



NGO information submitted to the

UN Committee on the Rights of Persons with Disabilities

with reference to the adoption, by the Committee, of a
List of Issues Prior to Reporting (LOIPR)
on the combined Second and Third reports of the

EUROPEAN UNION
a regional integration organization

scheduled for the
26th session of the Committee (7 March 2022 – 25 March 2022)
under the Convention on the Rights of Persons with Disabilities

Submitted by:

Validity Foundation – Mental Disability Advocacy Centre

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I. OVERVIEW and EXECUTIVE SUMMARY

1. This written submission provides information to the Committee on the Rights of Persons with Disabilities (“CRPD Committee”) in preparation for the adoption of a List of Issues Prior to Reporting (“LOIPR”) concerning the combined Second and Third period reports of the European Union (“EU”) as a party to the Convention on the Rights of Persons with Disabilities (“CRPD”) pursuant to article 35 thereto, and subject to the EU’s status as a regional integration organisation within the meaning set out under article 44(1).
2. This submission has been prepared by the Validity Foundation – Mental Disability Advocacy Centre (“Validity”), an international non-governmental human rights organisation headquartered in Budapest, Hungary. Validity is a specialist legal advocacy organisation that uses legal strategies to promote, protect and defend the human rights of persons with intellectual disabilities and persons with psychosocial disabilities worldwide. Validity holds participatory status at the Council of Europe and special consultative status at the UN Economic and Social Council (ECOSOC). Validity provides legal expertise to movements of persons with disabilities, conducts monitoring, research and advocacy programmes across Europe, Africa and at other international fora, and collaborates with a broad range of networks and coalitions of persons with disabilities worldwide. For more information, please visit www.validity.ngo.
3. Being headquartered in central Europe since establishment in 2002, Validity has two decades of experience in pursuing strategic litigation and advocacy initiatives to promote the rights of persons with disabilities, having litigated many leading cases on behalf of persons with disabilities at national courts across the continent, including before the European Court of Human Rights. Validity, then the Mental Disability Advocacy Centre (“MDAC”) advocated firmly for the alignment of national legislation and policies with CRPD standards in the process of accession of a number of central and eastern European countries to the EU during the first decade of the century.
4. Validity advocated for and welcomed the EU’s confirmation of the Convention in 2009, this representing a landmark achievement, being the first international treaty acceded to by the Union, and marking the first, and to date only regional integration organisation to voluntarily accede to the CRPD under article 44(1). The EU is one of the single largest development donors in the world.¹ The EU is comprised of twenty-seven national Member States, a combined population of 447.7 million people,² and an estimated 87 million citizens with disabilities.³
5. Despite the huge potential of the EU to transform the lives of European citizens with disabilities, this submission addresses some major concerns. **Part II** of this submission provides a description and critical analysis of the status and operation of the CRPD within EU law (art. 44). Whereas questions of “*competence*” and “*shared management*” have a level of technical complexity, we are concerned that representatives of the European institutions are using the principle of “*subsidiarity*” to escape EU accountability for mass financing of schemes that violate the CRPD and are instead reinforcing and expanding disability segregation and isolation. The remainder of the submission, **Part III**, addresses issues concerning the EU’s compliance with specific articles of the CRPD including general obligations and principles (arts. 1-4), equality and non-discrimination (arts. 5-7), the right to life in the context of the pandemic (arts. 10-11), access to justice and equality before the law (arts. 12-13), the right to independent living and the ongoing problem of institutionalisation within the Union (arts. 14-19), aspects concerning political rights (arts. 29), and implementation and monitoring (art. 33).

¹ See, for example: European Commission, ‘Europe remains the world’s biggest development donor - €74.4 billion in 2018’, press release, 11 April 2019, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2075.

² Eurostat, ‘Facts and figures on life in the European Union’, factsheet, undated, available at: https://european-union.europa.eu/principles-countries-history/key-facts-and-figures/life-eu_en.

³ See: European Commission, *Union of Equality – Strategy for the Rights of Persons with Disabilities 2021-2030*, COM(2021) 101 final, Brussels, 2021, at p. 4 and fn 6, available at: <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8376&furtherPubs=yes>.

II. STATUS AND OPERATION OF THE CRPD IN THE EU

6. As a regional integration organisation, the EU is comprised of twenty-seven Member States,⁴ all of which are also states parties to the CRPD.⁵ Twenty-two EU member states have ratified the Optional Protocol to the CRPD (“OP-CRPD”), two have signed but are yet to ratify OP-CRPD, and three member states have neither signed nor ratified OP-CRPD.⁶ The EU has not, to date, confirmed OP-CRPD.
7. The EU confirmed its accession to the CRPD on 10 December 2010 subject to a declaration of competence under art. 41(1),⁷ appointing the European Commission as the focal point for the purposes of art. 33(1) CRPD.⁸ The European Commission (“Commission”) is the EU’s executive arm, responsible for the day-to-day functioning of the affairs of the EU, drawing up proposals for new EU legislation and implementing decisions taken by the Council of the European Union (“Council”) and the European Parliament (“Parliament”), which are the other main institutions of the EU concerned with legislation.⁹ The Commission has a wide set of responsibilities flowing from the EU treaties, including regulation and enforcement of the single European market and EU law, managing internal EU policies and funding to Member States, and representing the EU externally.
8. The CRPD holds the status of an “international agreement” to which the EU is party by virtue of art. 216 of the Lisbon Treaty (also known as the Treaty on the Functioning of the European Union, “TFEU”). Subsection (2) of art. 216 TFEU states that: “[a]greements concluded by the Union are binding upon *the institutions of the Union and on its Member States*” [emphasis added]. Whereas the interaction between EU and international law can be complex, the Court of Justice of the European Union (“CJEU”), the EU’s main judicial organ, has held that the CRPD is an “*integral part of the European Union legal order*”.¹⁰ To the extent that the CRPD is binding on the institutions of the EU and the Member States, the CJEU has held that it “*prevails over acts of the European Union*”.¹¹ More specifically, the Court has stated that instruments of secondary EU law must be interpreted as far as possible consistently with the CRPD.¹²
9. Whereas the treaties and the jurisprudence of the CJEU appear to give the CRPD a strong, cross-cutting and legally-binding status at all levels of EU action, our experience shows us that both EU institutions and Member States are in fact failing to ensure alignment with both general obligations and specific rights set out under the CRPD. Indeed, Validity and many of our partners are deeply concerned that the EU continues to pursue policy approaches and investment priorities that knowingly and directly violate core provisions of the CRPD, most notably by providing large-scale investments to Member States that are renovating and expanding systems of

⁴ Following the departure of the United Kingdom from the EU on 31 December 2020, the current membership is comprised of Austria, Belgium, Bulgaria, Croatia, the Republic of Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden. See: https://european-union.europa.eu/principles-countries-history/country-profiles_en.

⁵ Ireland became the final EU Member State to ratify the CRPD in 2018, preceded by Finland and the Netherlands, both in 2016.

⁶ Czechia became the most recent EU Member State to ratify OP-CRPD in June 2021. Bulgaria and Romania have signed but not ratified OP-CRPD. Source: United Nations Treaty Collection, Chapter IV, Human Rights - <https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=en>.

⁷ The declaration of competence was annexed to the legislative measure adopted by the Council of the European Union authorising confirmation of the CRPD by the EU (at Annex II): Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ L 23, 27.1.2010, p. 35–36, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32010D0048>.

⁸ *Ibid.*, art 3: “*With respect to matters falling within the Community’s competence and without prejudice to the respective competences of the Member States, the Commission shall be a focal point for matters relating to the implementation of the UN Convention in accordance with Article 33.1 of the UN Convention.*”

⁹ For further details on the role and functioning of the Commission, see here: https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/european-commission_en.

¹⁰ Judgment of 11 April 2013, *HK Danmark (Ring and Skouboe Werge)*, Joined Cases C-335/11 and C-337/11, ECLI:EU:C:2013:222, at para. 30, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62011CJ0335>.

¹¹ *Ibid.*, para. 28.

¹² *Ibid.*, para. 29.

institutionalisation of persons with disabilities across many Member States. The CRPD Committee has expressed its concerns about the problematic role of EU funds in reinforcing institutionalisation in the context of its recent Inquiry under OP-CRPD concerning Hungary,¹³ and in recent concluding observations concerning Estonia.¹⁴ Far from being one-off or isolated incidents, Validity and our partners are aware of many problematic investments amounting to hundreds of millions of euros, spanning numerous EU Member States, and potentially affecting the lives of hundreds of thousands of persons with disabilities on the continent.

