

Challenging the Use of EU Funds: *Locus Standi* as a Roadblock for Disability Organisations

ECJ Order of 15 April 2021, Case C-622/20 P, *Validity and Center for Independent Living v Commission*

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INTRODUCTION

On 15 April 2021, in Case C-622/20 P, *Validity and Center for Independent Living v Commission*,¹ the European Court of Justice dismissed the appeal to the order of the General Court, T-613/19,² in which the General Court found inadmissible the action for annulment lodged by three non-governmental organisations that defend and represent persons with disabilities, due to a lack of legal standing. The succinct order of the Court of Justice is *prima facie* in line with previous case law and does not seem to offer any noteworthy developments in

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¹ECJ Order of 15 April 2021, Case C-622/20 P, *Validity and Center for Independent Living v Commission*, ECLI:EU:C:2021:310.

²EGC Order of 2 September 2020, Case T-613/19, *ENIL Brussels Office and Others v Commission*, ECLI:EU:T:2020:382.

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the jurisprudence. However, the decision is relevant because, whilst it consolidates previous case law, it is the first case brought by a non-governmental organisation seeking to ensure the use of EU funding in line with the rights of persons with disabilities, as protected by the UN Convention on the Rights of Persons with Disabilities (UN Convention) and the EU Charter of Fundamental Rights (the Charter). As such, it offers a stark illustration of how the restrictive interpretation of the rules on *locus standi* for non-privileged applicants, as set out in Article 263(4) TFEU, and the accompanying reliance (and rhetoric) on ‘a complete system of legal remedies’ by the Court of Justice, further perpetuates the systemic and structural inequalities faced by persons with disabilities in EU member states. In particular, it epitomises the significant gap in the judicial protection of the rights of persons with disabilities at the EU level, which may entail a breach of the UN Convention.

The case was initiated by three non-governmental organisations: the European Network on Independent Living (a non-governmental organisation organised as a Europe-wide network of persons with disabilities and their representative organisations), the Validity Foundation-Mental Disability Advocacy Centre (an international non-governmental human rights organisation that uses legal strategies to promote, protect and defend the human rights of people with mental disabilities worldwide), and the Center for Independent Living Association (a non-governmental organisation of persons with disabilities, based in Bulgaria). The case concerned a challenge to a letter of the European Commission refusing to suspend payment of a grant that was intended to support the aim of deinstitutionalisation but has instead, according to the appellants, financed projects that further perpetuated segregation of persons with disabilities. Alas, the serious concerns about EU funding being used for projects incompatible with the Charter and the UN Convention were never addressed in substance, as the General Court declared the action for annulment inadmissible, and the appeal to that order before the Court of Justice was dismissed as manifestly unfounded.

The finding of inadmissibility of the case prevents an urgent examination in substance of the compliance of EU funding measures with the EU’s deinstitutionalisation obligations, as arising from Article 5 (on equality and non-discrimination) and Article 19 of the UN Convention (on living independently and being included in the community).³ More broadly, the spill-over impact of this decision on deinstitutionalisation policies is potentially significant in terms of hampering the move towards community living. Furthermore, the gap in judicial protection that came to light in this case raises questions about the EU’s compliance with its obligations under Article 13 of the UN Convention

³On deinstitutionalisation in the EU, see A. Broderick and S. Favalli, ‘The Transition from Institutional Care to the Community Living in the EU: Lessons Learned in the Shadows of the COVID-19 Pandemic’, in P. Czech et al., *European Yearbook on Human Rights* (Intersentia 2021) p. 231.

(on access to justice). It is this latter aspect of the case that this case note – by examining in particular the issue of legal standing of organisations of persons with disabilities – focuses on.

The case note begins by setting out the EU's obligations with regard to the rights of persons with disabilities, in particular as arising from its ratification of the UN Convention, and explains the legal framework of EU funds as one of the EU's key implementing tools. It then proceeds to summarise the facts of the case and the decision and reasoning adopted in the orders of the General Court and the Court of Justice. The commentary on the case then focuses on three issues: the unsurprising result of the case in light of the Court of Justice's settled case law on legal standing; the validity of relying on access to national courts to justify the restrictive interpretation of standing in the specific context of actions being brought by representative organisations of persons with disabilities; and the proposal for narrowing the gap in (quasi-)judicial protection in these cases by the EU acceding to the Optional Protocol to the UN Convention (the Optional Protocol).

THE LEGAL FRAMEWORK

The rights of persons with disabilities are gaining prominence in EU law.⁴ This development has in particular been spurred on by the EU's conclusion of the UN Convention in 2010.⁵ The UN Convention is a ground-breaking human rights treaty, the first to focus on the rights of persons with disabilities.⁶ It is said to be based on a social-contextual model of disability,⁷ reflected in the Convention's understanding of disability as resulting from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.⁸ The UN Convention also embeds a so-called 'human rights model' of disability,⁹ centring

⁴See for example D. Ferri and A. Broderick (eds.), *Research Handbook on EU Disability Law* (Edward Elgar 2020).

⁵Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ L 23/35.

⁶A. Broderick and D. Ferri, *International and European Disability Law and Policy. Text, Cases and Materials* (Cambridge University Press 2019) p. 55.

⁷A. Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (Intersentia 2015) p. 77; Broderick and Ferri, *supra* n. 6, p. 17.

⁸Para. 5 of the Preamble to, and Art. 1(2) of, the UN Convention.

⁹T. Degener, 'Disability in a Human Rights Context', 5(3) *Laws* (2016) p. 35; A. Lawson and A.E. Beckett, 'The Social and Human Rights Models of Disability: Towards a Complementarity Thesis', 25 *The International Journal of Human Rights* (2020) p. 1.

persons with disabilities as equal holders of rights. The case at hand engages a number of substantive rights guaranteed by the UN Convention. Articles 12 (on equal recognition before the law) and 13 (on access to justice) are particularly relevant for the issue of *locus standi*. In terms of the deinstitutionalisation mandate, which is the core substantive issue in this case, the most important provisions of the UN Convention are Article 5 (on equality and non-discrimination) and Article 19. The latter provision recognises the right of persons with disabilities to live independently in the community,¹⁰ and while it does not mention deinstitutionalisation explicitly, it has been interpreted as, inter alia, requiring the phasing out of institutionalisation by prohibiting the building of new institutions, as well as – except in exceptional circumstances – the renovation of old institutions.¹¹ Article 19 has to be read in conjunction with Article 5 of the UN Convention, ‘since institutionalisation is viewed as a discriminatory practice’.¹²

As the first human rights treaty which the EU acceded to, the UN Convention now forms an ‘integral part of European Union legal order’.¹³ The UN Convention even enjoys a ‘sub-constitutional status within the EU legal order’,¹⁴ and as such requires EU secondary law to be interpreted in a manner consistent with it.¹⁵ Further, persons with disabilities are of course equally entitled to the enjoyment of all rights provided in the EU Charter of Fundamental Rights,¹⁶ but one can point to Article 20 on equality before the law, Article 21 on non-discrimination, and Article 26 on the integration of persons with disabilities¹⁷ as provisions of particular significance in this context.

¹⁰On this right, see Committee on the Rights of Persons with Disabilities, *General Comment No. 5 on Living Independently and Being Included in the Community*, 27 October 2017, UN Doc. CRPD/C/GC/5.

¹¹Ibid, para. 49.

¹²Broderick and Favalli, *supra* n. 3, at p. 236.

¹³ECJ 11 April 2013, Joined Cases C-335/11 and C-337/11, *HK Danmark*, ECLI:EU:C:2013:222, para. 30.

