

STRATEGIC LITIGATION GUIDEBOOK

AUTHOR(S)

SIMONA FLORESCU, VALIDITY FOUNDATION

THIS GUIDEBOOK WAS DRAFTED FROM NATIONAL REPORTS

PREPARED BY

CENTRE FOR LEGAL RESOURCES

FORUM FOR HUMAN RIGHTS

KERA FOUNDATION

VALIDITY FOUNDATION

WITH THE SUPPORT OF

VICTIM SUPPORT EUROPE

EUROPEAN NETWORK ON INDEPENDENT LIVING

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FOREWORD

This guidebook builds on the experience of non-governmental organisations in litigating the rights of persons with intellectual and psychosocial disabilities. Persons with disabilities and their representative organisations provided direct input during the research phase.

The guidebook offers information for persons with disabilities, their representative organisations, and other (legal) professionals who wish to better understand how to use the EU Charter of Fundamental Rights for the advancement of the rights of persons with disabilities.

It has been prepared with the support of the European Commission as part of the EU funded project: Strategic Litigation as a Gateway to address the rights of Persons with Disabilities in the European Union (101084868 – LITI-GATE- CERV-2022-CHAR).

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ACRONYMS

CJEU	Court of Justice of the European Union
CRPD	UN Convention on the Rights of Persons with Disabilities
CRPD Committee	Committee on the Rights of Persons with Disabilities
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
ECSR	European Committee on Social Rights
EU Charter	Charter of Fundamental Rights of the European Union (2000/C 364/01)
FRA	Fundamental Rights Agency
NGO	non-governmental organisation
OHCHR	Office of the High Commissioner for Human Rights
OP-CRPD	Optional Protocol to the Convention on the Rights of Persons with Disabilities
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
VRD	Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

KEY CONCEPTS

Cognitive disability refers to difficulties with learning and processing information and can be associated with acquired brain injuries, strokes and dementias including Alzheimer's disease. (Source: MDAC - Litigating the right to community living).

Developmental disability includes intellectual disability and people identified as having developmental challenges including those suffering from cerebral palsy, autism spectrum disorder or foetal alcohol spectrum disorder. (Source: MDAC - Litigating the right to community living).

Disability: the social effect of interaction between individual impairment and the social and material environment. (Source: 2015 Report of the CRPD Committee, A/72/55)

Human rights model of disability: disability is seen as a social construct; impairment is not a legitimate ground for the denial or restriction of human rights (Source: CRPD Committee, General Comment No. 6).

Impairment: physical, psychosocial, intellectual or sensory personal conditions that may or may not come with functional limitations of the body, mind or senses. Impairment differs from what is usually considered the norm. (Source: 2015 Report of the CRPD Committee, A/72/55)

Institutionalization of persons with disabilities refers to any detention based on disability alone or in conjunction with other grounds such as "care" or "treatment". (CRPD Committee, Guidelines on deinstitutionalization, including in emergencies).

Institution: a place having one or more of the following characteristics: obligatory sharing of assistance with others and no or limited influence as to who provides the assistance; isolation and segregation from independent life in the community; lack of control over day-to-day decisions; lack of choice for the individuals concerned over with whom they live; rigidity of routine irrespective of personal will and preferences; identical activities in the same place for a group of individuals under a certain authority; a paternalistic approach in service provision; supervision of living arrangements; and a disproportionate number of persons with disabilities in the same environment. (Source: CRPD Committee, Guidelines on deinstitutionalization, including in emergencies).

Legal capacity: the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency). (Source: CRPD Committee, General Comment No. 1).

Medical model of disability: persons with disabilities are seen through the lens of their impairment. Differential treatment is legitimised by an incapacity approach to disability. (Source: CRPD Committee, General Comment No. 6).

Mental capacity: the decision-making skills of a person, which naturally vary from one person to another and may be different for any given person depending on several factors, including environmental and social factors. (Source: CRPD Committee, General Comment No. 1).

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. (source: CRPD Convention).

Person with intellectual and psychosocial disabilities applies to people with intellectual, developmental, cognitive, and/or psycho-social disabilities. (Source: MDAC - Litigating the right to Community living).

Person with intellectual disabilities generally has greater difficulty than most people with intellectual and adaptive functioning due to a long-term condition that is present at birth, or which arises before the age of eighteen. (Source: MDAC - Litigating the right to Community living).

People with psychosocial disabilities are those who experience mental health issues or mental illness, and/or who identify as mental health consumers, users of mental health services, or as survivors of psychiatry. (Source: MDAC - Litigating the right to Community living).

Procedural accommodation: all necessary and appropriate modifications and adjustments in the context of access to justice, where needed in a particular case, to ensure the participation of persons with disabilities on an equal basis with others. Unlike reasonable accommodations, procedural accommodations are not limited by the concept of "disproportionate or undue burden." (Source OHCHR, [International Principles and Guidelines on Access to Justice for Persons with Disabilities](#)).

Reasonable accommodation: necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms (CRPD)

Social model of disability: persons with disabilities are prevented from reaching their potential due to legal, attitudinal, architectural, communications and other discriminatory barriers that exist in the society.

1. INTRODUCTION

1.1 BACKGROUND TO THE RESEARCH

Litigation for the rights of persons with disabilities is rooted in the Convention on the Rights of Persons with Disabilities (the “CRPD”), adopted on 12 December 2006 by Resolution A/RES/61/106 of the United Nations General Assembly. The CRPD, the only international human rights instrument ratified by the EU itself, marks a shift from the medical and social model of disability to the human rights model of disability.¹

The European Union is a self-proclaimed *sui generis* legal order. The Union is not a typical international organisation, nor can it be compared to a federation of states. Its 27 Member States are bound together by a series of treaties whose implementation is overseen by various EU bodies. The EU architecture is complex and so is the relationship between the EU and its Member States. Today, more than 70 years since its inception, it is accepted that the Union has an important role to play in the protection of human rights.

It is estimated that around 87 million people in the EU have some form of disability.² According to official EU data, more than 52% of persons with disabilities feel discriminated against and about 28.4% of persons with disabilities are at risk of poverty and social exclusion.³

At the international level, the rights of persons with disabilities are laid out primarily in the United Nations Convention on the Rights of Persons with Disabilities (the “CRPD”). All EU Member States have ratified the CRPD since it opened for signatures on 30 March 2007. The EU, as an organisation, has also ratified the 2010 CRPD, which lays down a comprehensive list of rights for persons with disabilities. At the UN level, the CRPD Committee is tasked with overseeing implementation of the Convention by both Member States and the EU.

The rights of persons with disabilities can be implemented through societal practices, by legislation or court ratification. Litigation can be an important tool for mainstreaming the rights of persons with disabilities; particularly in view of supra-national human rights obligations. Courts may drive legislative change when parliaments do not take action due to the supremacy of international human rights instruments over national legislation. While national courts often act within the confines of national legislation, careful tailoring of litigation strategies can empower courts to

1 Degener, T. (2016). A human rights model of disability. In *Routledge handbook of disability law and human rights* (pp. 31-49). Routledge.

2 <[3 Ibid.](https://ec.europa.eu/social/main.jsp?catId=1137#:~:text=Around%2087%20million%20people%20in,not%20all%20accessible%20to%20them.>></p></div><div data-bbox=)

contribute to the change of societal biases and practices. In other words, litigation can be used to enhance the rights of persons with disabilities, just as it can be a means of limiting progress.

Within the European legal landscape, the Council of Europe, through the European Court of Human Rights (the “ECtHR”) and – to a lesser extent – through the European Committee on Social Rights (the “ECSR”), has been the main human rights adjudicative forum. The ECtHR continues to play a key role in driving change at national level. Furthermore, since it began accepting individual applications, it has been transformed into the most prolific international court in history. Individual applicants from all European State parties have used this forum whenever other domestic remedies have proved unsuccessful.

Persons with disabilities have also turned to the ECtHR for affirmation of their rights. Several of the cases brought to the Court by civil society organisations or individual attorneys, have been part of a concerted effort to bring about change that reaches beyond the individual applicants.

The EU’s highest court, the Court of Justice of the European Union (the “CJEU”), is equally competent to make decisions on the rights of persons with disabilities. However, to date its contribution in this field has been limited. Despite the EU’s ratification of the CRDP and its wide legislative powers, few disability rights cases have actually reached this Court.

This Guidebook aims to contribute to the development of strategic litigation on behalf of persons with disabilities within EU legal structures. It draws on the experience of the six (6) participating organisations, all of whom have been engaged in strategic litigation (primarily) at the United Nations and Council of Europe level. Their experience is indicative of the pathways and barriers that exist for persons with disabilities in litigating nationally and internationally. Their expertise forms the backbone of this Guidebook.

Nevertheless, as mentioned above, the EU is a *sui generis* legal order. Its judiciary is decentralised; it operates under a presumption of cooperation between the national and the EU courts. The EU has a legally competent Parliament and administration (the EU Commission) which can drive change in a more meaningful way than can other international bodies; the EU can adopt laws, and require that these laws are enforced through mechanisms that are not available to other such entities.

Thus, because strategic litigation is conducted only after a thorough understanding of the EU’s various legal mechanisms, this Guidebook has a strong procedural component, which focuses on EU judicial processes for litigating the rights of persons with disabilities.

This Guidebook is meant to assist legal professionals, persons with disabilities and civil society organisations who wish to engage in human rights strategic litigation within the European Union. It begins by outlining the concept of strategic litigation, distinguishing it from ordinary litigation. It offers practical examples of international strategic litigation achievements; for those considering such litigation, these examples may indicate potential pathways for its use.

The Guidebook then delves into procedural aspects of litigating rights within the European Union, to support litigators in choosing the best strategy for a particular cause. EU architecture is complex; however, the human rights of persons with disabilities should be mainstreamed across all areas of EU law. To illustrate the various litigation avenues explored in this Guidebook, the final section analyses such pathways in three areas of EU law: (i) victims' rights; (ii) the right to vote in the EU Parliament and (iii) the right to independent living. While these three areas are by no means exhaustive, they offer us the opportunity to explore practical litigation strategies.

1.2 METHODOLOGY

This Guidebook is the first step in the EU LITI-GATE project, the overarching goal of which is to increase the knowledge and application of the EU Charter of Fundamental Rights (the EU Charter) for the advancement of the rights of persons with disabilities and is primarily intended as a manual for legal professionals. Associated training materials will be developed across the five implementing countries in Central and Eastern Europe (Bulgaria, Czechia, Hungary, Romania and Slovakia).

The Guidebook is based on national and international desk, and empirical, research. The international desk research was divided into two stages; the first consisted of a review of EU law and practice. The review aimed to identify areas of pertinent EU legal competence on the rights of persons with intellectual and psychosocial disabilities. Such a review was necessary given the limitations of Article 51 of the EU Charter.

Article 51(1) determines the Charter's scope of application, providing that it applies to the acts of the EU institutions and bodies following the principle of subsidiarity, and to the Member States only when they are implementing EU law. In practice, the latter means that Member States are legally bound to respect fundamental rights, as defined in the context of the Charter, only when the MS' actions are within the scope of the EU law.

In this regard, the Charter has been [criticised](#) for its “limited applicability (...) to national measures” and is [considered](#) a source of “frustration” in the EU for not providing citizens with protection against acts by their respective states⁴.

Article 51(2) provides that the Charter does not, in any way, extend the competences of the EU. This further confirms that the Charter allows for limited and narrow intervention in cases beyond those where the EU has an already established ability to act.

The expertise and scope of activity of the participating organisations helped establish the criteria used to identify the relevant areas of EU law; thus:

- (i) The EU law should be of direct relevance for the rights of persons with intellectual and psychosocial disabilities.
- (ii) The specific EU law should touch upon structural issues in the areas of (i) legal capacity; (ii) deprivation of liberty; (iii) inclusive education; (iv) torture, inhuman and degrading treatment.

Following the EU law review and internal consortium discussions, four areas of interest were selected for in-depth research, as follows:

- (i) Victims’ rights;
- (ii) The right to vote in the European Parliament Elections;
- (iii) The right to independent living;
- (iv) Miscellaneous (including freedom of movement, employment discrimination, asylum law, and any other specific area which a researcher may identify as being particularly relevant for their national context).

From the preliminary selection of the above short-list, a questionnaire was prepared and distributed to the project’s partners in Bulgaria, Czechia, Hungary, Slovakia and Romania. The questions focused on the areas of law mentioned above and essentially covered the transposition of the relevant EU law(s) into the national legislations. The questions were designed to be answered by each partner, using desk and empirical research. Below is an outline of the methodology for empirical research used in each partner country.

In **Bulgaria**: a total of 12 interviews took place between January and June 2024. Researchers interviewed six persons with psychosocial disabilities, two experts who worked with persons with disabilities, one expert working at the State Refugee Agency, and three legal experts working in the field of the rights of persons with disabilities, refugee rights and human rights, respectively. The interviews covered all four areas of the study and were of different length and content depending on the person interviewed.

⁴ Spaventa, E. (2016) *The interpretation of Article 51 of the EU Charter of Fundamental Rights: the dilemma of stricter or broader application of the Charter to national measures*, pp. 14-15.

In the **Czech Republic:** research was conducted between December 2023 and February 2024 using participant interviews and questionnaires. In total, 13 respondents were consulted. Two lawyers from the Ombudsperson office completed the questions directed at migration issues. Three further lawyers from the Ombudsperson office were interviewed on other relevant areas, focusing on the rights of victims with severe disabilities. Two attorneys were interviewed on migration issues. Additionally, interviews were carried out with four social workers and other experts working in social services and NGOs representing persons with intellectual and psychosocial disabilities.

During the research, two persons with psychosocial disabilities were interviewed: the first currently serving a prison sentence, and the other (with a severe intellectual disability) currently living in an institution.

In **Hungary:** two researchers interviewed 6 persons – three with intellectual or psychosocial disabilities and three professionals – between January and March 2024. Four people (a person with disabilities, one lawyer, and two members of the electoral committee) were interviewed on the right to vote. The remaining interviews followed the research questions as provided by the desk research.

One person with cognitive disabilities asked for questions that were easier to understand. The language and the questions were adapted to meet their needs; thus, not all questions were asked. A focus group made up of six professionals – two human rights attorneys, two junior attorneys, an ex-advisor to the Supreme Court (Kúria), and a sociologist-lawyer who had experience working with vulnerable girls and who was currently working on international employment exploitation – was organised. The focus group discussed all the desk research questions, unless the group members indicated they lacked expertise in a particular topic, as noted in the focus group report.

In **Slovakia:** the research was conducted in March 2024 through a hybrid focus group and participant interviews. The hybrid focus group was held in both Bratislava and online; it included 28 individuals, representing persons with disabilities, family members of persons with disabilities, and professionals. Participant interviews were held with 11 individuals who had intellectual or physical disabilities, four family members, six lawyers, one state representative, six other professionals and personal assistants.

In **Romania:** the research was conducted between March and August 2024 by means of 14 interviews. Among the interviewees were five persons with disabilities. The other interviewees included a judge at the Bucharest Tribunal, a lawyer with experience in working with persons with disabilities, two former prosecutors, a police officer, two psychologists working in a non-governmental organisation (“NGO”) for persons with disabilities, and a support person from the NGO sector.

The final research stage consisted of a review of EU legislation, case law and (academic) literature and reports. The research questions used for the desk research were:

- (1) What is strategic litigation and how is it relevant for persons with disabilities?
- (2) How has strategic litigation engaged with the rights of persons with intellectual and psychosocial disabilities in Central and Eastern Europe?
- (3) How can strategic litigation within the EU legal system contribute to the advancement of the rights of persons with disabilities?

It should be noted that, to answer the third research question, we have incorporated findings from national reports on the three specific areas of law.

The research originally set a broader question concerning the relevance of (selected areas of) EU law for persons with disabilities in the research countries; such as, employment discrimination, freedom of movement or asylum. While these areas were exploratory in nature, given the wide EU competence in these fields, and given that the national reports did not produce any significant findings, it was ultimately decided to remove them from this Guidebook, without prejudice to their actual value for litigation. However, the upcoming training sessions and litigation surgeries at the national level may result in further important findings in these areas.

2. STRATEGIC LITIGATION AND ITS RELEVANCE FOR PERSONS WITH DISABILITIES

2.1 THE NOTION OF STRATEGIC LITIGATION

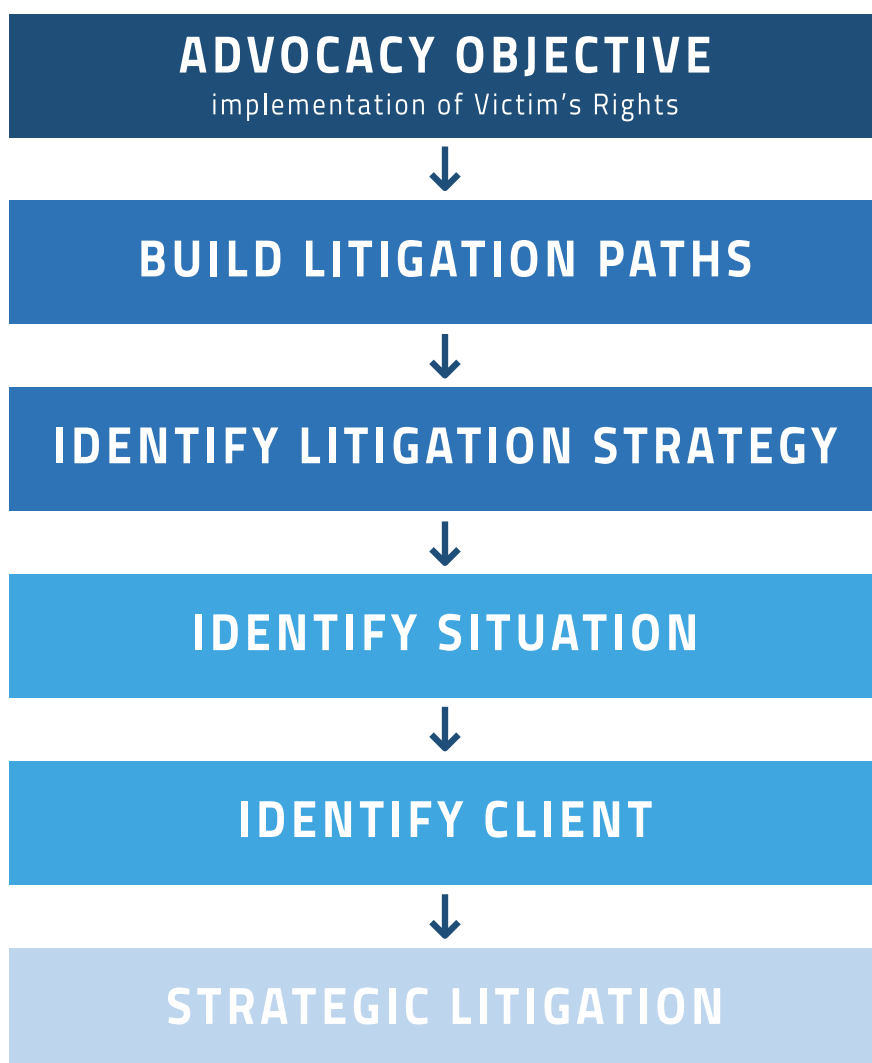
Litigation is the process by which one party takes legal action against another with the aim of having a dispute resolved by a court of law. *Stricto sensu*, the litigation objective is to have the claim decided by a judge and typically ends with the court's final decision. Litigation does not deal with the implementation of the judgment; however, failure to implement a judgment may form the focus a new legal remedy to this effect.

