



Study on Challenges and Good Practices in the Implementation of the UN Convention on the Rights of Persons with Disabilities (VC/2008/1214)

Final Report for the DG Employment, Social Affairs and Equal Opportunities of the European Commission

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The information contained in this study does not necessarily reflect the official position or opinion of the European Commission.

Executive Summary

The ‘Study on Challenges and Good Practices in the implementation of the UN Convention on the Rights of Persons with Disabilities’ (hereinafter referred to as ‘the study’) was carried out by the European Foundation Centre (EFC) representing the European Consortium of Foundations on Human Rights and Disability for the Unit for the Integration of People with Disabilities (Unit G3) of the Directorate-General Employment, Social Affairs and Equal Opportunities (DG EMPL), under the Contract N° VC/2008/1214, during the period January 2009 to February 2010.

The study aimed to analyse in detail the obligations set forth in the Convention, and in particular to gather information about the various practices related to the implementation of the Convention by the EU and its Member States. The goal was to identify challenges that may hinder the full and effective implementation of the Convention, and measures that would facilitate the achievement of its objectives (‘good practices’). The study is designed to support the objectives of the current EU Disability Action Plan with its emphasis on full participation and equal opportunities for all people with disabilities and to contribute to the preparation of the new EU disability strategy based more explicitly on the UN CRPD.

The findings of this study identified several challenges to the implementation of the UN CRPD at both the EU and Member States level. These challenges are mainly grouped around the following fields:

- **Uneven Implementation of the Paradigm Shift:** research has revealed that, in general, the paradigm shift embodied in the Convention has not yet been effectively reflected in the majority of the Member States. Some States have made progress, but the movement towards the main lesson of the paradigm shift (*i.e.* treating people with disabilities as full ‘subjects’ bearing equal rights and deserving equal respect, and not as ‘objects’ to be managed or pitied) has been uneven. The EU led the way in steering movement towards the paradigm shift in mid-1990s. The UN CRPD makes the implementation of the paradigm shift across all policy sectors more urgent. As regards the European Union, legislation appears to be implicitly based on a social model of disability, and therefore aims at removing physical and societal barriers that hinder full participation of persons with disabilities in society.
- **Lack of National Screening:** research has revealed that most of the Member States of the EU have not yet taken the first step towards the implementation of the UN CRPD, meaning that national legislation and policies have not yet been systematically reviewed. Only four complete national screening exercises were identified by this study. In addition to States, the obligation to carry out a ‘screening

exercise' applies with equal force to the European Union. The latter has checked existing legislation in order to identify existing EU instruments related to matters covered by the Convention. The outcome of this process is the Appendix that accompanies the declaration of competences, which intends to specify the areas of the Convention that fall within the EU competence and better show to the other contracting parties the distribution of competence between the EU and its Member States. However, the mere identification of EU legal instruments is not sufficient to show fulfilment of the obligation to perform a 'screening exercise' which entails an obligation to examine and if necessary modify existing legislation. Nevertheless, it is important to consider that any possible modification of EU legislation (or adoption of new EU legislation) can not influence the allocation of powers fixed by the Treaties. It is therefore necessary for any screening to be conducted by the EU to evaluate EU legislation towards the requirements of the UN CRPD and consider the EU competence to act in the fields covered by the Convention. The latter consideration (i.e. EU competence) will be important to determine the type of measure that the EU would need to take in order to meet the requirements of the Convention.¹

- **Uneven Reach of Non-discrimination Laws:** research has revealed that legislative acts on equality and non-discrimination exist mainly within the context of employment, at both the EU and Member State level. Many Member States have extended the application of the principle of non-discrimination beyond the workplace. However, significant challenges to implementing the UN CRPD remain and relate to the limited application of the duty to provide reasonable accommodation, the non-recognition of the denial of reasonable accommodation as an explicit form of discrimination, the general lack of laws addressing inter-sectional and multiple-discrimination, and limited material scope.
- **General Accessibility:** as regards the implementation of Article 9 UN CRPD, research has revealed that some progress has been made by the EU, but there is still room for improvement. Specifically one or more relevant EU instruments address accessibility and the built environment, transport, goods and services, information and communication technologies. However, even if the Member States have included in their national laws the principle of accessibility, this is not enough to guarantee enforcement of these laws and effective implementation of the UN CRPD accessibility requirements. Research in the Member States of the EU has also revealed that monitoring of implementation appears to be ineffective. In addition, exceptions included in some legislative acts (e.g. in some cases old