¹⁴D. Ferri, ‘The Unorthodox Relationship between the EU Charter of Fundamental Rights, the UN Convention on the Rights of Persons with Disabilities and Secondary Rights in the Court of Justice Case Law on Disability Discrimination’, 16 *EuConst* (2020) p. 275 at p. 281, referring to *HK Danmark*, *supra* n. 13.

¹⁵ECJ 18 March 2014, Case C-363/12, *Z v A Government Department and The Board of Management of a Community School*, ECLI:EU:C:2014:159, para. 75. See also Ferri, *supra* n. 14, p. 281; D. Ferri, ‘The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: A Constitutional Perspective’, 2 *European Yearbook of Disability Law* (2010) p. 47 at p. 67; and L. Waddington, ‘The European Union’, in L. Waddington and A. Lawson (eds.), *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts* (Oxford University Press 2018) p. 131 at p. 133-134, and 143 ff.

¹⁶D. Ferri, ‘Disability in the EU Charter of Fundamental Rights’ in Ferri and Broderick, *supra* n. 4, p. 29 at p. 30.

¹⁷For an overview, see *ibid*.

One of the EU's primary tools for fulfilling its obligations in respect of the rights of persons with disabilities is the European Structural and Investment Funds (EU funds).¹⁸ In the programming period relevant for this case (2014–2020), these funds supported the implementation of the EU's 2020 strategy for smart, sustainable and inclusive growth.¹⁹ In line with this strategy, EU funds have been used to further the inclusion of persons with disabilities into society.²⁰ In particular, EU funds 'can and should be used to empower people with disabilities and allow them to access employment and education opportunities, to avail themselves of high quality health and social services and to transition from institutional living to community-based care'.²¹

EU funds are governed by a common legal framework;²² on top of that, each of the funds is further regulated by a specific regulation.²³ The management of

¹⁸See European Commission, *European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe*, COM (2010) 636 final; and European Commission, *Union of Equality: Strategy for the Rights of Persons with Disabilities 2021–2030*, COM(2021) 101 final; E. McEvoy, 'EU Structural and Investment Funds and Disability' in Ferri and Broderick, *supra* n. 4, p. 321 at p. 325; C. Parker and I. Bulić-Cojocariu, *European Structural and Investment Funds and People with Disabilities in the European Union. Study for the PETI Committee* (European Parliament 2016) p. 30.

¹⁹Art. 4 of 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 [2013] OJ L 347/320 (Common Provisions Regulation).

²⁰McEvoy, *supra* n. 18, p. 322. See also Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of the European Union*, 2 October 2015, UN Doc. CRPD/C/EU/CO/1, para. 5.

²¹McEvoy, *supra* n. 18, p. 325.

²²For the relevant programming period 2014–2020, the Common Provisions Regulation; for the programming period 2021–2027, see Regulation (EU) No 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 [2021] OJ L 231/159.

²³See K. Pantazatou, 'European Union Funds', in H.C.H. Hoffman et al. (eds.), *Specialized Administrative Law of the European Union: A Sectoral Review* (Oxford University Press 2018) p. 532 at p. 532. For example, for the European Regional Development Fund – the fund at play in this case – see Regulation (EU) No 1301/2013 of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No 1080/2006 [2013] OJ L 347/289.

EU funds is shared between the EU and the member states.²⁴ While the role of the Commission is more pronounced at the programming stage, the member states enjoy a relatively wide margin of discretion in the implementation process.²⁵ Even then, however, the Commission maintains a supervisory role, as well as ‘a dominant role in evaluation, performance review, enforcement, and auditing’, and as such has the possibility to suspend or cancel EU funds in case of a breach of obligations adopted under the partnership agreement and an operational programme.²⁶

These obligations include the protection of the rights of persons with disabilities. As emphasised by McEvoy, ‘[t]he promotion of the rights of persons with disabilities is threaded gently through each of the ESI Regulations’.²⁷ In particular, the Common Provisions Regulation incorporates horizontal principles of non-discrimination and accessibility,²⁸ and so-called ‘*ex-ante* conditionalities’,²⁹ i.e. requirements which need to be in place before the funds are paid out.³⁰ These include general *ex-ante* conditionalities on anti-discrimination and disability, and thematic *ex-ante* conditionalities on promoting social inclusion, and combatting poverty and discrimination.³¹ Additionally, member states have an obligation to monitor the use of EU funds in this regard, with organisations of persons with disabilities assigned a role in the process.³²

Despite these safeguards, concerns have been raised by international and non-governmental organisations, disability law scholars, and other actors, that in practice EU funds have not always been used in compliance with the UN Convention, especially when it comes to the aim of transitioning from institutional settings to community care for persons with disabilities, as set out in Article 19 of the UN Convention.³³ In the case at hand, three non-governmental organisations sought to remedy such misuse of EU funds before the EU Courts.

²⁴Pantazatou, *supra* n. 23, p. 535; V. Viță, ‘Mainstreaming Equality in European Structural and Investment Funds: Introducing the Novel Conditionality Approach of the 2014–2020 Financial Framework’, 18 *German Law Journal* (2017) p. 993 at p. 997.

²⁵Pantazatou, *supra* n. 23, p. 535; Viță, *supra* n. 24, p. 997.

²⁶Pantazatou, *supra* n. 23, p. 535; Viță, *supra* n. 24, p. 997.

²⁷McEvoy, *supra* n. 18, p. 326.

²⁸Art. 7 of the Common Provisions Regulation.

²⁹Art. 19 and Annex XI of the Common Provisions Regulation.

³⁰McEvoy, *supra* n. 18, p. 327.

³¹For an overview, see Broderick and Favalli, *supra* n. 3, p. 242; McEvoy, *supra* n. 18, p. 329–330.

³²Art. 5 of the Common Provisions Regulations. See also Broderick and Favalli, *supra* n. 3, p. 242; and McEvoy, *supra* n. 18, p. 328.

³³Among many, Committee on the Rights of Persons with Disabilities, *Concluding Observations*, *supra* n. 20, para. 50; UN Special Rapporteur on the rights of persons with disabilities, Catalina Devandas-Aguilar, and UN 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,

FACTUAL BACKGROUND

In 2018, Bulgaria sought to implement an operational programme ‘Growing Regions 2014–2020’ co-financed by the European Regional Development Fund by issuing a Call for Proposals to award grants aimed at ‘Support for the deinstitutionalisation of social services for elderly people and people with disabilities’. The EU funds were to be given to 29 municipalities for ‘building, renovation, furnishing and equipment of six day-care centres and 68 care homes for older people and people with disabilities’.³⁴ Three disability rights organisations – namely the European Network on Independent Living, the Validity Foundation-Mental Disability Advocacy Centre, and the Center for Independent Living Association – considered that these projects were not advancing the goal of deinstitutionalisation. According to the appellants, the projects actually ‘perpetuated the segregation and isolation of people with disabilities in breach of the prohibition of discrimination on grounds of disability’.³⁵

In February 2019, the appellants asked the Bulgarian Managing Authority that issued the Call for Proposals to suspend it. As their request was denied, the appellants wrote to the Commission, asking it to suspend the Call for Proposals and all related payments, and to encourage Bulgaria to ensure that any future calls under the respective operational programme comply with Article 19 of the UN Convention. The Commission, by a letter of 24 May 2019, also replied to the appellants in the negative. It argued that the Call for Proposals was in line with the Partnership Agreement concluded with Bulgaria, as well as with the operational programme. In light of the shared management between the member states and the Commission, it also questioned its competence to suspend the Call for