Strategic litigation is, in substance, a process in which legal tools are used to advocate for a broader policy issue. As such, strategic litigation is based on finding one or several individual situations which are representative of a broader societal problem, and pursuing legal remedies for such a situation, in the hope that the final legal outcome can be a conductor to a broader policy or societal change. Therefore, strategic litigation is broader than the legal case itself, in

that it covers cases brought before courts which are not (only) about the plaintiffs but whose aims are wider. Thus, the final court ruling becomes one element of a wider arsenal of tools meant to achieve social change.⁵

Strategic litigation has several distinguishing features:⁶

- (1) It focuses on the wider goal/policy change;
- (2) It involves the careful selection of a 'test' case which aims to bring about the envisaged change;
- (3) It is an advocacy tool.



5 Goldston, J. A. (2006). Public interest litigation in Central and Eastern Europe: roots, prospects, and challenges. *Hum. Rts. Q.*, 28, 492, p. 494; Duffy, H. (2018). *Strategic human rights litigation: understanding and maximising impact*. Bloomsbury Publishing.

6 Goldston, J. A. (2006); Klaas J., Beets R., Hendrickx M. (2020), Guide on strategic litigation to combat ethnic profiling in the European Union, pp. 13-19.

In practice, strategic litigation has been referred to as *cause lawyering* or *public interest litigation*.⁷ In turn, ordinary litigation has also been called *case lawyering*. *Cause lawyering* (or strategic litigation) is driven to advance a cause; it aims at social change and represents “the underrepresented, the subordinated, and the public interest”.⁸ Since strategic litigation has broader goals than the individual case itself, winning the underlying case is important, yet sometimes losing the case is part of the strategy for putting a particular issue on the (public) agenda.

Due to its nature as an advocacy tool, strategic litigation requires advanced planning within the wider advocacy campaign. The interests of the client should be considered alongside the advocacy goal.

7 Klaas J., Beets R., Hendrickx M. (2020), p. 13.

8 Aiello, A. L. (2016). *Using strategic litigation to recognise and enforce the rights of people with intellectual impairments in institutional residential settings: What is the potential and how can it be achieved in European countries?* (Doctoral dissertation, University of Leeds), p. 45, Referring to Hilbink T., “You Know the Type. . . : Categories of Cause Lawyering” 29 *Law and Social Inquiry*, 2004, p. 659.

PREPARATION FOR STRATEGIC LITIGATION

Think of:

GOAL

- What is the objective of the case?
- Which are the systemic issues it is tackling?

CLIENT

- Is the client aware of the broader context of their case and are they committed to pursue such broader context?
- Is there a care plan in place for the client?
- Which are the risks the client is exposed to by litigation?
- Have measures been put in place to mitigate the risks the client is exposed to?

ARGUMENTATION

- How does the individual case fit into the larger policy/advocacy narrative?
- Can a convincing legal argument be developed and presented in court?
- How can the argument be developed to ensure the strategic legal outcome?

COALITIONS

- Which local partners are interested in pursuing the same objective?
- What is the position of other organisations on the issue subject to litigation?
- Will other organisation engage with the outcome of the litigation in their campaigns?

FORAS/OUTCOME

- Which are the fora (national and international) where the case will be adjudicated?
- What is the likelihood of success?
- Is a negative outcome positive for the cause?

FOLLOW-UP AFTER THE JUDGMENT

- How can the judgment be helpful for the wider advocacy goal?
- Which (public) bodies are responsible for bringing about reforms in line with the judgment?
- Will other similar (court) cases help in pushing for the advocacy goal?
- How can the findings of the judgment be disseminated to the wider public?

This Guidebook focuses on strategic litigation for advancing the rights of persons with intellectual and psychosocial disabilities. It can be used for persons residing in any European jurisdiction; however, it draws primarily on experiences with litigating the rights of persons with intellectual and psychosocial disabilities in Central and Eastern Europe.

In this region, strategic litigation has gained prominence since the fall of the Communist regimes. Factors contributing to the development of strategic litigation include the legacy of political dissent, the accession to supranational fora such as the Council of Europe and the European Union, and the availability of financial resources from donors.⁹ Grass roots organisations and activist lawyers with experience in using available legal tools to the advantage of larger groups of people are important in advancing strategic litigation.

Developments at the international level, such as the inclusion of the right to individual petition to the European Court of Human Rights (the "ECtHR", and to a lesser extent the preliminary reference proceedings to the Court of Justice of the European Union (the "CJEU"); the collective complaint procedures under the European Social Charter; the individual complaints to the UN Treaty Bodies and the human rights conditionalities set out by the EU for accession of new states, have been important in galvanising the advent of strategic litigation in Central and Eastern Europe.

2.2 THE IMPORTANCE OF STRATEGIC LITIGATION

Human rights exist at various levels and are included in national or international laws. While the responsibility for demonstrating respect for human rights lies ultimately with national governments, human rights are often applied (or breached) by individuals working in an official capacity, such as police officers, civil servants or doctors. However, human rights' standards may be accepted and applied by individuals, and observed in their day-to-day interactions with others.

Judges have an important role in developing an understanding of human rights or in applying human rights' norms. Cases brought before courts illustrate concrete interactions between norms and people's lives. In deciding such cases, judges give meaning to human rights. Strategic litigation can contribute to mainstreaming human rights in society and courts thus have an important role to play in this field.

⁹ Goldston 2006, p. 494.

Below are some of the possible outcomes of strategic litigation:

- Courts can strike down/dis-apply laws as incompatible with the (national) constitution;
- Courts can evaluate laws for their compatibility with national and international human rights laws;
- Courts can declare a certain practice as incompatible with the (national) constitution;
- Courts can re-interpret various concepts in ways that are more conducive to human rights realisation;
- Even when cases are dismissed, having courts decide on a particular matter can raise or highlight an issue for the public debate.

In the specific geographical context of Central and Eastern Europe, the bulk of strategic litigation focuses on the European Court of Human Rights (the “ECtHR”) and the European Committee for Social Rights. Cases brought before the ECtHR have not been selected on the likelihood of success in national courts. Quite the contrary, domestic courts have been expected to dismiss such cases. The purpose of (civil society) organisations has been to trigger change at the national level after having achieved a positive judgment from the ECtHR.

2.3 STRATEGIC LITIGATION FOR PERSONS WITH INTELLECTUAL AND PSYCHOSOCIAL DISABILITIES

2.3.1 Terminology

Persons with disabilities face systemic discrimination because of their disability. While language is a powerful tool in perpetuating such discrimination, it can also be used just as powerfully to both combat discrimination and set down principles for an inclusive society.

In this field, the CRPD and the CRPD Committee have laid down the groundwork for disability-inclusive language. Thanks to their efforts, which have been reinforced by other initiatives, it is now accepted that terms such as intellectual and psychosocial disability are preferred to ‘mentally ill’, ‘of unsound mind’ or ‘handicapped’. The [UN Guide](#) can be a useful tool for learning more about disability-inclusive language.

However, it is important to note that the terms intellectual and psychosocial disabilities are not synonymous. The CRPD Committee refers to persons with intellectual and/or psychosocial disabilities; they experience similar structural and systemic barriers in the exercise of their rights. Intellectual and psycho-social disabilities all under four main groups of disabilities, as presented below¹⁰:

¹⁰ MDAC (2014),, Litigating the right to community living for people with mental disabilities, A Handbook for lawyers

PEOPLE WITH INTELLECTUAL AND PSYCHOSOCIAL DISABILITIES

'People with **intellectual and psychosocial disabilities**' means people with intellectual, developmental, cognitive, and/or psycho-social disabilities.

People with **intellectual disabilities** generally have greater difficulty than most people with intellectual and adaptive functioning due to a long-term condition that is present at birth or before the age of eighteen.

Developmental disability includes intellectual disability, and also people identified as having developmental challenges including cerebral palsy, autism spectrum disorder or foetal alcohol spectrum disorder.

Cognitive disability refers to difficulties with learning and processing information and can be associated with acquired brain injury, stroke and dementias including Alzheimer's disease.

People with psychosocial disabilities are those who experience mental health issues or mental illness, and/or who identify as mental health consumers, users of mental health services, survivors of psychiatry, or mad.

These are not mutually exclusive groups. People with intellectual, developmental or cognitive disabilities may also identify, or be identified as, having psycho-social disabilities, or vice versa.

Whilst this guidebook has primarily been written to address the rights of people with intellectual and psychosocial disabilities, the contents may also be useful for people with other disabilities too, including those with physical, sensory or multiple impairments.

2.3.2. Legal capacity and institutionalization as barriers to strategic litigation for persons with disabilities

The CRPD does not lay down new human rights; rather, the Convention ensures that persons with disabilities enjoy all human rights on an equal basis with others.¹¹ The Convention embodies a transformative concept of justice in that it requires States to go beyond formal equality requirements. Article 13 of the CRPD on access to justice, obliges States to ensure procedural and age appropriate accommodations are made available so that persons with disabilities can *effectively* participate in legal proceedings.

Nevertheless, persons with intellectual and psychosocial disabilities continue to face systemic disability-based discrimination. Examples include the institution of guardianship which denies an individual legal capacity; deprivation of liberty on the ground of disability, or restrictions on the right to live in the community.¹² National and international laws sometimes even enable these human rights violations.¹³

As described in this Guidebook, strategic legislation has focused on abolishing laws and practices such as those mentioned above. The overarching aim has been to remove existing obstacles for persons with disabilities so that they can enjoy civil rights and obligations on a par with others. Nevertheless, some of these obstacles are in and of themselves barriers to undertaking strategic litigation.

The paragraphs below address two of the most important barriers: (1) legal capacity and (2) institutionalisation. While these barriers significantly impair litigation (strategies) for the rights of persons with intellectual and psychosocial disabilities, the examples given herein draw on litigation experiences across Central and Eastern Europe. It is expected that similar challenges exist elsewhere in Europe and beyond, as institutionalization and guardianship are common in other parts of the world.

The legacy of communism in Central and Eastern Europe has meant that the state has been viewed as the protector of the vulnerable; thus, families have been encouraged to leave the 'vulnerable' in the care of the state.¹⁴ For persons with disabilities, 'the care of the state' has resulted in large institutions being created to house them. However, these institutions functioned as *de facto* prisons and were situated far from urban areas, shielded from public scrutiny.¹⁵

11 Ruškus, J. (2023). Transformative Justice for Elimination of Barriers to Access to Justice for Persons with Psychosocial or Intellectual Disabilities. *Laws*, 12(3), 51-. <https://doi.org/10.3390/laws12030051>, p. 6.

12 Ruškus, J. (2023), p. 7.

13 For example Article 5(1)(e) of the ECHR continues to allow deprivation of liberty on the ground of impairment.

14 Mladenov, T., & Petri, G. (2020). Critique of deinstitutionalisation in postsocialist Central and Eastern Europe. *Disability & Society*, 35(8), 1203-1226; Berberova-Valcheva, C. (2019). Deinstitutionalization as part of the social development of the regions. *Trends in Regional Development and Security Management*, 86-95.

15 This section addresses issues of guardianship and institutionalization through the lens of strategic litigation experiences in Central and Eastern Europe. It should be noted that both guardianship and institutionalization are prevalent in countries outside this region.

In addition, under the guise of ‘protection’, persons with disabilities could legally be placed under guardianship or curatorship. The risk of being taken advantage of by others was used by institutions as justification for these ‘protective’ measures. Laws allowed for the legal rights of a person under guardianship to be transferred to their guardian. For those living in institutions, the guardian was often the head of the very institution from which the person under guardianship wished to escape or against which the person wished to complain. The legal systems believed that the guardian was best placed to assess the interests of the person under guardianship, and that person had no choice or agency in the decision.

The guardianship regime established under national laws, has important implications for litigation when the individual must have standing to lodge a court complaint. In its most simple form ‘standing’ conveys the individuals’ right to initiate proceedings before courts of law. Often, national laws deprive or limit the right of persons with disabilities to file court complaints. Cases litigated before the Strasbourg Court showed that, in some jurisdictions, persons deprived of legal capacity did not even have the right to challenge their deprivation of legal capacity.¹⁶ Nor could they be heard directly by judges or other decision makers in claims concerning the deprivation of their legal capacity.¹⁷

Strategic litigation before the ECtHR has resulted in some important changes for persons with disabilities. Existing ECtHR judgments require national authorities to enable persons with disabilities to complain in court about their deprivation of legal capacity.¹⁸ As a result of the ECtHR’s judgments, persons with disabilities must be heard in person in matters concerning the institution and in the modification or revocation of the guardianship regime.¹⁹ Nevertheless, the ECtHR has stopped short from condemning the institution of guardianship. Furthermore, under ECtHR case law, it remains unclear to what extent persons with disabilities, who are deprived of legal capacity, can complain directly before this Court about violations of their rights, other than those directly connected with their deprivation of legal capacity.

The example below is illustrative of this challenge.

16 For example, ECtHR, *Stankov v. Bulgaria*, no. 25820/07, 17 March 2015; ECtHR *Stanev v. Bulgaria*, no. 36760/-6, 17 January 2012; ECtHR, *Shtukaturv v. Russia*, no. 44009/05, 27 March 2008, ECtHR, *Sykora v. The Czech Republic*, no. 23419/07, 22 November 2012.

17 For example, ECtHR, *Stankov v. Bulgaria*, no. 25820/07, 17 March 2015, ECtHR.

18 *Supra*, fn. 14.

19 *Supra*, fn. 14 and 15.

EXAMPLE

The interaction between institutionalisation and guardianship - Hungary

In 2017, Validity Foundation (at the time Mental Disability Advocacy Centre, MDAC) visited Topház Speciális Otthon (“Topház Special Home”) a state-run institution, housing over 220 children and adults with disabilities in the town of Göd, approximately 30km from the Hungarian capital, Budapest. In the ensuing report, MDAC revealed that several residents – both adults and children – were kept in metal-cage beds, were routinely chemically and/or physically restrained, were underweight, and were physically, mentally and emotionally neglected. One of the residents was secluded in his room, being tied to his bed with a cloth strap around his ankle during most of the day. Several residents had open and untreated wounds, and residents generally showed signs of a lack of both basic and specialized medical care. This assessment was later confirmed by the Hungarian Ombudsperson.

All the residents in the Topház were there under guardianship, but it appeared that many if not all had never met their guardians.

The residents expressed their interest in initiating legal proceedings. However, institution staff denied all MDAC’S requests to access the persons living in Topház in order to provide them legal, medical and psychological assistance.

Under domestic procedural laws, people whose legal capacity is restricted do not have standing in civil or administrative proceedings. Any legal representation is subject to the approval of the individual’s guardian. Therefore, having any recourse to domestic legal avenues entirely depends on the discretion of the guardian; a conflict of interest between the guardian and the resident is easily discernible. It is the guardian who has decided to place the persons with disabilities in the institution, hence it is unlikely that the guardian would have any interest in changing the situation.

The legal and factual situation above have made it impossible hold those responsible accountable, nationally or internationally. However, one such case, concerning the death of a person with disabilities in Topház is currently pending before the ECtHR and Validity hopes to determine whether it has the standing to bring the case on behalf of the deceased victim, who has no known next of kin.

For other infringements, such as the right to a private or family life, unless the guardian agrees, there is no legal possibility to have a claim scrutinized by a court of law, including by the ECtHR.

A separate but related matter concerns the admissibility criteria to supranational fora. For example, under Article 34 ECHR, the person filing a claim must be the victim of an alleged violation and that person must have exhausted all domestic remedies available to them before recourse to the Strasbourg Court. In other words, (non-governmental) organisations and other individuals are not allowed to bring claims in the name of the victims of the alleged violations, nor could they represent clients in proceedings.

The case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania*, broke new ground when a non-governmental organisation was allowed to file a claim on behalf of an extremely vulnerable person who had no known next of kin to support him in defending his rights.

CASE LAW EXAMPLE

Expansion of standing requirements allowing organisations to represent applicants with disabilities

In the case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania*, an organisation (Centre for Legal Resources) brought an action on behalf of a person with disabilities who had lived in social care homes for persons with disabilities all his life and ultimately died in a Neuropsychiatric Hospital. Absent any identified next of kin, the Centre for Legal Resources unsuccessfully pursued criminal proceedings in Romania and ultimately brought a complaint to the ECtHR alleging a violation of Valentin's right to life.

In a ground-breaking judgment, the ECtHR allowed standing of the organisation to bring a complaint on behalf of the victim motivated by the fact that (i) the human rights violations claimed were extremely serious; (ii) the victim had no known next of kin; (iii) the organisation had been actively involved at national level in trying to pursue justice for the applicant.