¹ For further information on this matter, please go to section 3.2 of the final report of the Study on Challenges and Good Practices in the implementation of the UN Convention on the Rights of Persons with Disabilities VC/2008/1214.

buildings are not required to comply with the principle of accessibility), and the lack of disability specific training for professionals (e.g. architects and engineers) may hinder the full access and inclusion of persons with disabilities.

- **Legal capacity – Giving a Voice Back to People:** research in the EU Member States has revealed that in the field of legal capacity, several challenges to implementing the UN CRPD exist. While a few Member States have reformed relevant legislative measures, embracing a decisive move away from over-broad plenary guardianship laws towards a ‘supported decision-making’ model, a large number of Member States continue to operate far-reaching restrictive guardianship laws and policies. Challenges also exist in Member States that are attempting to move away from guardianship. While legislative reforms provide for the appointment of assistants to support persons with disabilities in decision-making, the distinction between such assistants and guardians is not clear enough. In many cases there are insufficient safeguards in place to ensure that such assistants do not exceed their duties and end up displacing the legal capacity of the person they are purportedly assisting. Another challenge may arise from interpretative declarations or ‘explanatory memorandums’ that some States have submitted, or may consider submitting, in relation to Article 12 UN CRPD.
- **Independent Living – Using that Voice to Choose How to Live:** research in this field has revealed that the existence of national laws that still permit institutionalisation of persons with disabilities hampers significantly their social inclusion and full participation in their society. Several national policies are focused on improving institutional care, instead of moving residents of such institutions into the community. In cases where national policies promote independent living for persons with disabilities, the frequent absence of direct payments, or individualised funding schemes, to allow persons with disabilities to manage their own affairs is a significant challenge to the effective implementation of the UN CRPD. With regards to the EU, the Council Decision concerning the conclusion of the UN CRPD lists several instruments related to the functioning of the internal market (in particular indirect taxation and state aid), which are relevant to Article 19 UN CRPD. Instruments of such nature could positively contribute to the elimination of barriers (such as inaccessible, or insufficient, goods and services) for persons with disabilities to fully enjoy the right to independent living.
- **Employment – Earn a Living by Work freely chosen or accepted in the labour market:** research in this field has revealed that the EU Member States have been highly influenced by EU secondary legislation, and in particular the Employment Equality Directive 2000/78/EC. To this end, Member States have prohibited, by law, discrimination on the basis of disability within the context of employment, and have

established provisions for reasonable accommodations for persons with disabilities. Nonetheless, several challenges to the effective implementation of the UN CRPD remain. Research has revealed an inconsistent interpretation of key concepts, such as 'discrimination' and 'reasonable accommodation', by the Member States of the EU. In addition, as Directive 2000/78/EC does not explicitly define an unjustified denial of reasonable accommodation as a form of discrimination, many Member States have not done so either. Finally, poor implementation of employment quotas, and low participation rates in the labour market for persons with disabilities, suggest that existing legislation may not be effective in practice.