Balakrishnan Rajagopal, *Letter to Ms Van der Leyen*, 18 May 2020, AL OTH 38/2020, (<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25267>) visited 14 February 2022; European Ombudsman, *Case 1233/2019/MMO*, 30 July 2020; I. Bulić-Cojocariu and N. Kokić, *Lost in Interpretation: The use of ESI Funds during 2014 – 2020 and the impact on the right of persons with disabilities to independent living. Report Commissioned by the GUE/NGL group in the European Parliament* (2020), (https://enil.eu/wp-content/uploads/2020/12/Study_EP_EN_09122020.pdf) visited 14 February 2022; Parker and Bulić-Cojocariu, *supra* n. 18; J. Šiška and J. Beadle-Brown, *Transition from Institutional Care to Community-Based Services in 27 EU Member States: Final Report. Research Report for the European Expert Group on Transition from Institutional to Community-based Care* (2020), (<https://deinstitutionalisationdotcom.files.wordpress.com/2020/05/eeg-di-report-2020-1.pdf>) visited 14 February 2022; Broderick and Favalli, *supra* n. 3, p. 234, 247–248, 253, and 257–258; McEvoy, *supra* n. 18, p. 331–332, and 335–336.

³⁴ENIL, ‘Bulgaria Must Suspend the Construction of 68 Institutions for the Disabled’ (2019) (<https://enil.eu/news/bulgaria-must-suspend-the-construction-of-68-institutions-for-the-disabled/>), visited 14 February 2022.

³⁵ENIL *Brussels Office and Others v Commission*, *supra* n. 2, para. 5.

Proposals. In these circumstances, the appellants felt that they ‘had no option left but to address the Court’.³⁶

THE INADMISSIBILITY OF THE ACTION: ORDERS OF THE GENERAL COURT AND THE COURT OF JUSTICE

The appellants brought to the General Court an action under Article 263 TFEU, seeking to have the Commission’s letter of May 2019 annulled. The Commission objected to the action on grounds of inadmissibility. It argued that: first, the letter of May 2019 did not constitute a challengeable act, as it did not produce binding legal effects; second, the appellants had no interest in bringing proceedings against that letter; and third, two of the appellants were not directly and individually concerned by the letter as it was not addressed to them, and in any case the appellants did not bring the action on behalf of a defined and identifiable group of persons with disabilities, and it was thus immaterial whether or not these persons were directly and individually concerned by the letter of May 2019.³⁷

The appellants, on the other hand, considered that the letter constituted a final decision of the Commission refusing to adopt a binding act, aimed at interrupting deadlines or suspending payments related to the Call for Proposals at issue. As such, the letter gave rise to legal effects. The appellants pointed to the fact that by the letter the Commission closed the complaint procedure that they had initiated in line with Article 74(3) of the Common Provisions Regulation, and in this regard drew parallels to the complaint procedure provided under the state aid scheme.³⁸ Moreover, the appellants contended that they represented the interests of a defined and identifiable group of persons with disabilities, whose legal position the letter of May 2019 affected.³⁹

The General Court began by assessing whether the letter of 24 May 2019 could be deemed a challengeable act for the purposes of Article 263 TFEU.⁴⁰ It recalled the ‘settled case-law that only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in its legal position are acts or decisions which may be the subject of an action for annulment under Article 263 TFEU’.⁴¹ The General

³⁶ENIL, ‘Press Release: NGOs Take European Commission to Court for Funding Segregation of Disabled Persons in Bulgaria’ (2019) (<https://enil.eu/news/press-release-ngos-take-european-commission-to-court-for-funding-segregation-of-disabled-persons-in-bulgaria/>) visited 14 February 2022.

³⁷ENIL *Brussels Office and Others v Commission*, *supra* n. 2, para. 18.

³⁸*Ibid.*, para. 22.

³⁹*Ibid.*, para. 23.

⁴⁰*Ibid.*, para. 19.

⁴¹*Ibid.*, para. 24.

Court, looking at the substance rather than the form of the act,⁴² considered that the Commission's letter constituted a refusal to act following the appellants invitation by letter of April 2019 to suspend the Call for Proposals and all related payments.⁴³ The General Court explained that a refusal to act may be the subject of an action for annulment 'provided that the act which the institution refuses to adopt could itself have been contested under that provision'.⁴⁴ In this case, that would have been an act of the Commission aimed at interrupting payment deadlines, suspending payments in respect of a call for proposals, or cancelling the EU's contribution to an operational programme. It was thus necessary to examine whether such an act could produce 'binding legal effects capable of affecting the applicants' interests by bringing about a distinct change in their legal position'.⁴⁵ In the case at hand, the act that the Commission refused to adopt by the letter at issue would have, according to the General Court, 'produced, above all, binding legal effects vis-à-vis the Member State to which the [European Regional Development Fund] contribution was addressed'.⁴⁶ However, the appellants in this case (and the group of persons that they claimed to represent) did not fulfil this standard, as they could neither be considered the beneficiaries of financial assistance, nor would they be liable for any payment of recovered funds.⁴⁷ Moreover, even if action was taken by the Commission, the member state could still replace any lost EU funding with its own, and thus enable the continuation and conclusion of the projects.⁴⁸

The General Court also rejected the appellants' argument that they had *locus standi* as they 'represent a defined and identifiable group of persons with disabilities who are not in a position to defend themselves'.⁴⁹ According to the General Court, the appellants did not invoke any special circumstances which would enable them to bring an action defending general and collective interests of a category of persons, nor did they 'show that they would be acting on behalf of certain persons with disabilities entitled to bring an action for annulment individually'.⁵⁰

Furthermore, the General Court held that invoking Article 47 of the Charter on the right to effective judicial protection was also not capable of changing the outcome of the case. The appellants, having failed to show that they were acting on behalf of certain persons with disabilities, could not rely on the right of these

⁴²Ibid, para. 25.

⁴³Ibid, para. 26.

⁴⁴Ibid, para. 27.

⁴⁵Ibid, para. 29.

⁴⁶Ibid, para. 37.

⁴⁷Ibid, para. 39.

⁴⁸Ibid, para. 36.

⁴⁹Ibid, para. 40.

⁵⁰Ibid, para. 41.

persons to effective judicial protection.⁵¹ In any event, in line with previous case law, Article 47 of the Charter was not ‘intended to change the system of judicial review laid down by the Treaties’ and as such cannot result in disregard for the condition of ‘challengeable act’ as provided for by the Treaties.⁵²

Finally, the General Court rejected the argument of the appellants on the analogy to be made between the complaint procedures under Article 74(3) of the Common Provisions Regulation on the one hand and in the area of state aid on the other hand, in particular as the Commission has exclusive jurisdiction to decide on the latter, whereas it is the member states that examine complaints in relation to the implementation of EU funding.⁵³ The Commission’s right to require member states to examine complaints concerning EU funding does not bring about an obligation on the Commission to adopt a decision closing such complaints.⁵⁴ It follows that the letter of 24 May 2019 was not a decision by which the Commission closed the complaint procedure provided for under Article 74(3) of the Common Provisions Regulation, and as such did not constitute ‘a challengeable act’.⁵⁵

Two of the appellants (Validity Foundation and Center for Independent Living Association) appealed the order, arguing that the General Court had erred in finding that the decision of the Commission did not directly entail binding legal effects on the legal position of the appellants. The appellants submitted that the letter was of direct and individual concern to persons with disabilities who would be housed in the homes built using the EU funds awarded under the Call for Proposals at issue, but who could not defend themselves due to their disabilities and fear of reprisal.⁵⁶ The appellants also argued that the General Court erred in its interpretation of Article 47 of the Charter.⁵⁷

On appeal, the Court of Justice reached the same conclusion as the General Court. It first noted, however, that where the case is brought by non-privileged applicants against a measure that had not been addressed to them, ‘the requirement that the binding legal effects of the measure being challenged must be capable of affecting the interests of the applicant by bringing about a distinct change in his or her legal position’, which the General Court examined, ‘*overlaps* with the conditions laid down in the fourth paragraph of Article 263 TFEU, pertaining to the act being challenged being of direct and individual concern to the applicant’.⁵⁸

⁵¹Ibid, para. 42.