The interaction between national guardianship laws and admissibility criteria at supranational level pose distinct barriers to persons with disabilities in accessing justice. Complaints against serious human rights violations such as torture, inhuman and degrading treatment or breaches of the right to private life can hardly be presented to the ECtHR if persons with disabilities are unable to bring these complaints domestically. This implies that litigation strategies around other rights, such as freedom from inhuman or degrading treatment or freedom to privacy and family life, are more difficult whenever legal capacity rules preclude the litigation of these aspects at the national level.

Another important barrier to engaging in strategic litigation for persons with disabilities living in social care homes, psychiatric hospitals and other institutions, is the risk of reprisals they may

face as a result of the very nature of the environment they live in. Persons with disabilities are dependent on institutional staff, and any complaint may expose them to reprisals or punishment by the forced administration of medication.

While strategic litigation pursues goals beyond the individual, ethical considerations mandate that lawyers and organisations consider first and foremost the individual and the risks they face if they pursue litigation. Consequently, it is only possible to bring such cases to court after lawyers have secured the release of the person from the institution or when they have otherwise minimised the risk of reprisals. Additionally, residents of an institution can be denied access to lawyers or human rights staff by the institution's administrators, who could also transfer the residents at will to other institutions.

EXAMPLE No 1

Restriction of access - Bulgaria

In 2018, the Bulgarian media released several videos showing staff physically and verbally abusing children in one of Bulgaria's many group homes. Following the release of the videos, the Network of Independent Experts (NIE) – a group of attorneys at law specialising in defending the rights of persons with disabilities – attempted to establish contact with the residents of those group homes. The authorities refused the lawyers any contact with the residents. The management of one of the group homes eventually permitted visits to just one resident. This permission was ultimately withdrawn without justification, despite the promising contact and the willingness of the victim to engage in conversation.

It is assumed that the children, who in the meantime have become adults, were later moved to other social care homes across the country. The result is that the perpetrators of the violence depicted in the videos have escaped any form of accountability for their actions and the victims have not been able to obtain reparation for the harm they suffered. Domestically, the Bulgarian Equality Body found the existence of a hate crime against the children. However, the Public Prosecutor's Office declined to investigate the matter. At no point during the proceedings have the victims been heard or have participated in any way in litigation concerning this serious breach of their rights.

These barriers co-exist with other obstacles in pursuing litigation for marginalised groups which have been discussed at length elsewhere.²⁰ They include, to name but a few: the prejudice and stigma of society at large and of the legal professionals in particular, length of proceedings, associated costs, lack of expert evidence, etc.

²⁰ For an overview in relation to persons with disabilities see Aiello, A. L. (2016), *supra* at 2, pp. 185-218

2.4 ACHIEVEMENTS OF STRATEGIC LITIGATION FOR PERSONS WITH DISABILITIES ACROSS CENTRAL AND EASTERN EUROPE

Legal frameworks everywhere in Europe continue to fall short from affirming the rights of persons with intellectual and psychosocial disabilities. Even when laws have been changed, persons with disabilities remain exposed to prejudices and stigma. This notwithstanding, progress has been made in various areas and strategic litigation has played an important role in achieving legislative change. The paragraphs below outline some of the successes and limitations of strategic litigation across Central and Eastern Europe.

THE RIGHT TO VOTE FOR PERSONS WITH DISABILITIES

(Alajos Kiss v. Hungary, no. 38832/06, 20 May 2010)

In 2010, the Hungarian Constitution provided for a general prohibition of the right to vote, which automatically and discriminatorily affected all persons placed under guardianship. Mr. Kiss was deprived of legal capacity and hence he was excluded from the Electoral register. His case was chosen to challenge the assumption that persons placed under guardianship are unable to choose between political candidates. After the Electoral Office dismissed the applicant's complaint against his exclusion from the electoral register as a result of the constitutional provision, the court dismissed the complaint against the Electoral Office's decision. Since the denial of the right to vote was based on a constitutional provision, it was foreseeable that the case would be lost at the national level.

The application was submitted to the ECtHR in 2006, almost two years before the CRPD became enforceable. On 20 May 2010, the ECtHR ruled against Hungary. The Court found a violation of Article 3 of Protocol No. 1 to the ECHR. It further concluded that 'the indiscriminate deprivation of the right to vote, without individual judicial assessment, based solely on a mental disability requiring partial guardianship, cannot be regarded as compatible with the legitimate grounds for restricting the right to vote' (paragraph 44 of the judgment). The ECtHR thus expressly allowed for an individualised assessment of the 'capacity to vote'. The outcome of the ECtHR judgment was to some extent disappointing; yet, litigation in Strasbourg had an effect in Hungary. The new Hungarian Basic Law (Constitution) of 2011 and Electoral Act of 2013 implemented the ECtHR decision in that it prohibited blanket restrictions of the right to vote. Later, in 2013, the CRPD Committee working on a case against Hungary (CRPD/C/10/D/4/2011) found that the individualised assessment of the 'capacity to vote' violated Article 29 of the CRPD, read alone and in conjunction with Article 12. This later decision of the CRPD is more far reaching and it ensures the right to vote of persons with disabilities on an equal basis with others. However, unfortunately to date the Hungarian Government has not implemented the CRPD's views.

DEPRIVATION OF LIBERTY AND LEGAL CAPACITY

(Stanev v. Bulgaria, no 36760/06, 17 January 2012)

Rusi Stanev was deprived of his legal capacity in 2000. In 2002 his legal guardian (whom he had never met) decided on the basis of a medical certificate to request his committal to a social care home located 400 km from his home town. He remained in that institution until at least the end of 2011, when he was moved to another facility, established in the grounds of a psychiatric hospital.

Aneta Genova, a Bulgarian lawyer working in collaboration with the Validity Foundation, then known as Mental Disability Advocacy Center, encountered Rusi Stanev during an official visit to the Pastra Social care home. Rusi wished to leave the institution in which he had been forced to live for so long. He also wanted to make his own life decisions; in other words, he wanted the guardianship to be lifted.

In 2005, Bulgarian lawyers started proceedings on his behalf for the restoration of legal capacity. Domestic proceedings were unsuccessful primarily because Rusi, a person deprived of legal capacity, was not able under domestic law to give a valid power of attorney. Additionally, he was unable to be heard in proceedings concerning his legal capacity in domestic courts. Thus, the case was subsequently submitted to the ECtHR and in the discussions concerning the legal grounds, Article 5 of the ECHR – the right to liberty and security – was included. At that time, Bulgarian laws and practices did not consider that persons with disabilities, living in social care homes, were deprived of liberty. The case aimed to challenge this premise; in addition to the deprivation of legal capacity itself.

For the ECtHR, this was a groundbreaking application and, for this reason, it was referred for adjudication to the Grand Chamber. The Court found that the applicant had been unlawfully detained in social care homes; that he did not dispose of any judicial remedies to challenge his detention; that he did not dispose of a right to compensation or of a right to request directly that courts revoke his partial guardianship as well as inhuman and degrading conditions in the institutions.

After this judgment several laws were changed: in cases concerning their legal capacity, persons with disabilities must be heard directly in court; and laws must allow them to claim compensation for the illegal deprivation of liberty. Moreover, it was accepted that persons living in institutions are indeed deprived of liberty. These standards are now applicable across all Council of Europe Member States and all States should change their legislation to meet these ECtHR requirements.

Nevertheless, issues with their practical implementation remain, and both Kera and Validity Foundation are still actively engaged with the Committee of Ministers of the Council of Europe on the implementation of this judgment (see also section 2.5.1. below). Also, despite its importance for persons with disabilities across Europe, due to Bulgaria's failure to develop community-based services, Mr Stanev ultimately died in an institution for persons with disabilities.

DEATH IN A PSYCHIATRIC HOSPITAL

(V. v The Czech Republic, no. 26074/18, 7 December 2023)

In 2016, the sister of a man who had just died in a psychiatric hospital reached out to the Forum for Human Rights. She was devastated as her brother, P.Z. a 30-year-old man had only been admitted the night before. While the staff knew P.Z. well, they forcefully administered anti-psychotic medication and made the decision to place him in seclusion, something he feared above all. Presumably at the thought of being transferred to solitary confinement, his anxiety increased; hospital staff called the police, who tasered him three times, and then a nurse gave him two injections of antipsychotic drugs. He died one hour later, presumably of cardiac arrest.

P.Z.'s family was devastated and wanted to seek justice on his behalf. This case was considered strategic as it tackled specific forms of ill treatment and disability-based discrimination. They expose the vulnerability of persons locked in psychiatric hospitals versus the staff's position of power, and that of police. Also, they expose the lack of services and non-violent intervention planning for persons with disabilities experiencing crisis situations.

At the end of 2023, ECtHR found a violation of the right to life. For the family that meant a recognition of wrongdoing. For civil society organisations it provides an opportunity for engagement with state officials in charge of developing appropriate community-based services and crisis intervention plans.

2.5. WHAT HAPPENS NEXT: IMPLEMENTATION OF THE JUDGMENT

Strategic litigation for the rights of persons with intellectual and psychosocial disabilities at the EU level is yet to emerge. As discussed in this Guidebook, for strategic litigation in general, the final court judgment is part of the wider aim for change. The next sections briefly outline post-judgement actions in strategic litigation cases for persons with disabilities at the ECtHR and CRPD Committee. In the absence of a parallel practice at the EU level, the examples below offer an overview of the wider implications of the international court judgments within strategic litigation endeavours.

2.5.1 Implementation of ECtHR judgments

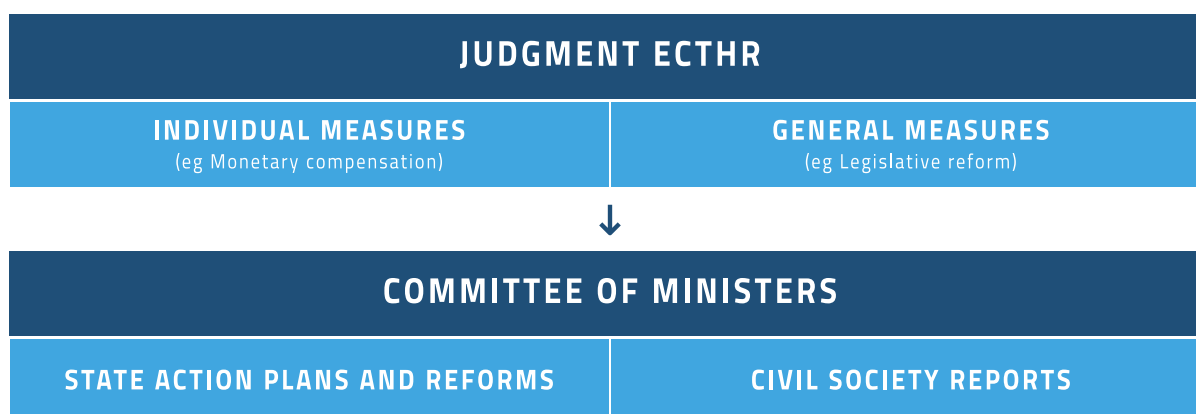
The characteristic of international courts is that their case-law, albeit formally binding, has a different enforcement power than that of domestic courts. In a national context, after a judgment has been delivered, the plaintiff can make use of the state authorities (such as police or bailiffs) to have it implemented. In international law, implementation of judgments is largely left to diplomatic relations and state peer-pressure.

Within the Council of Europe, final judgments of the European Court of Human Rights are sent to the Council of Europe’s Committee of Ministers to be monitored for implementation. *Stricto sensu*, a judgment is implemented whenever the respondent government has complied with the order of the Court as to the legal remedies. Most frequently, this remedy comes down to the payment of the just satisfaction in the amount decided by the ECtHR. However, in some cases, implementation may be more complex. For example, in the above-mentioned Stanev case, the Court ordered Bulgaria to conduct a reform of its legislation regarding legal capacity and guardianship, in particular regarding the ability of the persons under guardianship to demand restoration of their legal capacity.

At a wider level, the Committee of Ministers monitors whether the underlying circumstance, for example a law that has been deemed to lack conformity with the ECtHR, has been satisfactorily amended.

During the monitoring process, civil society organisations have the opportunity to submit reports and engage in dialogue with the Committee of Ministers and the respective State(s) on their progress on the implementation of judgments. States in turn, must submit action plans and progress reports to the ECtHR.

When it comes to rights of persons with disabilities, the need for reforms is wide-ranging. Yet, when required to change laws to ensure the implementation of the ECtHR judgments, States tend to do only the strict minimum that they are aware the Committee of Ministers will find acceptable. This means that many of ECtHR-driven reforms fall short of meaningfully enhancing the rights of persons with disabilities. The Committee of Ministers, through its supervisory powers can have an important role to play in mandating compliance from States on the human rights of persons with disabilities. To date, its decisions on the implementation of the disability related judgments of the ECtHR remain modest in reach; however, this remains a forum with an important potential for extending strategic litigation’s reach and for engaging in a constructive dialogue on reform.



EXAMPLE

NIE's engagement with the Committee of Ministers in the implementation of the Stanev/ Stankov Judgment

The case of [Stanev v Bulgaria](#) (discussed above) is a landmark judgment of the ECtHR. The Court found that Bulgaria had infringed Mr. Stanev's rights on many grounds. He had been unlawfully detained in social care homes; he did not have any judicial remedies to challenge his detention; he did not have a right to compensation or a right to request that his partial guardianship is removed. Also, the Court found that he was kept in harsh and degrading conditions. Bulgaria had to pay Mr. Stanev 15,000 EUR as compensation.

The Committee of Ministers was tasked with overseeing the implementation of this judgment. While, the State had readily paid the compensation, the implementation of the judgment required wider reforms to ensure that persons in situations similar to that of Mr. Stanev would not be exposed to the same violations. This case was then joined to that of [Stankov v Bulgaria](#) as they both raised similar issues.

The ECtHR judgement was issued in 2012, and since then the government and several Bulgarian and international civil society organisations have been actively involved with the Committee of Ministers in ensuring that this judgment is implemented. At the legislative level, Bulgaria has amended and adopted new provisions; persons with disabilities now have the right to be heard directly in court on aspects concerning their legal capacity. They can also directly request the courts to restore their legal capacity and they can benefit from a right to compensation.

However, many issues remain and others have emerged following this judgment. For example, the hearing of persons with disabilities remains a formalistic exercise and few procedural accommodations are provided to ensure that persons with disabilities are effectively heard in proceedings. Moreover, under the guise of deinstitutionalisation the Government has invested in smaller institutions which function under the same principles and have the same culture as the larger institutions where Mr Stanev lived the greater part of his life. Civil society organisations are now able to bring these issues to the attention of the Committee of Ministers as part of the process of the execution of the Stanev judgment. Furthermore, the Committee of Ministers can ask the State to provide evidence on any issues highlighted and condemn failures if they are found.

Active engagement with the Committee of Ministers ensures that States do not limit their responsibility to merely paying compensation to victims of violations. Civil society organisations have an important role to play in highlighting problems to the Committee of Ministers. At the same time, it is important that the Committee of Ministers remains alert to these developments and provides clear decisions requiring further implementation by State authorities. At present, the implementation of this judgement continues to be monitored.

2.5.2 Follow up by the CRPD Committee

In 2020, the CRPD Committee published its Inquiry Report on Hungary (CRPD/C/HUN/IR/1) and found that the State was responsible for 'grave and systematic' violations of the human rights of persons with disabilities in Hungary. The inquiry was triggered by the Validity Foundation and its partner organisations' request for an investigation by the CRPD Committee in 2017, after several years of research and documentation of reliable evidence.

The violations mainly affected persons with intellectual and psychosocial disabilities who were deprived of their legal capacity and segregated from their communities in institutions. Validity alleged that these acts were mutually reinforcing and constituted discrimination against persons with disabilities. Hungary continued to take retrogressive measures in these areas, such as launching new tenders to create smaller institutions (group homes or 'protected housing'), and enacting laws on guardianship under the guise of 'supported decision-making' in violation of the CRPD. Validity argued that the violations were 'systematic' because they were habitual, widespread and deliberate, and they were 'grave' because of their scale, the severity of their consequences and their targeting of persons with disabilities in a discriminatory manner.

The findings of the violations of the rights of persons with disabilities to equal recognition before the law (art. 12), to live independently and be included in the community (art. 19) and to equality and non-discrimination (art. 5), in line with the State party's general obligations under the CRPD (art. 4) came following a two-year investigation conducted by the CRPD Committee.

In 2023, the Committee followed up on the implementation of its recommendations in the inquiry report. Validity, together with national and regional organisations of persons with disabilities, submitted a shadow report to provide the Committee with first-hand information. In its Follow-up Report (CRPD/C/29/2, Annex IV), the CRPD Committee found that 'no significant progress has been made' and 'the State party has failed to take measures to address discriminatory legislation, public policies and practices that continue to constitute grave and systematic violations of the human rights of persons with disabilities in Hungary' (para 55).

Petitions to start inquiries by the CRPD Committee may be considered in other jurisdictions. The national political climate and its receptiveness to international law must be taken into account before deciding to engage this forum or other international fora.

3. THE EU LAW-BASED HUMAN RIGHTS OF PERSONS WITH DISABILITIES

3.1 THE ROLE OF THE EU IN AFFIRMING THE RIGHTS OF PERSONS WITH DISABILITIES²¹

The European Union has its origin in the European Coal and Steel Community established in 1951 and in the European Economic Community (EEC), created in 1957 by the Treaty of Rome. The European Union, as it is now known, is the result of successive modifications of the Treaty of Rome (the EEC Treaty) and the adoption of the Treaty of the European Union (the “TEU”) which came into effect on 1 November 1993. The latest modification to the founding Treaties of the European Union came into effect in 2009 with the Treaty of Lisbon. Following the Treaty of Lisbon, the European Union’s activities are based primarily on the Treaty on the Functioning of the European Union (the “TFEU”), the TEU and on the Charter of Fundamental Rights of the European Union (the “(EU) Charter”). They are all binding for Member States and for the Institutions of the European Union.

Under Article 47 of the TEU, the EU has legal personality. The EU can conclude and sign international treaties, it can become a member of international organisations and join international conventions.

KEY POINTS TO REMEMBER

The EU is a party to the CRPD.