10. We believe these issues flow from a long-term failure on the part of the EU institutions to ensure their day-to-day actions viz Member States align with the letter and spirit of the CRPD, and their own stated policy goals, such as those described within the recently-revised European Disability Strategy.¹⁵ Having substantially expanded our monitoring of the use of public funds within the EU in recent years, we regret to report a woeful and perceptible institutional inertia at many levels within the European Commission to properly execute its obligations to monitor and control the European budget. We have experienced consistent refusals to take action even in the most egregious cases where Member States are using EU funds to expand the overall capacity and numbers of institutions or other segregating ‘services’ for persons with disabilities within their territories, and a palpable defensiveness on the part of Commission officials when engaging with us and other representatives of civil society.
11. Whereas the EU is pursuing numerous actions to promote and advance the rights of people with disabilities in some areas, such “successes” are being undermined by any demonstrable commitment to ending the financing of segregation that remains prevalent across many Member States. Despite its role as guardian of the European treaties and focal point for implementation of the CRPD, we have repeatedly seen Commission officials exonerate Member States for continuing to invest in institutionalisation in Hungary;¹⁶ Bulgaria;¹⁷ Poland;¹⁸ and in Romania and Estonia;¹⁹ as well as in other cases pursued by our partners at the European Network on Independent Living (ENIL) in Austria;²⁰ and Portugal.²¹ The recurrent problems have also been addressed by the Special Rapporteur on the Rights of Persons with Disabilities, the Special Rapporteur on the right to health, and the Special Rapporteur on the right to adequate housing, among others.²²

¹³ CRPD Committee, Inquiry concerning Hungary under article 6 of the Optional Protocol to the Convention, CRPD/C/HUN/IR/1, 17 September 2021, para. 101(g).

¹⁴ CRPD/C/EST/CO/1, paras. 38-9,

¹⁵ Supra., fn 3.

¹⁶ See, for example: European Ombudsman, Case 417/2018/JN on the adequacy of the Commission’s reaction concerning alleged human rights violations in a home for persons with disabilities co-funded by the EU, decision, 17 September 2019, available at: <https://www.ombudsman.europa.eu/en/opening-summary/en/93849>; Validity Foundation, ‘Hungary: Lack of transparency prevents progress on independent living’, 19 May 2021, available at:

<https://validity.ngo/2021/05/19/hungary-lack-of-transparency-prevents-progress-on-independent-living/>; Validity Foundation, ‘Hungarian government must suspend and redesign deinstitutionalisation projects’, 26 February 2018, available at: <https://validity.ngo/2018/02/26/hungarian-government-must-suspend-and-redesign-deinstitutionalisation-projects/>.

¹⁷ See, for example: Validity Foundation, ‘NGOs Take European Commission to Court for Funding Segregation of Disabled Persons in Bulgaria’, 15 November 2019, available at <https://validity.ngo/2019/11/15/ngos-take-european-commission-to-court-for-funding-segregation-of-disabled-persons-in-bulgaria/>;

¹⁸ European Network on Independent Living (ENIL) and Validity, ‘ENIL and Validity challenge Polish misuse of EU funding which contributes to segregation of persons with disabilities’, 10 August 2020, available at <https://validity.ngo/2020/08/10/enil-and-validity-challenge-polish-misuse-of-eu-funding-which-contributes-to-segregation-of-persons-with-disabilities/>.

¹⁹ ENIL and Validity, ‘Commission Fails to Stop Romania and Estonia from Segregating Disabled Citizens’, 23 December 2020, available at: <https://enil.eu/news/commission-fails-to-stop-romania-and-estonia-from-segregating-disabled-citizens/>.

²⁰ ENIL, ‘Press Release: EU Structural Funds Used to Segregate Disabled People in Austria’, 8 July 2020, available at <https://enil.eu/news/press-release-eu-structural-funds-used-to-segregate-disabled-people-in-austria/>.

²¹ See, for example: European Ombudsman, ‘Decision in case 1233/2019/MMO on how the European Commission ensures that Member State governments spend European Structural and Investment Funds in line with the obligations stemming from the United Nations Convention on the Rights of Persons with Disabilities’, decision, 30 July 2020, available at: <https://www.ombudsman.europa.eu/en/decision/en/130886>.

²² Mandates of the Special Rapporteur on the rights of persons with disabilities and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context,

12. The Commission holds responsibility for managing the EU budget, comprised of longer-term budget allocations (known as “Multiannual Financial Frameworks”,²³ or “MFF”), and annual budgets. During the 2014-2020 MFF period, the overall budget was set at €959.51 billion. Negotiations for the 2021-2027 MFF period took place during the Covid-19 pandemic, triggering calls for increased investments into Member States to assist with immediate and longer-term recovery efforts. €1,074.3 billion was eventually agreed for the 2021-2027 period.²⁴ These funds cover all aspects of EU action including economic and social cohesion, agriculture, sustainable growth, security and development aid, among others. Whereas all aspects have an impact on the lives of persons with disabilities, both within and beyond the EU, priorities touching on the lives of persons with disabilities are most identifiable within the EU’s cohesion and development actions. During the 2013-2020 MFF period, cohesion investments represented 34% of the budget (€371 billion), and approximately 6% (€66 billion) for development and external actions. During the 2021-2027 period, the EU plans to invest €426.7 billion in cohesion, and €110.6 billion in development and external action.²⁵
13. It is far beyond the capacities of Validity and organisations of persons with disabilities to consistently monitor, track and report on the flows of funding, and even less so to adequately assess the targeting and impact of the EU’s financial and policy instruments on the lives of persons with disabilities. The lack of clear, comprehensive and real-time information from the Commission substantially hinders the role of organisations such as Validity, and the ability of persons with disabilities and their representative organisations, to effectively participate in decision-making affecting their lives,²⁶ including concerning the handling of specific complaints that do arise. Given this situation, since 2017 Validity has pursued a high number of ‘transparency requests’ under the EU Transparency Regulation,²⁷ to exercise the right to information concerning individual investments provided to Member States, and related to the policies and decision-making processes of the Commission and Member States. Often, our transparency requests are rejected at the first instance on a wide variety of bases including protection of personal data of Commission personnel; due to objections raised by Member States from which crucial documents emanate; due to opaque decisions stating that certain information is “out of scope”; and sometimes because the Commission takes a view that release of documentation may “prejudice” future acts of the EU, or the decisions of individual Member States. In many cases, such initial refusals take many months and complex legal argumentation to appeal. Due to this frustrating pattern of refusals, Validity initiated an action against the European Commission at the CJEU in October 2020,²⁸ challenging the refusal to release certain documentation concerning EU investments into Hungarian “small group homes” for persons with disabilities. The case is pending before the General Court. At the time of writing, Validity is also awaiting the outcome of a further request of documentation following the findings of the CRPD Committee Inquiry concerning Hungary.
14. These issues serve to highlight our concerns about the institutional capacity and willingness of the Commission to give proper effect to the CRPD within and across its actions. Most notably, the problems concern

Communication to the European Union, AL OTH 38/2020, 18 May 2020, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25267>; Mandate of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Communication to the European Commission, AL OTH 3/2020, 11 March 2020, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25091>.

²³ There have been three Multiannual Financial Framework (“MFF”) periods since the EU’s confirmation of the CRPD: 2007-2013, 2014-2020, and 2021-2027

²⁴ Summary information concerning the EU’s long-term and annual budgets are available here: https://ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget_en.

²⁵ For a summary, see here: https://ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/2021-2027/spending/headings_en.

²⁶ This issue was addressed by the European Ombudsman in an own-initiative inquiry concerning respect for fundamental rights in the operation of the EU’s cohesion investments: European Ombudsman, Case OI/8/2014/AN, decision, 11 May 2015, at paras. 32, and recommendations (v) and (vii), available at: <https://www.ombudsman.europa.eu/en/decision/en/59836>.

²⁷ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

²⁸ Case T-640/20, *Validity v. Commission*, summary here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62020TN0640>.

management and control of the EU's financial investments to Member States, through what are collectively referred to as the EU Structural and Investment Funds ("ESIF"). These are a collection of funds that the Commission uses to pursue objectives, *inter alia*, under the EU's cohesion policy.^{29 30} Many of the concerns raised above emerged during both of the two preceding MFF periods (2007-13 and 2014-20), and although there were some strengthening of controls during the recently-ended period and in respect of the current financial period (2014-20 and 2021-27),^{31 32} our concerns relate to the practical *willingness* of Commission representatives to exercise their monitoring and control functions in accordance with CRPD standards.