⁵²Ibid, para. 43.

⁵³Ibid, para. 46.

⁵⁴Ibid, para. 47.

⁵⁵Ibid, para. 48.

⁵⁶*Validity and Center for Independent Living v Commission*, *supra* n. 1, para. 44.

⁵⁷Ibid, paras. 56-57.

⁵⁸Ibid, para. 39, emphasis added; *see also* para. 42.

The Court of Justice proceeded to focus on probing the standing of the appellants under Article 263(4) TFEU. It agreed with the General Court that the appellants did not rely on any special circumstances that would entitle them to bring an action for annulment as an association where its members are not entitled to do so individually, neither did they show that they would be acting on behalf of certain persons with disabilities entitled to bring an action for annulment individually.⁵⁹ In particular, the Court of Justice did not consider disability and/or fear of reprisal to be circumstances liable to prevent persons with disabilities from bringing the action themselves.⁶⁰ Further, the Court of Justice held that 'it is not apparent from the appellants' reasoning that persons with disabilities living in such institutions [...] would have been directly and individually concerned by a decision of the Commission such as the decision whose adoption was refused by the letter at issue',⁶¹ as any potential infringement of their fundamental rights would be in fact committed by the Bulgarian authorities, and would not cease in the event of the Commission suspending or cancelling payments related to the project.⁶²

As to the interpretation of Article 47 of the Charter, the Court of Justice reiterated the position of the General Court that the right of effective judicial protection cannot result in disregarding the admissibility condition of 'direct and individual concern' set out in the Treaties.⁶³ In reaching this conclusion, it dismissed the appellant's suggested interpretation of previous case law, according to which Article 47 of the Charter would not be breached by a finding of inadmissibility of an action for annulment only where an alternative legal remedy existed. The Court of Justice further emphasised that the appellants could not rely on the right of persons with disabilities to effective judicial protection, as the action for annulment was brought in the appellants' name, and not on behalf of those persons.⁶⁴

COMMENT

An unsurprising decision on locus standi

The rules on *locus standi* for those seeking to challenge the legality of EU norms are infamous.⁶⁵ A natural or legal person can bring an action for annulment of an

⁵⁹Ibid, para. 46.

⁶⁰Ibid, paras. 47-51.

⁶¹Ibid, para. 52.

⁶²Ibid, para. 54.

⁶³Ibid, paras. 58-62.

⁶⁴Ibid, para. 63

⁶⁵Among many, see for example A. Barav, 'Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court', 11 *Common Market Law Review* (1974) p. 191; C. Harding, 'The Private Interest in Challenging

act not addressed to them only where it is of 'direct and individual concern' to them.⁶⁶ The Court of Justice interprets these requirements restrictively.⁶⁷ An applicant is directly concerned with an EU act where the measure directly affects their legal situation, and leaves no discretion to the addressees of the measure for its implementation.⁶⁸ To be individually concerned, the applicant must be affected by the measure 'by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed'.⁶⁹

In the light of the restrictive case law on *locus standi* for non-privileged applicants, the orders of both Courts did not come as a surprise; even one of the legal representatives of the appellants acknowledged that they realised that this was poised to be an uphill battle.⁷⁰ Indeed, it is exceptionally difficult for

Community Action', 5 *European Law Review* (1980) p. 354; A. Arnall, 'Private Applicants and the Action for Annulment Under Article 173 of the EC Treaty', 32 *Common Market Law Review* (1995) p. 7; P. Craig, 'Standing, Rights and the Structure of Legal Argument', 9 *European Public Law* (2003) p. 493; A. Cygan, 'Protecting the Interests of Civil Society in Community Decision-Making: The Limits of Article 230 EC', 52 *The International and Comparative Law Quarterly* (2003) p. 995; A. Albers-Llorens, 'The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?', 62 *The Cambridge Law Journal* (2003) p. 72; S. Flogaitis and A. Pottakis, 'Judicial Protection under the Constitution', 1 *EuConst* (2005) p. 108; X. Lewis, 'Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures', 30 *Fordham International Law Journal* (2006) p. 1496; and S. Peers and M. Costa, 'Court of Justice of the European Union (General Chamber), Judicial review of EU Acts after the Treaty of Lisbon, Order of 6 September 2011, Case T-18/10 *Inuit Tapiriit Kanatami and Others v. Commission & Judgment of 25 October 2011, Case T-262/10 *Microban v. Commission**', 8 *EuConst* (2012) p. 82. See also AG Jacobs' Opinion in ECJ 25 July 2002, Case C-50/00 *Unión de Pequeños Agricultores v Council of the European Union*, ECLI:EU:C:2002:462.

⁶⁶Art. 263(4) TFEU. Only following the Lisbon Treaty can such a person also bring proceedings against 'a regulatory act which is of direct concern to them and does not entail implementing measures'.

⁶⁷See A. Ward, *Judicial Review and the Rights of Private Parties in EU Law*, 2nd edn (Oxford University Press 2007) p. 258 ff.

⁶⁸See for example ECJ 5 May 1998, Case C-386/96 P, *Dreyfus v Commission*, EU:C:1998:193, para. 43; EGC Order of 6 September 2011, Case T-18/10, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:T:2011:419, para. 71; EGC 7 July 2015, Case T-312/14, *Federcoopesca and Others v Commission*, ECLI:EU:T:2015:472, para. 33.

⁶⁹ECJ 15 July 1963, Case 25/62, *Plaumann v Commission of the EEC*, ECLI:EU:C:1963:17.

⁷⁰B. Van Vooren, lawyer for the appellants, speaking at an event entitled 'Impunity for Investments in Disability Segregation – the Case of the European Union' organised by ENIL and the Validity Foundation (two of the appellants), recording available at (<https://enil.eu/news/impunity-for-investments-in-disability-segregation-the-case-of-the-european-union/>) visited 14 February 2022.

non-governmental organisations to be granted *locus standi* in actions for annulments,⁷¹ and ‘the use by representative groups of arguments that are founded on human rights’ does not yield success when it comes to standing requirements.⁷² In this regard, particular attention has been paid to non-governmental organisations as applicants in environmental matters, in which requirements on standing remain restrictive despite the EU’s obligations on access to justice for non-governmental organisations under the Aarhus Convention.⁷³

In the case at hand, the standing of the appellants failed already on the somewhat ‘preliminary’ question of whether the appellants were acting ‘on behalf of’ certain persons with disabilities. The appellants claimed that they were not acting ‘in their own name’, but rather in the interest of ‘a defined and identifiable group of persons with disabilities’, whose legal position was affected by the Commission’s letter.⁷⁴ However, both Courts considered that the appellants had lodged the application ‘in their own name’, and not ‘on behalf of other persons’, and quickly dismissed their application, pointing to the established case law that, in the absence of special circumstances, ‘the defence of the general and collective interests of a category of persons is not sufficient to establish the admissibility of an action for annulment brought by an association or organisation’.⁷⁵ Regrettably, in making its decision, the Courts did not consider whether, as Cygan suggests, *locus standi* should be extended to such ‘representative groups that can demonstrate a genuine interest and concern in the contested decision’, in particular when it comes to protecting fundamental rights.⁷⁶

Moreover, while the provisions of the UN Convention on access to justice for persons with disabilities do not expressly contain such specific obligations on legal

⁷¹C. Kombos, ‘Locus Standi of Representative Groups in the Shadow of Plaumann: Limitations and Possible Solutions’, 47 *Acta Juridica Hungarica* (2006) p. 373 at p. 375; C. Poncellet, ‘Access to Justice in Environmental Matters – Does the European Union Comply with its Obligations’, 24 *Journal of Environmental Law* (2012) p. 287 at p. 298-299; Cygan, *supra* n. 65.