In practice the CRPD will bind the EU only if (1) the EU has legislated in a particular area and (2) it is successfully argued that the provisions of the CRPD are sufficiently precise and unconditional.

The effect of the CRPD on the EU is to be determined on a case by case basis, through proceedings brought to the CJEU – the EU’s Supreme Court.

On 23 December 2010, the EU became party to the CRPD. The Convention entered into force in respect of the EU on 22 January 2011. It is the first international treaty ratified by the EU. The EU has not ratified the OP-CRPD.²²

Having ratified the CRPD does not mean that the EU is bound in full by its provisions. Rather, the EU shall only be bound by the CRPD’s provisions for which it has exercised its competence, and which form an integral part of EU law.²³

²¹

²² Under Articles 19(1) and 218(8) TFEU, such ratification requires that all EU Member States agree to the EU’s ratification of the OP-CRPD. It has been noted that 3 Member States have objected to EU’s ratification of the OP-CRPD. Chamon, M. (2020). Negotiation, ratification and implementation of the CRPD and its status in the EU legal order. In *Research Handbook on EU Disability Law* (pp. 52-70). Edward Elgar Publishing, p. 57. The author also notes that 3 Member States (the Netherlands, Ireland and Poland) have not ratified the OP-CRPD in their individual capacity.

²³ Chamon, M. (2020).

Furthermore, as a party to the CRPD, the EU has so far only been reviewed [once](#) by the CRPD Committee. In its Concluding Observations, the CRPD Committee has highlighted, among others, the EU's failure to mainstream disability in its legislation and its failure to consult persons with disabilities in the adoption of EU laws and other measures. The Committee has recommended that the EU uses structural and investment funds for the development of support services and community based services for persons with disabilities.

The next review is scheduled for March 2025. The EU Commission has prepared a [draft response](#) to the list of issues identified by the CRPD Committee.

It should also be mentioned that the EU has published a [Strategy for the Rights of Persons with Disabilities](#) for 2021-2030. This strategy is not legally binding, but it can be an important policy tool for better understanding EU's vision on this topic.

3.2 THE COMPETENCES OF THE EU

The EU can only act to the extent to which it is competent, according to the Treaties. Thus, its competences are laid down in the Founding Treaties; they can be exclusive, shared with Member States (Article 4 TFEU, eg. Social policy, research and development, internal market) and supportive (Article 6 TFEU, eg. culture and education). Shared competences mean that both the EU and its Member States can pass legislation in a given area. Supporting competences mean that the EU can only intervene to support, coordinate or complement the action of its Member States.

When it is exercising its competence the EU is bound by the principles of conferral, subsidiarity and proportionality (Article 5 of the TEU).

Subject to these restrictions, the EU can mainly pass three types of legal acts: regulations, directives and decisions. These represent the laws of the European Union, Member States must apply them either directly (regulations and decisions) or must implement them (directives).

In most areas relevant for persons with disabilities, the EU's competences are either shared or supporting. In practice, the EU, or as the case may be, the CJEU, must decide on a case-by-case basis whether the EU is competent in a given domain and thus, if it is bound by the CRPD. This notwithstanding, having legislated in a given area is not sufficient for the EU to be bound by the CRPD. The respective CRPD provision must also have *direct effect*. The CJEU has consistently ruled that a provision of an international agreement has direct effect (i) when the nature, structure and broad logic of the agreement so allows and when (ii) the provision of the international agreement which is relied upon, is sufficiently precise and unconditional.²⁴

24 Chamon, M. (2020), p. 68.

The CJEU has yet to determine, on a case-by-case basis, the extent to which specific provisions of the CRPD have direct effect, so that the EU (and EU Member States) are bound to follow them as a matter of EU law. Existing case law suggests that demonstrating direct effect to the CJEU may prove challenging as this Court has previously considered, *obiter dictum* that the “the provisions of that convention [n.a.the CRPD] do not constitute, from the point of view of their content, unconditional and sufficiently precise conditions which allow a review of the validity of the measure of EU law in the light of the provisions of that convention.”²⁵

3.3 THE EU CHARTER OF FUNDAMENTAL RIGHTS

RIGHTS IN THE EU CHARTER OF FUNDAMENTAL RIGHTS

I. Dignity

II. Freedoms

right to liberty, freedom of religion; right to asylum; right to education

III. Equality

non-discrimination, rights of the elderly, rights of persons with disabilities

IV. Solidarity

workers’ rights, environmental protection, family and professional rights

V. Citizens Rights

right to vote; good administration

VI. Justice

right to an effective remedy, fair trial, presumption of innocence

The EU Charter of Fundamental Rights has been referred to as the Constitution of the EU. It has become binding since the enforcement of the Treaty of Lisbon in 2009. The Charter includes an extensive panoply of rights, from the right to life to the freedom to conduct a business.

Some rights laid down in the EU Charter are directly relevant to persons with disabilities. For example, Article 26 is titled Integration of persons with disabilities. It reads: “The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.”

Similarly, Article 25 concerns the rights of the elderly and it affirms the right of older persons

to dignity, independence and participation in social and cultural rights. Article 21 concerning non-discrimination expressly includes disability as a prohibited ground of discrimination under EU law. Many other rights of the EU Charter are equally relevant to persons with disabilities, and can be considered as strategic litigation avenues.

However, it is important to note that several limitations apply. First, the rights provided in the EU Charter can only be relied upon in litigation to the extent the EU has already legislated in a given field. In other words, both Member States and the EU must observe the EU Charter when they

²⁵ Case C356/12, *Wolfgang Glatzel v Freistaat Bayern*, 22 May 2014, para 69.

are implementing EU law. Conversely, a person cannot rely on the EU Charter if the litigation does not concern the implementation of the EU law. It is important to remember that the distinction between areas where the EU has legislated and areas where it has not, is not always clear cut. In cases of doubt, the CJEU can clarify this aspect. It is difficult to predict whether the CJEU will adopt an expansive or narrow interpretation of the field of applicability of the EU Charter.

CASE EXAMPLE

Expansive application of the EU Charter

The case of [Åkerberg Fransson](#) concerned the compatibility of Swedish tax legislation with the principle of *ne bis in idem*, guaranteed under Article 50 of the Charter. The Swedish tax legislation in question had not been adopted in the implementation of any EU legislation. However, the CJEU declared that it had jurisdiction to decide on the matter as there was EU legislation which required *inter alia* that Member States take measures for tax collection and combat tax evasion. Therefore, even if the Swedish legislation was not directly transposing EU law, the CJEU considered that the Swedish authorities were acting in the implementation of EU law in that situation, as there was a direct link between national legislation and EU legislation.

A further challenge for adjudicating the rights of persons with disabilities, is the distinction of Article 52 (2) of the EU Charter between rights and principles. The CJEU confirmed in *Glatzel* (Case C-356/12) that Article 26 (Integration of persons with disabilities) does not confer individuals with a right which they may invoke as such. In other words, the CJEU has qualified Article 26 as a principle rather than a right, which needs to be expressed more specifically in EU or national law for it to become justiciable.

Nevertheless, this does not rule out litigation on independent living for persons with disabilities under the EU Charter, to the extent the claim can be anchored in a more concrete provision of national or EU law. Moreover, the CJEU's jurisprudence in this area is evolving. Academic research has pointed that out and the Court may sometimes adopt a wider reading of a Charter provision, without a clear indication as to the circumstances which led the Court to take that particular approach.²⁶

²⁶ Greer, S., Gerards, J., & Slowe, R. (2018). The Fundamental Rights Jurisprudence of the European Court of Justice. In Human Rights in the Council of Europe and the European Union (pp. 293–367). Cambridge University Press, p. 313

4. LITIGATING THE RIGHTS OF PERSONS WITH DISABILITIES USING THE EU CHARTER

This chapter focuses on essential aspects in planning for strategic litigation. The questions here are (1) what is the role of courts (national and international) in Charter-based litigation, (2) what are the most important legal avenues for engaging with the CJEU and (3) what are the advantages or disadvantages of arguing for the rights of persons with disabilities before the CJEU?

In order to answer the first question, it is important to understand how the CJEU functions. Section 4.1. discusses topics such as the jurisdiction of this Court, the types of legal actions which can be brought before it, and possible outcomes of litigation before the CJEU. National courts are also important actors, and for this reason Section 4.2 addresses their role in EU law litigation. Finally, Section 4.3 includes some thoughts on advantages and disadvantages of using the EU Charter of Fundamental Rights. Each lawyer and potential litigation should consider them before embarking on any of the avenues discussed in this Guidebook.

4.1 THE COURT OF JUSTICE OF THE EUROPEAN UNION

4.1.1 Jurisdiction

The Court of Justice of the European Union has held this name since 2009, when the Lisbon Treaty entered into force. Prior to the Lisbon Treaty it was referred to as the European Court of Justice ('ECJ'). The CJEU functions in accordance with the provisions of the Treaties, mainly Articles 19 and Articles 251-258 TFEU.

Under the TFEU, there are several legal avenues under which to activate the Court's jurisdiction. These include: infringement proceedings (Articles 258-260 TFEU); action for annulment (Article 263 TFEU); preliminary ruling proceedings (Article 267 TFEU), and action for failure to act (Article 265 TFEU).

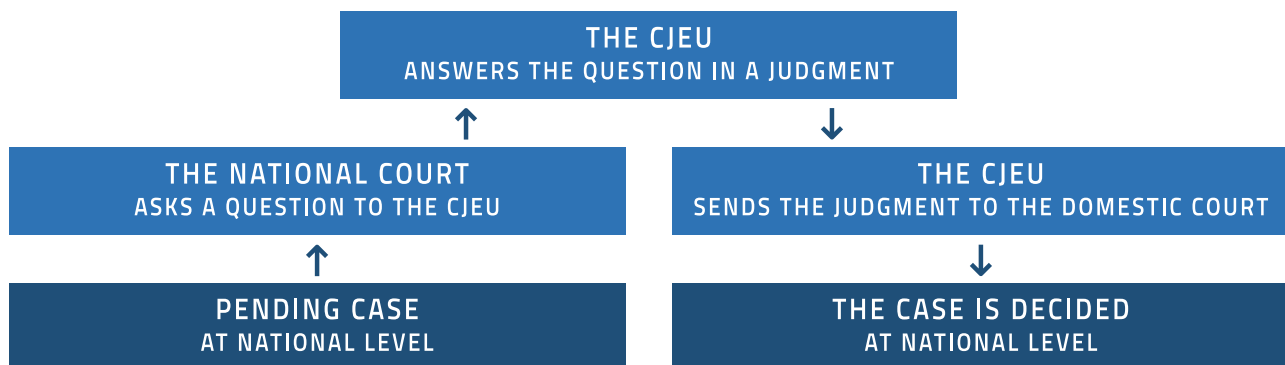
It is important to note that despite the seemingly many available legal proceedings, the judicial system of the EU is decentralised. This means that the CJEU does not have the power to settle disputes concerning the application and interpretation of EU law. The CJEU exercises this role indirectly, primarily through the preliminary reference procedure described below.

Also, most of the legal actions enumerated above only give standing to Member States and the EU Institutions to bring proceedings. For private applicants - which includes NGOs, or (organisations of) persons with disabilities - the most relevant legal actions are the preliminary ruling proceedings; infringement actions are another potentially important avenue. Therefore, in respect of the CJEU, this Guidebook shall focus primarily on preliminary references and to a lesser extent on the infringement proceedings.

4.1.2 Preliminary references

Preliminary references have been and remain the main means of triggering CJEU intervention. It is through preliminary references that the CJEU has expanded its case law and has developed core principles of EU law (such as primacy, supremacy, and state liability for damages). Preliminary references are essentially questions filed by domestic courts to the CJEU. The CJEU provides an answer to these questions and subsequently the domestic court must take this answer into account when delivering the judgment at the national level.

THE PRELIMINARY REFERENCE PROCEDURE



It is important to note that the CJEU cannot seize a case unless the national judge(s) agree to file such a preliminary request. The filing may only occur in disputes which are pending before a national court.

To-date, the case law of the CJEU has been fairly strict in that it has not allowed preliminary references stemming from quasi-judicial bodies (such as for example equality bodies).

National courts of first or second instance have discretion in filing a preliminary reference to the CJEU. However, under Article 267 TFEU, courts and tribunals against whose decisions there is no further judicial remedy under national law must refer a question to the CJEU (courts of last instance).

By way of exception, under the well-established CILFIT doctrine (case C-283/81), such obligation does not exist if:

- (1) The question raised before the national court is not relevant to the outcome of the case;
- (2) There is already European case-law on the matter;
- (3) The rule of law is clear enough and does not necessitate clarification from the CJEU (the *acte claire* doctrine).

It is important to remember that additional conditions apply which trigger the opportunity or the obligation to refer. Among these are the following:

- Questions must arise out of a genuine dispute before a court or tribunal of a Member State;
- No hypothetical questions are allowed;
- The questions must be sufficiently clear;
- The national court must supply sufficient factual information.

Notwithstanding the above, if a national court has filed a question, in most cases the CJEU will accept that it has jurisdiction to rule on it. It has been noted in practice that national courts can sometimes be reluctant to refer questions before the CJEU. Therefore, domestic lawyers should not remain passive but should provide the domestic courts with reasons as to (i) why they should refer the questions to the CJEU and (ii) the relevance of the questions for the dispute at hand.

One successful example of a domestic legal team putting pressure on a domestic court in order to have the case referred to the CJEU, comes from Romania. A group of human rights NGOs intervened in proceedings of *Coman and Other v Romania* – a case concerning the freedom of movement rights of same-sex spouses. The Romanian authorities rejected Mr Coman's husband's request for permanent right to reside in Romania because the Civil Code prohibits same-sex marriage and does not recognise such unions, even if contracted abroad (Article 277(2)). This decision was challenged and referred to as an act of discrimination on the grounds of sexual orientation, which was supported by an *amicus curiae* from several NGOs.

These contributions are believed to have played a significant role in pressing the Romanian Constitutional Court to refer a relevant question to the CJEU. Although not directly related to disability rights, this case demonstrates that lawyers have a significant role to play in insisting that national courts refer questions to the CJEU in cases related to fundamental rights.²⁷²⁸ Once a domestic court has agreed to submit questions to the CJEU, its procedures are suspended

27 Accept (n.d.) *Cazul Coman va ajunge la Curtea de Justiție a Uniunii Europene*. Available at: <https://web.archive.org/web/20180918195535/http://coman.acceptromania.ro/cazul-coman-va-ajunge-la-curtea-de-justitie-a-uniunii-europene/?lang=ro>

28 AIRE Centre, ICJ and ILGA-Europe (2021) *Coman and Others v Romania*. Available at: <https://www.ilga-europe.org/case-law/coman-and-others-v-romania/>

until the CJEU has ruled. Once the CJEU has made its decision, the domestic court can resume adjudication of the case.

It takes the CJEU about 15 months on average to issue a ruling. However, an urgent preliminary reference procedure is possible, if the CJEU finds that this is necessary given the nature of the case. For example, in the case of *Rinau* (Case C-195/08, concerning child abduction) the urgent preliminary reference procedure was activated and a decision was delivered within two months, allowing the case to resume quickly.

The CJEU receives and decides on an average of 500 preliminary references per year.²⁹ In 2023, 518 references were sent to the CJEU, while in 2022, there were 546 such references. Of these, 105 (less than 20%) questions concerned the EU Charter of Fundamental Rights.³⁰

Below is an overview of the number of preliminary references sent in 2023 and 2022 from the participating countries in the EU LITI-GATE project. These figures show that, on average, few questions are being sent to the CJEU. Furthermore, the numbers below refer to the total number of references, including non-human rights related disputes.

COUNTRY	2022	2023
Bulgaria	43	51
Czechia	13	12
Hungary	20	18
Romania	29	40

From the perspective of strategic litigation, the effects of a CJEU judgment are important. It should be highlighted from the outset, that the CJEU does not directly interpret, affirm, or repeal national law, even if it is contrary to EU law. However, domestic courts may have to do this if they find that such national law is not (interpreted) in conformity with EU law.

By virtue of preliminary references, the CJEU may:

(A) Interpret EU law

Most of the CJEU's work centres on this area. Preliminary references procedures may lead to national practices and laws being found incompatible with the EU Charter or other provisions of EU law. It is ultimately up to the national courts to declare such incompatibility, but the CJEU's reasoning in the preliminary reference has at times been very instructive in the findings of the national courts.

²⁹ [https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608628/EPRS_BRI\(2017\)608628_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608628/EPRS_BRI(2017)608628_EN.pdf)

³⁰ [https://curia.europa.eu/jcms/jcms/Jo2_7032/en/#:~:text=The%20number%20of%20cases%20brought,in%202021%20\(838%20cases\).](https://curia.europa.eu/jcms/jcms/Jo2_7032/en/#:~:text=The%20number%20of%20cases%20brought,in%202021%20(838%20cases).)

EXAMPLE No 1

Clarification of the definition of disability

HK Denmark, cases C-335/11 and C-337/11, judgment of 11 April 2013

This case concerned a labour dispute between employees claiming disability and their employer. This dispute was covered by Directive 2000/78 on equal treatment in employment and occupation. The Danish court was unclear as to whether the employees' situation fell under the concept of disability as laid down in the EU Directive.

It thus brought the question to the CJEU, seeking among others to clarify the concept of disability under EU law.

In its judgment, the CJEU ruled that the concept of disability under EU law must be aligned to the CRPD, in light of the EU's ratification of the Convention. The CJEU then held that *disability* must be interpreted as including a condition caused by an illness which entails a (long-term) limitation resulting from particular impairments which – in interaction with various barriers – may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.

The national court then had to decide the case using the aforementioned definition of disability, which differed from the definition of disability in national legislation.

EXAMPLE No 2

Proportionality test in determining discrimination

C-270/16, judgment of 18 January 2018

This case concerned the dismissal of a person on the grounds of his medically related absences. He was recognised as having a disability under national law; nevertheless, the dismissal did not breach national law.

The Spanish court asked the CJEU whether Article 2 (2)(b)(1) of Directive 2000/78, namely the prohibition of discrimination in employment, allowed this interpretation.

