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JOINT MEMORANDUM.

**Re: Community Living for All – The need to
provide clarity in Thematic Conditionality 10.**

Date: 16 October 2013

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Executive Summary

The EU Structural Funds are one the highest impact and most successful tools available to the European Union to express solidarity among our peoples. The Funds generate real EU added-value in processes of progressive change in recipient Member States.

A major criticism of the Funds in the past was that they were used to finance projects that failed to optimise the prospects for community living for children, persons with disabilities and older people. In some instances they were used to maintain or open new institutions instead of transitioning monies and services to the community. This was not helped by the fact that the underlying Regulations appeared permissive toward this kind of (mis)-use of taxpayers' money. This was hardly conducive to enabling people to live their lives in the community on an equal basis with others.

A major turning point in the future trajectory of the Funds is now at hand. The underlying Regulations are due for renewal and a climactic vote is expected in the European Parliament shortly. The changes will hopefully render such negative expenditure no longer acceptable and will condition the receipt of monies on initiating a transition from institutions to community-based services. This will be achieved through new ex ante conditionalities and more particularly through an important 'criterion of fulfilment' attaching to the same.

This is a highly laudable development and marks a coming of age of the Funds as an instrument that can meaningfully advance the human rights of EU citizens. We, the co-signatories, welcome this development which is both symbolic as well as highly practical in its implications. However, we feel one last effort is needed to refine, clarify and strengthen the language particularly in the relevant 'criterion of fulfilment' in order to eliminate any possible perception that the transition to community-based service is optional.

We propose alternative language below that might be studied as a basis for reflecting on how the relevant text might be strengthened. We are especially concerned with the language mandating community based services 'depending on identified needs'' as per the relevant criterion of fulfilment since it has the danger of making the relevant obligations appear contingent and subjective. Our proposed text is aimed at replacing this language and tightening up the language to make it better fit with current international legal obligations of both the EU and its Member States.

In addition or as an alternative, the draft Guidance on Ex Ante Conditionalities published by the European Commission on 20 August 2013 will need to be clarified and strengthened.¹ This document purports to provide a 'framework

¹ European Commission, 'Guidance on *Ex Ante* Conditionalities (Part II)', DG Regional and Urban Policy (20 September 2013) - http://ec.europa.eu/regional_policy/what/future/pdf/preparation/20092013_guidance_part_2.pdf (last accessed 1 October 2013).

for the assessment by the Commission of...[the] fulfilment of ex ante conditionalities. The draft contains useful guidance on the definition of institutions, community based services, deinstitutionalisation and measures for the transition institutional to community based care. The intention is good – but the language needs to be tightened to bring it more fully in line with international legal obligations of the EU and its Member States. More to the point, the key phrase ‘depending on identified needs’ is left undefined and with no clear parameters. At the very least it should be made abundantly plain that this should not be interpreted to confer a discretion on Member States that they do not actually enjoy under relevant international law.

We are fully aware of and appreciate the sterling efforts of the European Parliament thus far in the process of negotiating the new Regulations. What we propose is fully consistent with the intentions of the Parliament and is put forward in a constructive spirit in order to give better expression to those intentions. The stakes are indeed high. In particular, Europe’s commitment toward human flourishing in the community for all including children, persons with disabilities and older people on an equal basis with others is being put to the test.

1. Background & Purpose of this Memo.

The purpose of this memo is to set out why we consider the draft language on community living in the proposed EU Structural Funds Regulations can and should be improved to give better effect to the intentions of the European Parliament and thus meaningfully advance the rights of children, persons with disabilities and older people in the EU.

Based on the ordinary legislative procedure, now that the Regional Development Committee has adopted the report of its Rapporteurs on the cohesion policy legislative proposals which have emerged from Trilogue negotiations, it will fall to Parliament to revise this text and adopt its final position.

There is therefore an opportunity at this point to amend the text as adopted by the Regional Development Committee. After the plenary vote, the Council will then decide whether to agree with the vote taken by the Parliament.

In a connected process, the European Commission is preparing its own interpretative guidance on the ex ante conditionalities of the regulations which detail how the next round of structural funds should be spent. Should a parliamentary amendment not be possible or successful, this memo outlines why the EC's guidance must include a clear interpretation of the rules to ensure compliance with the European Union's human rights obligations.

A: *The Laudable Intentions of the Framers.*

The intention of the framers is plain. And the sterling work of the European Parliament to retain the relevant provisions is laudable. Nevertheless, the latest version of the draft text could still be improved to give better effect to that underlying intention.

We recognise and applaud the efforts of both the European Commission and European Parliament over recent years to reform Regulations for the use of EU funding. The resulting focus on the transition from institutions to community living and family life in the draft EU Structural Funds Regulations for the next programming period is extremely welcome. It represents a potential major step forward in realising the rights of millions of Europe's most marginalised and disadvantaged citizens by ensuring access to community living for all and ending the practice of institutionalization. It is therefore essential that the language of the Regulations is fit for purpose, is free from ambiguity and is configured to have the best prospects of achieving this goal.

As it currently stands the draft text could well be improved upon to give better effect to the underlying intentions of the framers. This would optimize the prospect of complying with the EU's international legal obligations and resonate more closely with stated EU policy goals. Moreover, EU taxpayers have a right to demand the intelligent and efficient use of scarce EU monies. Ambiguity needs to be avoided since the shift from institutional to community-based services is a complex process of change that is well known to be

subject to significant resistance. Our concern focuses particularly on the draft criterion of fulfilment attached to draft thematic *ex ante* Conditionality 10 in the proposed Common Provisions Regulation and the need to clarify and strengthen it.

The stakes are high. The purpose of *ex ante* conditionalities is to ensure that the Funds are used constructively and that genuine European added-value is created, especially if we are serious in our collective ambition to achieve a 'smart, sustainable and inclusive economy and society' – the stated goal of **Europe 2020**. Ensuring effective *ex ante* conditionalities is all the more important in times of austerity where every cent counts and should be spent intelligently and efficiently. It is therefore critically important that the relevant 'criteria of fulfilment' are carefully calibrated to have the kind of impact that EU citizens deserve and EU taxpayers are entitled to demand.

B: The Need to Clarify and Improve the Draft Text to Give Better Effect to the Intentions of the Framers.

As it currently stands, the relevant draft Thematic *ex ante* conditionality (10) requires that a 'national strategic policy framework for poverty reduction, aiming at active inclusion' be put in place by Member States, as a condition for accessing the Structural Funds. This is extremely positive. Several 'criteria of fulfilment' are attached to each thematic *ex ante* conditionality. At the time of writing one of the more important draft 'criteria of fulfilment' attaching to draft Thematic *ex ante* conditionality 10 is to the effect that:

depending on the identified needs, includes measures for the shift from institutional to community care.

[italics added].

This draft language was adopted by the Regional Development Committee of the European Parliament on the 10th of July 2013 and will therefore be the subject of a plenary vote by the European Parliament at the first reading of the Common Provisions' Regulation (2011/0276(COD)).

The intent behind this draft criterion of fulfilment is admirable. It speaks to the general imperative of creating genuine community-based options for all our citizens to flourish outside of institutions. Since a large amount of scarce resources are currently tied up in institutional arrangements this new approach means, in essence, a concerted, planned and intelligent transfer of resources away from institutions and into better living arrangements and support systems. Such systems will enable people to live independently and be included in their community.

And to its credit, the draft language makes no distinction between different groups. It is therefore assumed that it has traction across a broad range of groups (including children, persons with disabilities, older people, etc.). Institutionalization affects many people and groups including children, persons with disabilities and older persons.