- **Education – Full Development of persons with disabilities' potential to participate effectively in society:** research for this study has revealed several challenges to the effective implementation of Article 24 UN CRPD by the EU Member States. Information compiled from the Member States revealed few efforts to move towards the provision of inclusive education on the basis of equal opportunity. In most Member States, while education for persons with special educational needs can take place in ordinary establishments, the option of sending children with disabilities to special educational facilities is permissible and in most cases favoured. This is a significant challenge to the effective implementation of Article 24 UN CRPD, because as long as the option of sending children with disabilities to special educational facilities remains available, their full and effective integration in an inclusive education system may not be realised. In addition, the frequent lack of resources for the provision of individualised services and support to learners with disabilities, and the lack of specialised training for teachers in supporting learners with disabilities, are also major challenges to the full and effective inclusion of persons with disabilities in the education system.
- **Uneven Participation in Political and Public Life:** Research in the Member States of the EU has revealed that even though most Member States have adopted legislative provisions in order to ensure that persons with disabilities can participate in voting procedures, these are not enough to ensure full and effective participation of *all* persons with disabilities. Indicative case-studies show that while States ensure accessibility to polling stations, ballots and general information about the elections are not provided in alternative formats (e.g. Braille or easy-to-read formats). In addition, there are cases where the right of persons with disabilities to vote by secret ballot is not effectively implemented. With regards to participation in decision making processes, research for this study has revealed that the majority of the EU Member States have created consultative disability forums in order to ensure the participation of persons with disabilities in public life. However, little information is available in relation to the effectiveness of such forums.

- **Lack of Training:** research for this study has revealed that there is an urgent need for both the EU and its Member States to initiate training seminars for all types of professionals, such as judges, lawyers, public administrators, architects, engineers and servants related to all policy fields with the aim to raise awareness about the obligations set forth in the UN CRPD. Such training should also be focused on the practical implementation of the Convention, and should be accessible to, and inclusive of, people with disabilities and representatives from organisations representing the rights of persons with disabilities.
- **Insufficient Disability-specific Statistics and Data:** this study could not identify adequate information within the Member States of the EU regarding practices related to the collection of statistics and data based on a social model of disability and being disaggregated, as appropriate, to support policy development and the monitoring of policy implementation. It logically follows that there is a need for further research in this field. Regarding the EU, instruments listed in the Council Decision concerning the conclusion of the UN CRPD have established methodological frameworks and systems for the compilation of reliable and comparable data in the fields of social protection and inclusion. However, it appears that there is a need to review existing instruments and evaluate whether (or not) such instruments are appropriate for the compilation of disaggregated data on disability for matters covered by the Convention.
- **Enhanced International Cooperation and Development Aid:** Despite some available information on mainstreaming disability in development cooperation, this study could not indicate clear challenges to the implementation of Article 32 UN CRPD as relevant practices that have been identified in the Member States of the EU are fairly new. With regards to the EU, research has revealed that several partnerships and development programmes have been established with many developing countries around the world. Such partnerships cover many areas that are relevant to the implementation of the UN CRPD. Therefore, the EU can (and as a party to the UN CRPD should) influence and support third, or candidate, countries to ensure the realisation of the UN CRPD objectives within their territory. This goal can be achieved through, for example, the use of the so called 'human rights clauses'.

Finally, research has revealed that existing communication channels with third countries, such as the Transatlantic Dialogue, could serve as a role model for the establishment by the EU of similar communication forums with other parties to the UN CRPD, and with the aim of enhancing learning about different approaches related to the implementation of the Convention.