15. We cannot fully account for the *unwillingness* referred to above, however the outcomes of some of our transparency requests to the Commission may be instructive. On 18 June 2018, Validity submitted a formal request for documentation concerning the handling of one of our complaints, where we had uncovered the use of ESIF in the notorious Topház institution for children and adults with disabilities in Hungary.³³ An internal legal opinion, prepared by Commission Legal Services, was eventually released, finding that the "*alleged mistreatment of the residents of the Tophaz Special Home*" could not "*justify a financial correction*".³⁴ Financial corrections are regarded as one of the most severe penalties that can be imposed on EU Member States for breach of EU law. Instead, the legal opinion says: "*Admittedly, the result that the mistreatment occurring at the Tophaz Special home has no impact on the financing received by that Home is not very satisfactory in that it puts the Commission into a bad reputational position. The Commission is probably perceived to finance infrastructure, which is then used in a manner allegedly not respecting fundamental rights.*" It is regrettable that these issues were perceived merely as "*reputational*". We believe this is a clear example of the Commission refusing to give effect to its obligations under the CRPD and EU law.

²⁹ For the 2014-2020 MFF period, the cohesion policy was comprised of the following funds: European Regional Development Fund ("ERDF"), European Social Fund ("ESF"), and the Cohesion Fund. Together with two other funds, the European Agricultural Fund for Rural Development ("EAFRD") and the European Maritime and Fisheries Fund ("EFF"), these comprised what are referred to as the "European Structural and Investment Funds" ("ESIF"). See here for a brief summary: https://ec.europa.eu/regional_policy/sources/docgener/informat/basic/basic_2014_en.pdf.

³⁰ For the 2021-2027 MFF period, the cohesion policy was revised and is now comprised of the following: (1). ERDF, ESF+, the Cohesion Fund and the Just Transition Fund ("JTF"), all of which come under the Goal of Investment for Jobs and Growth ("IJG"); (2). Interreg – European Territorial Cooperation; and (3). EU managed instruments and technical assistance. For further information, see: https://ec.europa.eu/regional_policy/en/newsroom/panorama/2021/12/12-01-2021-cohesion-policy-2021-2027-budget-in-brief.

³¹ 'Ex ante conditionalities' were introduced for the 2014-20 MFF period within the Common Provisions Regulation ("CPR") governing ESIF, making funding contingent on a preliminary assessment of the "*existence of administrative capacity for the implementation and application of the United Nations Convention on the rights of persons with disabilities (UNCRPD) in the field of ESI Funds in accordance with Council Decision 2010/48/EC*", and through introducing an anti-poverty target. See: Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, OJ L 347, 20.12.2013, p. 320–469.

³² In negotiations concerning the 2021-27 MFF period, 'ex ante conditionalities' were replaced with 'enabling conditions'. The latter are said to be stronger than the former, in that they are subject to an ongoing assessment throughout the MFF period (and not just at the beginning when negotiating Partnership Agreements with Member States) – see: https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2381. Of these, the most relevant 'horizontal enabling condition' is: "*Implementation and application of the United Nations Convention on the rights of persons with disabilities (UNCRPD) in accordance with Council Decision 2010/48/EC*". See: Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, OJ L 231, 30.6.2021, p. 159–706, in particular art 14, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R1060>.

³³ The complaint came following Validity's investigation uncovering torture and ill-treatment in the institution that was published in 2017: Validity Foundation, *Straightjackets and seclusion: An investigation into abuse and neglect of adults and children with disabilities in Hungary*, 2017, available at: <https://validity.ngo/2017/05/03/straightjackets-and-seclusion/>.

³⁴ EU Document, Reference Ares(2018)3638816 – 23/05/2018.

16. A separate legal opinion, dated 29 June 2018, was also subsequently released following a request from our partners at ENIL.³⁵ This expanded on the earlier opinion, responding to internal queries from Commission staff as to whether ESIF could be used to fund institutional care for persons with disabilities. Commission Legal Services used the opportunity to outline key aspects of what, to this day, have remained regular responses to complaints submitted by Validity, ENIL and others. In summary, their views are: (1). that there is no prohibition on using ESIF to fund institutionalisation of persons with disabilities; (2). that General Comment No. 5 of the CRPD Committee is not binding as a matter of international law, and that the GC “cannot alter the legal interpretation of the Convention”. This second point means that the Commission does not accept that investments into institutions for persons with disabilities are banned by art. 19 CRPD; and (3). that the Commission could impose penalties on Member States that breach EU law, but only where they are found to be “implementing EU law” – a highly technical, legal question. This problematic legal opinion concludes with: “However, taking into account the potential reputational harm for the Commission if it is perceived to finance infrastructures which are then used in a manner not respecting fundamental rights, the Commission may still use its political influence in situations when Member State’s [sic] actions do not constitute the implementation of Union law, and promote respect for the Charter [of Fundamental Rights of the EU] even outside its scope of application.” The restrictive approach is deeply regrettable and, far from exercising mere “political influence” on intransigent Member States, this legal opinion has served as cover for ongoing financing of institutions across the continent to this day.
17. Portions of this legal opinion are frequently copied and pasted into formal letters to Validity and our partners, rejecting our complaints concerning the funding of institutionalisation in many countries, such as those set out in para. 11, above. Our concern, here, is that the Commission consistently downplays the status of the CRPD within EU law, refuses to act in accordance with the Committee’s authoritative general comments, regarding them as little more than advisory. We note that such practices are in striking contrast with the status of the CRPD confirmed by the CJEU. Instead of seeking alignment with authoritative interpretations of the CRPD by the CRPD Committee, the Commission is imposing its own interpretations and standards in such a way as to depart substantially from the meaning of the text of the CRPD, and its object and purpose. The result has been to provide cover to numerous Member States who have received hundreds of millions of Euros to renovate and expand their existing systems of institutionalisation, potentially affecting hundreds of thousands of persons with disabilities. In many cases, the Commission simply authorises the ongoing use of ESIF to develop new, smaller carceral spaces known as “group homes”, despite these falling foul of the Convention and retaining all the features of institutions. Such “innovations” are not worthy of the tag: they result in the denial of the right to independent living and to be included in the community to tens of thousands of persons with disabilities,^{36 37 38} placing national deinstitutionalisation plans on catastrophically wrong paths that will have ongoing consequences for generations.

³⁵ EU Document, Reference Ares(2018)3471732 – 29/06/2018.

³⁶ An example includes the Commission’s refusal to suspend the Bulgarian Call for Proposals BG16RFOP001-5.002 “Support for the deinstitutionalisation of services for adults and people with disabilities” under Priority Axis 5 (Regional social infrastructure), which became the subject of litigation in: Case T-613/19 - *ENIL Brussels Office and Others v Commission*, and a subsequent appeal: Case C-622/20 P - *Validity and Center for Independent Living v Commission*; see - <https://curia.europa.eu/juris/liste.jsf?num=T-613/19&language=en>. This litigation is discussed further in Part III of this submission, below.

³⁷ Further example: Reply of the Commission to Complaint reference CHAP(2019)3261 concerning the “Liikva Päikesekodu” project (‘the Project’), Operational Programme for Cohesion Policy Funds of Estonia under axis 2, priority number 2, and violation of European and international human rights law, 3 December 2020, submitted by Validity. See: <https://validity.ngo/wp-content/uploads/2020/12/CHAP20193261-.pdf>.

³⁸ Further example: Reply of the Commission to Complaint reference CHAP (2020) 2159 concerning investments into eight projects in the Łódź Voivodeship, Poland, that contravene Union and national law in the area of social inclusion and the rights of persons with disabilities, 31 July 2020, submitted by ENIL and Validity. The Commission has failed to respond to follow-up communication regarding this complaint, including an opinion from the Polish Ombudsman raising concerns about compliance of the projects with EU law and the CRPD, and the manner in which the Commission has conducted its investigation.