However, the draft language in the relevant criterion of fulfilment could be improved to remove latent ambiguity, to make plain the kind of paradigm shift that is needed and to give much better expression to the underlying intention of the framers.

C: Structure of this Memo.

In order to establish the need for a clarified and improved text this memo will recall briefly the EU's relevant international legal obligations with respect to the right to community living (Section 2). It will then recount the high degree of resonance between these international legal obligations and stated EU policy (Section 3). It will then advert to some bad practices which all are agreed must end but for which the draft language may not be sufficient and examples of good practice to be built upon (Section 4). It will then set out why the draft language stands in need for clarification and improvement (Section 5). And lastly it will propose an amendment that shows better prospect in meeting the EU's international legal obligations and showing faith with existing EU policy (Section 6).

All co-signatories to this memo also have broader but related concerns regarding the amendments proposed for Article 2 (specifically, the definition of an "applicable *ex ante* conditionality") and to Article 17 ('*Ex ante* conditionalities'). If adopted they have the potential to limit the scope and effectiveness of *ex ante* conditionalities, placing the burden of proof regarding the very applicability of the conditionalities on the Commission and leaving a wide discretion to Member States to amend programmes so as to potentially avoid conditionality. However, this memo focuses more narrowly on the relevant criterion of fulfilment attached to draft Thematic conditionality 10.

2. International Legal Obligations of the EU: The Centrality of the Right to Community Living including Children, Persons with Disabilities and Older Persons.

At a minimum, any criterion of fulfilment should respect all relevant international legal obligations to which the EU and its Member States are bound. The relevant international law has in fact been crystallising in the past few years.

The right to live independently and be included in the community is implicit in most international human rights treaties. It is now explicit – either in the text or in the jurisprudential understandings – of both the UN Convention on the Rights of Persons with Disabilities (UN CRPD) and in the UN Convention on the Rights of the Child (UN CRC). The explicit reference to the right to live in the community in these instruments is illustrative of a deep commitment to human flourishing in community latent in all UN human rights instruments. It extends to older people even in the absence of a specific thematic convention on the rights of older people.

The Overarching Equality Perspective – the right to live in the community ‘on an equal basis with others’.

The right to live in the community stands on its own.

But it is also directly implicated as well as informed by the right to non-discrimination which underpins the entirety of the UN human rights treaty edifice and which is central to EU law and policy. It will be recalled that the US Supreme Court held in the famous 1999 case of *Olmstead v LC* that the inappropriate placement of a person in an institution constitutes direct discrimination under the relevant provisions of the Americans with Disabilities Act which forbids discrimination with respect to public services and entities. From then on the use of public monies (State and Federal) to maintain inappropriate institutions was deemed illegal unless a transition plan was put in place to re-allocate resources toward community based services.²

Indeed, the US Federal Government responded by establishing an Administration for Community Living which aims to bring disparate strands of Federal funding together to assist States invest on community living resources covering both persons with disabilities and older people.³ In a way, the correct conditioning of access to the EU Structural Funds could achieve much the same result as is demanded by the interpretation of non-discrimination law in the United States.

The right to equality and non-discrimination is recognised in Article 2 of the Universal Declaration of Human Rights (UDHR) and is also contained in a number of other general and thematic UN human rights instruments.

Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR)⁴ respectively, state:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

and

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Human Rights Committee, in its General Comment 18 on non-discrimination⁵ has stated that Article 26 requires that the law guarantee to all

² *Olmstead v. L.C.*, 527, U.S., 581 (1999).

³ See: <http://www.acl.gov/index.aspx>

⁴ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966)

⁵ Human Rights Committee, *General Comment No. 18: Non-discrimination*, 11/10/1989.

persons equal and effective protections against discrimination on any of the enumerated grounds.⁶ It continued:

When legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.⁷

Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁸ states that:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2 of the UN Convention on the Rights of the Child (CRC)⁹ provides that:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 5 CRPD frames its equality and non-discrimination provision as follows:

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

We submit that the right to equality, as repeatedly affirmed in these international human rights instruments, extends to requiring States and regional actors such as the EU to vindicate the right of their citizens to live in

⁶ *Ibid*, para. 12.

⁷ *Ibid*, para. 12.

⁸ International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976.

⁹ UN Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Entry into force 2 September 1990.

their communities and providing them with the necessary individualised supports to do so. Our view is fortified by the position taken by the US Supreme Court in *Olmstead*. From the above treaties, it is clear that the right to equality is of immediate effect. That means that inappropriate institutionalisation, which is a form of discrimination, must be eliminated with an immediate effect. While a process of transition may require resources and time and so can be 'progressively achieved', the principle of immediate effect requires that the process itself must start.

A: Legal Obligations – Children.

In terms of children's rights, the United Nations Convention on the Rights of the Child (UN CRC) sets out clearly a range of rights that, taken together, should ensure that children develop to their full potential and then can, as adults, live independently in the community. This includes the right to know and be cared for by their parents and to be protected from harm and abuse. The CRC clearly states that the child has "the right to know and be cared for by his or her parents" (art 7), and "shall not be separated from his or her parents against their will, except when... such separation is necessary for the best interests of the child" (art 9). Moreover, "parents... have the primary responsibility for the upbringing and development of the child" (art 18.1); where parents face difficulties in raising their children "State Parties shall render appropriate assistance to parents... in the performance of their child-rearing responsibilities". Children also have the right to be protected from abuse and neglect (art 19), to an education (art 28) and to adequate healthcare (art 24).

The more specific right of children with disabilities to live in their communities is well established under the CRC - Article 23(1) of which requires States to:

...recognise that a mentally or physically disabled child should enjoy a full and decent life, in conditions that ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

In its General Comment on the rights of children with disabilities of September 2006, the Committee called on State Parties to the CRC "to set up programmes for de-institutionalization of children with disabilities, replacing them with their families, extended families or foster care system."¹⁰

While it is acknowledged that Articles 18(2) and 20(3) of the CRC also envisage a role for institutional care¹¹, it is submitted that in the two decades since the adoption of the CRC, the children's rights community and international legal opinion have moved on and are now of the clear opinion that such forms of service provision are severely detrimental to the potential well-being and flourishing of children. A clear distinction must also be drawn between 'residential' care (for which there may sometimes be a role in cases

¹⁰ Committee on the Rights Of The Child, General Comment No. 9 (2006), 'The rights of children with disabilities', Forty-third session, Geneva, 11 – 29 September 2006, CRC/C/GC/9, para. 49.

¹¹ Articles 18(2) and 20(3) of the UN Convention on the Rights of the Child.

of children requiring specialist services) and 'institutional' care, which is entirely negative in its effects.

In some countries children are institutionalized to provide special education, or allegedly specialist healthcare and therapy, or to protect them from abuse and neglect; but whilst doing this, they are denied their right to family life and are often exposed to greater risk of abuse or neglect, as the examples in section 4A below demonstrate.

In addition to the right to live independently, the UN CRPD to which the EU is a party, requires that persons with disabilities are protected from any form of torture or cruel, inhuman or degrading treatment or punishment (Article 15) and exploitation, violence and abuse (Article 16). Such treatment is a common occurrence in long-stay residential institutions across Europe. As regards children with disabilities, Article 23(1) of the UN CRPD provides that they have equal rights with respect to family life, and Article 23(5) states that where the immediate family is unable to care for them, State Parties shall "undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting."