- **National Implementation and Monitoring:** Research in this field has revealed that the majority of the designated focal points have, as required by Article 33(1) UN CRPD, been established at a high level of government (*i.e.* Ministry level). However, national information regarding the establishment, or designation, of a coordination mechanism is generally poor, which implies that EU Member States have yet to designate a coordination mechanism. In some cases it is clear that the possibility of establishing such a mechanism will be reviewed by the government of a Member State upon official ratification of the UN CRPD. Similarly, many Member States have yet to nominate a framework as envisaged by Article 33(2) UN CRPD, and may not do so until after the Convention is officially ratified.
- **EU Implementation and Monitoring:** Article 3 of the Council Decision concerning the conclusion of the UN CRPD designated the European Commission as the **focal point** of the EU for all matters covered by the Convention. The European Commission, as the executive body of the EU, has a unique and quite complex structure of governance, which results from the Treaty establishing the European Community. In this respect, this study considered which body within the Commission could perform the tasks of the focal point of the EU. In this respect the following options were reviewed: (a) the President of the Commission; (b) the Secretary-General; and (c) Commissioner for Justice, Fundamental Rights and Citizenship. The findings of this research suggest that the broad mandate of the President and the Secretary-General may become a barrier that will potentially hamper their optimal effectiveness as the EU's focal point for matters relating to the UN CRPD. Regarding the Commissioner for Justice, Fundamental Rights and Citizenship, it appears that the position can be considered as the equivalent of a Ministry, and therefore could be tasked with the responsibilities of the focal point for all matters related to the UN CRPD. However, it is suggested that the EU reviews the mandate of the Commissioner, and existing methodological frameworks for horizontal monitoring of EU legislation, policies and programmes that could be of added value to the Commissioner's work, if that position will be designated as the overall focal point within the European Commission.

For matters related to **coordination**, research has revealed that several mechanisms exist at the EU level and could facilitate coordination for matters related to the implementation of the UN CRPD by the EU. Such mechanisms involve, for example, the Inter-Service Group of Disability (ISGD), which could facilitate coordination among the DGs of the European Commission; and the High Level Group on Disability (HLGD), which could facilitate coordination between the EU and its Member States, and among the Member States of the EU. Similar to the HLGD, the EU could use the Open Method of Coordination (OMC), or could

consider the development of a European Pact on Equal Rights of Persons with Disabilities, as recently suggested by the European Disability Forum. No matter what the final choice, the EU should carefully review existing mechanisms and, if necessary, modify them in order to ensure effective coordination at *all* levels. It should also be noted, that research in this area did not identify a mechanism that would ensure effective coordination between Commission DGs and other EU institutions, such as the Parliament and the Council. Therefore, there is a need for further research in this respect.

For matters related to the establishment of a **'framework'** to 'promote, protect and monitor' implementation of the UN CRPD, research has revealed that there is no single EU body with the adequate mandate to effectively perform all the tasks set forth in Article 33(2) UN CRPD. Therefore, the EU should consider the establishment of a creative 'mix' of institutions, bodies, and agencies for matters related to Article 33(2) UN CRPD. For the purposes of such a 'mix' of EU organisations, this study reviewed several options (the Fundamental Rights Agency, the European Ombudsman and the European Courts) and identified that existing structures do not fulfil requirements such as independence, and therefore may pose critical challenges to the effective implementation of the obligations to 'promote, monitor and protect' implementation of the UN CRPD.

Recommendations for national and EU policy makers

Based on the aforementioned findings and the obligations deriving from the UN Convention on the Rights of Persons with Disabilities, this study suggests the following good practices for EU and national policy-makers for the future and overall implementation of the Convention and the effective achievement of its objectives.

- Use the process of **ratification** to raise awareness and promote understanding of the UN CRPD. To this end, the text of the Convention should be widely disseminated in national languages² and accessible formats to all interested parties (all governmental departments, persons with disabilities and their representative organisations, NGOs, political parties, the judiciary, academia, and others).
- **Avoid**, where at all possible, the use of reservations, interpretative declarations or 'explanatory memorandums', as they may diminish the scope of protection afforded by the UN CRPD. Where parties to the Convention determine that a reservation to

² It should be noted that as the text of the UN CRPD was annexed in Council Decision 2010/48/EC concerning the conclusion of the Convention by the European Community, it has been translated into all EU languages by the Commission and is available at: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2010:023:SOM:EN:HTML>

the UN CRPD is unavoidable, they should endeavour to withdraw the reservation, if feasible, at the earliest possible opportunity.³