18. When addressing these and other issues, the Commission commonly argues that ESIF are subject to a principle of “*shared management*”. This is an EU legal concept that refers to joint obligations between the Commission and Member States when managing investments – and therefore liabilities – concerning the control of EU funding. The Commission frequently cites the principle of “*subsidiarity*”, namely deference to the decision-making of Member States, arguing that the latter have responsibility for investigating complaints regarding problematic investments. These principles are complex and have a profound operation on the very functioning of the EU, but in the case of the above-mentioned investments, they are being utilized to avoid transparency, accountability, and enforcement of the CRPD as an integral part of the EU legal order. They are not only undermining the reputation of the EU, and particularly the Commission: they are in fact shielding the inescapable conclusion that the EU continues to finance widescale human rights violations of persons with disabilities.
19. In this section, we have outlined that the CRPD has, within EU law, a crucially important status. We have pointed to the fact that the European institutions, and the Commission, has the resourcing, the technical capacity, and the legal obligations to fully empower it to ensure proper implementation of the CRPD. Yet, at the institutional level, the Commission has shown its unwillingness to step in when required, viewing the rights of persons with disabilities as a matter of mere damage-limitation, as opposed to a subject of binding international human rights law. Promises to strengthen oversight and control have little value in the absence of full transparency and concrete action to shift investment priorities. The onus has been placed on civil society to “*raise concerns*”, yet many years of raising complaints and concerns has garnered little identifiable change. Instead, the continual flow of funds risks causing rollbacks and retrogression on the rights of persons with disabilities across Europe.³⁹ This has profound implications for ongoing and future investments, such as in the provision of long-term care for older persons,^{40 41} and urgent investments being approved at the time of writing under the EU’s Recovery and Resilience Facility, which is flexible funding to Member States to deal with the consequences of the pandemic.⁴²
20. The EU is not oblivious to the concerns presented herein, and Validity among others have engaged in extensive dialogue with EU institutions about these concerns for many years. The EU has the potential to trigger transformative change to advance the promotion, protection and fulfillment of the human rights of persons with disabilities, both within and beyond the territorial boundaries of the Union. There are some limited positive signs, notably within the revised European Disability Strategy 2021-2030,⁴³ including a commitment on the part of the Commission to “*support Member States to use EU Funds in compliance with the UNCRPD and respecting accessibility ensuring that EU funds do not support actions that contribute to segregation or*

³⁹ The Commission has gone to some lengths to argue, for example, that “*small group homes*” of the type being financed in Bulgaria are not, from their perspective, “*institutions*”; the result has been that this human rights-violative approach to deinstitutionalisation is being replicated in numerous other Member States as a model of purported “*good practice*”. *Contra* this opinion, see: Nadya Devena, *Deinstitutionalisation and life in the community in Bulgaria* (Validity, 2021), where these notions are comprehensively interrogated and dismantled, available at: <https://validity.ngo/wp-content/uploads/2021/09/Deinstitutionalisation-and-Life-in-the-Community-in-Bulgaria-FINAL.pdf>.

⁴⁰ See, for example: European Commission, ‘2021 Long-Term Care Report Trends, challenges and opportunities in an ageing society’, in which one of the focus areas argued for is “quality” in residential care provision, available at: <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8396#:~:text=2021%20Long%20term%20care%20in%20the%20EU&text=Principle%20of%20the%20European,care%20services%20of%20good%20quality>.

⁴¹ See also: Forum for Human Rights & Validity Foundation, *Institutionalisation, disability and ageing: Institutional care for older persons with disabilities in the Czech Republic* (Validity, 2021), available at: <https://validity.ngo/wp-content/uploads/2021/11/ENG-Older-persons-with-disabilities-and-DI-Report.pdf>.

⁴² See basic information here: https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en. Validity has not in the position to conduct a detailed assessment of National Recovery and Resilience plans that have been submitted by Member States over recent months, as they are voluminous and are authored in national languages.

Nevertheless, we are aware that some Member States have proposed to apply further funds, with fewer restrictions, to finance a variety of forms of disability institutionalisation, including as forms of ‘long-term care’.

⁴³ European Commission, *Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030* (EU: 2021, March 2021, COM(2021) 101 final, available at: <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8376&furtherPubs=yes>).

exclusion” and a further commitment to “support Member States to use EU Funds in compliance with the UNCRPD and respecting accessibility ensuring that EU funds do not support actions that contribute to segregation or exclusion”. But it remains to be seen whether the proposed “monitoring framework for the objectives and actions of [the revised EU Disability] strategy” will result in enhanced control and enforcement action in the sphere of the EU budget, to prevent the financing of human rights violations. A welcome development would be for the EU to enter into far more regular dialogue with the CRPD Committee concerning implementation of the Convention.⁴⁴ We would welcome it if the Commission would build on some limited promising correspondence we have seen between the Commission and Hungary following publication of the CRPD Committee’s Inquiry report concerning the latter under OP-CRPD, suspending EU investments for the construction of group homes.⁴⁵

21. The Validity Foundation therefore respectfully suggests that the following questions be put to the European Union under art. 44 CRPD, in conjunction with arts. 3-7, 19, 32, 33, and 37:

- What is the status of the CRPD within EU law? As an “integral part of the European legal order”, how do EU institutions, and particularly the European Commission as the delegated focal point pursuant to art. 33(1) CRPD, ensure the consistent interpretation and application of the CRPD across all areas of EU action, generally and specifically with respect to the European Structural and Investment Funds (“ESIF”)? Does the EU depart from the CRPD Committee’s authoritative interpretations of the scope and application of art. 19 CRPD; if so, why, how, and with what justification? How does the EU plan to bring internal legal analysis into full alignment with the CRPD, including the general comments of the CRPD Committee, with a view to giving full effect to the CRPD when managing investments to Member States?
- How do the institutions of the EU monitor and ensure compliance with the CRPD in all actions of the EU, and particularly concerning cohesion policy and the development agenda? Please indicate what institutional arrangements are in place to monitor compliance with the CRPD, and what mechanisms exist where Member States or recipient states depart from these. Please provide a breakdown of complaints received and considered by the EU concerning any alleged misapplication of EU funds as they pertain to persons with disabilities, and the outcomes thereof. Please provide any relevant legal, policy and technical standards used by EU institutions when evaluating financing agreements with Member States (including, but not limited to, the approval of MFF Partnership Agreements, Calls for Proposals, and the evaluation of project co-financing agreements), and recipient states within the field of development aid, and in the considering any complaints concerning proper application of the CRPD by the EU, Member States, or recipient states. Please describe any measures or controls in place to ensure consistent application of the CRPD within all areas of EU action, including institutional, democratic and political forms of oversight, within internal and external actions.
- Please provide a comprehensive breakdown of EU investments to Member States that relate to persons with disabilities under the 2014-20 MFF period, and those proposed or underway for the 2021-27 MFF period.

⁴⁴ Pursuant, for example, to the protocol established under art. 37(2) CRPD (‘Cooperation between States Parties and the Committee’), in conjunction with art. 32 (‘International cooperation’), interpreted in light of art 44(2) (‘Regional integration organizations’).

⁴⁵ The Validity Foundation has repeatedly requested access to official correspondence between the European Commission and Hungary following the Inquiry report. At the date of submission, partial disclosure of documents show that the Commission entered into enhanced dialogue with Hungary concerning a Call for Proposals related to building new group homes for persons with disabilities affecting 7,500 people, totally some €145 million. Correspondence emanating from the Commission, released partially in the context of ongoing proceedings before the CJEU, states that: “It is clear that the UN Committee on the Rights of Persons with Disabilities is mandated to by the CRPD to make recommendations on the compliance of the deinstitutionalisation process with the CRPD in a given country. Nevertheless and in view of the CRPD Committee report ‘Inquiry concerning Hungary carried out by the Committee under article 6 of the Optional Protocol to the Convention’ presented on 16 April 2020 and the assessment of the report by our services, we have to express our serious concerns about the compliance of the current deinstitutionalisation process in Hungary with the CRPD.” Letter of the European Commission to Hungary, date unspecified, EU Document, Reference Ares(2021)4467519 – 09/07/2021.

Please indicate, by Member State or recipient state as applicable, the value of such investments and the numbers of expected final beneficiaries, and a list of specific projects that have been, or are expected to be, financed from the EU budget on a disaggregated basis. Please indicate where the EU has taken any action to evaluate the impact of funds disbursed or committed, a summary of the any infringements identified, and the outcomes of any infringement or correction procedures during the 2014-20 and 2021-27 MFF periods/Please provide specific information concerning how funding has been used concerning adults with disabilities, older person with disabilities (including the sphere of ‘long-term care’), women and girls with disabilities, children with disabilities, and ethnic or racial minority or immigrant populations of persons with disabilities, and how much funding has gone to institutional settings of all types.

- Please provide any relevant guidance, policies or plans in place, and any evaluations thereof, to ensure full alignment of EU, Member States’ and recipient states’ actions with the CRPD. What plans are in place for the EU to strengthen such guidance, policy and plans? What lessons has the EU and its institutions learnt concerning effective monitoring, control and enforcement of CRPD standards across internal and external fields of EU action, and what proposals are in place to strengthen these?
- The Committee has found grave and systematic violations of the Convention in respect of two Member States of the EU – Spain and Hungary – and concerning an ex-Member State, the United Kingdom of Great Britain and Northern Ireland.⁴⁶ What lessons has the EU drawn from these findings? Has the EU taken any steps following the CRPD Committee’s Inquiry reports in these cases; if so, what; and specifically, has the EU taken any enforcement investigations and actions concerning these Member States? How will the EU prevent any ongoing or future funding arrangements into schemes that violate the Convention?