The focus on family and community living is reflected and reinforced in several important UN soft law instruments in the field of children's rights. For example, the 2009 UN Guidelines for the Alternative Care of Children¹² clearly states that children should grow up with their families:

The family being the fundamental group of society and the natural environment for the growth, well-being and protection of children, efforts should primarily be directed to enabling the child to remain in or return to the care of his/her parents, or when appropriate, other close family members. The State should ensure that families have access to forms of support in the care-giving role.¹³

The Guidelines state that removal of a child from the care of the family should be seen as a measure of last resort.¹⁴ In addition, maintaining the child as close as possible to their habitual place of residence, in order to facilitate contact and potential reintegration with their family and to minimize disruption of their educational, cultural and social life, is of central importance in decision making.¹⁵ Institutions are often situated at a long distance from the home of the child's family, making it difficult to maintain relationships with the family and community.

Signed by all Member States of the European Union, the 2010 WHO Better Health, Better Lives Declaration¹⁶ addresses the rights of children and young people with intellectual disabilities to the same rights to health and social care, education, vocational training, protection and support as other children and young people and to live their lives as part of the community. Priority number

¹² A/HRC/11/L.13 15 June 2009.

¹³ Section II, paragraph 3.

¹⁴ Paragraph 13.

¹⁵ Paragraph 10.

¹⁶ European Declaration on the Health of Children and Young People with Intellectual Disabilities and their Families. EUR/51298/17/6, 26 November 2010.

3 specifically addresses the negative impact of institutional care and the importance of the transition to community based services.

The EU Charter of Fundamental Rights explicitly recognises children's right to protection and care according to their best interest (Article 24), and the right of persons with disabilities to participate in the life of the community (Article 26). Since persons placed in long-stay residential institutions are denied many of these rights, such settings should not benefit from EU funding. Instead, any available funding should be used to support structural reforms aimed at the development of high quality family-based and community-based services, the closure of institutions and on making mainstream services accessible to all.

B: Legal Obligations – Persons with Disabilities.

The right to live independently and to be included in the community for persons with disabilities is defined in Article 19 of the UN CRPD. It includes a right to choose where to live and with whom, a right to have supports personalized or individualized (and hence detached from institutions) and a right to have generally available community services made accessible to those who exercise the right to live independently and in the community. These three elements, voice, choice and control, personalized services and the development of genuinely accessible and adequate community services apply to all cohorts – whether children, persons with disabilities or older persons.

UN treaty obligations are not just abstractions that have only fleeting relevance in the context of the drafting of key EU instruments. Uniquely, the European Union has ratified (technically 'confirmed') the UN Convention on the Rights of Persons with Disabilities (UN CRPD) in 2010. It has done so alongside and in addition to its Member States. The majority of Member States have also ratified the UN Convention and the rest are expected to do so soon. The EU, as a body and as individual Member States, has thus publicly committed itself to added – and clear – international legal obligations on the ground of disability.

The principle of '*pacta sunt servanda*' applies in international law and it is to the effect that States are assumed to have entered into such treaty-based obligations in good faith and that they intend to implement them. For the purposes of the disability convention the EU is considered a State Party. Upon ratification the EU lodged a Declaration of Competences identifying how competence is shared between the EU and its Member States. The Declaration contained an Annex of illustrative areas/instruments where the EU bears competency. The Structural Funds are explicitly listed as one such area that lies within its competence – and for which it bears ultimate responsibility and international legal accountability. There can therefore be no gainsaying that the UN CRPD is directly relevant to the drafting of the new Structural Funds Regulations.

Each Party to the CRPD is required to lodge an Initial Report on progress made and obstacles encountered in the implementation of the Convention. The EU's Initial Report is currently being drafted. If the draft text of the criterion of fulfilment so far established by the Trilogue is adopted, it is likely that the EU will be censured by the relevant UN treaty monitoring body (the UN Committee on the Rights of Persons with Disabilities). This would be highly regrettable and is completely avoidable, by removing the ambiguity from the draft text. The EU – one of the main architects of the Convention – could certainly not demand improved practices from others around the world if found wanting by the UN Committee.¹⁷

The core right in question for our purposes is the right to live independently and be included in the community (Article 19 of the UN CRPD). The relevant Article sets out a wholly positive philosophy of human flourishing in the community. It contains a bundle of rights – all aimed at enabling this flourishing to take place. It does not assume that this flourishing is for some and not for all – no matter the severity of the disability.

In essence this requires a transition in many countries from institutional-based services to new forms of community living arrangements. Such transitions do not happen overnight but require forethought, planning, consultation and a responsible shift of resources. The Convention requires the 'progressive achievement' of such obligations. This will certainly not happen unless a conscious and concerted effort is put into designing and implementing a transition. Easing such processes of transition is precisely where the EU financial instruments can have genuine EU added-value.

Since the adoption of the disability Convention in 2008 the UN Committee has already developed jurisprudence on Article 19. It has adopted conclusions requiring China to begin immediately the process of phasing out of institutions (China, Conclusions of the Committee (2012)). It has adopted conclusions requiring Hungary to shift resources from institutions to community living arrangements (Hungary, Conclusions of the Committee (2012)). It has adopted conclusions requiring Argentina to develop a broader range of policy options and financial instruments to enable the right to gain meaning (Argentina, Conclusions of the Committee (2012), etc.

Furthermore, the current Structural Fund arrangements have not escaped the attention of the UN Committee. The UN Committee has explicitly called on Hungary to re-examine how it spends its EU Structural Funds (Hungary conclusions of the Committee (2012)). If the criteria of fulfilment remain open-textured in the Regulations and permit the Funds to continue to be used to fund institutions and not to initiate a process of transfer and change (or if the Regulations make that process appear optional) then it is not merely possible but highly likely that the UN Committee will hold the EU, as such, directly accountable. This is unnecessary and should not be allowed to happen.

¹⁷ See, DeBurca, G., *The EU in the Negotiations of the UN Disability Convention*, 35 *European Law Review*, No 2, (2010).

C: Legal Obligations – Older Persons.

While there is no specific or thematic international legal instrument for older persons, they clearly enjoy the same rights as the rest of the population under general and thematic instruments. There is no doubt, for example, that the relevant provisions of the Convention Against Torture (CAT) apply to them. Indeed, the Committee against Torture noted in its General Comment No. 2 (2008)¹⁸ that institutions that care for older people fall within the definition of places of detention.¹⁹ There is no doubt International Covenant on Civil and Political Rights (UN ICCPR) and the UN International Covenant on Economic, Social and Cultural Rights (UN ICESCR) apply to them. And in as much as there is an overlap between old age and disability the UN CRPD applies.

The 2012 UN OHCHR report *Normative standards in international human rights law in relation to older persons*²⁰ notes that it has generally been maintained that the lists of prohibited grounds of discrimination in UN and regional human rights instruments are illustrative, not exhaustive, and that therefore the open ended category of “other status” may allow treaty bodies to consider age-related discrimination.²¹ It goes on to highlight, however, that:

... the practice of considering age as “other status” is far from consistent among human rights bodies, allows for a significantly broad margin of discretion, lacks the benefit of legal clarity and requires the argument to be specifically made on a case by case basis. Moreover, the consideration of age as “other status” for the purpose of anti-discrimination protection still raises the question of the standard of scrutiny employed to decide the claim: even if age might be considered “other status” in order to trigger anti-discrimination analysis, if the standard of scrutiny utilised is too deferent, distinctions on the basis of age might be easily justified. Furthermore, as age is in general not explicitly identified as a forbidden ground of discrimination, the need for positive measures to eradicate age-based discrimination might also be challenged.²²

However, the same UN OHCHR document also acknowledged that safeguards in international law regarding the forced institutionalisation of all older persons have been criticised as inadequate and an assessment of the normative gaps in protection makes a compelling case for careful consideration to be given to developing further measures of protection.²³

In its General Comment No. 6 of 1995, the Committee on Economic, Social and Cultural Rights addressed the economic, social and cultural rights of older persons²⁴. The Committee referenced the 1982 Vienna International Plan of

¹⁸ Committee Against Torture, *General Comment No. 2: Implementation of article 2 by States parties*, 24 January 2008, CAT/C/GC/2.