- As part of the UN CRPD implementation process, and as a matter of first priority, the EU and Member States should conduct a comprehensive '**screening exercise**' of EU and national legislation and, if necessary, should modify or abolish existing instruments in order to ensure full compliance with the UN CRPD. Such a 'screening exercise' should be **horizontal** in order to ensure that all legislation, policies and programmes are reviewed and evaluated, and should consider the Convention not only **article by article**, but also **holistically**, recognising the interdependence and indivisibility of human rights. In the process of the 'screening exercise' the EU and Member States should seek and facilitate the meaningful contribution of persons with disabilities and their representative organisations. The outcomes of the screening process should be made **publicly available** and **disseminated** in accessible formats.
- Any draft legislation, or amendments to existing legislation, or administrative regulations designed to bring laws into alignment with the UN CRPD should be the subject of further consultation with persons with disabilities and their representative organisations and other interested parties (e.g. employers, teachers, legal operators, engineers or others). To this end, the EU and Member States should follow **participatory decision-making** processes.
- For any draft legislation, or amendments to existing legislation, or administrative regulations, the EU and Member States should take into account obligations deriving from the **paradigm shift**, and **article of general and cross-cutting nature** (i.e. Articles 3, 4, 5, 6, 7 and 9 of the UN CRPD).
- The EU and Member States should ensure that all legislation and policy springs from the **social model of disability**, and should thus be reflected in the overall statement of guiding principles for law and policy reform or development. As EU legislation is implicitly based on a rights-based approach to disability, it is suggested for the EU to lead by example or use soft law measures (such as communications, guidelines etc) in order to provide **guidance** for the Member States on how to approach disability, and effectively implement the principle of equal treatment and equality of opportunity.
- If the wording of EU or national legislation is open to more than one **interpretation**, the EU and Member States should adhere, as far as possible, to the interpretation

³ For further information on reservations, please go to Section 1.1.3 of the final report of the Study on Challenges and Good Practices in the implementation of the UN Convention on the Rights of Persons with Disabilities VC/2008/1214.

that renders the provision most consistent with the UN CRPD. Therefore, all EU and national governmental institutions, including the judiciary (EU and national Courts), should apply EU and national law in a manner that is most consistent with the UN CRPD. To this end, both the EU and Member States should organise and provide appropriate training of public servants, including judiciary staff, on the rights recognised in the Convention and obligations deriving from it.⁴

- The EU and Member States should ensure that legislation (EU or national) does not limit the scope of the duty to provide **reasonable accommodation**. The provision of reasonable accommodation is a necessary measure to promote equality, and therefore its application should not be limited to the context of employment. It should thus be extended to all areas of social, political, civil and economic life covered by the prohibition of discrimination. Importantly, both national as well as EU non-discrimination legislation should clearly provide that the **unjustified denial of reasonable accommodation** is a form of discrimination.
- Equality legislation should foresee the adoption of **positive measures** required to promote *de facto* equality of persons with disabilities, in conformity with Article 5(4) UN CRPD.
- The EU and Member States should explicitly address the issue of **multiple-discrimination** in conformity with the general principles and Articles 6 and 7 of the UN CRPD. As multiple-discrimination is a fairly new topic in the area of non-discrimination, it is suggested for the EU and Member States to launch research activities with the aim to identify how a legal prohibition of multiple-discrimination could be framed in order to fully achieve the objectives set forth in the UN CRPD.
- For matters related to **general accessibility**, it is suggested for the EU and the Member States to work in close cooperation in order to ensure that the principle of accessibility applies to all policy sectors (employment, education, transport, ICT, justice etc) and that adequate accessibility requirements and standards are established.

Accessibility measures should also include a clear **timeframe for conformity**, indicate the nature of **interventions** in cases of non-compliance (e.g. financial sanction), and be applied in both urban and rural areas.

It is also suggested for the EU and Member States to approach accessibility as an investment that will positively contribute to the internal market. Any measure that

⁴ It should be noted that in 2009, the Commission committed to fund under PROGRESS training seminars for legal and policy practitioners on the UN Convention of the Rights of Persons with Disabilities. Such trainings are expected to be realised within 2011. More information is available at: <http://ec.europa.eu/social/main.jsp?catId=658&langId=en>

encourages the development of **universally designed** goods, services, equipment and facilities would reduce, or avoid, the costs of the subsequent dismantling of physical barriers as accessibility issues would be considered from the outset.