III. SPECIFIC ARTICLES OF THE CONVENTION

Articles 1 – 4: General principles and general obligations

22. As described in Part II above, Validity is of the view that the EU institutions have taken insufficient steps to ensure compliance with CRPD actions across all areas of EU action. The European Disability Strategy is the primary policy document setting out the EU’s plans concerning the rights of persons with disabilities.⁴⁷ Chapter 7 of that document is entitled “*Efficiently delivering the strategy*” and contains general commitments to prevent discrimination on the basis of disability, enhance cooperation between the EU and Member States and support implementation of the strategy through use of EU funds. Validity welcomes proposals that all EU institutions and agencies “*designate disability coordinators*” and “*UNCRPD focal points*”; that steps are proposed to enhance disability-inclusion and CRPD-compliance; and commitments to improve partnership with organisations of persons with disabilities and civil society organisations. We also welcome the establishment of a new EU Disability Platform, the stated purpose of which is to bring together disability focal points, organisations of persons with disabilities and the Commission, while calling for this platform to have an open-door policy to small, grassroots and national-level organisations of persons with disabilities.
23. We remain concerned, however, that the EU has yet to conduct any comprehensive approach to assess, amend, and abolish laws, policies and practices with a view to achieving overall coherence with the CRPD, and in particular the general obligations under art 4. In our view, this must include a careful analysis of the use of ESIF, protocols and practices concerning interactions between the EU and Member States, and significant strengthening of monitoring and control frameworks. As also noted above, the Commission has produced legal opinions that contradict the letter and spirit of the CRPD, and particularly art. 19 and General Comment No. 5.⁴⁸ Further, we are concerned that consultative mechanisms that currently exist within the EU, including the

⁴⁶ Spain: CRPD/C/20/3; Hungary: CRPD/C/HUN/IR/1; the United Kingdom of Great Britain and Northern Ireland, CRPD/15/45.

⁴⁷ Supra., at fn. 43.

⁴⁸ Supra., at fns. 34 and 35.

involvement of organisations of persons with disabilities in assessing and evaluating ESIF, are far from sufficient, at times appearing tokenistic. In this connection, we are aware of instances in Hungary, Romania and Bulgaria where organisations of persons with disabilities have been excluded from decision-making processes concerning deinstitutionalisation strategies and plans, particularly where they are perceived as being overly “critical”. Full and effective participation in decision-making is further hindered due to inadequate transparency and release of information by the EU institutions, particularly concerning negotiations, monitoring and control of ESIF.

24. The Validity Foundation therefore respectfully suggests that the following questions be put to the European Union under arts. 1-4:

- Please explain specifically what assessments of law, policy and practice have been conducted in accordance with art. 4, setting out any steps taken to ensure the protection and promotion of the human rights of persons with disabilities in all programs and policies.
- What mechanisms are in place to ensure full and effective participation of persons with disabilities, their representative organisations, and civil society organisations, in decision-making at EU and Member State levels? How does the EU ensure that such processes are inclusive of a broad range of representative and civil society organisations in policy and practice, in terms of decision-making, implementation and monitoring, in accordance with General Comment No. 7?
- What plans, if any, does the EU have to improve transparency and accessibility of information concerning the rights of persons with disabilities in the scope of EU and Member State action? How will the EU ensure comprehensive, timely and accessible information is regularly published and made available to representative organisations of persons with disabilities and civil society organisations, particularly concerning ESIF?
- What steps have the EU taken to ensure that the institutions of the EU and Member States refrain from any acts or practices that are inconsistent with the CRPD? Will the EU withdraw legal opinions that enable ongoing investments into institutions? What monitoring and control procedures are in place to prevent discrimination in policy and practice on the part of public officials within EU institutions, and how are complaints concerning the rights of persons with disabilities handled?

Articles 5 – 7: Equality and non-discrimination

25. To date, the EU lacks an overarching legislative framework to guarantee equality and prevent discrimination on the basis of disability. In 2008, the Council proposed an equal treatment horizontal directive,⁴⁹ the stated purpose of which was to “*combat discrimination based on religion or belief, disability, age or sexual orientation and to put into effect the principle of equal treatment, outside the field of employment*”. The proposal has stalled due to disagreements within the Council, meaning that the EU still lacks effective protection against discrimination on the basis of disability outside the realm of employment, and beyond general principles contained within the Charter of Fundamental Rights of the EU (“Charter”).⁵⁰ As such, there are no legally-binding obligations on the EU institutions or Member States to guarantee the provision of reasonable

⁴⁹ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM/2008/0426 final, available at: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52008PC0426>.

⁵⁰ Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012P%2FTXT>. Article 21 of the Charter contains a general prohibition on discrimination, including on the basis of disability. Article 26 of the Charter concerns the “*integration of persons with disabilities*”.

accommodations to persons with disabilities outside the employment sphere,⁵¹ nor is the failure to provide reasonable accommodations actionable as a form of prohibited discrimination on the basis of disability.⁵²

26. Drawing in part on the analysis provided in Part II above, and the lack of an overarching equality and antidiscrimination framework at EU level, there is a systemic failure to acknowledge institutionalisation of persons with disabilities as a form of prohibited discrimination. The obvious and profound consequence is that the EU continues to fund this form of discrimination, and fails to prevent Member States from pursuing strategies to renovate and build new institutions in many Member States. The consequences are wide-ranging. For example, in Bulgaria, the EU has continued to finance euphemistically-named “group homes” for children with disabilities across the country, in violation of the right to family life and development, despite numerous calls to end this practice.⁵³ This discriminatory model is now being replicated across other Member States, with financing being provided by the EU. Whereas there is policy guidance expressing the EU’s commitment to inclusive education for children with disabilities,⁵⁴ there is no moratorium on providing EU funding to special schools. We are aware of projects in the field of employment that are financing sheltered workshops for persons with disabilities. Whereas we welcome recent legislative measures clarifying that sheltered workshops “*violate the CRPD*”,⁵⁵ studies have shown them to be prevalent across the EU, with some Member States wrongly arguing that the CRPD itself provides a “*legislative basis*” for such schemes.⁵⁶ Further, recent research shows that older women with disabilities are disproportionately affected by institutionalisation in EU Member States.⁵⁷
27. The Validity Foundation therefore respectfully suggests that the following questions be put to the European Union under arts. 5-7:
- Please inform the Committee about any legislative plans or proposals to promote equality and to prohibit discrimination on the basis of disability across all areas of EU action, including prospects for the horizontal Equal Treatment Directive. Please describe how the EU and the Commission monitor and prevent discrimination against persons with disabilities, and particularly children with disabilities, women and girls with disabilities, and older persons with disabilities, throughout the implementation of ESIF.
 - Please provide a summary of any specific allegations of discrimination faced by persons with disabilities as a result of EU actions, or actions undertaken by Member States when implementing EU law. Please specify

⁵¹ See, for example: Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 02/12/2000 P. 0016 – 0022, and particularly art. 5 thereto, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000L0078>.

⁵² In 2016, the Commission published a study concerning reasonable accommodations beyond employment. The study found high variance among Member States as to the legal status and effectiveness of reasonable accommodations to persons with disabilities, underlining the need for EU-level action: European Commission, European Network of Legal Experts in Gender Equality and Non-Discrimination, *Disability law and reasonable accommodation beyond employment. A legal analysis of the situation in EU Member States* (Brussels: European Commission, 2016), available at: <https://op.europa.eu/en/publication-detail/-/publication/154560d2-d494-4080-90b5-dacfc1b83094>.

⁵³ See, for example: Validity Foundation, *Deinstitutionalisation and Life in the Community in Bulgaria: a Three-Dimensional Illusion* (2021), available at: <https://validity.ngo/wp-content/uploads/2021/09/Deinstitutionalisation-and-Life-in-the-Community-in-Bulgaria-FINAL.pdf>; and Disability Rights International, *A Dead End for Children: Bulgaria’s Group Homes* (2019), available at: <https://www.driadvocacy.org/wp-content/uploads/Bulgaria-final-web.pdf>.

⁵⁴ European Commission, ‘Access to quality education for children with special educational needs’, 2018, available at: <https://ec.europa.eu/social/BlobServlet?docId=20625&langId=en>.

⁵⁵ European Parliament resolution of 10 March 2021 on the implementation of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation in light of the UNCRPD (2020/2086(INI)), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021IP0075>.

⁵⁶ See, for example: European Parliament, ‘Reasonable Accommodations and Sheltered Workshops for Persons with Disabilities: Costs and Returns of Investments’, study for EMPL Committee, January 2015, available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536295/IPOL_STU\(2015\)536295_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536295/IPOL_STU(2015)536295_EN.pdf).