⁷²Kombos, *supra* n. 71, p. 404.

⁷³See M. Eliantonio, ‘Towards an Ever Dirtier Europe? The Restrictive Standing of Environmental NGOs before the European Courts and the Aarhus Convention’, 7 *CYELP* (2011) p. 69; I. Hadjiyianni, ‘Judicial Protection and the Environment in the EU Legal Order: Missing Pieces for a Complete Puzzle of Legal Remedies’, 58 *Common Market Law Review* (2021) p. 777; G.C. Leonelli, ‘A Threefold Blow to Environmental Public Interest Litigation: The Urgent Need to Reform the Aarhus Regulation’, 45 *European Law Review* (2020) p. 324; S. Marsden, ‘Direct Public Access to EU Courts: Upholding Public International Law via the Aarhus Convention Compliance Committee’, 81 *Nordic Journal of International Law* (2012) p. 175; Poncellet, *supra* n. 71; O. Kelleher, ‘Systemic Climate Change Litigation, Standing Rules and the Aarhus Convention: A Purposive Approach’, 34 *Journal of Environmental Law* (2022).

⁷⁴*ENIL Brussels Office and Others v Commission*, *supra* n. 2, para. 23.

⁷⁵*Ibid.*, para. 40; *Validity and Center for Independent Living v Commission*, *supra* n. 1, para. 45.

⁷⁶Cygan, *supra* n. 65, p. 996.

standing of non-governmental organisations as does the Aarhus Convention in relation to environmental matters,⁷⁷ the Courts' quick dismissal of standing of organisations of people with disabilities disregards the special role that these organisations hold in ensuring the effective participation of persons with disabilities in society.⁷⁸ Indeed, the participation of persons with disabilities through their representative organisations is at 'the heart of the [UN] Convention'.⁷⁹ The importance of the role of organisations of persons with disabilities was reflected in the negotiating and drafting process of the UN Convention,⁸⁰ and manifests itself in the provisions of the UN Convention stipulating that representative organisations of persons with disabilities should be consulted and actively involved in the development and implementation of legislation and policies implementing the UN Convention, as well as in other decision-making processes concerning issues relating to persons with disabilities,⁸¹ and should also participate in the national implementing and monitoring process.⁸² Further, the Courts' orders overlook that collective action taken by a representative organisation might be required to tackle systemic discrimination experienced by persons with disabilities.⁸³

The Courts' approach to standing of representative organisations of persons with disabilities can be contrasted with the jurisprudence of the European Court of Human Rights, which recognised in *Câmpeanu* that non-governmental organisations can be given standing as a 'de facto' representative of a person with a

⁷⁷See in particular Art. 9 of the Aarhus Convention.

⁷⁸On the role of organisations of persons with disabilities in implementing the Convention on the Rights of Persons with Disabilities, see for example F. Mahomed et al., 'Transposing the Convention on the Rights of Persons with Disabilities in Africa: The Role of Disabled Peoples' Organisations', 27 *African Journal of International and Comparative Law* (2019) p. 335; see also L. Vanhala, *Making Rights a Reality? Disability Rights Activists and Legal Mobilization* (Cambridge University Press 2011) p. 39-40 and 252-256.

⁷⁹See Committee on the Rights of Persons with Disabilities, *General Comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention*, 9 November 2018, UN Doc. CRPD/C/GC/7, para. 1.

⁸⁰R. Kayess and P. French, 'Out of Darkness into Light – Introducing the Convention on the Rights of Persons with Disabilities', 8 *Human Rights Law Review* (2008) p. 1 at p. 3-4.

⁸¹Art. 4(3) of the UN Convention.

⁸²Art. 33(3) of the UN Convention. See also Committee on the Rights of Persons with Disabilities, *General Comment No. 7, supra* n. 79.

⁸³On the importance of collective judicial mechanisms to address systemic discrimination against the Roma community, see M. Dawson and E. Muir, 'Individual, Institutional and Collective Vigilance in Protecting Fundamental Rights in the EU: Lessons from the Roma', 48 *Common Market Law Review* (2011) p. 751 at p. 766-776; and S. Benedi Lahuerta, 'Ethnic Discrimination, Discrimination by Association and the Roma Community: CHEZ', 53 *Common Market Law Review* (2016) p. 797 at p. 812-816.

disability, the direct victim of the alleged violations, in ‘exceptional circumstances’.⁸⁴ Admittedly, it is far from certain that the appellants in the case at hand would have satisfied the standing requirements as set in *Câmpeanu*.⁸⁵ However, the General Court and the Court of Justice could have at least more thoroughly engaged with the appellants’ arguments concerning the difficulties in accessing justice that, on account of their disabilities and fear of reprisal, exist for the people that were to be housed in the institutions built with EU funds.

The appellants’ standing was thus primarily refused because the Courts’ case law does not allow bringing actions for annulment in the general and collective interest,⁸⁶ but it should be pointed out that the outcome would most likely be the same even if the appellants had managed to show that the action was brought ‘on behalf of’ persons with disabilities that were to be housed in the institutions financed by EU funds, or, indeed, if these persons were to lodge the action themselves. In particular, these persons could be deemed not to satisfy the requirement of individual and direct concern. While as a ‘closed group’, they might satisfy the requirement of individual concern, both Courts hinted that establishing direct concern – usually the less problematic of the two requirements⁸⁷ – could be an insurmountable obstacle.⁸⁸ In the context of EU funding, the Courts have previously recognised direct concern to the beneficiary member state, as well as, albeit inconsistently, to the final recipient of funding (the beneficiary), but not, at least as far as this author is aware, to those participating in EU-funded projects (the participants).⁸⁹ Thus, for persons with disabilities as ‘participants’ in projects financed through EU funds, but not ‘beneficiaries of financial

⁸⁴ECtHR 17 July 2014, No. 47848/08, *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania*, paras. 104-114. See also ECtHR 23 January 2020, No. 38067/15, *L.R. v North Macedonia*, paras. 46-54.

⁸⁵In her critique of the judgment, De Vylder observes the overly casuistic nature of the solution adopted by the European Court of Human Rights, which makes it difficult for future applications by non-governmental representations to be successful: H. De Vylder, ‘Rewriting *CLR* on behalf of Valentin Câmpeanu v Romania (ECtHR): *actio popularis* as *ultimum remedium* to enhance access to justice of victims with a mental disability’, in E. Brems and E. Desmet (eds.), *Integrated Human Rights in Practice: Rewriting Human Rights Decisions* (Edward Elgar 2017) p. 289.

⁸⁶This was particularly evident in the judgment of the Court of Justice, which, differently to the General Court, practically did not discuss who could be considered directly affected by a decision on EU funding that the Commission refused to adopt by the letter of 24 May 2019.

