word 'care' is now somewhat outdated)". It should be noted that the explicitly expressed possibility to spend ESIF funding on transition from institutions to community-based care did not stem from the 'ex ante conditionalities', but from the introduction of three investment priorities under thematic objective 9.1 to this effect. The 'ex ante conditionality' appertaining to these thematic objectives required the Member States to have a national strategic policy framework in place that "depending on the identified needs, includes measures for the shift from institutional to community based care". As long as such a broad policy framework was in place at the time of programme adoption, the 'ex ante conditionality' was fulfilled. The sentence should therefore be replaced by "For the programming period 2014-2020, new thematic investment priorities were introduced relating specifically to transition from institutional to community-based health services. An ex-ante conditionality for access to support under this thematic objective was to have a strategic policy framework in place that, depending on the needs, included measures from the shift from institutional to community-based care".

15. Paragraph 43 stating: "From this meeting it appears that the relevant authorities in the Directorate-General for Regional and Urban Policy do not believe that segregating persons with disabilities into institutions amounts to discrimination. It is unclear how this view was arrived at, since it is strikingly at odds with the Convention. On the other hand, it was suggested that the spatial segregation of entire communities might amount to actionable discrimination – but not the segregation of persons with disabilities" seems to be misrepresented. Directorate-General for Regional and Urban Policy (DG REGIO) point was to say that DG REGIO works closely with Member States to ensure progress towards de-institutionalisation and to steer investments in this direction. Investments in institutions, while not prohibited by the applicable legal framework should therefore be limited, but may still be necessary/justified depending on the state of advancement of the MS towards de-institutionalisation. Situations in MS are not all the same but differ and the investment needs have to be adjusted. In accordance with Art. 3 (1) (d) (v) of Regulation 2021/1058, the ERDF should promote the transition from institutional to family-based and community-based care, which is what COM is doing when negotiating programmes (see also recital 24). Whether a setting is to be considered discriminatory/amounting to segregation under EU law has to be assessed on a case-by case basis.

16. Paragraph 44 refers to the note "Deinstitutionalization and financial support from the EU Budget for residential care facilities" described as 'consensus paper'. It states that the note "list[s] the conditions under which investments in residential care facilities can be envisaged on a case-by-case basis and in accordance with the requirements of the UN CRPD."

The note clearly stipulates that "[a]s a general principle, the ERDF and the ESF+ should not consider investments in residential care facilities, in accordance with the general guidance developed for the Cohesion Funds (…); such investments could **exceptionally** be considered on a case-by-case basis, provided they comply with the conditions stipulated in the note. The conditions include (among other):

- being fully in line with the requirements of the UNCRPD (including the principles of equality, freedom of choice, the right to independent living, accessibility and prohibiting all forms of segregation), reaffirmed in the Strategy for the Rights of Persons with Disabilities 2021-2030;
- the investment should form part of a broader strategy for the health and social care systems that addresses investment gaps in the family- and community-based care and aims at creating alternatives, and does not undermine the de-institutionalisation process;
- residential care facilities must respect the highest standards of human rights and fundamental freedoms, ensuring quality services;
- individual circumstances should be assessed, while taking into consideration the UNCRPD provisions on independent living.

17. In paragraph 45, it is indicated that "There is no need for a 'case-by-case' approach, since the assumption that any form of institutionalization amounts to discrimination should be controlling". The case-by-case analysis mentioned in the Legal Service's note however concerns the question whether the actions subject to criticism by the Special Rapporteur fall within the scope of implementation of EU law or not in the individual case, not the question whether institutionalisation amounts to discrimination. The same paragraph – as well as paragraph 47 - also contains an incorrect reference to the additionality principle as requiring innovation, which should be deleted.

18. In paragraph 69, it is stated that: "The European Union is assisted by its Agency for Fundamental Rights, whose main task is to provide evidence-based advice on human rights to member States when implementing European Union law". However, this description of the role of EU Fundamental Rights Agency is incomplete as the Agency also advises the EU itself.

19. In paragraph 70, reference is made to EQUINET and to the doctrine of "sincere cooperation". It follows however from Articles 4(3) and 13(2) TEU that the principle of sincere cooperation applies between the Union and the Member States and between the Union institutions. Thus, reference to the principle of sincere cooperation in relation to EQUINET appears misplaced. The sentence: "This is important since the doctrine of 'sincere cooperation' requires such bodies as an aid to figuring out what is happening on the ground" should thus be deleted.

20. Concerning segregation of persons on the basis of their disability and the reference made by the Special Rapporteur to Article 26 of the Charter, the Court of Justice held that "*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*"[2].

21. In addition to the inputs gathered in the report, the Directorate-General for European Civil Protection and Humanitarian Aid Operations (DG ECHO) would like to add elements mentioned during the visit, namely, in 2019, DG ECHO adopted an Operational Guidance on disability inclusion, has also contributed to the elaboration of the respective

[2] Judgment of 22 May 2014, Case C-356/12, *Wolfgang Glatzel v Freistaat Bayern*, para. 78, ECLI:EU:C:2014:350.

IASC Guidelines, has strengthened disaggregated data collection and uses the OECD-DAC Disability Marker.