The CJEU refrained from interpreting national law. However, the CJEU laid down the legal test which should be followed by the domestic courts in cases of alleged discrimination. Under this test the domestic court must assess whether the national law, in allowing for dismissal due to absenteeism, in addition to pursuing a legitimate aim, does not go beyond what is necessary to achieve that aim. Thus, the proportionality analysis must ultimately be conducted by the national court; albeit by applying the EU law standards.

All in all, The CJEU declared that EU law precluded a certain interpretation of national law Ruiz Conejero,

EXAMPLE No 3

Interpretation of whether the mental health of an asylum seeker is included under the notion of inhuman and degrading treatment under Article 4 of EU Charter

C.K., C-578/16, judgment of 16 February 2017

The case concerned proceedings in Slovenia, whereby the national authorities intended to transfer an asylum seeker, who had just given birth, and her baby to Croatia under the rules of the Dublin III Regulation. The woman experienced post-natal depression and periodic suicidal tendencies which were also connected to her status and upcoming transfer.

In the request for a preliminary reference, the Slovenian court specifically asked whether transferring a person with (particularly serious) mental health issues amounted to inhuman and degrading treatment under the EU Charter of Fundamental Rights, especially if her condition was likely to worsen following the transfer.

The CJEU accepted that serious mental health illnesses which would result in a real and proven risk of a significant and permanent deterioration would constitute inhuman and degrading treatment within the meaning of Article 4 of the Charter.

The CJEU subsequently laid down detailed instructions for the domestic court on how it could ensure that the person would nevertheless be transferred to another country and thus, eliminate the risk of ill-treatment.

(B) Declare that a certain provision of EU law is (not) in conformity with the EU Charter of Fundamental Rights

EXAMPLE

Proportionality of limiting access to certain professions based on disability

Glatzel, Case C-356/12, judgment of 22 May 2014

The case concerned the inability of an applicant with a visual impairment to drive C1 category vehicles due to an EU Directive requirement providing for drivers to have a minimum visual acuity.

The CJEU held that it can only decide the case, after it had assessed whether the EU Directive is compatible with Article 21(1) of the EU Charter (the prohibition of non-discrimination).

In this case it held that the requirement of a minimum visual acuity fulfilled a public interest objective (i.e. improvement of road safety), was necessary and was not a disproportionate burden.

Consequently, the CJEU held that the impugned provisions of the EU Directive were not contrary to the EU Charter and therefore did not require any specific consideration from the national courts in this respect.

While the CJEU may find that a provision of EU Law is invalid, national laws implementing such invalid EU law provisions are permissible only to the extent they provide solutions to the flaws and omissions that the CJEU has found in relation to the invalid EU legislation.³¹

³¹ C-2013/15 and C-698/15. See also Gerards et al (2018), supra n. 13, p. 303.

(C) Clarify the scope of EU law**EXAMPLE**

EP, Case C-467/18, judgment of 19 September 2019

The case concerned a person who was accused of killing his mother. Following a psychiatric report, the public prosecutor proposed that EP be committed to a psychiatric hospital on the grounds that he had committed the offence in a state of mental disorder. Consequently, the suspect never benefited from any of the rights typically applicable in criminal proceedings, such as the right to access a lawyer, the right to information, the right to a judicial remedy against the findings of law of the Public Prosecutor's Office.

In its preliminary question, the Lukovit District Court asked whether the measures adopted in respect of the suspect fell under the scope of two of the EU Directives (applicable to persons suspected or accused of having infringed criminal law) – Directive 2012/13 (right to information) and Directive 2013/38 (right to access a lawyer).

The CJEU ruled that the two EU Directives' scope applied to cases in which an order may be made for the committal to a psychiatric facility of a person who was found guilty of a criminal offense. It was acknowledged that the accused must be informed of their rights as stated in the Directives, as soon as possible (before their official questioning by the police, at the latest). This decision was contrary to national law which concluded that compulsory medical measures should be applied, referring to EP's state of mental disorder whilst he committed the crime. While related to the rights of the offender and not the victim, this legal strategy may be important to replicate in the pursuit of the full implementation of the Victims' Rights Directive and other EU legal instruments relevant for victims of crimes.

The effect of this judgment was that domestic courts were to offer persons suspected of having infringed criminal law, all the procedural guarantees required under EU law, regardless of whether they were considered to have acted in a *state of insanity*.

As explained here, domestic courts (of last resort) must refer their questions to the CJEU. In exceptional circumstances, the State is liable for damages if courts have failed to refer such questions to the CJEU.

Three conditions must be met for an applicant to request damages:

- (1) the rule of law infringed must be intended to confer rights on individuals;
- (2) the breach must be sufficiently serious.
- (3) there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained.³²

Such requests for damages must be brought before national courts and Member States are not allowed to introduce laws limiting state liability for damages for failure to refer questions by national courts to the CJEU.³³ The state liability for damage doctrine will be further discussed in Section 4.2 below.

4.1.3. Infringement proceedings

Infringement proceedings are laid down under Articles 258-260 of the TFEU and can only be initiated by the European Commission. Civil society organisations and private individuals may report various issues of non-compliance to the Commission, who retains discretion in investigating the matter and ultimately in bringing it before the CJEU. Most infringement cases concern failures to (properly) transpose EU legal acts. For example, on 16 November 2023, the Commission [referred](#) Bulgaria to the CJEU for its failure to transpose the Victim's Rights Directive. The Commission will probably ask that the CJEU imposes financial sanctions on Bulgaria for its failure to transpose two of the Directive's provisions.³⁴

The CJEU's [2023 statistics](#) indicate that preliminary references formed 63.1% of its pending case-law. Comparatively, infringement proceedings were represented in a much smaller proportion of the Court's docket. Nevertheless, through infringement proceedings the Commission pursues important European Union principles.

Furthermore, the Commission has wide investigative powers within this process which it can exercise in turn towards Member States. Issues such as failure(s) to transpose EU law can thus be settled between the Commission and the respective state without the need for proceedings before the CJEU. For example, at the end of each year between 2015 and 2020, the Commission was left with some 1,500 infringement proceedings still open.³⁵ While the Commission handles over 3,000 complaints per year, it only brings a small proportion – between 35 and 75 cases –

³² Köbler-ruling, 147; See also Case C-362/18 Hochtief AG (order) ECLI:EU:C:2019:1100; Case C-620/17 Hochtief Solutions AG Magyarországi Fióktelepe ECLI:EU:C:2019:630; Case C-168/15 Tomášová ECLI:EU:C:2016:602; Case C-681/13 Diageo Brands ECLI:EU:C:2015:471 para 66; Case C-173/03 Traghetti del Mediterraneo ECLI:EU:C:2006:391; and Case C-224/01 Köbler ECLI:EU:C:2003:513. From the practice of Member State courts, see the ruling by French Conseil d'État of 18 June 2008 in Case No 295831, Gestas, and the ruling by the Austrian Verfassungsgerichtshof (Constitutional Court) of 13 October 2004 in case A5/04, reported in 22e Rapport sur le contrôle de l'application du droit communautaire, COM(2005)570, A, referred in Broberg, M. P., & Fenger, N. (2021). Broberg and Fenger on preliminary references to the European court of justice (Third edition.). Oxford University Press.p. 238.

³³ Case C-620/17 Hochtief Solutions AG Magyarországi Fióktelepe ECLI:EU:C:2019:630, paras 45–7; and Case C-379/10 Commission v Italy ECLI:EU:C:2011:775, paras 40–6, referred in Broberg, M. P., & Fenger, N. (2021), supra n. 20, p. 240

³⁴ This Directive is further analysed in Section 6.1.5 of this Guidebook and has direct strategic potential for advancing the human rights of persons with disabilities.

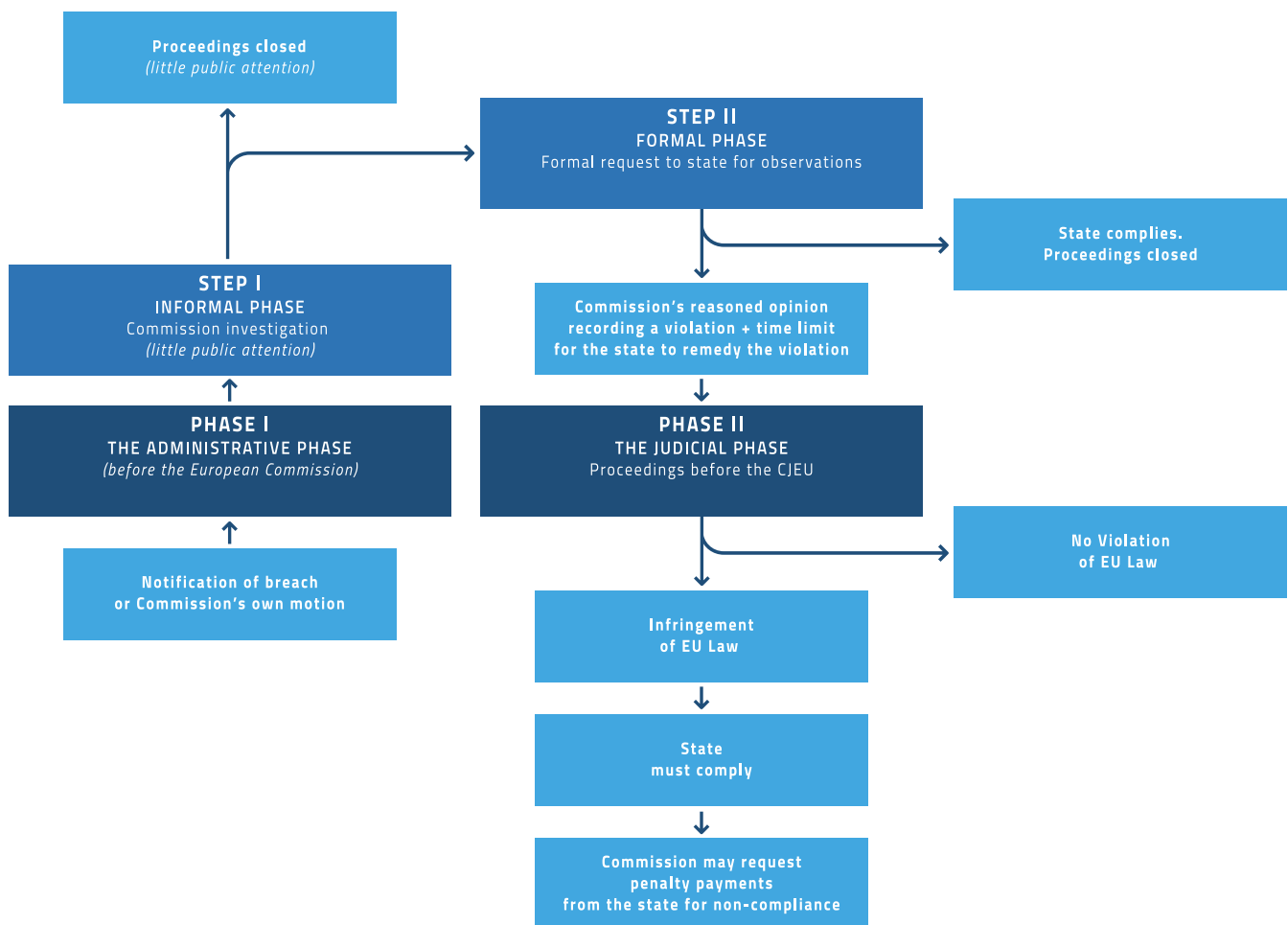
³⁵ Prete, L., & Smulders, B. (2021). The age of maturity of infringement proceedings. Common Market Law Review, 58(2), p. 286.

before the CJEU.³⁶³⁷

It must be noted that infringement proceedings have not yet been found relevant to the rights of persons with disabilities. Nevertheless, they may still play an important strategic role.

The table below outlines the process for the infringement procedure.

THE INFRINGEMENT PROCEDURE



It is possible for individuals or organisations to file complaints requesting the Commission to start infringement proceedings. The Commission will deal with these complaints pursuant to the administrative procedure laid down in the [Communication from the Commission - EU law: Better results through better application, C/2016/8600](#).

36 Ibid., p. 286.

37 Ibid., p. 287.

Complaints must be completed and filed online, using a [standard form](#) or via regular postal services. Within one year of filing, the Commission will inform the complainant in writing of its decision. When closure of a case is envisaged, the complainant has the opportunity to submit written comments to the Commission's letter, setting out the grounds on which it is proposing that a case is closed.

From the perspective of human rights strategic litigation, infringement proceedings are important in several ways.

First, the Commission is willing to initiate infringement proceedings when national courts of last resort fail to refer preliminary questions to the CJEU, in breach of their obligation under the EU Treaties (see for example, case C-416/17, *Commission v France*). As this amounts to an infringement of Article 267 of the TFEU, unsuccessful preliminary references can be addressed in infringement proceedings.

Second, systemic breaches of EU law by Member States can also be tackled through infringement proceedings. The litigation strategy should identify the scale of the breach and document how domestic authorities have failed in their duties to transpose EU law.

Furthermore, in contrast to preliminary references, in infringement proceedings the EU Charter can form the sole legal basis for legal action (see for example Case C-66/18 *Commission v Hungary* and contrast with Case C-235/17, *Commission v Hungary*).

Finally, it has been noted that, on many occasions, the principle of sincere cooperation of Article 4(3) TFEU is raised in infringement proceedings.

This Article reads:



Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

Despite its vagueness, this Article can be useful for advancing strategic litigation goals for persons with disabilities, including a closer alignment between EU law and the CRPD. For example, it could be argued that the failure of Member States to use CRPD standards whenever they implement EU legislation in relation to the rights of persons with disabilities, goes against the principle of sincere cooperation.

4.2 THE ROLE OF NATIONAL COURTS

EU law is based on the premise that national courts directly apply the relevant EU law provisions. In litigation, it is the national courts who bear primary responsibility for applying EU law, including the EU Charter. Moreover, as opposed to other international law instruments, the EU Charter applies in any dispute, either between an applicant and the State or between private parties, provided that a link with an EU law instrument can be found.

National courts are obliged to set aside provisions of domestic laws which are contrary to EU law. For this reason, it is important that lawyers and litigants raise EU law provisions directly before the national courts. They can also request that national courts disapply a national provision which is contrary to EU law. Failure by domestic courts to do this may trigger the State's liability for damages (as per the well-established *Francovich* doctrine, cases C-6 and C-9/90 *Andrea Francovich and Danila Bonifaci and Others v Italian Republic*, 1991).

As per this line of case-law, liability for damages is triggered if three conditions are met:

- (1) The Union act which was not implemented must have intended to confer rights on individuals (direct effect);
- (2) The breach by the Member State must be sufficiently serious;
- (3) There is a causal link between the breach and the damage to the individual.

In practice, the national courts' engagement with EU law or the EU Charter has been inconsistent. Some courts have been more willing than others to directly apply EU law or to construe arguments on this basis.

At the national level, the effectiveness of the state liability for damage doctrine has been limited.³⁸ In this regard, the latest report of the EU Fundamental Rights Agency (FRA) has identified that it has mostly been the national Supreme Administrative Courts which have included such references in their case-law in respect of the implementation of the EU Charter³⁹⁴⁰

38 Reich, Norbert, 'Francovich Enforcement Analysed and Illustrated by German (and English) Law', in András Jakab, and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford, 2017; online edn, Oxford Academic, 20 Apr. 2017

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40 FRA Fundamental Rights Report, European Union Agency for Fundamental Rights, 2023, available at << https://fra.europa.eu/sites/default/files/fra_uploads/fra-2023-fundamental-rights-report-2023_en_1.pdf>>, last accessed on 24 May 2024.

4.3 ADVANTAGES/ DISADVANTAGES OF LITIGATING UNDER THE EU CHARTER

Compared to strategic litigation in front of some other international bodies, human rights litigation under the EU Charter of Fundamental rights is still in its infancy. Yet, the Charter is a tool which may have significant potential for advancing the rights of persons with disabilities. Including Charter-based arguments before domestic courts can be useful as the consistent failure of national courts to engage with such arguments may open opportunities for infringement proceedings by the Commission, or actions for damages before domestic courts.

In addition, persons with disabilities, their lawyers or representative organisations can request domestic courts to file preliminary references to the CJEU. Failure by the national courts to submit references exposes them to liabilities both under EU law and under the ECtHR law, as will be shown below. Moreover, such requests do not in any way preclude subsequent applications to the ECtHR. Rather, in this field, the ECtHR and the CJEU should be seen as being part of a litigation strategy rather than as alternatives to it.

Furthermore, when focusing on references to the CJEU, lawyers and persons with disabilities can design litigation strategies which limit the applicant's exposure to reprisals. For example, administrative actions for the provision of disability inclusive measures can directly pave the way to the CJEU and do not necessarily change the day to day life of a person, if the request concerns the creation or provision of a service which did not exist.

At the same time, if a reference is sent, the CJEU's adjudication time is substantially lower than that of the ECtHR. Moreover, failure to directly apply the judgment exposes states to direct sanctions and fines. In short, the EU's enforcement options are much broader than those within the Council of Europe or the CRPD Committee.

Nevertheless and to date, it is questionable which rights for persons with intellectual and psychosocial disabilities the CJEU will consider justiciable. The EU has wide competences in matters such as discrimination in employment, and freedom of movement. However, the EU's competence is less clear on issues such as deinstitutionalisation or legal capacity. The justiciability of rights is further limited by Article 19 of the Charter - which has been qualified as a principle rather than as a right; by the fact that the CJEU sees the CRPD as a programmatic document not intended to confer direct rights on individuals; and by the overall and limited competence of the EU for persons with intellectual and psychosocial disabilities. All these shortcomings can change if strategic litigation succeeds in creating positive case-law at the CJEU level. For actual change, this case law - when it emerges - should be adopted in advocacy campaigns.

To sum up, the potential of strategic litigation at the EU level is significant. However, it has been underutilised in enhancing the rights of persons with intellectual and psychosocial disabilities.