⁵⁷ Forum for Human Rights & Validity Foundation, *Institutionalisation, disability and ageing: Institutional care for older persons with disabilities in the Czech Republic* (Validity, 2021), at p. 1, available at: <https://validity.ngo/wp-content/uploads/2021/11/ENG-Older-persons-with-disabilities-and-DI-Report.pdf>: “[women with disabilities] represented 75 % of clients in residential facilities for seniors and 70 % of clients in special regime facilities.”

the outcomes of any investigations, including any enforcement actions taken to prevent EU funds from being used on segregationist schemes and programs in the fields of education, employment, social protection, health, social policy, and long-term care.

Articles 10 – 11 (and 25): Rights to life and health in the context of the pandemic

28. There is now extensive evidence available internationally concerning the disproportionate impact of the pandemic on persons with disabilities.⁵⁸ During the early stages of the pandemic, Validity and our partners raised serious concerns about lockdowns and other severe restrictions being imposed, often discriminatorily, against persons with disabilities.⁵⁹ Emergency laws and policies imposed by many states resulted in high levels of violence and abuse,⁶⁰ denials of access to basic and emergency forms of healthcare, the adoption of discriminatory triage policies in healthcare sectors,⁶¹ and dangerous decisions to lockdown institutions (both health and social care).⁶² The pandemic has been catastrophic for persons with disabilities across the EU too.
29. We have repeatedly highlighted the inherent dangerousness of keeping people in congregate living settings in the context of a deadly and highly transmissible virus, calling for emergency efforts to proceed with deinstitutionalisation.⁶³ Despite these calls, Member States across Europe imposed highly restrictive lockdowns on institutions, in some cases for substantially longer periods than restrictions imposed on the general population, a matter that we are pursuing through litigation.⁶⁴ The European Centre for Disease Prevention and Control (“ECDC”), an agency of the EU, has conducted surveillance of COVID-19 in “long-term care facilities” (“LTCFs”) across EU Member States since early 2021.⁶⁵ It has also produced guidance for EU Member States on preventing and controlling COVID-19 in such facilities.⁶⁶ Perhaps most shockingly, the ECDC confirmed the fears of many, stating that: “*By May 2020, deaths among LTCF residents accounted for 37–66% of all COVID-19-related deaths in EU/EEA countries, depending on the country (countries with available data).*” The ECDC has also undertaken efforts to collect a list of measures taken by EU Member States in respect of the pandemic, providing the possibility for data to be sorted as to target population (such as

⁵⁸ See, for example: COVID-19 Disability Rights Monitor (DRM), *Disability rights during the pandemic A global report on findings of the COVID-19 Disability Rights Monitor* (2020), available at: <https://covid-drm.org/assets/documents/Disability-Rights-During-the-Pandemic-report-web.pdf>; OECD, ‘Rising from the COVID-19 crisis: Policy responses in the long-term care sector’, December 2021, available at: https://read.oecd-ilibrary.org/view/?ref=1122_1122652-oyri4k81cp&title=Rising-from-the-COVID-19-crisis-policy-responses-in-the-long-term-care-sector; GLAD Network, ‘COVID-19 response and the rights of persons with disabilities’, list of resources, available at: <https://gladnetwork.net/search/resources/covid-19-response-and-rights-persons-disabilities>.

⁵⁹ On 9 April 2020, members of the COVID-19 DRM wrote to the Secretary-General of the World Health Organization (WHO) to call for, among others “*official guidance or instructions for States concerning the specific issue of care and support for persons with disabilities staying at/living in/detained in institutional settings during the COVID-19 pandemic*”. Correspondence can be supplied on request.

⁶⁰ COVID-19 DRM, ‘COVID-19 Disability Rights Monitor (DRM) calls for an end to police violence and abuse against persons with disabilities and their family members’, 4 August 2020, available at: <https://covid-drm.org/en/statements/covid-19-disability-rights-monitor-drm-calls-for-an-end-to-police-violence-and-abuse-against-persons-with-disabilities-and-their-family-members>.

⁶¹ COVID-19 DRM, ‘COVID-19 Disability Rights Monitor calls on governments to ensure access to food, medication and essential supplies for persons with disabilities’, 17 September 2020, available at: <https://covid-drm.org/en/statements/covid-19-disability-rights-monitor-calls-on-governments-to-ensure-access-to-food-medication-and-essential-supplies-for-persons-with-disabilities>.

⁶² COVID-19 DRM, ‘COVID-19 Disability Rights Monitor (DRM) calls for an emergency response to the catastrophic abuse of the human rights of persons with disabilities in institutions’, 20 July 2020, available at: <https://covid-drm.org/en/statements/emergency-response>.

⁶³ ENIL, Disability Rights International (DRI) and Validity, ‘Emergency Deinstitutionalisation: A joint call to act now!’, 11 June 2020, available at: <https://enil.eu/news/emergency-deinstitutionalisation-a-joint-call-to-act-now/>.

⁶⁴ Collective complaint no. 197/2020, *Validity v. Finland*, European Committee of Social Rights, documentation available at: <https://www.coe.int/en/web/european-social-charter/-/no-197-2020-european-federation-of-national-organisations-working-with-the-homeless-feantsa-v-finland>.

⁶⁵ ECDC, ‘Surveillance of COVID-19 in long-term care facilities in the EU/EEA’, 29 November 2021, available at: <https://www.ecdc.europa.eu/en/publications-data/surveillance-COVID-19-long-term-care-facilities-EU-EEA>.

⁶⁶ ECDC, ‘Prevention and control of COVID-19 in long-term care facilities’, list of resources, available at: <https://www.ecdc.europa.eu/en/all-topics-z/coronavirus/threats-and-outbreaks/covid-19/prevention-and-control/LTCF>.

restrictions placed on residents in LCTFs).⁶⁷

30. Perhaps predictably, calls emerged from among service providers and other bodies for rapid increased investments into social and health care systems across the EU. On 10 February 2021, the European Parliament approved the establishment of the Rescue and Resilience Facility (“RRF”), a new source of emergency funding for Member States to respond to impacts of the pandemic, totaling €672.5 billion in loans and grants.⁶⁸ EU Member States were invited to rapidly prepare national plans detailing investment priorities.⁶⁹ The European Commission has prepared an online dashboard providing information concerning thematic financing priorities of the RFF, disbursements, milestones and targets, and some thematic analyses.⁷⁰ One of the policy priorities is stated to be “*Health, and economic, social and institutional resilience, with the aim of, inter alia, increasing crisis preparedness and crisis response capacity*”, with currently available information showing that 5% of available funding under this theme will go to “*Long-term care: resilience, sustainability, adequacy, availability, accessibility and quality, including digitisation and infrastructure*”.⁷¹ A summarised thematic briefing on this area of investment shows that Lithuania, Portugal and Slovakia are among EU Member States planning to use this financing to “*improve*”, “*reform*” and “*strengthen the response capacity*” of long-term care facilities.⁷² It is not possible to conduct a detailed analysis of these plans or investments, nor other thematic priorities that may affect persons with disabilities. We are concerned, however, that such investments must be prevented from reinforcing institutionalisation in any way.
31. The Validity Foundation therefore respectfully suggests that the following questions be put to the European Union under arts. 10-11, in conjunction with art. 25:
- Please provide information, data and statistics concerning the impact of COVID-19 on persons with disabilities in the EU, disaggregated by age, gender, and disability-status. What analyses have been done concerning the disproportionate impact of the pandemic on persons with disabilities, including measures taken by EU Member States? Please also provide disaggregated data on infections and deaths of persons with disabilities in EU Member States, and specify how many of these occurred in institutional settings.
 - What steps are the EU taking to ensure investments under the Rescue and Resilience Facility (“RRF”) are strictly applied in accordance with EU and Member State obligations under the CRPD? What measures are in place to detect and prevent any investments that could provide financial support to institutionalisation? Please provide a summary of disability-specific or disability-relevant funding provided under RRF plans, and a list of relevant projects proposed or underway by Member States.

Articles 12 and 13 – Legal capacity and access to justice

32. Validity welcomes recent efforts on the part of the EU to strengthen protection of fundamental rights and the rule of law. Notable among these developments have been the launch of a new Citizens, Equality, Rights and Values (“CERV”) programme to provide support to civil society organisations active at local, regional, national and transnational level, that work in the fields of inclusion, gender equality, violence prevention or democracy.

⁶⁷ ECDC, JRC Crisis Management Laboratory statistical GitHub, accessible here: <https://covid-statistics.jrc.ec.europa.eu/RMeasures>. It is not possible to provide a detailed analysis of the data collected within the framework of the present report.

⁶⁸ European Commission, ‘Commission welcomes European Parliament’s approval of Recovery and Resilience Facility’, press release, 10 February 2021, available at: https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_21_423/IP_21_423_EN.pdf.

⁶⁹ A list of National Resilience and Recovery plans are on this webpage: https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en#latest.

⁷⁰ The dashboard can be accessed here: https://ec.europa.eu/economy_finance/recovery-and-resilience-scoreboard/index.html?lang=en.