⁸⁷Albors-Llorens, *supra* n. 65, p. 75.

⁸⁸See in particular *ENIL Brussels Office and Others v Commission*, *supra* n. 2, para. 39; *Validity and Center for Independent Living v Commission*, *supra* n. 1, para. 52.

⁸⁹On standing of beneficiaries of financial assistance, see Pantazatou, *supra* n. 23, p. 551-555, and H.P. Nehl, ‘Legal Protection in the Field of EU Funds’, *European State Aid Law Quarterly* (2011) p. 629 at p. 645; on sub-state actors as such beneficiaries, see for example D. Caruso, ‘Direct Concern in Regional Policy: The European Court of Justice and the Southern Question’, 17 *European Law Journal* (2011) p. 804.

assistance' as such, the door to the Court of Justice seems to be shut even when their fundamental rights are at stake.

An (in)complete system of judicial remedies?

The Court of Justice's entrenched line of reasoning for justifying the restrictiveness of the rules on standing for non-privileged applicants is that 'the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions'.⁹⁰ It is considered that while direct challenges before the Court of Justice of the European Union might be restricted, member states are to ensure access to national courts, which can in turn make a preliminary reference on the validity of an EU measure to the Court of Justice using Article 267 TFEU.⁹¹

The critique of this reasoning is well known. Most notably, it has been pointed out that natural and legal persons do not always have access to national courts, and even when they do, they must convince the national court of the necessity of a preliminary reference, as well as incur additional delays and costs associated with national proceedings.⁹² These issues have only partially been resolved with the amendment to Article 263(4) TFEU brought about by the Lisbon Treaty.⁹³ Moreover, when it is a non-governmental organisation that seeks to initiate proceedings before a national court in the interest of the people it represents, it might, depending on the rules of each member state, face further obstacles.⁹⁴ In fact, this case is an exemplar of ineffective domestic proceedings: one of the appellants and two natural persons brought this case before the Bulgarian courts, but it was found to be inadmissible.⁹⁵

⁹⁰*Unión de Pequeños Agricultores v Council*, *supra* n. 65, para. 40.

⁹¹ECJ 1 April 2004, Case C-263/02 *Commission v Jégo-Quéré*, ECLI:EU:C:2004:210, paras. 29-34; *Unión de Pequeños Agricultores v Council*, *supra* n. 65, paras. 34-44.

⁹²See for example AG Jacobs' Opinion in *Unión de Pequeños Agricultores v Council*, *supra* n. 65; Arnall, *supra* n. 65, p. 41-42; P. Craig, *EU Administrative Law*, 3rd edn (Cambridge University Press 2018) p. 339; Eliantonio, *supra* n. 73, p. 79-80; M. Eliantonio et al. (eds.), *Standing up for Your Right(s) in Europe: A Comparative Study on Legal Standing (Locus Standi) before the EU and Member States' Courts* (Intersentia 2013) p. 25-27.

⁹³Eliantonio et al., *supra* n. 92, p. 26-27; T. Lock, 'Article 47 CFR', in M. Kellerbauer et al. (eds.), *The EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) p. 2214 at p. 2218. For a more positive view of the impact of the changes brought by the Lisbon Treaty, see A. Kornezov, 'Shaping the New Architecture of the EU System of Judicial Remedies: Comment on Inuit', 39 *European Law Review* (2014) p. 251.

⁹⁴On actions for collective interests and litigation for general/public interests before civil courts, and administrative courts, see Eliantonio et al., *supra* n. 92, p. 3-4.

⁹⁵*Validity and Center for Independent Living v Commission*, *supra* n. 1, para. 56. Note that the author does not know the precise ground for inadmissibility before national courts in this case.

Thus, it seems that when EU funding is being used in breach of the EU's obligations on the rights of persons with disabilities, the primary remedy envisioned in the EU's 'complete system of legal remedies' is for persons with disabilities to challenge EU measures in national courts. Alongside the general challenges already mentioned, this solution is problematic because persons with disabilities 'often experience multiple barriers to litigating in defence of their rights'.⁹⁶ These barriers include 'laws denying them legal standing; inadequate information or advice; insufficient resources; inaccessible architectural design; inaccessible information or communication methods; and inadequate protection from subsequent victimization'.⁹⁷ Guardianship laws in particular can effectively 'prevent a person from bringing a legal claim'.⁹⁸

While the UN Convention guarantees effective access to justice,⁹⁹ and also requires State Parties to recognise that persons with disabilities 'enjoy legal capacity on equal basis with others',¹⁰⁰ there is evidence that these provisions have not been fully implemented in all EU member states and access to justice for persons with disabilities has not been fully realised in Europe. For example, as recently as July 2020, a report by the European Network of National Human Rights Institutions and Mental Health Europe found that many national legal frameworks across Europe 'continue to allow for the denial of legal capacity and substitute decision-making under certain circumstances'.¹⁰¹ The Commission's Strategy for the Rights of Persons with Disabilities 2021–2030 also acknowledges that barriers to access to justice for persons with disabilities still exist in EU member states.¹⁰² In this context, the argument of a 'complete system of legal remedies' can

⁹⁶L. Series, 'Legal Capacity and Participation in Legislation: Recent Developments in the European Court of Human Rights', 5 *European Yearbook of Disability Law* (2014) p. 103; see also L. Clements and J. Read, 'The Dog that Didn't Bark: The Issue of Access to Rights under the ECHR by Disabled People', in A. Lawson and C. Gooding (eds.), *Disability Rights in Europe: From Theory to Practice* (Hart Publishing 2005) p. 21; Vanhala, *supra* n. 78, p. 39-40; E. Flynn and A. Lawson, 'Disability and Access to Justice in the European Union: Implications of the United Nations Convention on the Rights of Persons with Disabilities', 4 *European Yearbook of Disability Law* (2013) p. 7 at p. 9 ff.

⁹⁷Flynn and Lawson, *supra* n. 96, p. 7 at p. 9.

⁹⁸*Ibid.*, p. 10.

⁹⁹Art. 13 of the UN Convention.

¹⁰⁰Art. 12 of the UN Convention.

¹⁰¹European Network of National Human Rights Institutions and Mental Health Europe, *Implementing Supported Decision-making: Developments across Europe and the role of National Human Rights Institutions* (2020), (<https://www.mhe-sme.org/wp-content/uploads/2020/06/Report-ENNHRI-and-MHE-Implementing-supported-decision-making.pdf>) visited 14 February 2022. See also European Agency for Fundamental Rights, *Legal Capacity of Persons with Intellectual Disabilities and Persons with Mental Health Problems* (2013), (<https://fra.europa.eu/sites/default/files/legal-capacity-intellectual-disabilities-mental-health-problems.pdf>) visited 14 February 2022; and Series, *supra* n. 96.

¹⁰²Commission, *Strategy for the Rights of Persons with Disabilities 2021–2030*, *supra* n. 18, p. 13.

hardly justify a lack of legal standing for organisations of persons with disabilities to defend the rights of persons with disabilities before the Court of Justice of the European Union.

The Optional Protocol to the UN Convention: filling the gap

As the case at hand demonstrated, persons with disabilities and their representative organisations find themselves short of options in accessing courts to hold the EU accountable for its failings in ensuring that EU funds are spent in line with the rights of persons with disabilities. It is proposed that this gap could – at least to some extent – be filled by the EU's accession to the Optional Protocol.