5. PROCEDURAL CONSIDERATIONS FOR LITIGATING THE RIGHTS OF PERSONS WITH DISABILITIES UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS

5.1 USING THE ECtHR TO INCREASE THE WILLINGNESS OF NATIONAL JUDGES TO REFER QUESTIONS

The ECHR can be used to reinforce national judges' obligations to refer questions to the CJEU. The ECtHR considers that a failure by domestic courts to refer questions may, in certain circumstances, amount to a breach of a fair trial under Article 6(1) ECHR. From the perspective of the ECtHR, arbitrary refusals to refer questions violate the fairness of proceedings. Thus, to avoid an infringement of Article 6(1) ECHR, domestic courts of last resort must provide reasons for such refusals (*Baydar v. the Netherlands*, no. 55385/15, 24.07.2018, §39).

The ECtHR has not indicated that Article 6 has been violated when a domestic court only provides a summary reasoning for the rejection of the preliminary reference; instead, it agreed that the preliminary reference request did not raise fundamentally critical legal issues, or it had no prospect of success. Furthermore, it is acceptable for domestic courts to dismiss preliminary references if they are insufficiently pleaded or formulated in broad or general terms (*Baydar v. the Netherlands*, no. 55385/15, §§ 42, 46, 48; see also *Pasteur v. France*, no. 25137/16).

Consequently, litigation strategies to be presented to the CJEU could consider the interplay between the two Courts. Failure to refer may in itself trigger a violation of the ECtHR; at the same time bringing this argument before domestic courts of last resort could ensure that preliminary questions are actually referred.

5.2 LITIGATION COSTS AND LEGAL AID

Litigation before the CJEU is detailed in the [Rules of Procedure](#). Title III covers Preliminary references (indirect actions), whereas Title IV is dedicated to direct actions (including the infringement proceedings or actions for annulment). As discussed in Section 4.1.3 of this Guidebook,

infringement proceedings are lodged by the Commission against the state(s). Individuals, or civil society entities are not parties to infringement proceedings. Furthermore, given the restrictive approach to admissibility criteria, in practice individuals have mainly engaged the CJEU through preliminary references. Consequently this section will only focus on litigation costs and legal aid in preliminary references as regulated under Title III of the [Rules of Procedure](#).

Litigation costs are covered by Article 102 of the [Rules of Procedure](#). As preliminary references are seen as non-contentious, interim proceedings, litigation costs for preliminary references follow the rules laid down in the national law of the court filing the respective reference. The national court filing the reference, not the CJEU, will decide on the amount of costs. Only parties to the main domestic proceedings will be entitled to costs. In addition, for the purposes of Article 102 of the [Rules of Procedure](#), only when the state is a party to the main domestic proceedings, will it and other intervening parties to such domestic proceedings, be entitled to costs. If the state submits observations to the CJEU in accordance with the Court's statute, but is not at the same time a party to the domestic case, it shall not be entitled to claim costs in the preliminary references.

Furthermore, there are no court fees or other costs charged by the CJEU or the EU in connection with preliminary references.

Legal aid is distinct from litigation costs, and it refers to the financial support a party to the main domestic proceedings is entitled to receive in connection to costs incurred by the preliminary reference before the CJEU. Legal aid is provided solely if a party is unable, in whole or in part, to meet the costs of preliminary references and provides supporting documents to this effect.

Legal aid is covered by Articles 115 to 118 of the [Rules of Procedure](#). The applicant, i.e. the party to the national proceedings, must claim legal aid from the CJEU and present supporting documents thereto, including any domestic decision on legal aid which has already been granted. The party should first seek legal aid domestically, and only subsequently and with subsidiarity, should such claim be made directly to the CJEU. In any event, the CJEU's decision solely concerns legal aid in connection to the preliminary references.

Legal aid covers, fully or partly, the costs incurred both for written and oral observations and includes basic lawyers' fees as well as hotel and travel costs. The Rules of Procedure do not clarify whether the lawyer's fees covered are those of a lawyer *ex officio* or of a lawyer chosen by the applicant. All requests for legal aid should be filed with the CJEU and accompanied by supporting documentation.

An application for legal aid can be made 'at any time'. Hence, it may be lodged before the preliminary reference is received by the Court of Justice and, at least, up to the point of the hearing. In certain cases, a request has even been made after the judgment in question has been delivered. There is no obligation to be represented by legal counsel in connection with the preparation and submission of such an application for legal aid. As per Article 116(4) of the [Rules of Procedure](#), a team from the CJEU will decide on the application for legal aid; their decision is final and is not subject to appeal.

6. STRATEGIC LITIGATION AVENUES TO EXPLORE

The preceding sections of this Guidebook have dealt with procedural and substantive questions concerning litigation before the CJEU. As explained here, what makes litigation strategic is the wider (human rights) goal or change which is to be achieved through the process.

Thus, the first question to be asked is: what is the wider purpose of this case? How does it reach beyond the individual applicant?

In the case of persons with intellectual and psychosocial disabilities, the wider goals can be identified by, for example, looking at the alternative reports submitted to the CRPD Committee by civil society organisations or organisations of persons with disabilities. The Concluding Observations of the CRPD Committee and alternative reports to this body can equally be taken into account. For example, in their alternative report of February 2022, the European Disability Forum highlighted the EU's failure to mainstream disability rights across its legislation.

Second, once a goal has been identified it is important to explore the relevant legal provisions. For EU law in particular, identifying Articles of the EU Charter of Fundamental Rights is not enough. Given that the EU Charter only applies in the implementation of EU law, identifying such EU law(s) and the way they have been transposed into national law thus becomes essential (see also Section 3.2.3 above).

A first step is to review relevant EU law relating to disability. This aids the understanding of the EU's areas of competence in this field.⁴¹ Nevertheless, a review of such laws from the perspective of persons with intellectual and psychosocial disabilities yields limited results; many EU laws are relevant for persons with disabilities even if they do not directly target or mention them.

⁴¹ See Appendix (*Community acts which refer to matters governed by the Convention*) to the Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ L 23/35.

If mainstreaming disability across EU law is the objective, the strategy should start with an understanding of the specific laws which would benefit from mainstreaming. For example, in the field of freedom of movement, many of the rights in the Citizen's Directive⁴² have been included following CJEU case-law. This shows that litigation can have important legislative results.

Third, when the relevant pieces of EU legislation have been identified, it is important to clarify how and whether they have been transposed at the national level, and then how they are applied. Transposition is the process of incorporating EU directives into the national law of Member States. Practical implementation refers to the process of actual and effective application and enforcement of laws that have been transposed by relevant bodies at the national level. It is significant to distinguish between the transposition of EU law and its practical implementation.

For example, in the case of the VRD, only Bulgaria has been under infringement for its failure to correctly transpose EU rules as it did not fully adopt all provisions of the VRD into national law within a set time period. Research indicates that the practical implementation of the VRD, on the other hand, is far from being fully ensured across the whole EU. In 2018, the VOCIARE report indicated that none of the Member States offered a full and satisfactory implementation of the entire VRD to all victims on their territory. The latest BeneVict findings suggest that progress has been observed in countries associated with the project; for example, Bulgaria has introduced new or amended legislation relating to over a 10 of VRD's articles, leading to their practical implementation. Not all countries progress equally, however. For example, Romania has practically implemented provisions relating to Article 2 only, the rest remain at the stage of transposition. The same goes for Hungary, where Articles 23 and 24 are yet to be implemented, and Slovakia, where over 10 Articles have only been transposed to the national level. Several questions should be asked here:

Questions related to EU law:

- (1) Is the respective EU law compatible with the EU Charter of Fundamental Rights?
- (2) Could the EU law benefit from clearer articulation of certain rights for persons with intellectual disabilities?
- (3) How should the respective EU law/EU Charter provisions be interpreted so as to be closer aligned with the CRPD?

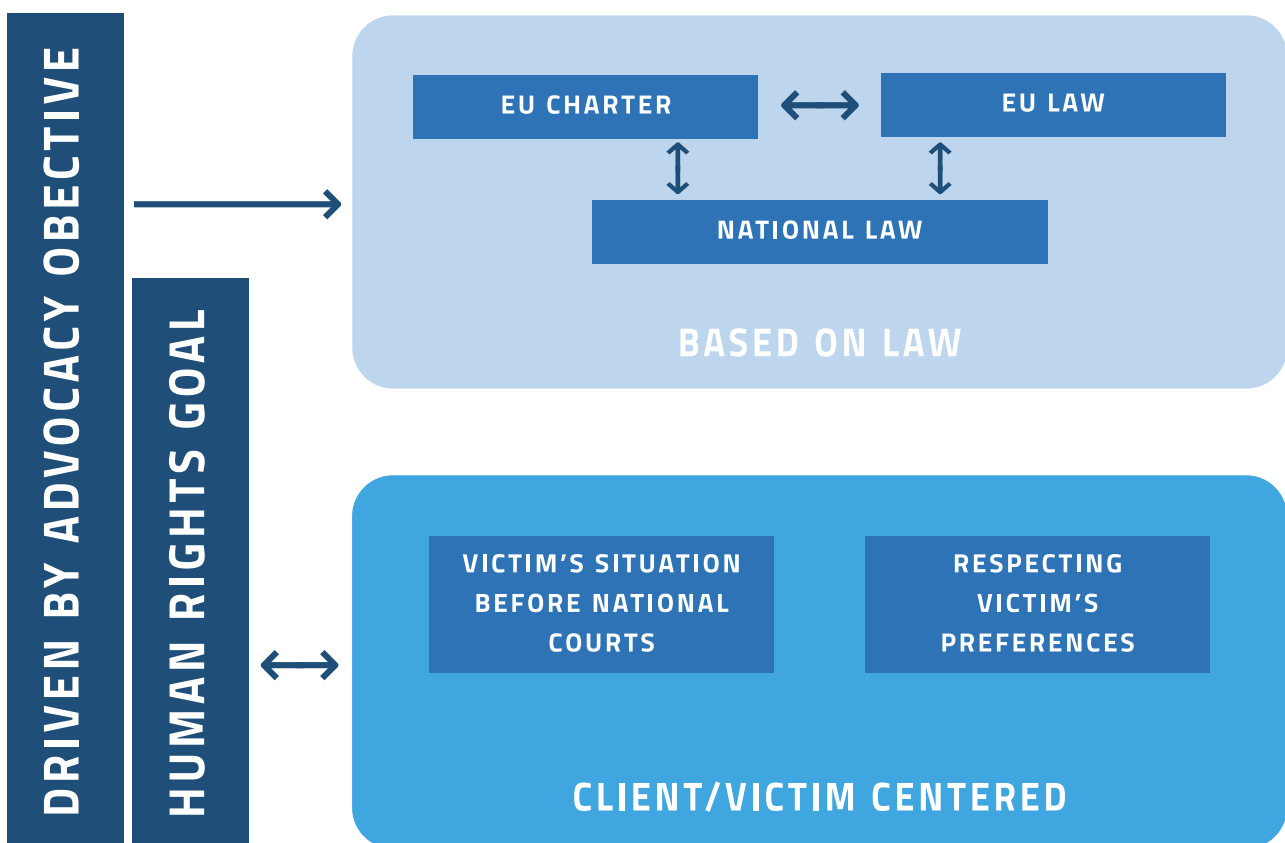
⁴² Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance)

Questions related to national law:

- (4) How has national law transposed, implemented, taken over the EU law?
- (5) Has there been a failure to implement relevant EU law? Does this in turn affect the rights of persons with disabilities?
- (6) Can national law benefit from another interpretation which is more closely aligned with the CRPD? Is such interpretation supported by EU law?

The questions above should be answered from the perspective of persons with disabilities and their experience should inform any litigation strategies. Organisations or lawyers should actively work towards identifying and supporting persons with disabilities who wish to take legal action.

As mentioned in this Guidebook, the ultimate public interest goal should not affect discussions on the risks for the person with disabilities in undertaking litigation as well as on how such risks could be mitigated. The advantage of EU law is that it is suitable for bringing test cases (such as administrative actions) which minimise the exposure of persons with disabilities to risks of re-victimisation or reprisals.



To effect change through strategic litigation, there are three main building blocks that need to be in place. Firstly, there needs to be an advocacy objective, which is intended to be achieved through litigation. This objective may be rather general – e.g. promoting human rights of persons with disabilities, or very specific – e.g. ensuring that each person with intellectual disabilities gets access to psychological support in their place of residence. Yet, this objective will need to be woven into the litigation strategy and remain its driving force.

The second fundamental element of a litigation strategy that is targeted at the CJEU, is the legal framework. The issue being presented in the advocacy strategy must be built into the EU legislative framework in several ways. There must be a fundamental rights guarantee in the EU Charter to construct the legal argument around. There must also be a specific material law guarantee in another EU legal instrument (e.g. Victims' Rights Directive), and finally there must be a national legislative provision that is applicable to the context of the EU legislation.

The final block is related to the actual person experiencing a violation of their fundamental rights – the client. The litigation strategy must be built on an actual situation that concerns an actual person with disabilities, whose rights are not being respected. The requirement for taking the case to the CJEU is that it relates to an actual case that is pending at the national level. In addition, a requirement for ethical advocacy and litigation will make sure that the client understands and agrees with the litigation strategy and accepts their role in the process.

6.1 STRATEGIC LITIGATION TO ADVANCE THE RIGHTS OF VICTIMS WITH DISABILITIES

6.1.1 Overview of the Victims' Rights Directive

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing the minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (the "VRD" or the "Victims' Rights Directive") covers the rights of all victims of crime within the EU. Article 2 of the VRD clarifies that a victim means:

"(i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence;

(ii) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death."

The Directive recognises the need to emphasise the rights of victims with disabilities. Article 22 specifically states the requirement for the “individual assessment of victims to identify specific protection needs” and considers victims with disabilities as a group that “would benefit from special measures in the course of criminal proceedings” particularly in relation to their participation in criminal proceedings and their need for protection from secondary victimisation resulting from such participation.

The existence of this instrument brings the area of victims’ rights within the scope of EU law. Consequently, the EU Charter of Fundamental Rights is equally applicable.

Currently, the VRD is under review. On 12 July 2023, the European Commission published a [proposal](#) for a new Directive and an Explanatory Memorandum, which mentions that only 26% of persons with intellectual disabilities receive appropriately designed information. The Memorandum also identifies other equally important areas where the VRD falls short of securing adequate protection for victims of crime with disabilities. These include the needs assessment, the lack of victim support services, the lack of effective participation in criminal proceedings, or shortcomings in victims’ access to compensation.

6.1.2 Access to information for victims with disabilities

AT THE EU LEVEL

Information drives effective support for victims of crime and, under current EU legislation, Member States are obliged to grant victims access to information that should be easily understandable to act upon. State and non-state actors must ensure that information is available, accurate and factual, written in clear language, accessible through a variety of channels (e.g. media, organisation and community, interpersonal), timely and repeated, and adapted to victims’ individual needs⁴³. Several articles of the VRD lay down specific information rights that are particularly relevant for victims with disabilities: a human rights approach to disability entails adapting these rights to facilitate the *effective* participation in the proceedings by victims with disabilities.

First, **Article 3 of the VRD (the right to understand and be understood)** specifies the right of victims to receive communication in simple and accessible language and provides for the rights of victims to be accompanied by a person of their choice in their first contact with the competent authorities.

43 APAV and Victim Support Europe (2022) *Transforming how we communicate with victims: Moving beyond information provision to a system of communication*

Article 5 (rights when making a complaint) and **Article 6 (right to receive information)** require authorities (for eg police; the prosecutor) to acknowledge the victim's complaints in writing and to notify victims of the findings of the investigation as well as of the time and place of a trial. However, these Articles do not clarify whether, for example, a victim with disabilities is entitled to receive the information directly or whether the authorities have discharged their duties once they have given the information to a third party. This may, in particular, affect the rights of persons deprived of legal capacity.

Article 11(3) VRD lays down the victims' right to be given and receive sufficient information on the decision not to prosecute.

However, the wording of its provisions indicates that the VRD leaves it up to Member States to interpret how to actually implement the information rights for victims of crime.

Therefore, to understand the legal framework, it is important to understand how these rights have been transposed in law and in practice, and how strategic litigation could clarify potential gaps or align the VRD further with the CRPD.

For example, when it comes to Article 3, in 2018, the research revealed gaps in its practical implementation. Further research in 2024, suggests that, although progress has been initiated by some Member States, many still rely on information that is standardised rather than tailored to the victims' needs. The practical implementation of Article 5 is, similarly, inconsistent across the EU.

In comparing the research into the theoretical and practical implementation of the right of victims to receive official acknowledgement of the crime reported, 14 Member States showed no improvement between 2018 and 2024.

Nevertheless, lawyers can directly invoke the provisions of the Directive and of the EU Charter in domestic litigation, independent of any decision to request the referral of a question to the CJEU.

It is important to emphasise that the provision of information is far from simple, even for victims without a disability. Victims' journeys are often complex and rarely straightforward. Victims will need information on many things: where and how to file a criminal complaint; where to find support: legal, psychological, emotional, practical, financial etc.; their rights at different stages of proceedings; their obligations in relation to the participation in criminal proceedings; what to expect from the authorities and when; how to receive compensation; how to flag risks and request protection etc. Often, it takes years for proceedings to be concluded – while victims' lives are subject to change – which may impact also their needs.

All of these elements must be considered when ensuring that a victim's right to information is respected. Importantly, it is inefficient and unhelpful to provide all information about everything, at the same time. Information should be provided in an individualised fashion, to respond to the victim's personal situation at each stage of proceedings.

The provision of information should be adapted to each victim's communication needs. Yet, this does not take place in practice; information is generic, printed on standardised templates, without regard as to whether the information facilitates the individual's understanding of a specific situation. This is especially challenging for victims with psycho-social and intellectual disabilities.

AT THE NATIONAL LEVEL

This section covers the findings from national research (legislation, interviews and/or focus groups) carried out under the LITI-GATE project.

Reports confirmed that victims' rights to understand and be understood are laid down in all of the legislations of the countries researched. Authorities are required by law to provide information in a clear and accessible language; usually, police officers are expected to verify that the victim has understood their rights. The police officer (or other state official) must also inform the victim of their role and the procedural alternatives during the criminal trial.