¹⁹ *Ibid*, para. 15.

²⁰ Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons - Analytical Outcome Paper*, August 2012. Available at <http://social.un.org/ageing-working-group/documents/ohchr-outcome-paper-olderpersons12.pdf> (last accessed 28 August 2013).

²¹ *Ibid*, p. 8.

²² *Ibid*, p. 8-9.

²³ *Ibid*, p. 29.

²⁴ Committee on Economic, Social and Cultural Rights, *General comment 6: The economic, social and cultural rights of older persons*, 12/08/1995, E/1996/22.

Action on Ageing which was adopted by the World Assembly on Ageing. This document was endorsed by the General Assembly. It details the measures that should be taken by Member States to safeguard the rights of older persons within the context of the rights proclaimed by the International Covenants on Human Rights. In its General Comment, the ESCR Committee noted that:

Recommendations 19 to 24 of the Vienna International Plan of Action on Ageing emphasize that housing for the elderly must be viewed as more than mere shelter and that, in addition to the physical, it has psychological and social significance which should be taken into account. Accordingly, national policies should help elderly persons to continue to live in their own homes as long as possible, through the restoration, development and improvement of homes and their adaptation to the ability of those persons to gain access to and use them (recommendation 19). Recommendation 20 stresses the need for urban rebuilding and development planning and law to pay special attention to the problems of the ageing, assisting in securing their social integration, while recommendation 22 draws attention to the need to take account of the functional capacity of the elderly in order to provide them with a better living environment and facilitate mobility and communication through the provision of adequate means of transport.²⁵

The Committee therefore recognised the essential nature of ‘ageing in place’ in going beyond structural requirements to encompass social connectedness and community supports.

There is now a process in place in the UN to reflect on the case for drafting a similar legally binding instrument in the field of age (UN Open-Ended Working Group on the Rights of Older Persons).²⁶ In its opening statement at the 2nd working session of the Working Group which took place from the 1st to the 4th of August 2011 the EU emphasized the strong correlation between disability and ageing. It also stated its belief that the UN CRPD offers protection to a large cohort of older persons and that it is the responsibility of State Parties (including the EU) to implement the Convention, taking into account their needs.²⁷

Confirmatory of the link between general or thematic human rights treaties to old age is the range and depth of soft law instruments in the field. The UN Principles for Older Persons (1992)²⁸ adopted by the UN General Assembly provides, *inter alia*, for:

5. Older persons should be able to live in environments that are safe and adaptable to personal preferences and changing capacities.
6. Older persons should be able to reside at home for as long as possible.
10. Older persons should benefit from family and community care and protection in accordance with each society's system of cultural values.

²⁵ *Ibid*, para. 33.

²⁶ UN General Assembly Resolution 65/182 *Follow-up to the Second World Assembly on Ageing*

²⁷ Opening statement by the European Union at the United Nations Open-ended Working Group on Ageing for the purpose of strengthening the protection of the human rights of older persons, 2nd working session, New York, 1st of August 2011.

²⁸ *United Nations Principles for Older Persons*, Adopted by General Assembly resolution 46/91 of 16 December 1991.

12. Older persons should have access to social and legal services to enhance their autonomy, protection and care.

14. Older persons should be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives.

Also, the 2002 Madrid International Plan of Action on Ageing (MIPAA) a UN document intended to design international policy on ageing for the 21st century which was adopted by the Second World Assembly on Ageing (accompanied by a political declaration) includes relevant references such as the following objectives:

- Promotion of “ageing in place” in the community with due regard to individual preferences and affordable housing options for older persons.
- Improvement in housing and environmental design to promote independent living by taking into account the needs of older persons in particular those with disabilities.

The Action Plan also asks signatories to:

- Take steps to provide community-based care and support for family care;
- Increase quality of care and access to community-based long-term care for older persons living alone in order to extend their capacity for independent living as a possible alternative to hospitalization and nursing home placement;

However, the UN General Assembly in its resolution entitled *Follow-up to the Second World Assembly on Ageing* highlighted the fact that:

... in many parts of the world, awareness of the Madrid Plan of Action remains limited or non-existent, which limits the scope of implementation efforts...²⁹

The right to live in the community of older people (often referred to as ‘ageing in place’) has been defined as “the ability to live in one’s own home and community safely, independently, and comfortably, regardless of age, income, or ability level”.³⁰ Ageing in place includes the retention of identity and relationships as well as independence and autonomy.

Article 25 (The rights of older people) of the Charter of Fundamental Rights of the European Union states that the EU:

... recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

Yet across the EU older people face the same problems as do others regarding their need for care and assistance. Examples of the common concerns faced by older people across the EU are numerous: lack of support for informal carers who are often older people themselves; inadequate training and poor working conditions for professional carers; lack of specific structures for people with dementia; the negative image of ageing and of older people in

²⁹ Resolution adopted by the General Assembly 65/182, *Follow-up to the Second World Assembly on Ageing*, A/RES/65/182, 4 February 2011, p. 1.

³⁰ Centers for Disease Control and Prevention (CDC), Healthy Places Terminology. Available at <http://www.cdc.gov/healthyplaces/terminology.htm> (last accessed 28 August 2013).

society, the taboo about elder abuse; the difficulty in finding integrated care systems that are flexible enough to adapt to the changing needs of the person and that support participation and empowerment. In some countries it is increasingly difficult for older people to access affordable quality care especially when budget cuts are imposed without improving the care system's quality and efficiency.

Older people suffer from ageism and sexism and from negative stereotypes linked to the fear of the ageing process. Consequently elder care is largely undervalued by society. As demonstrated by a large body of research over the last decade, elder abuse is a problem in all EU Member States. It is found in all types of care settings (institutional, community and home care) provided by public, not-for-profit and commercial service providers as well as families and volunteers.

For older persons, it is important for services to be provided by the public and private sector as well as the third sector. The focus should be on quality person-centred services, whether formal or informal care. Moreover, services for older persons need to encompass prevention, rehabilitation and enablement, cure and care, including end-of-life care and combine health and social care for activities of daily living (ADL) such as eating, bathing, dressing, grooming, housekeeping, and leisure.³¹

For older persons with very complex medical and dependency needs, their right to community living should be promoted and supported even when their condition requires residential care through a person centered approach and measures to support their right to self determination, dignity and privacy.

3. EU Policy: The Imperative of the Right to Community Living in EU Policy.

There is a high degree of symmetry between these international legal obligations and policy commitments made by the EU in recent years. They are mutually reinforcing. It follows that any criterion of fulfilment in the draft Regulations on the Structural Funds should be faithful to and provide a reliable mechanism for achieving EU policy.

Put more directly, transitioning away from institutions is not just an international legal obligation that cannot be avoided - it is also a stated imperative of EU policy.

A: EU Policy - Children.

With respect to EU child policy the stated intention of the EU 'Agenda for the Rights of the Child' (2011) is to:

³¹ For example, see the Quality of Care framework developed in the frame of the WeDo project (www.wedo-partnership.eu).

Reaffirm the strong commitment of all EU institutions and of all the Member States to promoting, protecting and fulfilling the rights of the child in all relevant EU policies and to turn it into concrete results.