- The Member States of the EU should reform legislation in order to **abolish restrictive guardianship laws and policies**, in compliance with Article 12 UN CRPD. To this end, Member States should also take measures to ensure access for persons with disabilities to **supported decision-making**. In addition, Member States which, in line with Article 12 UN CRPD, provide for the appointment of assistants to support persons with disabilities in decision-making, should establish effective **safeguards** to ensure that such assistants do not exceed their duties and displace the legal capacity of the person they are assisting.
- The Member States of the EU should implement **direct payment or individualised funding schemes** to allow persons with disabilities to manage their own lives, as required by Article 19 UN CRPD. Such schemes should be accessible to *all* persons with disabilities. Member States should also establish **community based services**, which should be adequately funded and sufficiently resourced for the provision of the required hours of personal assistance to support the living needs and inclusion of persons with disabilities in all aspects of society. Importantly, Member States should **shift** their focus from improving institutional care to relocating the residents of such institutions into the community.

With regards to the **EU**, secondary legislation should ensure that any indirect tax reliefs for goods and services, or any funding to be given, should encourage and promote persons with disabilities' independent living, and should not support any residential, medical, or other institution that restricts the autonomy of persons with disabilities.

- For matters related to **employment**, and besides the application of the equality principle, it is suggested for the EU and the Member States to develop a common strategy to promote equal opportunities and combat the unemployment of persons with disabilities.
- For matters related to education, EU Member States should ensure that legislation and policy respect the rights of persons with disabilities to be educated in an **inclusive education system**, which guarantees a **common learning environment** for all persons with disabilities alongside those without disabilities.
- For matters related to the rights of persons with disabilities to fully **participate in all aspects of the political and public life**, EU Member States should ensure that legislation and policy take into account the general principle of accessibility, and address the needs of all persons with disabilities.

- The EU and its Member States should ensure that **disability specific data and statistics** are compiled and disaggregated, as appropriate, to support policy development and monitoring related to the implementation of the UN CRPD. In this respect, existing methodological tools should be tested, and if necessary should be modified, with the aim to ensure their suitability for matters covered by the Convention.
- The EU and its Member States should ensure that their **international development** programmes respect the principles set forth in the UN CRPD, and promote the rights of all persons with disabilities, as required by Article 32 UN CRPD.
- The EU and Member States should designate one (or more) **focal point(s)** within their governments for all matters relating to the implementation of the Convention and Article 33(1) UN CRPD. The focal point should be placed at the **highest level** of executive authority to **guarantee** the mainstream impact of its work, and the status of its recommendations, while also serving as a permanent reminder that the rights of persons with disabilities need to be respected in all areas of government.
- The EU and Member States should consider the establishment or designation of a **coordination mechanism** at government level to facilitate the consistency of related actions in different sectors and at different levels, in accordance with Article 33(1) UN CRPD.

As the UN CRPD is a ‘mixed agreement’, to which both the EU and its Member States are parties, Member States are subject to a **duty of loyal cooperation** between themselves and the EU (Article 4.3 TEU). In other words, the fields covered by the UN CRPD fall in part within the EU competence, in part within that of the Member States, and in part within the shared competence of the EU and its Member States. It is therefore essential for the EU and the Member States to closely cooperate in order to implement legislation stemming from the Convention in a coherent manner and to ensure unity in the international representation of the Union. To this end, any coordination mechanism to be established by the EU and the Member States should take into account the necessity to coordinate actions between national and EU levels.

- The EU and Member States should, in accordance with their legal and administrative systems, designate or establish a **‘framework’** for all matters related to the UN CRPD. The framework’s mandate should be to *‘promote, protect and monitor’* the implementation of the UN CRPD. Such a framework should include one or more independent mechanisms, which should comply with the Paris Principles.