Despite this legislative requirement, four of the five EU Member States usually gave out information using standardised templates (BG, CZ, RO, SK). The competent authorities do not see it as part of their duties to ensure that victims have actually understood their rights. For example, interviews conducted in Romania revealed that the authorities formally report that the process of informing the victim has been completed; however, the goal of ensuring that the victim has understood the information is rarely achieved. This is because the authorities generally consider the provision of information as simply being the distribution of leaflets or brochures which lists the victim's rights, rather than ensuring that key information is understood by the victim.

Furthermore, research has identified that accessible communication formats are not always available for persons with disabilities. Additionally, the laws are vague on extent to which persons deprived of legal capacity may choose to be accompanied by a person - other than their legally appointed guardian - during first contact with the competent authorities.

In reality, victims with intellectual disabilities are not seen in criminal proceedings. Instead, the victim is ignored during the proceedings, and all interaction is directed towards the victim's legal

representative, even when the victim is present.⁴⁴ The professionals working with victims with disabilities estimate that the normative landscape can accommodate persons with disabilities; however, this is yet to be fully implemented in practice.⁴⁵

Additional obstacles identified across all the countries include the lack of accessibility and an absence of pathways towards identifying properly trained experts to facilitate the process of the information delivery:

An interviewee in Hungary stated:



[...] it is more clear for persons with physical disabilities, however even they face obstacles regularly. The availability of sign language interpreters is a problem. Also, there is no official register of sign language interpreters which makes having access to them during legal procedures a common challenge. The judge can have a professional involved to help facilitate communication, however, this is not an obligation for the judge and there is also no guidance on who or what kind of professional to involve.⁴⁶

An interviewee in Bulgaria noted:



These people who work in this system have no skills whatsoever to even talk to people who have some kind of disability, and it is enough for them to realise that they have a disability to stop communicating with them.

The Romanian research revealed that despite existing laws, specialists facilitating communication between the judicial authorities and persons with disabilities, are hard to find and there is no approved Ministry of Justice list of communication specialists, as is the case with experts from other fields.

With respect to Articles 5 and 6 of the VRD, the Czech report flagged the vagueness of the national transposition in that applicable laws do not clarify whether individuals, particularly those with disabilities, are directly entitled to receive information or whether authorities fulfil their

44 BG/1/6

45 HU 1/1/

46 HU/1/1

obligations by providing information to a third party. This may have important consequences for persons deprived of legal capacity.

The same ambiguity was highlighted in the Slovakian research, which highlighted a discrepancy in the definitions given for a victim in the Victims Act and the Code of Criminal Procedure. Thus, under the Victims Act, potential victims are included within the concept of victim; however, such an extensive definition does not exist in the Code of Criminal Procedure. Consequently, some of the victims' rights mentioned in the Victims Act are not effective under the Code of Criminal Procedure.

Similarly, research indicates that while the requirement of Article 11(3) of the VRD to inform victims of the decision not to prosecute, is largely complied with and victims are generally told of any decision to not prosecute, notifications are delivered without any regard as to the need for accessibility for victims with disabilities. For example, in Romania, while a victim shall be notified in writing of the decisions (not) to prosecute, the report highlighted:

"From the discussions held with both specialists in the field and with persons with intellectual and/or psychosocial disabilities, it appears (in addition to the lack of legislative provisions) that there are no differentiated procedures according to the needs of the participants in the proceedings in terms of the way in which documents are drawn up/communicated. The language is the same, there are no adaptations, there are no staff trained to facilitate communication or to explain the content of the documents drawn up."

This lack of information available in accessible formats has also been highlighted in Czechia, Slovakia, and Bulgaria.

Interviewee in Bulgaria⁴⁷ :



They are not notified. There is no such practice and it stems from the fact that if you think the person does not understand then there is no point in explaining.

The failure to provide timely, accurate and relevant information to victims in a manner that responds to their communication needs can have important legal (e.g. failing to meet prescribed legal deadlines for remedies), financial (e.g. not knowing that they have the right to reimbursement of costs or free legal aid), etc., consequences that lead to many instances of secondary victimisation.

47 BG/1/6

At the same time, in the countries observed for the purposes of this paper, there appears to be no remedy, or any other legal sanction or consequence for the authorities' failure to comply with their obligation to provide information to victims, or to ensure that their right to understand and be understood is diligently implemented.

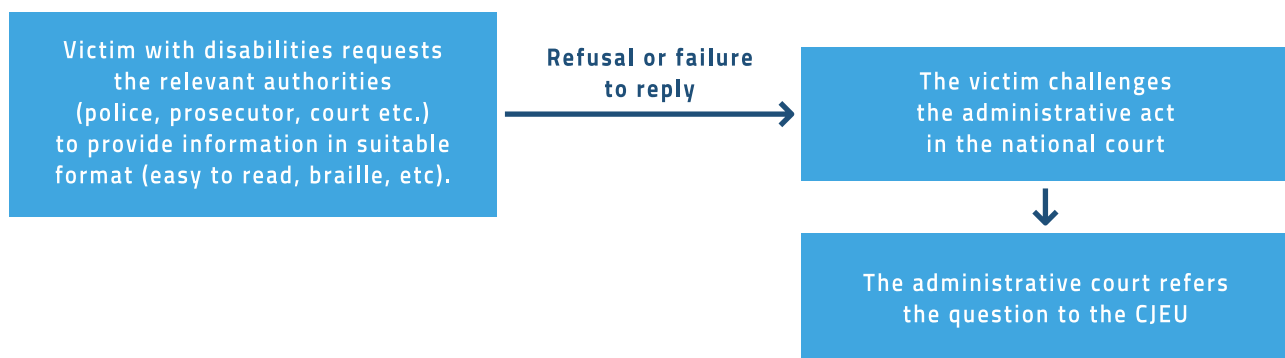
STRATEGIC LITIGATION AROUND INFORMATION RIGHTS

It is important to keep in mind that the VRD only sets out minimum standards for the rights of victims across the EU. One reason for the proposed revision is the excessive margin of autonomy given to national authorities to decide on its implementation. Before considering strategic litigation, the various barriers to access to justice from the perspective of persons with disabilities who have been victims of crimes should be listed. Secondly, the national laws should be tested against those barriers, and consideration given as to whether the laws have arguably fallen below such minimum standards.

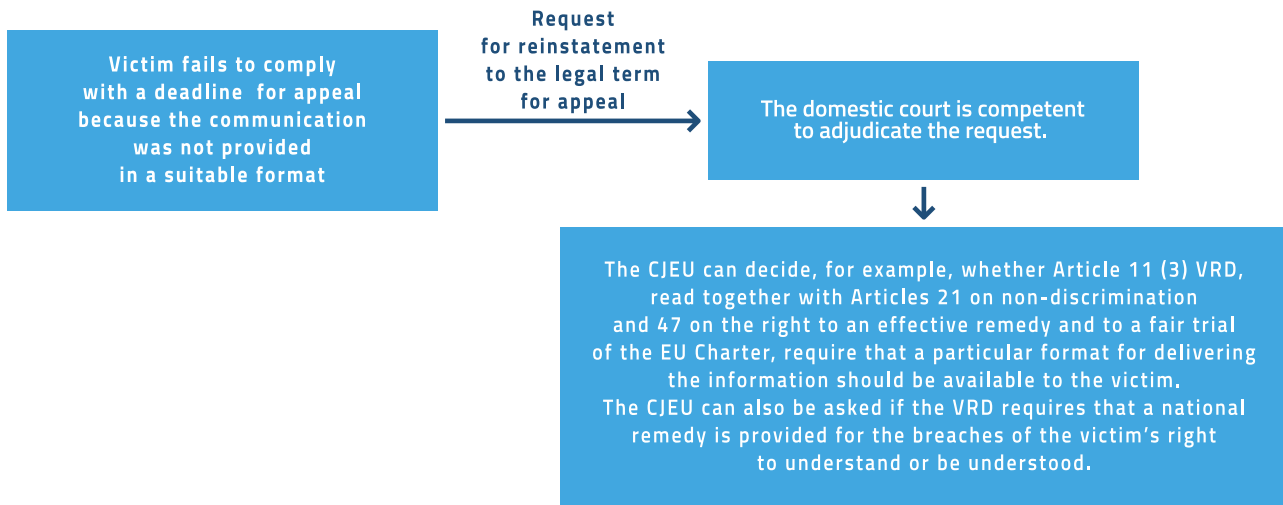
The Bulgarian, Czech, Hungarian and Slovak reports identified the right to understand and be understood as being particularly problematic and thus suitable for strategic litigation. In Slovakia, it has been suggested that strategic litigation could be used to target the provision of appropriate remedies for victims or to request accessible communication.

In this area, administrative law can prove a suitable avenue for triggering the option of submitting preliminary references to the CJEU.

Procedurally the table below outlines how administrative litigation might be viewed:



Another option could consider the challenges faced by victims whenever they have missed a procedural deadline because the information regarding the said deadline has only been communicated in writing and not in an other more suitable format.



The fact that the action has little likelihood of success from the perspective of national law does not mean that the national court does not have the obligation to refer the question.

What matters is that the question raised is relevant for the outcome of the case.

6.1.3 Participation and procedural accommodations

AT THE EU AND INTERNATIONAL LEVELS

Article 10 of the VRD provides that Member States shall ensure that victims may be heard in criminal proceedings in accordance with procedural rules determined by national law. Such national law provisions are key to ensuring that victims with disabilities can effectively participate in proceedings.

Article 13 of the CRPD introduces the notion of procedural and age appropriate accommodations as tools for effective access to justice. The OHCHR's [International Principles and Guidelines on Access to Justice for Persons with Disabilities](#) clarify that procedural accommodations

represent all necessary and appropriate modifications and adjustments to ensure the participation of persons with disabilities on an equal basis with others. Within the CRPD, disability is conceptualised as a dynamic process that changes during the person's life; thus, their experiences, support network, or physical and mental state can influence how they are recognised by a state body with respect to their need for support in the judicial process. Consequently, it is important that assessments or adaptations, which should be holistic and consider the individual's circumstances, reflect the person's wishes and diagnosis.

Article 22 of the VRD imposes on Member States the obligation to provide an individual assessment to identify and respond to the needs of victim to be protected from intimidation, retaliation, revictimisation and – importantly – secondary victimisation. The individual assessment could be seen as a precursor for procedural accommodations, as here the authorities can assess the type of accommodations needed for a victim's effective participation in the ensuing (criminal proceedings).

AT THE NATIONAL LEVEL

The experiences of persons with disabilities are indicative of the need for procedural accommodations and their availability or lack thereof at the national level.

In Bulgaria, victims may be heard as witnesses in domestic proceedings. Nevertheless, forensic reports may be administered to test the victim's capacity to testify. However, the Code of Criminal Procedure does not contain requirements for the provision of procedural accommodations for victims with psychosocial/intellectual disabilities.⁴⁸

An interviewee in Bulgaria (BG/1/6) mentioned that within the criminal proceedings, sporadic measures are undertaken, by a few judges, to provide accommodations to people with disabilities who are victims of crimes. Some judges and lawyers endeavour to provide information in accessible language, create a supportive environment for hearings, and direct individuals to social services for support. But, there is a lack of systemic practice to ensure referral for persons with disabilities to support services.

This failure applies to both adults and children. Recent research indicates that there is a lack of provisions that spell out how justice professionals connect with child protection professionals to ensure procedural accommodations for children with disabilities across the EU⁴⁹. Access to specialised services is free of charge, but often such services are not available in the community, which results in only a fraction of victims being able to receive assistance.

⁴⁸ Article 142 (3) provides for procedural facilities for witnesses who are deaf/mute - a sign language interpreter is appointed for them.

⁴⁹ Marinova, T. and Genova, A. (2024) *Bulgaria: National Briefing Paper*, p. 30



The process of interviewing people with disabilities as witnesses is often characterized by insufficient attention and approach from the judicial system. Individuals with visible disabilities are often disregarded as unreliable witnesses, and their testimony is rarely sought. Being under guardianship further complicates the right to be heard for these individuals. While “blue rooms” are available for interviewing children with disabilities, this does not guarantee their adequate protection and support during the judicial process. Apart from these separate premises for children, other procedural accommodations for victims with disabilities are limited and require support to ensure their equal access to justice is long overdue.⁵⁰

In Czechia and Slovakia, laws allow victims to have a person of trust present with them during the hearing, as guaranteed by Article 20 of the VRD. However, no procedural accommodations are laid down in the law.

Research in Hungary also revealed that while the law theoretically allows for procedural accommodations, in practice victims with disabilities are not perceived as being credible.



[...] the criminal procedure prescribes that a person, from whom a reliable witness statement cannot be expected, shall not be heard as a witness. This can lead to the exclusion of persons with disabilities based on their disability status.⁵¹

In Romania, victims shall always be heard during proceedings. National law (Article 111(6) Criminal Procedure Code) lays down the following possible procedural accommodations:

- Adapted premises;
- Hearing victims through or in the presence of a psychologist or other victim support professional;
- Video conference or other technical means of communication at the place where they are granted temporary accommodation, such as, for example, shelters for victims of gender-based violence.

50 Interviewee BG/I/8

51 Interviewee HU/FG/1

Interviews revealed that authorities often fall short of offering victims with disabilities the necessary procedural accommodations.



I don't think there is a difference between the way a person with a disability is heard and a person without a disability. I have personally been to a hearing of a person without a disability and I could make a comparison - in both cases they are trying to find out information and use sterile, formal language. Not much freedom is given to the person to say, in their own words, what happened. I have noticed this in both disability and non-disability hearings.⁵²

In conclusion, it should be mentioned that several shortcomings have been identified in the way individual are carried out. For example, in Slovakia, while the Victims Act recognises that law enforcement agencies, the court and support services must pay attention not only to the seriousness of the crime but also to the circumstances of the crime when assessing the victims' vulnerability (Article 3(7)⁵³), there are no specific provisions or guidelines governing individual assessment. Although a methodology for individual assessment was adopted in 2021, it is unclear to what extent competent authorities understand and implement it. An Hungarian focus group revealed that, at the criminal trial stage, "individual assessment very much depends on the qualities of the judge presiding over the case, mainly through self-training as there is a lack of official trainings and guidelines."

In Bulgaria, national legislation includes the VRD provisions. An expert mentioned during the interview:



Yes, there is a tool called individual assessment. It is described in detail. Now, whether it is good or not is another matter. It is not good, to be precise. But even as it stands, there is no one to make it work because whoever has to do the individual assessment does not know what they are doing.⁵⁴

52 Interview with a professional (RO.I.9):

53 Ministry of Justice of the Slovak Republic (2017) ZÁKON z 12. októbra 2017 o obetiach trestných činov a o zmene a doplnení niektorých zákonov, 274/2017

54 (BG/I/6)

The Romanian research revealed that national legal provisions concerning the individual assessment are aligned with the VRD. As of 2024, Article 22 of the VRD has finally been transposed, but it is not yet being implemented. New legislation outlines specific criteria which should be included in the individual assessment and a protocol for how it should be recorded; results of the assessment are included in the Assessment Report and a new assessment can be requested by the judicial authorities if the first loses its relevancy. The quality of these assessments, when available, was, nevertheless, considered doubtful by interviewees.

STRATEGIC LITIGATION AND PROCEDURAL ACCOMODATIONS

The same routes as those mentioned in relation to information rights may be available for procedural accommodations. The victim can file a request with the competent authority for the provision of procedural accommodation; the authority's refusal or failure to respond can in turn be challenged in court. Once the case is pending before the domestic court, a preliminary reference can be filed with the CJEU.

One other litigation strategy could revolve around claiming damages for failure to provide procedural accommodations or otherwise failure to implement the rights specified by the VRD. When the case is pending before the national court, the CJEU can be asked to clarify the extent to which EU law can be interpreted as (i) requiring the availability of procedural accommodations or (ii) entitling victims to direct claims for damages as a breach of EU law.

It is important to note that a CJEU ruling will reach far beyond the national jurisdiction, therefore clarifications or expansions of minimum standards from this Court have significant impact across the EU.

In Hungary, an expert noted (HU/FG/1):



strategic cases should be brought before civil courts, suing the police or other authorities involved in criminal procedure, claiming that the rights of persons with disabilities as victims are not enforced or that their rights are not respected or guaranteed in practice. Preliminary reference procedures can be initiated in these civil cases, likely with better effect than in the criminal procedures.

6.1.4 Legal capacity

AT THE EUROPEAN AND INTERNATIONAL LEVELS

The VRD does not include any direct provision on legal capacity. Legal capacity is defined as the ability of an individual to act under the law as an agent for themselves, with the power to engage in transactions and create, modify or end legal relationships.⁵⁵ It is one of the most contentious issues that a person with intellectual or psycho-social disability has to deal with.

More often than not, a extent of a person's disability is related to the lack trust society has in them to make personal decisions; to be in control of their relationships with those around them and to make their own mistakes. Consequently, persons with disabilities are often fully or partially deprived of their capacity to create, modify or end legal relationships – which leads to them not being recognised as able to act before authorities. Hence, they become invisible to the legal system, their will is subsumed by that of their representative – their guardian.

Article 12 of CRPD enshrines persons with disabilities' right to legal capacity on an equal basis with others. In this regard, the CRPD Committee has condemned capacity assessments for persons with disabilities as being discriminatory⁵⁶, highlighting that such an approach "presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right — the right to equal recognition before the law." However, in recognising that sometimes persons with disabilities may not be able to make decisions independently, the CRPD introduced, by virtue of Article 12, the concept of supported decision-making.

While all four of the countries in the present document have ratified the CRPD without reservation, they all fail (to different extents) to fully embrace the capacity of persons with disabilities to make their own decisions when interacting with the legal system.

In the context of the VRD, victims with disabilities, if under guardianship, may experience difficulties in accessing the criminal justice system. They may be limited in their ability to report the crime, testify at court, have their testimony taken seriously, or to access remedies. Furthermore, legal guardians entrusted with the well-being of persons with disabilities may turn out to be their abusers.