It continues:

In the future EU policies that directly or indirectly affect children should be designed, implemented and monitored taking into account the best interest of the child enshrined in the EU Charter of Fundamental Rights and the UN CRC.

It is difficult to see how this can happen (given the UN CRC's emphasis on family life, protection from harm and abuse and community living) unless the language of the relevant criterion of fulfilment is clarified.

The Europe 2020 Strategy includes specific objectives in relation to poverty reduction - with poverty among the underlying factors in the placement of children in institutional care in countries in economic transition,³² the process of developing community-based services must go hand in hand with other anti-poverty and social inclusion measures.

An overlapping EU strategy which is relevant for the promotion of the rights of children with disabilities is the European Disability Strategy 2010 – 2020. This strategy presents a framework for action at the European level, in support of national activities. Achieving full participation of people with disabilities (including children with disabilities) in society by providing quality community-based services, including personal assistance, is set out as one of the goals.

B: EU Policy - Persons with Disabilities.

With respect to disability, the most recent disability-specific strategy to emerge from the EU is the '*European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe*.'³³ Of particular relevance is the action line on 'participation.' In this regard the Strategy asserts that the EU will work to:

... promote the transition from institutional to community-based care by: using Structural Funds and the Rural Development Fund to support the development of community-based services and raising awareness of the situation of people with disabilities living in residential institutions, in particular children and elderly people.³⁴

Note the language of 'transition' from the very outset and the direct link made with the Structural Funds. Most of this transition has to happen at Member State level but can also be helped by instruments such as the Structural Funds. For its part the EU will support national activities to:

achieve the transition from institutional to community-based care, including use of Structural Funds and the Rural Development Fund for training human resources and

³² Browne K. (2009) *The Risk of Harm to Young Children in Institutional Care*. London: Save the Children, p.7.

³³ COM(2010) 636 - *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe*.

³⁴ *Ibid* p. 6.

adapting social infrastructure, developing personal assistance funding schemes, promoting sound working conditions for professional carers and support for families and informal carers...

The relevant action line in the EU strategy seems admirably tailored to moving forward the transition toward full implementation of Article 19 in a European context. But it is likely to remain purely aspirational unless strong *ex ante* requirements are inserted into the Regulations, which will make prioritising the transition from institutional to community based services an unambiguous pre-condition to funding.

C: EU Policy on Older people.

The European Year for Active Ageing and Solidarity between Generations which took place in 2012 was intended to raise awareness of the contribution that older people make to society. It sought to encourage policymakers and relevant stakeholders at all levels to take action with the aim of creating better opportunities for active ageing and strengthening solidarity between generations. A key component within the EU's concept of active ageing is independent living and nineteen 'Guiding Principles' in the areas of employment, social participation and independent living were adopted by the EU Council of Ministers at the end of the European Year for Active Ageing and Solidarity between Generations 2012.³⁵ One heading in those Guidelines deals specifically with 'Independent Living.' It spans adapted housing and services, accessible and affordable transport, age friendly environments and the maximization of autonomy in long-term care.

The 'European Innovation Partnership for Active and Healthy Ageing' was initiated by the EU in 2010 (as the pilot European Innovation Partnership (EIP)) in order to support research and innovation for active and healthy ageing.³⁶ It has set itself the target of increasing the average healthy lifespan by two years by 2020. Its approach is to facilitate the engagement of all stakeholders in overcoming the barriers to the delivery of practical innovation in the fields of, *inter alia*, active and independent living of older people. A key component of this Partnership is the optimisation, alignment, coordination and efficiency of the existing EU financial tools. The Strategic Implementation Plan of this EIP sets out specific actions of the Partnership to be carried out by public authorities, businesses and civil society from now to 2020, including "improving the uptake of interoperable ICT-based independent living solutions through global standards".³⁷ This innovation demonstrates the ability of the EU, in particular its financial programmes, to support and encourage activity and research which can have a demonstrable impact on the achievement of community living. The same can be said for the potential of cohesion funding

³⁵ Council Declaration on the European Year for Active Ageing and Solidarity between Generations (2012): The Way Forward, 17468/12, Brussels, 7 December 2012.

³⁶ Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions - *Europe 2020 Flagship Initiative - Innovation Union*, COM(2010) 546 final, Brussels, 6.10.2010.

³⁷ Strategic Implementation Plan for the European Innovation Partnership On Active And Healthy Ageing - Steering Group Working Document - Final Text Adopted By The Steering Group On 7/11/11, Brussels, 17 November 2011, p.11.

to influence and shape policy in this area, if the legal framework is correctly drafted, monitored and implemented.

For example, in June 2010 the outcome of an EU-funded project called *Eustacea*, which was coordinated by AGE Platform Europe, was published as the *European Charter of the rights and responsibilities of older people in need of long-term care and assistance*. Article 2(2) of the Charter states that older people have the right to choose a place to live that is adapted to their needs, whether in their own home or in formal care settings. Another EU-funded project, *WeDo*, developed an EU quality framework for long-term care services and created a lasting and growing partnership of organisations committed to improve the wellbeing and dignity of older people.³⁸

In sum, EU policy strongly affirms the right of community living and active participation for all including children, persons with disabilities and older people. This too points strongly in the direction of clearer and stronger ex ante conditionalities and related criterion of fulfilment.

4. Examples of Bad Practice in the Use of Structural Funds – and Examples of Good Practice to be Built Upon.

At a minimum, whether because of international legal obligations or because of stated EU policy, any criterion of fulfilment should put a halt to the use of Structural Funds in continuing bad practices and extending the use of institutionalisation.

As currently drafted, and in the absence, so far, of clear interpretative guidance from the European Commission, the relevant criterion of fulfilment would appear to allow Member States to make their own interpretation of what is needed in terms of the transition from institutional to community based care and to use the Structural Funds in accordance with that interpretation. During the current programming period, Member-States have had such flexibility in their interpretation of the use of Structural Funds. As a result, large sums have been expended on programmes, which, in spite of good intent, have allowed acknowledged bad practices to continue. This section outlines examples of such practices.

One of the key problems is that, without an agreed definition of the transition from institutional to community care (deinstitutionalisation), many programmes have been implemented entitled 'deinstitutionalisation' but which, in fact, reinforce institutional practices.

A: Bad Practices – to Be Precluded.

³⁸ For further information see: www.wedo-partnership.eu.

A number of Member States and pre-accession countries continue to renovate and ‘improve’ institutions or establish new institutions using external funds, including European funds. The following examples highlight practices that have taken place over recent years, where investments in institutions have not significantly improved conditions for children and adults but have in fact extended institutionalisation by making it more difficult to close institutions and develop community services: once significant sums have been invested in an institution building, there is an imperative on the part of State authorities to continue using that building.