The Optional Protocol was adopted alongside the UN Convention in December 2006, and just as the latter entered into force in May 2008. The Optional Protocol aims to supplement the provisions of the UN Convention on the monitoring of its implementation.¹⁰³ For this purpose, it grants the Committee on the Rights of Persons with Disabilities (the Committee) the competence to receive and consider individual complaints on alleged violations of the UN Convention by the State Parties to the Optional Protocol,¹⁰⁴ as well as to undertake *ex-officio* inquiries of grave or systematic violations of the UN Convention.¹⁰⁵

The EU's accession to the Optional Protocol would enable individuals or groups of individuals to have recourse to the Committee, a quasi-judicial body,¹⁰⁶ to examine their grievances on the failure of the EU to fulfil its obligations under the UN Convention. This could include applications concerning compliance with Articles 5 (equality and non-discrimination) and 19 (living independently and being included in the community) of the UN Convention in the process of the allocation and use of EU funding, as well as applications in relation to restricted access to justice (Article 13 of the UN Convention). While individual applications are in principle only admissible if domestic remedies had been exhausted,¹⁰⁷ 'domestic remedies need not be exhausted if they objectively have no prospect of success'.¹⁰⁸ in the light of the Court of Justice of the European

¹⁰³O. Ferrajolo, 'Optional Protocol to the Convention on the Rights of Persons with Disabilities', in V. Della Fina et al. (eds.), *The United Nations Convention on the Rights of Persons with Disabilities* (Springer 2017) p. 703 at p. 708.

¹⁰⁴Art. 1 of the Optional Protocol.

¹⁰⁵Art. 6 of the Optional Protocol.

¹⁰⁶Broderick and Ferri, *supra* n. 6, p. 80; Ferri, 'The Conclusion of the UN Convention', *supra* n. 15, p. 55.

¹⁰⁷Art. 2 of the Optional Protocol.

¹⁰⁸Committee on the Rights of Persons with Disabilities, *Communication No 7/2012, Noble v Australia*, 10 October 2016, UN Doc. CRPD/ C/ 16/ D/ 7/ 2012, para. 7.7.

Union's position on the legal standing of non-governmental organisations adopted in the case at hand, it is likely that an organisation representing persons with disabilities could bring such a case to the Committee without first turning to the General Court. Importantly, the Optional Protocol also allows applications to be submitted *on behalf of* victims of violations,¹⁰⁹ and in this sense, non-governmental organisations such as the appellants could play a crucial role in holding the EU accountable. It should, however, be acknowledged that this does not mean that these organisations could simply initiate proceedings in the public interest.¹¹⁰ In fact, it is not immediately clear from the wording of the Optional Protocol whether the consent of the victim is required for an application to be brought on their behalf.¹¹¹ While Quinn argued that the text allows the Committee 'to dispense with prior authorisation in circumstances of particular vulnerability (e.g. in certain institutional settings)',¹¹² Stavrinaki finds that the Committee requires applicants to show proof of consent by the victim(s), or, exceptionally, that they demonstrate that the victim(s) are unable to lodge the complaint and have accepted that the applicant should act in their name.¹¹³

Following an examination of the individual application, the Committee can adopt suggestions and recommendations ('views'),¹¹⁴ which are authoritative, but formally not legally binding.¹¹⁵ In these views, the Committee can make recommendations on general obligations of the state parties arising from the UN Convention, and may also suggest specific remedies aimed at achieving equality for the victim.¹¹⁶

The conclusion of the Optional Protocol by the EU is by no means a wild proposition. The possibility of an accession of a 'regional integration organization' is envisioned by the Optional Protocol.¹¹⁷ As the 'views' issued by the Committee are not legally binding,¹¹⁸ accession to the Optional Protocol should not be as

¹⁰⁹Art. 1(1) of the Optional Protocol.

¹¹⁰T. Stavrinaki, 'Optional Protocol to the Convention on the Rights of Persons with Disabilities', in I. Bantekas et al. (eds.), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press 2018) p. 1218 at p. 1223; Ferrajolo, *supra* n. 103, p. 713.

¹¹¹Ferrajolo, *supra* n. 103, p. 712.

¹¹²G. Quinn, 'Resisting the "Temptation of Elegance": Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?', in G. Quinn and O.M. Arnardóttir (eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Brill 2009) p. 215 at p. 253.

¹¹³Stavrinaki, *supra* n. 110, p. 1224.

¹¹⁴Art. 5 of the Optional Protocol.

¹¹⁵On the legal status of Views, *see* Stavrinaki, *supra* n. 110, p. 1248-1250.

¹¹⁶Stavrinaki, *supra* n. 110, p. 1250-1251.

¹¹⁷*See* Arts. 10-12 of the Optional Protocol.

¹¹⁸On the legal status of Views, *see* Stavrinaki, *supra* n. 110, p. 1248-1250.

complex as the EU's accession to the ECHR.¹¹⁹ When the Commission first submitted to the Council its proposal to conclude the UN Convention, this was accompanied by a proposal for a Council Decision concerning the conclusion, by the EU, of the Optional Protocol.¹²⁰ However, at the time, the Council decided to focus its attention on the accession to the UN Convention, and postponed the decision on the Optional Protocol.¹²¹ As of yet, the EU has not even signed the Optional Protocol. This state of affairs has been observed with concern by the Committee, which appealed to the EU to ratify the Optional Protocol.¹²² The sentiment is shared by the European Parliament, which considers the Optional Protocol to be 'an indivisible part of the [UN Convention]'.¹²³ The Commission has also stated on a number of occasions that the process of acceding to the Optional Protocol could still be pursued.¹²⁴

As the issue of the accession to the Optional Protocol remains alive,¹²⁵ the ball is firmly in the Council's court. The crux of the problem lies, however, in the requirement for unanimity voting in the Council, prescribed by Article 19(1) TFEU, read in conjunction with Article 218(8) TFEU.¹²⁶ In particular those member states that have so far not signed the Optional Protocol themselves are reluctant to agree to the EU's accession,¹²⁷ allegedly due to a fear of the consequences of conclusion of the Optional Protocol by the EU on their national legal

¹¹⁹Contrast with ECJ 18 December 2014, *Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:2014:2454, para. 184. On these complexities, see for example T. Lock, 'The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13: Is it Still Possible and is it Still Desirable?', 11 *EuConst* (2015) p. 239 at p. 243; and B. de Witte and Š. Imamović, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court', 40 *European Law Review* (2015) p. 683.

¹²⁰COM(2008) 530 final.

¹²¹L. Waddington, 'Breaking New Ground: The Implications of Ratification of the UN Convention on the Rights of Persons with Disabilities for the European Community', in Quinn and Arnardóttir, *supra* n. 112, p. 111 at p. 121.

¹²²Committee on the Rights of Persons with Disabilities, *Concluding Observations*, *supra* n. 20, paras. 6-7.

¹²³Most recently, see European Parliament, *Resolution of 7 October 2021 on the protection of persons with disabilities through petitions: lessons learnt*, 7 October 2021, P9_TA(2021)0414, para. 4.

¹²⁴See for example Commission, *Strategy for the Rights of Persons with Disabilities 2021–2030*, *supra* n. 18.

¹²⁵See also J. Arsenjeva, *The Implementation of the UN Convention on the Rights of Persons with Disabilities in the EU External Relations. Briefing Paper for the European Parliament's Subcommittee on Human Rights* (European Parliament 2013) p. 26.

¹²⁶M. Chamon, 'Negotiation, Ratification and Implementation of the CRPD and its Status in the EU Legal Order', in Ferri and Broderick, *supra* n. 4, p. 52 at p. 57 and 70; Broderick and Ferri, *supra* n. 6, p. 318.