⁷¹ See: https://ec.europa.eu/economy_finance/recovery-and-resilience-scoreboard/health.html.

⁷² European Commission, ‘Recovery and resilience scoreboard: Thematic analysis – Healthcare’, December 2021, available at: https://ec.europa.eu/economy_finance/recovery-and-resilience-scoreboard/assets/thematic_analysis/5_Health.pdf.

Following political debates within the EU in the context of approval of the 2021-27 MFF (including the RRF), the EU also enhanced the so-called ‘Rule of Law Mechanism’ under art. 7 of the Treaty on the EU (“TEU”),⁷³ the stated purpose of which being to enhance the EU’s ‘toolbox’ to respond, withdraw or suspend EU funding in situations where Member States are found to be seriously undermining “*effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; [...] and non-discrimination and equality before the law*”.⁷⁴ The relevant EU regulation sets out that one of the key principles of the rule of law is access to justice.⁷⁵ These are welcome developments in the sense that they make EU funding tied to principles of non-discrimination, access to justice and possibly even recognising the role of procedural adjustments within judicial processes. The package is still new and it remains to be seen whether it will be used in cases concerning violations of the rights of persons with disabilities.

33. Beyond this, as the CRPD Committee has consistently found, many EU Member States retain guardianship systems that restrict or deny the right to legal capacity and equality before the law for person with disabilities.⁷⁶ Substitute decision-making regimes remain persistent across the continent. This area is not, strictly speaking, within the control or ‘competences’ of the EU. Nevertheless, guardianship regimes continue to have profound consequences for European citizens with disabilities, denying them the opportunity to exercise specific rights that flow from EU citizenship on an equal basis with others, such as free movement and employment on the open market, access to and control over social protection and assistance, and in many other areas. There has been limited recognition of these issues at the EU level.⁷⁷
34. In terms of access to justice, the EU has a justice and fundamental rights policy dimension which is predominantly focused on development and implementation of normative procedural standards in civil, criminal and other judicial fields. In the criminal domain, EU action has included adoption of a procedural rights directive for child victims and suspects in criminal law,⁷⁸ and the victims’ rights directive.⁷⁹ Validity has been

⁷³ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, *OJ L 433I*, 22.12.2020, p. 1–10, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32020R2092>.

⁷⁴ The mechanism has also been upheld following an important judgment of the CJEU in a case initiated by Hungary and Poland: Case C/156/21 – *Hungary v Parliament and Council*, available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=254061&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=195106>.

⁷⁵ At art. 3(2), the Regulation states that a breach of the rule of law may include “*limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law*”.

⁷⁶ Austria – CRPD/C/AUT/CO/1, paras. 27-8; Belgium – CRPD/C/BEL/CO/1 – paras. 23-4; Bulgaria – CRPD/C/BGR/CO/1 – paras. 29-30; Croatia – CRPD/C/CRO/CO/1, paras. 17-18; Republic of Cyprus – CRPD/C/CYP/CO/1, paras. 33-4; Czechia – CRPD/C/CZE/CO/1, paras. 22-3; Denmark – CRPD/C/DEN/CO/1, paras. 32-3; Estonia – CRPD/C/EST/CO/1, paras. 23-4; France – CRPD/C/FRA/CO/1, paras. 25-6; Germany – CRPD/C/DEU/CO/1, paras. 25-6; Greece – CRPD/C/GRC/CO/1 – paras. 17-8; Hungary – CRPD/C/HUN/CO/1, paras. 25-6, as well as the findings of the recent inquiry under art. 6 OP-CRPD; Italy – CRPD/C/ITA/CO/1, paras. 27-8; Latvia – CRPD/C/LVA/CO/1, paras. 20-1; Lithuania – CRPD/C/LTU/CO/1, paras. 25-6; Luxembourg – CRPD/C/LUX/CO/1, paras. 24-5; Malta – CRPD/C/MLT/CO/1, paras. 21-2; Poland – CRPD/C/POL/CO/1, paras. 19-20; Portugal – CRPD/C/PRT/CO/1, paras. 28-9; Slovakia – CRPD/C/SVK/CO/1, paras. 38-9; Slovenia – CRPD/C/SVN/CO/1, paras. 18-9; Spain – CRPD/C/ESP/CO/2-3, paras. 22-3, and previously in CRPD/C/ESP/CO/1, paras. 33-4; and Sweden – CRPD/C/SWE/CO/1, paras. 33-4.

⁷⁷ A notable exception includes a public hearing held by the European Economic and Social Council towards the end of 2021, see here: <https://www.eesc.europa.eu/en/news-media/news/legal-capacity-protects-persons-disabilities-remove-legal-barriers-and-prevent-new-restrictions>. See also: European Network of National Human Rights Institutions (ENNHRI) and Mental Health Europe (MHE), *Implementing supported decision-making: Developments across Europe and the role of National Human Rights Institutions*, June 2020, available at: <http://ennhri.org/wp-content/uploads/2020/06/8-June-2020-Implementing-supported-decision-making-Developments-across-Europe-and-the-role-of-NHRIs.pdf>.

⁷⁸ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, *OJ L 132*, 21.5.2016, p. 1–20, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0800>.

⁷⁹ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, *OJ L 315*, 14.11.2012, p. 57–73, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012L0029>.

active in promoting proper implementation and application of these directives in respect of children and adults with disabilities. Promising aspects include the right to information and communication, and for these to be adapted, as well as the right to individual assessments. Nevertheless, in the framework of two major research projects we are currently implementing across multiple EU Member States,⁸⁰ we have found very limited practical improvements for victims and suspects of crimes with disabilities. The text of the directives themselves adopt the language of ‘vulnerabilities’ rather than rights, and in our view fail to give full expression to the right of persons with disabilities to access justice on an equal basis with others in conformity with the Convention. There is a protectionist flavour in the way in which individual assessments have been developed within the directives, and no strong standards concerning direct access to justice without the involvement of guardians. Research from both projects is underway, and we hope to update the Committee later this year with more detailed findings.

35. Finally, we wish to express our concerns about restrictive rules of procedure, particularly concerning standing, that pose high and potentially insurmountable barriers to persons with disabilities accessing justice before the Court of Justice of the European Union (“CJEU”). In the case of *ENIL Brussels and Others v. Commission* and the subsequent appeal, *Validity and Center for Independent Living v. Commission*,⁸¹ and alongside our partners, Validity initiated proceedings against the failure of the European Commission to prevent Bulgaria from using an €18million investment to build, renovate and furnish sixty-eight care homes for persons with disabilities.⁸² Both the General Court and the Court of Justice denied our application and appeal, finding that NGOs such as ours lacked standing to challenge an investment agreement between the Commission and a Member State (as well as problematic comments saying such negotiations were of a closed nature between the two parties, making it difficult for any European citizens to challenge these). Whereas the final judgment on appeal left the theoretical possibility open for persons with disabilities directly affected by EU financing schemes to approach the Court, the decisions gave no consideration to our submissions that the majority, if not all of the ‘final beneficiaries’ of the scheme in Bulgaria are under guardianship, rendering it illusory. There was no engagement with the impossibility of persons in closed institutional settings in Bulgaria to file applications before the Strasbourg Court, and the refusal to acknowledge the rights of representative and civil society organisations to pursue such claims means a vast chasm in which impunity can thrive within the EU.
36. The Validity Foundation therefore respectfully suggests that the following questions be put to the European Union under arts. 12-13:
- What plans, if any, does the EU have to promote the abolition of guardianship regimes for persons with disabilities across Member States, and their replacement with support in the exercise of legal capacity, in conformity with art. 12 and General Comment No. 1? Please describe whether and how current guardianship regimes imposed by Member States interact with EU citizenship rights.
 - Please describe plans to promote equal access to justice for persons with disabilities in the EU. What evaluations are planned of actions taken by the EU under the justice and fundamental rights policy framework to ensure regulations and directives are in line with, and give full expression to, access to justice for persons with disabilities in accordance with art. 13?
 - Please explain whether the EU plans to apply the enhanced ‘Rule of Law toolbox’ to the situation of persons with disabilities, and particularly in cases where Member States invest ESIF in institutions and

⁸⁰ *Voices for Justice: Communicating with Victims of Crime with Disabilities*, co-financed by the EU: <https://validity.ngo/projects-2/voices-for-justice/>; and *Child-Friendly Justice: Developing the Concept of Social Court Practices*, co-financed by the EU: <https://validity.ngo/projects-2/child-friendly-justice/>.

⁸¹ Case T-613/19 - *ENIL Brussels Office and Others v Commission*, and the appeal, Case C-622/20 P - *Validity and Center for Independent Living v Commission*, both available at: <https://curia.europa.eu/juris/liste.jsf?num=T-613/19&language=en>.