In its 2010 Focus Report³⁹, the European Coalition for Community Living (ECCL) pointed to several examples where Structural Funds were still being used to build and/or renovate institutions for persons with disabilities. The report noted that:

Although projects assisted by structural funding may use terms that suggest wider and more socially inclusive objectives, their ability to achieve them is doubtful if the planned activities of the project are limited to carrying out works that improve the physical environment of a residential institution. For example, a project for the ‘modernisation’ of an institution in Romania included general objectives such as improving the quality of the infrastructure for social services in the locality and equal access for citizens to social services. However, the project was focused on carrying out construction works at the institution with the ‘beneficiaries’ of the project being the residents of the institution. It was therefore not clear how the project’s general objective of improving the quality of social services in the county and ensuring the county population’s access to services is to be met fully, if at all.⁴⁰

The ECCL report also notes the concerns raised in the use of Structural Funds in Latvia during the programming period 2007–2013 by Zelda (Resource Centre for People with Mental Disability), a nongovernmental Organization. Zelda noted that the greatest part of the Ministry of Welfare’s budget for its ‘Programme for the development of social care and social rehabilitation services for persons with mental disabilities for 2009–2013’ was allocated to institutional care. This led Zelda to conclude that this programme was “insufficiently geared towards deinstitutionalisation and furthering the integration of mentally disabled people into society.”⁴¹

In Bulgaria, in 2007 €140,000 of Europe Aid funding earmarked for deinstitutionalisation was spent on renovating one institution for children and adults with severe disabilities.⁴² In spite of the improvements to the building, in 2010, the same institution was the subject of an investigation into high levels of mortality due to malnutrition, which was highlighted in a report of the

³⁹ *Wasted Time, Wasted Money, Wasted Lives ... A Wasted Opportunity?* – A Focus Report on how the current use of Structural Funds perpetuates the social exclusion of disabled people in Central and Eastern Europe by failing to support the transition from institutional care to community-based services (European Coalition for Community Living, March 2010).

⁴⁰ *Ibid*, p. 27.

⁴¹ *Ibid*, p. 28.

⁴² Written Question by MEPs Elly de Groen-Kouwenhoven and Katty Sinnott to the European Commission (12 Feb 2008 E-0644/08), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2008-0644+0+DOC+XML+V0//EN&language=HU>

UN Committee Against Torture.⁴³ Other practices that continued in the institution include: placing children and adults together; children rarely leaving the building; children with severe disabilities rarely leaving their cots; tying children up to prevent self-harm; using psychiatric medication to control behaviours, where no psychiatric diagnosis exists.⁴⁴

Also in Bulgaria, research undertaken by Lumos has found that in 68% of cases, the primary reason for admission of children to mainstream children's homes (i.e., for children without disabilities) was poverty. This is a direct contravention of the CRC. Many of these institutions have been the subject of 'improvements' using EC funds.⁴⁵

In one county in the Czech Republic from 2008 – 2012, more than €5.6 million of Structural Funds was spent on renovating baby institutions, children's homes and institutions for children and adults with disabilities.⁴⁶ In spite of this expenditure, the following practices continue in the institutions: placing adults and children with disabilities together in the same institution, with insufficient procedures to prevent children being abused by adults;⁴⁷ placing babies in institutions for longer than six months⁴⁸ – this practice is proven to cause permanent damage to early brain development⁴⁹; placing emotionally vulnerable children, who have committed no offences, together with young offenders, including those who have committed serious violent offences, as well as young people with a psychiatric diagnosis.⁵⁰

It should be noted that both Bulgaria and the Czech Republic have now committed themselves to ending the practice of institutionalising children and

⁴³United Nations (2011) 47th session, Concluding observations of the Committee against Torture, Bulgaria, http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.BGR.CO-4-5_en.doc

⁴⁴ Bulgarian Helsinki Committee (2010) Report of the Bulgarian Helsinki Committee following Inspection of the Home for Children with Intellectual Disabilities, Krushari, Dobrich Region (available in Bulgarian only), http://forsakenchildren.bghelsinki.org/wp-content/uploads/2010/09/Doklad-DDMUJ-Krushari_bd.pdf

⁴⁵ *Ibid.*, above note 11.

⁴⁶ Ministry of Regional Development, Czech Republic, <http://www.strukturalni-fondy.cz/en/Informace-o-cerpani/Seznamy-prijemcu>

⁴⁷ ⁴⁷ Report of the Czech Ombudsman. *Veřejný ochránce práv: Zpráva z návštěv, Domovů pro osoby se zdravotním postižením* [on-line]. Available at: http://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/2009/SZ_zarizeni_pro_osoby_s_mentalnim_postizenim.doc. Checked July 23, 2013.

⁴⁸ Report of the Czech Ombudsman. *Veřejný ochránce práv: Zpráva ze systematických návštěv, Zdravotnická zařízení poskytující péči ohroženým dětem do 3 let věku, Kojenecké ústavy* [on-line]. Available at: http://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/2013/NZ-25_2012-kojenecke-ustavy.pdf. Checked July 23, 2013.

⁴⁹ Rutter M et al. (1998). Developmental catch-up, and deficit, following adoption after severe global early privation. *Journal of Child Psychology & Psychiatry*, 39(4):465– 476.

⁵⁰ Report of the Czech Ombudsman. *Veřejný ochránce práv: Zpráva ze systematických návštěv, Školských zařízení pro výkon ústavní a ochranné výchovy* [on-line]. Available at: http://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/2012/2012_skolska-zarizeni.pdf. Checked July 23, 2013.

See also, Report of the Ministry of the Interior on criminality among care leavers. *Ministerstvo Vnitřní České republiky: Hodnocení systému péče o ohrožené děti* [on-line]. Available at: <http://www.mvcr.cz/soubor/hodnoceni-systemu3-pdf.aspx>. Checked July 23, 2013.

are actively developing programmes to strengthen community based services and remove children from institutions.⁵¹

In each of the cases cited, it was the intention of the authorities to improve the provision of care to residents. Indeed in the case of Romania and Bulgaria, the renovation of institutions was defined as 'deinstitutionalisation'. All the examples cited highlight the need for rigorous *ex ante* conditionality to be applied to the Operational Programmes of Member States. It is entirely foreseeable that the retention of language as adopted by the Regional Committee (i.e. "depending on identified needs") would permit Member States to make a determination that the requirement to transition from institutional to community-based care does not apply to a particular project or programme, or more worryingly, to a specific group of people.

In some countries, there is still an expectation that the most severely disabled children and adults need to live in institutions. In others, Governments have at times asserted that baby institutions provide the best possible quality of care, in spite of decades of research evidence demonstrating significant harm to the health and development of babies raised in institutions.⁵² For example, the Czech Republic is long known for having one of the highest rates of institutionalising babies in Europe.⁵³ In 2012 in the Czech Republic, then President Klaus vetoed a new child protection law that had been passed by parliament and issued a public statement defending the institutional care system:

The international institutions that are now criticising Czech baby homes, children's centres and baby boxes should take into consideration the fact that the Czech Republic has always been and still is one of the countries with top class medical care for children and the lowest child mortal rate globally, and they should even consider the possibility that the existence of Czech baby homes does not mean our backwardness, but on the contrary a head start

⁵¹ Action Plan for The Fulfilment of The National Strategy to Protect Children's Rights, Czech Republic (Ministerstvo práce a sociálních věcí: Akční plán k naplnění Národní strategie ochrany práv dětí), http://www.mpsv.cz/files/clanky/14312/NAP_ENGL_2012-2015.pdf.

Operational Programme Regional Development 2007-2013, In Support of the Deinstitutionalization of Children in Bulgaria, Childhood for All' <http://www.bgregio.eu/media/Info%20materials/Childhood%20for%20all.pdf>

⁵² Bowlby J (1951). *Maternal care and mental health*. Geneva, World Health Organisation.; Matějček Z, Langmeier J (1964). *Psychická deprivace v dětství* [Mental deprivation in childhood]. Prague, Avicenum.

⁵² Nelson, C. and Koga, S. (2004) Effects of institutionalisation on brain and behavioural development in young children: Findings from the Bucharest early intervention project, paper presented at the International Conference on 'Mapping the number and characteristics of children under three in institutions across Europe at risk of harm', 19 March 2004, EU Daphne Programme 2002/3 and WHO Regional Office for Europe, Copenhagen, Denmark.

