

# Comments on the EU Strategy

April 19, 2021 online, Markus Schefer

Thank you madam chair. Good morning, commissioner, secretary of state, ladies and gentlemen. I am honored to participate in today's conference on the new EU strategy. As a member of the CRPD Committee, it is my great pleasure to witness the energy and determination that shines through the words, sentences and paragraphs of the densely composed strategy. Its scope is broad, its analysis succinct, and its plan for action concise. I could spend the ten minutes allotted to my comment with effervescent praise. That might make us all feel good, but it would not contribute to the implementation of the Convention on the Rights of Persons with Disabilities.

So let's take a different perspective: In many areas, implementing the Convention fully requires substantial changes not just in the law and in government, but also in society as a whole, its conception of disability and its perspective on persons with disabilities. European societies, as societies in all other regions of the world, are in need of a paradigm shift in their collective perception of disability, in the sense that the physicist Thomas Kuhn coined the phrase for science. Different from science however, paradigm shifts in society do not happen by revolution, but by evolution. The EU Strategy is not the beginning of this paradigm shift, and it is not its end, either. So where is it located, in the journey toward a society inclusive of all people? Let me distinguish three levels: analysis, goals and measures.

On the level of analysis, I would like to draw your attention to the focus of the strategy on "Enjoying EU Rights". "Persons with disabilities", the strategy holds, "should enjoy all rights on an equal basis with others". One of the most fundamental obstacles against the full guarantee of any and all rights lies in the restrictions of legal capacity, prohibited by article 12 of the Convention. In its second prong, the capacity to act and to exercise a right, legal capacity is restricted in the legal orders of most EU member states. And yet, the strategy lists restrictions on legal capacity only in the specific context of political rights, access to justice and self-employment and entrepreneurship, not as an all-encompassing issue. As a lawyer steeped in the dogmas of civil law, I fully understand the momentous changes article 12 CRPD entails. And I therefore understand the ferocity of the resistance against them. These obstacles, however, should not prevent the strategy from conducting an analysis of the restrictions on legal capacity as foundational impediments against the full realization of EU rights. Such an analysis would have altered the trajectory of the goals and measures significantly

A second, comparatively minor aspect of the analysis the strategy employs, pertains to the ratification of the Optional Protocol to the CRPD. The issue has been pending since 2008. The strategy holds that the EU will look to what member states are doing and act accordingly. This approach, in my view as the Special Rapporteur on New Communications, is misplaced. I would expect the EU to critically examine the jurisprudence of our Committee and base its decision on this assessment. Member states may well each have their own political reasons to ratify or not, reasons entirely immaterial to the position of the European Union. I fail to see why the EU should swim with the crowd on this topic.

Let us move to the goals the strategy aims to achieve.

One of the strategy's priorities is employment. In this context, the strategy addresses sheltered employment. It states that, I quote, "not all ensure adequate working conditions or labour-related rights", unquote. It remains silent on whether segregation in the labor market is in conformity with the principles of international anti-discrimination law or not – a question whose answer, I would hope, is settled. As a consequence, the reader scours the strategy in vain for a statement on the future of sheltered workshops. The omission of such a goal may be due to serious conflicts of opinions and interests among the parties involved. It nevertheless remains an elephant in the room a bit too carefully ignored by the strategy.

Another area, where the goals are not entirely clear to me, is access to justice. The strategy lists an impressive array of hindrances persons with disabilities face in accessing justice, even mentioning deprivation of their legal capacity, as I briefly alluded to above. However, it does not address the serious issue that, particularly in criminal proceedings, persons with disabilities deemed unfit for trial are often referred to a different procedural track ending in much more serious deprivations of their liberty. In addition, the strategy states that the Commission will work with Member States to, I quote, "implement the 2000 Hague Convention on the international protection of vulnerable adults *in line with the CRPD*", unquote. It is safe to predict that this goal will remain elusive. The 2000 Hague Convention deeply relies on limitations of legal capacity that the CRPD prohibits. In law, we are rarely confronted with clear-cut either-or situations. But this is one of them. You can't have the cake and eat it.

I would now move to the third level, to measures.

The constraints of time compel me to confine myself to one issue, the inclusion of women and girls. Throughout, the strategy mentions women and girls with disabilities explicitly and pledges to pay particular attention to their situation. On the level of the measures to be taken, however, references to women and girls become scarce. None of the descriptions of the Flagship Initiatives by the strategy explicitly incorporates them. Certainly, this does not necessarily mean they won't be included in the further development of these Initiatives. Explicit references, however, would have given the reassurance that articles 6 and 7 of the CRPD – and with them the plight of women and girls with disabilities – will not be forgotten.

Just as we could go on praising the strategy, we could go on criticizing it. Despite of all its shortcomings – some of them of a truly serious nature – it represents an important step forward. It is, in its core, a political endeavor. And as such, it is subject to the constraints of political majority rule. The CRPD Committee will continue to encourage the European Union to keep laying the groundwork that will allow European societies to develop the majorities necessary to shift their paradigm and include all persons with disabilities as fully equal members of their communities. In the end, we are all in this together. And the EU has made it clear with its strategy that it is on board, too. I thank you.