¹²⁷Chamon, *supra* n. 126, p. 57. These are Ireland, the Netherlands, and Poland. Additionally, Bulgaria, and Romania have signed, but not ratified the Optional Protocol.

orders.¹²⁸ This seems to be recognised by the Commission in its newest Strategy for the Rights of Persons with Disabilities 2021–2030, in which it committed itself to ‘re-examine the EU’s ratification of the UNCRPD Optional Protocol’ in light of the progress made by the member states on their accession to the Optional Protocol.¹²⁹ It is hoped that at least once all member states sign the Optional Protocol, the Council can achieve the required unanimity to proceed with the EU’s accession as well.

It should be noted that even once all member states have ratified the Optional Protocol, the EU’s accession would still be imperative. The nature of the UN Convention as a mixed agreement reflects the division of competences between the member states and the EU in this area.¹³⁰ In particular in relation to the case at hand, it has already been noted above that the management of EU funds is shared between the Commission and the member states, and each has distinct tasks in this regard. When exercising these tasks, both the Commission and the member states are obliged to respect the UN Convention. The accession of the EU to the Optional Protocol would thus allow for, inter alia, the Commission’s actions related to the management of EU funds – or lack of them – to be examined in the light of the EU’s obligations in respect of the UN Convention. Moreover, the Committee’s ‘views’ given in a specific case could guide the Commission in improving its compliance with the UN Convention in the management of EU funds more generally, while the sole fact of a possibility of an individual complaint being lodged against it might make the EU more vigilant in its compliance with the UN Convention, or even deter it from potential violations.¹³¹ In any case, in light of the gap in access to the Court of Justice of the European Union for persons with disabilities and their representative organisations identified above, the EU should strive to accede to the Optional Protocol sooner rather than later.

CONCLUSION

EU funding is a vital tool in furthering the rights of persons with disabilities, and fostering their participation and inclusion into society, and it is crucial that EU funds are used in compliance with the EU’s obligations under the Charter and the UN Convention. Certainly, the EU is aware of its obligations. The legal framework on EU funds provides certain safeguards and obligations aimed at respecting

¹²⁸Arsenjeva, *supra* n. 125, p. 26.

¹²⁹Commission, *Strategy for the Rights of Persons with Disabilities 2021–2030*, *supra* n. 18, p. 27.

¹³⁰Chamon, *supra* n. 126.

¹³¹On the effects of individual complaints as part of the UN Human Rights Treaty Body System, see G. Ulfstein, ‘Individual Complaints’, in H. Keller and G. Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) p. 73 at p. 75.

the rights of persons with disabilities, and these commitments have been further strengthened for the 2021–2027 programming period.¹³²

These safeguards can, however, fail. In the follow-up, experience shows that national complaints procedures are not always effective, and the Commission might refuse to act.¹³³ In that scenario, and in line with the understanding of persons with disabilities as subjects of rights, rather than passive recipients of charitable donations, persons with disabilities and their representative organisations should be enabled to play an active role in defending their rights. But are they?

The case at hand demonstrates that the *locus standi* requirements for lodging actions for annulments of EU measures before the General Court render such applications made by persons with disabilities and their representative organisations almost inevitably inadmissible. Despite arguments that – in the particular context of rights of persons with disabilities – the justification that the restrictive standing is offset by the ‘complete system of legal remedies’ in the EU does not hold, it seems unlikely that the Court of Justice would loosen the standing requirements in these cases, and even less that this would be achieved via a Treaty amendment. Other pathways must then be explored.

One option might be for persons with disabilities or organisations of persons with disabilities to make a complaint to the European Ombudsman about the maladministration by the Commission. Indeed, the European Ombudsman has already, for example, dealt with complaints with regard to the use of EU funds for the construction of institutional care facilities in EU member states,¹³⁴ and has also opened an own-initiative inquiry into the Commission’s monitoring of EU funds intended to promote the right of persons with disabilities to independent living.¹³⁵ Another option was put forward in this case note: the EU should accede to the Optional Protocol, allowing the Committee to receive communications from or on behalf of individuals or groups of individuals claiming to be victims of a violation by the EU of the provisions of the UN Convention.

Crucially, these pathways enable, at least to some extent, representative organisations to act on behalf of persons with disabilities. As such, they should be pursued and utilised forcefully and speedily. However, these two pathways do not completely close the gap in protecting the rights of persons with disabilities, as neither allow for real collective action to be taken by a representative organisation in the interest of persons with disabilities before a court. The limits of individual and institutional enforcement in tackling structural inequalities are

¹³²Broderick and Favalli, *supra* n. 3, p. 247.

¹³³*Ibid.*, p. 257.

¹³⁴European Ombudsman, *Case 1233/2019/MMO*, 30 July 2020; European Ombudsman, *Case 417/2018/JN*, 17 September 2019.

¹³⁵European Ombudsman, *Case OI/2/2021/VS*, opened on 3 February 2021. *See also* Broderick and Favalli, *supra* n. 3, p. 248.

well-known,¹³⁶ and have come to be demonstrated also in the case at hand. Additionally, national implementation of recommendations made by human rights treaty bodies, such as the Committee, has often faced difficulties.¹³⁷ The EU has been no exception in similar circumstances,¹³⁸ and, in case of EU ratification of the Optional Protocol, the mechanism of consideration and implementation of the Committee's 'views' must be carefully considered.¹³⁹ Still, the most important part of the puzzle in closing the gap in protecting the rights of persons with disabilities in the EU might be staring us right in the face, even if unpopular to admit: perhaps, after all, representative organisations acting in the interest of persons with disabilities should be given legal standing to bring actions defending their fundamental rights before the Court of Justice of the European Union.



¹³⁶In regard to Roma, see Dawson and Muir, *supra* n. 83; Benedi Lahuerta, *supra* n. 83, p. 812-816; more generally M. Bell, 'Walking in the Same Direction? The Contribution of the European Social Charter and the European Union to Combating Discrimination', in G. De Búrca and B. De Witte (eds.), *Social Rights in Europe* (Oxford University Press 2005) p. 261 at p. 275-276.

¹³⁷Ulfstein, *supra* n. 131, p. 104-105.

¹³⁸While not a human rights treaty body, the complexities can be seen from the example of the EU's (lack of) implementation of the findings made by the Aarhus Convention Compliance Committee in 2017 concerning the incompatibility of the Aarhus Regulation and the *Plaumann* jurisprudence with the Aarhus Convention's provisions on access to justice (Case ACCC/C/2008/32 European Union (Pt II)). It took the EU four years to adopt an amended Aarhus Regulation (Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies L 356/1), which was to address these findings. The amendments represent 'an important acceptance by the EU institutions of the applicability of the [Aarhus] Convention and authority of the [Aarhus Convention Compliance Committee]', however it remains questionable whether these amendments fully implement the Compliance Committee's findings, and bring EU law in compliance with the Aarhus Convention. A. Hough, *Final Report: Analysis of the Revised Proposal to Amend the Aarhus Regulation Agreed 12.07.21* (EJNI Access to Justice Observatory 2021) p. 7; also see Kelleher, *supra* n. 73, p. 11-12 and 26.

¹³⁹A detailed discussion of the implementation of the Committee's 'views' by the EU goes beyond the scope of this paper, however, for a general discussion on the legal status of decisions by human rights bodies in national law, and associated issues of implementation, see for example R. van Alebeek and A. Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law', in Keller and Ulfstein, *supra* n. 131, p. 356.