⁵² Rutter M et al. (1998). Developmental catch-up, and deficit, following adoption after severe global early privation. *Journal of Child Psychology & Psychiatry*, 39(4):465– 476.

⁵² Perry, B.D. (2000). *Traumatized children: How childhood trauma influences brain development*. Child Trauma Academy. Retrieved June 2009 from www.childtrauma.org/CTAMATERIALS/trau_CAMI.asp

⁵³ Browne, K. et al (2005) Mapping the number and characteristics of children under three in institutions across Europe at risk of harm, University Centre for Forensic and Family Psychology (EU Daphne Programme, Final Project Report No. 2002/017/C)

compared to the other countries. Further modernization of the baby homes may actually – contrary to their closing down as a relic – constitute progress. The Czech Republic has no reason to give up its head start just to be the same as others.⁵⁴

Although the law eventually passed, this episode eloquently makes the case for tightening the criterion of fulfilment so that Member States are not the sole judge of when or whether to apply external funds to transition to community living in cases where such funds are been drawn on. It should be emphasised here that the EU cannot oblige a Member-State to introduce a genuine deinstitutionalisation programme. However the EU can and should insist that EU funds provided to member-States are used in line with EU legislation and policy.

B: Examples of Good Practice – which should be Built Upon.

The use of EU Structural Funds to promote the transition from institutional to community-based services should build on examples of good practice, some of which are presented here.

Of course, the permissiveness of the old regulations worked both ways. If Member States were minded to use the funds positively they could do so. But there was nothing to preclude bad uses of the funds or to mandate positive uses.

Over the past 15 years, European Union funds have been used to promote the transition from institutions to community-based services in pre-accession and neighbourhood countries, including Romania (Children First programme)⁵⁵, Moldova⁵⁶ and Montenegro⁵⁷, among others. These funds were used to help countries fulfil their pre-accession criteria. It is worthy of note that the EU insisted on pre-accession countries using its funds to promote transition from institutions to community-based services. However it does not as yet insist on this in terms of EU member-States' use of Structural Funds. Nevertheless, a number of member-States are showing the way in this regard.

⁵⁴ Excerpt from a letter by Vaclav Klaus, the President of the Czech Republic, to the Vice-Chairwoman of the Chamber of Deputies of the Parliament of the Czech Republic, Ms. Miroslava Němcová, in which he states his reasons for vetoing the Act on Social and Legal Protection of Children (12 Sep 2012).

See also Prague Monitor, Klaus vetoes foster care legislation

<http://praguemonitor.com/2012/09/13/klaus-vetoes-foster-care-legislation>

⁵⁵ EC PHARE (2001-03) "Strengthening and diversification of the child protection activities" pp. 3-4, http://ec.europa.eu/enlargement/fiche_projet/work/2003-005-551%20Romania%20National%20programme.pdf?CFID=621792&CFTOKEN=93830371&jsessionid=0601ea5d038017427210

⁵⁶ UNICEF Moldova/EU TACIS "Development of integrated social services for vulnerable children and families at risk", p.2, http://ec.europa.eu/europeaid/where/neighbourhood/regional-cooperation/enpi-east/documents/annual_programmes/moldova_ap_2005_pf_vulnerable_layers_of_population_en.pdf

⁵⁷ UNICEF Montenegro (2011) EU support to boost social inclusion in Montenegro, http://www.unicef.org/montenegro/media_16559.html

Over the past five years, the Czech government, through the Ministry of Labour and Social Affairs (MOLSA) has implemented a programme, using both ESF and ERDF funding (€55 Million), to deinstitutionalise more than 30 of the countries social care homes (institutions that house adults and children with disabilities). This has resulted in developing a range of community-based services for children and adults with disabilities. More than five hundred people have already moved out of institutions as a result of the programme with another five hundred expecting to be moved in the coming years.⁵⁸

MOLSA has also just instituted a fund (4 648 000€) to develop community-based services for vulnerable children and families and to increase the provision of foster care.⁵⁹ The aim is to reduce reliance on institutions and prevent the separation of children from their families. These funds are to support the implementation of the new law on social and legal protection of children as well as the National Action Plan for the Transformation of Children's Services.⁶⁰

In Bulgaria, the government has embarked upon an ambitious programme to completely transform services for children and families, using €110 million of Structural Funds. Admirably the programme has prioritised starting with 1,800 children with disabilities living in institutions where conditions are extremely poor. The programme uses ESF and ERDF funding and brings together all relevant government ministries to oversee and ensure implementation of the programme.⁶¹ It has a long-term vision and, realistically, will be implemented over 15 years. Once complete there will be no more babies, children with disabilities or socially vulnerable children in institutions. Instead, a range of family support services, inclusive education, foster care and specialised small group homes will be provided.

Whilst such countries have made ambitious and courageous moves in the right direction, progress and continuity are subject to the vagaries of party politics. As we write, those managing deinstitutionalisation programmes in the Czech Republic and Bulgaria are awaiting the impact on the process of a change in national government.

⁵⁸ Ministerstvo práce a sociálních věcí. Manuál rušení ústavů. Available at: <http://trass.cz/Download.aspx?param=T2lkOmK6ODg1OTw/JSQKDT5GaWxlSWQ6aTo4ODcwPD8lJAoNPkNyYzpzOjM5MDM4MzUyMzU0MDIzNzE4MzI3NmI4N2VhMDE0ZGFkNWFiZDFjOTE0OTE2MDE5MTIxMzU8PyUkCg0%2bVHlwZTpzOkNvbnRlbnQ8PyUkCg0%2bTWV0aG9kOnM6SW5saW5lPD8lJAoNPg%3d%3d>; last accessed: 14 Aug 2013.

⁵⁹ Calculation based on calls for proposals for the development of the services: <http://www.esfcr.cz/zakazky/pilotni-overovani-site-sluzeb-v-pardubickem-kraji-ramcova>; < <http://www.esfcr.cz/zakazky/pilotni-overovani-site-sluzeb-v-karlovarskem-kraji-ramcova>; < <http://www.esfcr.cz/zakazky/pilotni-overovani-sluzeb-pro-pestounskou-peci-zlinsky-kraj>; < <http://www.esfcr.cz/zakazky/pilotni-overovani-sluzeb-pro-pestounskou-peci>; < <http://www.esfcr.cz/zakazky/pilotni-overovani-sluzeb-pro-pestounskou-peci-1>>

⁶⁰ Operational Programme Regional Development 2007-2013, In Support of the Deinstitutionalisation of Children in Bulgaria "Childhood for All", <http://www.bgregio.eu/media/Info%20materials/Childhood%20for%20all.pdf>

⁶¹ EU Regional Policy Projects, Bulgaria: New fit-for-purpose homes for children with disabilities, http://ec.europa.eu/regional_policy/projects/stories/details_new.cfm?pay=BG&the=82&sto=2700&lan=7®ion=ALL&obj=ALL&per=2&defL=EN

In Bulgaria, a new Member of Parliament has called into question the programme financed by the Structural Funds, stating that the deinstitutionalisation process in Bulgaria is costing the country too much and that the policy of child protection is not limited to deinstitutionalisation only.⁶² It is unlikely that Bulgaria will abandon its programme, precisely because of the agreement with the EC to use the Structural Funds for deinstitutionalisation. But this case does highlight the potential of EU Structural Funds in ensuring consistency of approach to human rights issues that should not be affected by changes in government.

5. Four Weaknesses in the Draft Text that Need to be Improved.

The core job of the relevant 'criterion of fulfilment' must be both to put a halt to bad practices and to ensure that the Funds will be used to play their part in initiating a positive process of change toward community living.