⁸² Validity, ENIL and the Centre for Independent Living (Sofia), ‘Press Release: NGOs Take European Commission to Court for Funding Segregation of Disabled Persons in Bulgaria’, 15 November 2019, available at: <https://validity.ngo/2019/11/15/ngos-take-european-commission-to-court-for-funding-segregation-of-disabled-persons-in-bulgaria/>.

schemes that result in segregation, denial of access to justice, and institutionalisation. Can persons with disabilities, including those presently under guardianship, have effective access to justice before the Court of Justice of the EU, and if so, how? If not, what are the plans to remove procedural barriers to direct access to the Court? What procedural and reasonable accommodations are available before the Court, including as to the legal validity of powers of attorney provided by persons under guardianship.

Article 14-19: The right to independent living, protection against torture and ill-treatment, and other forms of abuse

37. This submission has dealt extensively with our concerns related to the EU's role in maintaining, financing and expanding systems of institutionalisation for persons with disabilities across many Member States. Whereas the EU has the power to shift these investments, decisively, in a manner that could prompt transformation across the continent, it fails and refuses to do so. Beyond their segregative effects, there is also extensive evidence that EU financing has been found in institutions where torture and ill-treatment have been documented and exposed publicly. In a major two-part documentary aired on *Al Jazeera* in 2019,⁸³ film-maker Sarah Spiller investigated numerous allegations of torture, ill-treatment and mass incarceration of persons with disabilities in Bulgaria, Romania and Hungary.⁸⁴ The documentary relied extensively on official EU documentation, with the film-maker putting questions to representatives of the Commission in Brussels. There was no official response by the EU following the airing of the documentary.
38. Rather than shift policy and investment on the continent, our complaints are generally rejected by the Commission (as described in Part II above). Informally, senior Commission officials have expressed frustration with activists with disabilities and ourselves, often telling us that deinstitutionalisation “*cannot happen overnight*”, that investments into institutions are “*justified in the interim*” (despite the absence of genuine progress across many Member States), and that it is “*impossible to imagine people with ‘high needs’ ever being able to live independently*”. We have been repeatedly warned informally, including by representatives of other civil society organisations and Commission officials, that raising complaints risks Member States and the EU pulling out of deinstitutionalisation schemes entirely. This is a parlous state of affairs, and we respectfully look to the CRPD Committee to intervene to the extent possible, including through offering technical assistance to the EU.
39. Finally, the Committee is fully informed concerning problems related to a proposed additional protocol to the Oviedo Convention at the Council of Europe. The EU is not a party to the Council of Europe, although EU Member States are. Whereas the institutions of the EU have no specific competence in this field, we believe it could have an important role to play in using its political influence and diplomatic relations to urge the Council of Europe not to proceed with adoption, such as through the European Councils Working Party on Organization for Security and Co-operation in Europe (“OSCE”) and the Council of Europe (“COSCE”).
40. The Validity Foundation therefore respectfully suggests that the following questions be put to the European Union under arts. 14-19:
- When will the EU stop financing all forms of institutionalisation, both large-scale and smaller-scale, regardless of their names, of persons with disabilities, including through ESIF? How will the EU enhance its monitoring and control of European financial instruments, and use the Rule of Law toolbox, to prevent any further investments into the renovation, maintenance, construction and expansion of ‘services’ that restrict or deny the rights to liberty, freedom of movement, choice and control, and to live independently and be included in the community, of persons with disabilities? What sanctions have been, and will, the EU

⁸³ Al Jazeera, *People and Power: Europe's Recurring Shame*, 5 December 2019, available at: <https://www.aljazeera.com/program/people-power/2019/12/5/europes-recurring-shame>.

⁸⁴ This was a follow-up to an earlier documentary focused on Romania, uncovering horrendous abuses in institutions in that country that were funded by the EU, back in 2014: Al Jazeera, *People and Power: Europe's Hidden Shame*, 17 April 2014, available at: <https://www.aljazeera.com/program/people-power/2014/4/17/europes-hidden-shame>. Following the airing of that documentary, the Commission was forced to publicly announce that it would halt EU investments into “*large-scale institutions*”.

impose on Member States that have used or continue to use ESIF on institutionalisation?

- How will the EU bring its policies and standards into full accordance with art. 19 of the Convention and the Committee’s General Comment No. 5? How will the EU ensure that Member States do the same? Please describe all forms of redress and remedies available to persons with disabilities in the EU who have been affected by misuse of EU funds resulting in institutionalisation, torture, other forms of ill-treatment, exploitation, violence and abuse, and denial of the right to independent living, including (but not limited to) the provision of reparations, collective and individual redress, compensation, rehabilitation, and public apologies.
- Has the EU expressed its objections to the proposed additional protocol to the Oviedo Convention under preparation by the Council of Europe?

Article 29: Political participation

41. Under this article, we simply note that universal suffrage of persons with disabilities is still not guaranteed within European Parliamentary elections, undermining the right to political participation. Both practical and legal barriers prevent the right to vote, most notably for persons subject to guardianship orders. The right to vote and stand for public office is a competence of EU Member States.
42. The Validity Foundation therefore respectfully suggests that the following question be put to the European Union under art. 29:
 - How does the EU plan to guarantee the right to vote for all citizens with disabilities in European Parliamentary elections, ensuring that universal suffrage is realised?

Article 33: Implementation and monitoring

43. Validity welcomed the appointment of Ms. Helena Dalli as European Commissioner for Equality with a specific mandate to coordinate implementation of the CRPD across EU actions in 2019.⁸⁵ This is a cross-cutting thematic portfolio, meaning the Commissioner has responsibility for coordination across all Directorate-Generals of the European Commission. We note, however, that the Commissioner has a relatively small team supporting her work, housed within the Directorate-General for Employment, Social Affairs and Inclusion (EMPL.D.3). We further note that disability rights is one of numerous equality and non-discrimination portfolios for which she is responsible.
44. Following the first periodic review of the EU before the CRPD Committee, Validity welcomed the Commission’s decision to withdraw from the EU CRPD independent monitoring framework,⁸⁶ in recognition of the conflict of interest. Members of the framework meet twice per year,⁸⁷ with their minutes published on the website of the EU Agency for Fundamental Rights (“FRA”), which currently acts as secretariat of the Framework. In our view, the work of the Framework lacks visibility, and there is limited knowledge and awareness concerning its role and mandate. The 2021-22 Work Programme of the Framework specifies three tiers of work, comprised of ongoing activities of the various bodies that are members,⁸⁸ however it is not clear to us how overall coordination of monitoring activities are achieved in practice, nor what mechanisms are used

⁸⁵ Appointment letter of President of the European Commission, Ursula von der Leyen, 1 December 2019, available at: https://ec.europa.eu/commission/commissioners/sites/default/files/commissioner_mission_letters/mission-letter-helena-dalli_2019_en.pdf.

⁸⁶ See: <https://www.edf-feph.org/un-crpd/>.

⁸⁷ Current members are drawn from the European Parliament, European Ombudsman, EU Agency for Fundamental Rights (“FRA”), and the European Disability Forum (“EDF”), see: <https://fra.europa.eu/en/cooperation/eu-partners/eu-crpd-framework/resources>.

⁸⁸ The work programme is available here: https://fra.europa.eu/sites/default/files/fra_uploads/work-programme-eu-framework-2021-2022.docx.

to ensure ongoing, consistent feedback and follow-up of conclusions and recommendations that are provided to the Commission.

45. The Validity Foundation therefore respectfully suggests that the following questions be put to the European Union under art. 33:

- Please provide details on the coordinating mechanism under art. 33(1). Specify what resources are available to the Commissioner for Equality to effectively execute her role in coordinating implementation of the CRPD across all areas of EU action, including the recently-adopted European Disability Strategy 2021-2030, in accordance with art. 33(1). What practical mechanisms have been put in place to ensure coordination across the Commission's Directorates-General to ensure alignment with the CRPD? Does the Commission have any plans, and if so, what, to enhance internal capacities to coordinate implementation, and ensure consistent application of the CRPD in its relationships with Member States of the EU?
- Please describe the mandate, functioning, membership, activities, and financing of the EU's designated independent monitoring mechanism pursuant to art. 33(2). Please set out key priorities of the mechanism since the first periodic review of the EU under the Convention. What methods are used by the mechanism to conduct ongoing and regular monitoring of the implementation of the Convention across all areas of EU action? What plans are in place to increase the visibility of the mechanism, both within the institutions of the EU, and publicly, in particularly for persons with disabilities and their representative organisations? Please also describe whether the mechanism has the authority to investigate complaints from persons with disabilities, whether it has done so, and if so, the outcomes of any such complaints.

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