It is understood that, following a series of Trilgoue negotiations in which both the Commission and the European Parliament stated their opposition to the removal of Thematic Ex Ante Conditionality 10, the following language was agreed for that provision on the 17th of June 2013:

- A national strategic policy framework for poverty reduction, aiming at active inclusion, is in place that:
 - ...
 - *depending on the identified needs*, includes measures for the shift from institutional to community based care.

[italic added].

This memo is premised on the view that the text could be made clearer and strengthened in order to give better expression to the underlying intention of the Parliament to ensure that the Funds are used to add value to the efforts of the Member States in progressively achieving the right to community living.

Why should the draft text be clarified and strengthened?

First of all, the draft text makes the obligation to begin a process of transferring resources from one system (institutionalization) to another (community living) appear to be conditional. In fact the legal obligation is not (and should not be made to appear) contingent on 'identified needs.' It is a categorical imperative both under international law and even within stated EU policy.

Secondly, even if it were a question of needs and not rights (which it is not) the language is too permissive or open-ended as to who assesses the needs

⁶² Bulgarian National Television, Parliamentary Session on 2nd Aug 2013, available at: http://bnt.bg/bg/news/view/105766/posleden_raboten_den_na_deputatite <http://bnt.bg/bg/news/view/105766/posleden_raboten_den_na_deputatite> ; last accessed: 9 Aug 2013.

and (if an assessment is required – which it is not) in accordance with what standards and criteria? It should be recalled, for example, that persons with disabilities now have a legal right to be actively involved and consulted in all processes and decisions that affect them (Article 4.3 of the UN CRPD). Given the history of institutionalisation, and the demonstrated resistance to change across many European countries it is fair to surmise that any open-ended process is likely to lend itself to abuse or at least allow practices to continue as before without any change or even an impulse for change – all of which of course negates the whole purpose of Article 19 of the UN CRPD.

Thirdly, it is not really a question of moving resources to ‘community care.’ It is more a question of moving resources from institutions to more individualized arrangements for the individual in the community and by making existing community services more accessible to persons with disabilities, children and older people. Language is important as it always carries baggage from the past. It is important to be sensitive to the real claim/need, which is to make community services more accessible to groups hitherto excluded.

Fourthly, and much more fundamentally, the issue is not ‘needs’ - it is ‘rights.’ By framing the issue as one of ‘needs’ it makes it appear as if they can be rationed, or set-off against other countervailing ‘needs’, or that it really is a question of policy (unconstrained by law) rather than a categorical, legal imperative.

Nobody doubts that the transition to the community will involve time, intellectual effort and resources. It is of course a process that can only be progressively achieved. But if the EU does not ‘kick-start’ that process in the right direction it will probably never happen.

The draft text can and should be clarified and strengthened to stand a better chance of achieving the underlying intention of the Parliament.

6. Proposals.

We – the co-signatories - share in the laudatory aim and intention of the relevant criterion of fulfilment and are indeed gratified by the insistence of many about its continued inclusion. It is our view that the relevant criterion of fulfilment must remain but can and should be tightened up and that the relevant Guidance from the Commission can and should place clearer parameters around some of the ambiguous language.

With this in mind, we have 2 proposals:

1. ***Delete and replace some language in the Criterion of Fulfilment.***

2. Add Clearer Parameters on the criterion of fulfilment in the European Commission's draft Guidance on ex ante Conditionalities.

These are outlined in detail below.

1st Proposal - Delete and replace some language in the Criterion of Fulfilment.

First, the phrase '*depending on identified needs*' has to be deleted. It may be that in including this phrase, the intention was to suggest that some countries have no institutions and therefore have no need of a process of transition to community-based services. If this were the case in any EU member-State (and that is highly unlikely), the criterion of fulfilment would simply be irrelevant to that country. It should be remembered that the transition from institutions to community-based services is an issue of fundamental rights that are not optional. As such, the role of assessing the use of Structural Funds for such programmes cannot and should not be delegated to member-States, but must remain the responsibility of the EU.

Secondly, and related to the first point, the reference to 'community-based care' needs to be amended to highlight that it is community based services that are at stake. No matter how well intentioned, the use of the word 'care' only serves to perpetuate paternalism, which reinforces learned passivity. This vicious cycle has to be broken.

Thirdly, what is important is the personalisation of services to ensure that the person's will and preferences are respected. Europe's social model is clearly in transition and will respond more directly to the person's life situation and rights. Technology will play an increasing role in the years ahead in ensuring this personalisation. This steady personalisation of services needs to be reflected in the draft text.

Fourthly, what is important is that generally available community services (hitherto foreclosed to disabled and others groups) should be made more accessible. Concentric circles of inclusion and exclusion will need to be folded back. One of the best ways of doing this is gradually to extend general community-based systems to all. Great care will be needed in this process to tend to specific needs – but in a general policy environment and not in isolated and isolating silos as in the past.

Fifthly, the process of transition should not be made to appear contingent – it is a legal requirement as well as a policy imperative. This is key. Any language that seems to confer discretion needs to be strenuously avoided.

We would therefore suggest replacing the current text on the relevant criterion of fulfilment with something along the lines of the following:

Include measures to achieve the right to community living on an equal basis with others by planning for and implementing the transfer of resources from institutional care to more individualized arrangements in the community and by making community services more accessible.

Other formulae can be found – so long as the process of change is seen to be responding to rights and not needs, so long as the transition is seen as mandatory and not optional and so long as the goal is community living on an equal basis with others.

We advance this draft language in the hope that it might prove instructive in the process of further clarifying and strengthening the relevant criterion of fulfilment. Only in this way can the relevant criterion of fulfilment do its job, meet the EU's international legal obligations, keep faith with professed EU policy and provide a stepping stone for a truly 'smart, sustainable and inclusive' Europe of the future for all our citizens. We, the co-signatories, laud the European Parliament for its steadfastness and respectfully submit that there is a need for new language to make the intention of the Parliament as clear as possible and to provide optimum prospects for a better use of the Structural Funds for some of Europe's most marginalized citizens.

2nd Proposal – Add Clearer Parameters on the criterion of fulfilment in the European Commission's draft Guidance on ex ante Conditionalities.

Alternatively, if the existing language ("depending on identified needs") is retained, we would propose that the accompanying European Commission Guidance⁶³ (still in draft form as of August 2013) must, at a minimum, be clarified to provide much clearer guidance or parameters on the interpretation and application of the language.

As the draft Guidance currently stands there is no definition of the phrase "depending on identified needs." At the very least it should be made abundantly plain that this language should never be interpreted to suggest that a transition to community-based services is optional. And it should be made plain that rights – not just needs – lie at the heart of this criterion of fulfilment and are therefore non-negotiable. This would give the Commission a much clearer yardstick to assess compliance with the relevant ex ante conditionality and thus operationalize the Regulations more efficiently in the taxpayers' interests and in compliance with international law.

The draft Guidance contains a good start at some key definitional issues such as 'community based services.' These too need further tightening and clarification. But the most important gap remains the lack of any parameters in the draft Guidance on the key phrase 'depending on identified needs.' We urge Members of the European Parliament to call on the European Commission to provide such Guidance in the final draft of this text.

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http://ec.europa.eu/regional_policy/what/future/pdf/preparation/20092013_guidance_part_2.pdf

If the phrase “depending on identified need” is maintained in the final text of the regulations, it is imperative that the European Commission defines clear parameters in its Draft Guidance on the ex ante conditionalities. Failure to do this will result in the laudable goals of Europe 2020 remaining elusive for all our citizens- children, persons with disabilities and older persons – still languishing in unsuitable institutions.