From the perspective of the EU's Charter of Fundamental Rights, restrictions of legal capacity may be seen through the lenses of a denial to access justice (Article 47) or violations of the principle of non-discrimination (Article 21). Thus, legal capacity can present a cross-cutting obstacle to exercising rights for victims in the criminal proceedings.⁵⁷

55 Committee on the Rights of Persons with Disabilities, general comment No. 1 (2014) on equal recognition before the law, para. 12, <https://atlas-of-torture.org/en/entity/6077tnbn376?page=3>

56 Committee on the Rights of Persons with Disabilities, general comment No. 1 (2014) on equal recognition before the law, para 15.

57

AT THE NATIONAL LEVEL

Observing the national situations of the Member States in this Guidebook, Hungary's legal capacity restrictions appear to have the most far reaching impact. As courts may restrict an individual's capacity to initiate litigation, they require their guardian's approval to start any legal or procedural activity. The guardian therefore acts on behalf of the person and their actions are to be viewed as if they were taken by the person. It is only the guardian who has the power to appoint an attorney to represent the person with disability (defense attorney, attorney for the victim or witness).

Conversely, it does not appear that the lack of legal capacity results in a denial of access to court in Romania. Here, the deprivation of legal capacity results in a legal representative being appointed for the person with disabilities.

Furthermore, individuals retain the right to be accompanied by a person of their choice during the various procedural steps. However, it seems difficult to ensure that persons with disabilities completely understand the process and can thus, independently, choose a person of trust. It is more usual for persons with disabilities to be accompanied by their guardians and the guardians' presence will not be questioned; this may negatively impact an individual's ability to testify and pursue justice.

For example, victims may be uncomfortable about testifying on sensitive issues (such as sexual abuse) in the presence of their parents, who are often their guardians, and in turn, persons of trust. If the abuse take place within an institution and the person's guardian is also the director of the institution, the guardian should not be allowed access to the victim. Hence, the role of the guardian, and the process of appointing persons of trust by victims with disabilities, should be explored further to identify the litigation potential in shortcomings such as those explained above.

In Czechia, persons under guardianship shall be advised by their guardians; however, the guardian will never replace the victim in the eyes of the court and decisions should not be made against the victim's wishes. To explore whether this process truly works in practice, questions should be asked on how this is ensured, who is entrusted with finding out the wishes of the victim, and how that can take place without the guardian's intervention.

In Slovakia, the law is ambiguous as to whether the information is to be provided solely to the representative or whether the victim should also receive it. This ambiguity also applies to choosing a person of trust and to other rights, which are mainly exercised by the guardian on the person's behalf.

In practice, this ambiguity appears to be particularly harmful for victims with disabilities. “During our work in our area, we discovered that some individuals who were entrusted with the care of people with disabilities could potentially be perpetrators of abuse against those they were supposed to care for. The issue was that the disabled individuals had no direct relationship with the caregiver, and yet they were being referred to that person for care. We were searching for someone who could assist them in standing up for their rights and reporting any criminal activities. Unfortunately, we found that this was a significant problem, as there was no institution or individual in charge who was actively addressing these issues.”⁵⁸

Research carried out in Bulgaria identified several issues related to the deprivation of legal capacity:



The right of choice of persons with disabilities is not respected, especially in cases where these people are placed in institutional setting. There is very often a conflict of interest there, as the person who represents the person with disabilities is also the director of the service or an employee there... I can quote an acquaintance of mine who I talked to, he's an investigator, and he says, "Nobody gets involved with us or talks to us if it becomes clear that the person is under a legal guardianship [...], things end there."⁵⁹

Finally, in all the jurisdictions analysed, research highlighted that deprivation of legal capacity affects the perception of the victim's credibility throughout the proceedings. As noted in an interview with a victim support professional in Bulgaria, the consequences of discrediting a person with disability may lead to their statements being rejected⁶⁰. Additionally, victims and witnesses with disabilities may be perceived as being “unreliable sources of information and a burden to the justice process rather than essential participants”⁶¹.

STRATEGIC LITIGATION AROUND DEPRIVATION OF LEGAL CAPACITY

From the perspective of EU law, given that legal capacity is not directly regulated therein, it is important to assess the extent to which legal capacity can be mainstreamed across the VRD.

For example, it would be important to determine whether EU law prohibits situations where a person is not heard as a witness or is not allowed to be represented by a person of their choice due

58 LITIGATE focus group, 26/3/2024. 31:45-32:30

59 Interview I/BG/6:

60 Genova, A. and Krasteva, M. (2022) Voices for Justice: Victims of crime with disabilities in Bulgaria, p. 34

61 Ibid, p. 39

to legal capacity restrictions. The CRPD Committee also condemns legal capacity assessments and the CJEU can be asked if the VRD should equally be interpreted to prohibit such assessment.

Nevertheless, while persons with disabilities should always be able to make their own decisions regardless of any evaluation of their legal capacity, an individual needs assessment may be required to ensure a victim with disabilities will experience the best outcomes from participating in criminal proceedings. Such an assessment should help ensure that victims' experiences can be fully captured during the proceedings, and that secondary victimisation is prevented.

For example, as some victims with disabilities may experience difficulties understanding concepts of time and space, an individual needs assessment can ensure that expertise is brought in to introduce appropriate procedural accommodations. In line with such an assessment, for example, a recommendation could be made for questions to be asked in such a way that allows the victim to fully encapsulate their experiences. A litigation strategy might be built around a case pending at the national level, where such procedural accommodations are not being put in place.

For the latter example, the Bulgarian report has identified that forensic reports shall be administered to test the victim's capacity to testify. Thus, questions to the CJEU can be submitted whenever domestic courts request the administration of such forensic reports. If the forensic report is administered by a law enforcement officer (eg a public prosecutor), the decision can be challenged in court as being incompatible with the VRD. The preliminary reference question can be included directly in the court challenge.

In view of the above, some questions for consideration by the CJEU could include:



Does Article 10 VRD, read together with Articles 20 and 21 of the EU Charter of Fundamental Rights, allow for the participation of a person with disabilities in proceedings to be dependent on a prior capacity assessment?

An alternative could be:

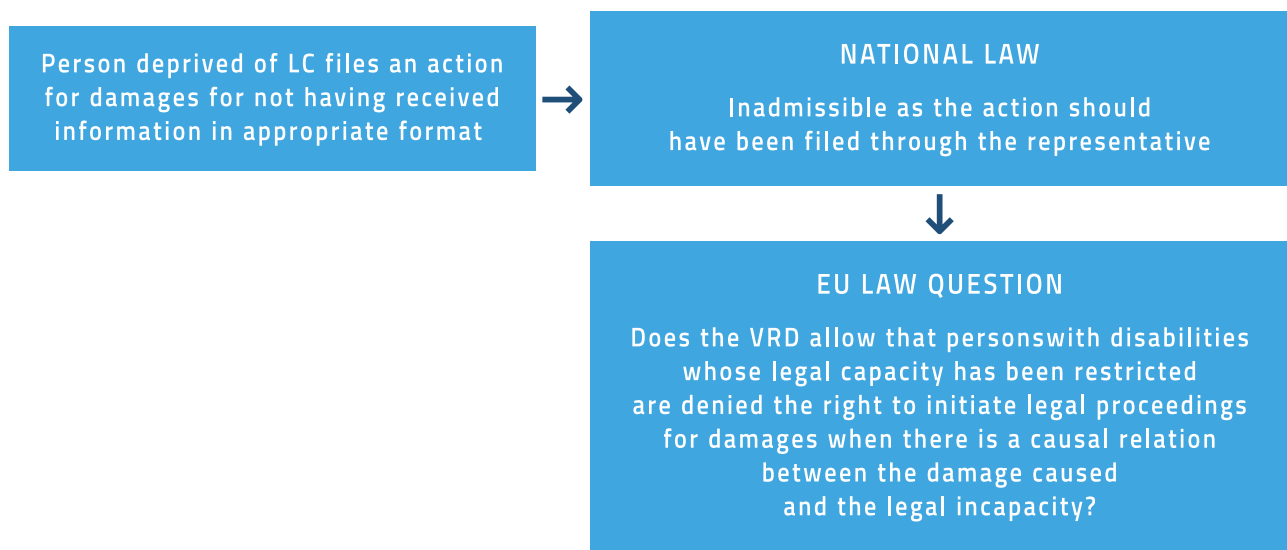


Does Article 10 VRD require that procedural accommodations are in place to support a person with disabilities to exercise their right to be heard directly in criminal proceedings? Do these procedural accommodations take into consideration the individual needs of persons with disabilities and provide for their genuine participation in criminal proceedings?

This question is relevant in situations where national law denies persons with disabilities the right to be heard directly or where no procedural accommodations are available.

Furthermore, failure to provide procedural accommodations in a given case could give rise to a national action for damages: the person with disabilities should show the damage. A preliminary reference could be sent to the CJEU to clarify whether the VRD includes a right to reparation for victims whose rights as laid down in the VRD have not been restricted. In cases of persons deprived of legal capacity, their incapacity to file national legal proceedings is an obstacle in initiating this type of litigation. However, even if the action is inadmissible as a matter of national law, if the question to the CJEU affects the inadmissibility, then in principle the domestic court is obliged to refer the question.

The graphic below describes this situation:



6.2 LITIGATION REGARDING THE RIGHT TO VOTE IN THE EUROPEAN PARLIAMENT ELECTIONS

6.2.1 The Right to vote in the European Parliament elections under international and European Union law

The European Parliament has 705 Members (the MEPs) elected from the 27 Member States by direct universal suffrage for a five-year period.⁶²

The right to vote for Members of the European Parliament is laid down under (i) Article 14 of the TEU, (ii) Articles 20, 22(2) of the TFEU, (iii) The Act concerning the election of the representatives of the Assembly by direct universal suffrage (the "1976 Act"), (iv) the Council Directive 93/109/EC (the "EP Elections Directive") and (v) Article 39(1) and (2) of the EU Charter. In addition, Articles 21 and 26 of the EU Charter explicitly prohibit discrimination on the grounds of disability and provide for equal participation of persons with disabilities in society.

It is important to note that Member States have the liberty to define conditions under which their nationals can vote. This means that, for example, in 21 Member States, people aged 18 and above can vote. In Belgium, Germany, Austria and Malta, the minimum voting age is 16. In Greece, people who turn 17 during the election year can vote, while in Hungary married individuals can vote regardless of age⁶³.

6.2.1.1 *The right to vote and stand in European Parliament elections*

AN EU NATIONAL RESIDING IN A MEMBER STATE OTHER THAN THE MEMBER STATE OF ORIGIN

The EP Elections Directive⁶⁴ lays down detailed arrangements whereby citizens of the EU residing in a Member State of which they are not nationals may exercise the right to vote (and to stand as a candidate) in elections to the European Parliament. Based on Article 3 of the Directive, the right to vote is vested in any person who:

- is an EU citizen,
- is not a national of the Member State of residence but satisfies the same conditions in respect of the right to vote as that State imposes by law on its own nationals.

⁶² This Guidebook has been last updated on 31 May 2024. By the time of its publication the European Parliament Elections will have taken place.

⁶³ Reuters, European election 2024: How does it work and who can vote?, 7 June 2024, available at: <https://www.reuters.com/world/europe/key-facts-about-european-parliament-election-2024-06-03/>

⁶⁴ ADD REFERENCE TO THE DIRECTIVE, LINK ETC, plus reference to articles previously mentioned in the body text: This situation is regulated under Articles 20 and 22(2) of the TFEU, the EP Elections Directive as well as Article 39(2) of the EU Charter.

In light of the above, persons with disabilities, voting in a Member State other than the State of their nationality, must be allowed to vote under the same conditions as nationals. Therefore, if for example reasonable accommodations for voting are provided to nationals with disabilities, the same accommodations must be provided to non-national residents with disabilities.

In this vein, if the country of residence allows for more favourable voting conditions, these conditions should apply. The fact that conditions for voting are laid down by Member States confirms that, when it comes to persons with disabilities, legal capacity may represent a barrier to voting in EU Parliament elections. Namely, in a number of EU Member States, such as Bulgaria, persons who are placed under guardianship do not have the right to vote or to stand as a candidate in any election, including elections for the EU Parliament. This might mean that a person under guardianship from, for example, Italy or Croatia, would not be able to vote in Bulgaria. This would put them in a more disadvantaged position than they would have been if they had voted in their home country.

The CJEU would be competent to adjudicate on questions concerning such a situation.



Questions for persons with disabilities

Are you a person with disability living in a country other than your country of nationality?

Are you able to vote in the same way as other persons with disabilities vote in that country?

In the upcoming European Parliament Elections, are you treated differently to other persons with disabilities living in your country of residence?

If you cannot vote in the same way as other persons with disabilities in your country of residence, this can constitute discrimination under EU law?

The situation of EU nationals residing in their Member States of origin is regulated under Article 20(2) TFEU, Article 14(3) TEU and Article 1(3) of the 1976 Act. As the CJEU has stated in the *Delvigne* judgment, these Articles are to be interpreted in the light of Article 39 (2) of the EU Charter.

The Charter's application in this scenario was uncertain until the 2015 *Delvigne* judgment (*Delvigne v Commune de Lesparre-Medoc, Préfet de la Gironde*, C-65/13, judgment of 6 October 2015). In the *Delvigne* case, the CJEU found that an individual's right to vote existed under Articles 14(3) TEU and Article 1(3) of the 1976 Act, which should be interpreted in light of Article 39(2) of the EU

Charter. In other words, the right to vote in the EU Parliament elections is now a standalone right and subject to EU law.

However, in its Concluding Observations of 2015, the CRPD Committee noted with deep concern that across the EU, persons with disabilities, especially those deprived of their legal capacity or residing in institutions, cannot exercise their right to vote in elections and that participation in elections is not fully accessible. The Committee recommended that the EU take the necessary measures, in cooperation with its member States and representative organizations of persons with disabilities, to enable all persons with all types of disabilities, to enjoy their right to vote, including by providing accessible communication and facilities.

Under the CRPD, the right to vote is laid down under Article 29 which covers the right to vote and to stand in elections for persons with disabilities. Pursuant to this Article, State parties must (i) ensure that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use, (ii) persons with disabilities as electors can freely express their will and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice, and (iii) protect their right to vote by secret ballot in elections and public referendums without intimidation.

The right to stand in elections is regulated similarly to the right to vote. It has also been recognised by the CRPD Committee, in line with the above, that persons with disabilities shall be allowed to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate. It is, again, important to distinguish between two scenarios as follows:

- a. the right to stand in elections when freedom of movement has been exercised. This situation applies to EU citizens with disabilities who reside in other country than their country of nationality.
- b. the right to stand in elections when freedom of movement has not been exercised. This situation applies to EU citizens with disabilities who reside in their country of nationality.

The CJEU has not yet delivered any judgment on the right to stand for elections. Without further interpretation from the CJEU, EU law only guarantees a right not to be discriminated on grounds of nationality when standing for European elections in a country that is not the EU citizen's country of origin.

In addition, according to Article 6 of EP Elections Directive – which only applies in cross-border situations – an EU citizen shall be precluded from exercising their right to stand in the Member State of his/her residence, if they have been deprived of such right under either the law of the Member State of residence, or the law of the Member State of origin, through an individual judicial decision or an administrative decision (e.g. the placement under guardianship).

6.2.2 The Right to Vote and to Stand in Elections at the national level

LEGAL CAPACITY AS A BARRIER TO EXERCISING THE RIGHT TO VOTE AND TO STAND IN ELECTIONS

Restrictions of legal capacity affect persons with disabilities' right to vote. In the countries surveyed, deprivation of legal capacity can make it absolutely impossible to exercise the right to vote (Bulgaria), or such deprivation can be the result of an individual assessment whereby a judge decides on a case by case basis whether a person can vote (Czechia, Hungary and Romania). Both approaches are out of step with the CRPD; however, they require different litigation strategies from the perspective of EU law.

In Bulgaria, the Constitution denies persons deprived of legal capacity - either fully or partially - the right to vote. This is the most far reaching restriction of the right to vote and contravenes the relevant ECtHR case-law.

Romanian legislation in relation to legal capacity was overhauled in 2022. Previously, persons with disabilities may have been deprived of their right to vote by the individual decision of a judge. It remains unclear how the new legal provisions will affect persons with disabilities' right to vote.

In Czechia, Slovakia and Hungary, the right to vote for persons whose legal capacity has been restricted is subject to an individual assessment by a judge. In Hungary it has been highlighted that the individual assessment is usually an additionally stigmatizing factor for persons with disabilities, and yet another practice separating them from other citizens who are not subject to any tests to determine their fitness to vote.

Conversely, the Slovak report highlighted that the focus should move from assessing the capacity of persons with disabilities to determining how they can be supported when exercising their rights. Such an approach has not yet been undertaken in any of the countries analysed for the purposes of the present Guidebook, and remains to be explored as a potential litigation path.

The right to stand in elections follows the same rules at the national level as the right to vote.

OTHER BARRIERS TO VOTE AND/OR STAND IN ELECTIONS

In principle, persons with disabilities are allowed to be accompanied by a support person to the polling booth. In Czechia, some innovative practices enhancing accessibility have been highlighted.

For example, all ballot papers have QR Codes which direct the person to a website featuring election information in sign language or easy to read versions.

Nevertheless, significant barriers for persons with disabilities have been highlighted in other countries.

According to the Romanian report



Discussions with interviewees, particularly from the perspective of people with intellectual and/or psychosocial disabilities, revealed that the information on the ballot papers is extremely limited and generic. There are no ballot papers in simplified language. The information appearing in the polling stations is difficult to understand. There are no independent people to provide adequate information. The electoral maps are not produced in plain language. The process is quite difficult to understand.⁶⁵

Others analysed Member States identify similar problems.

6.2.3 Strategic litigation avenues

LITIGATION STRATEGIES FOR ORGANISATIONS

The CJEU has a tendency to intervene in freedom of movement cases as there is a clear link with EU law, and freedom of movement is one of the core EU freedoms. Here, countries granting fewer rights to persons with disabilities may need to adjust their legislation to the same level as the country of residence.

Two litigation strategies for ensuring the right of persons with disabilities in the EU Parliament could be considered on the basis of the Coman case. For either, it is important to identify countries whose legislation is closer aligned to the CRPD when it comes to voting for persons with disabilities. Then these provisions should be applied by association to persons with disabilities in that state.

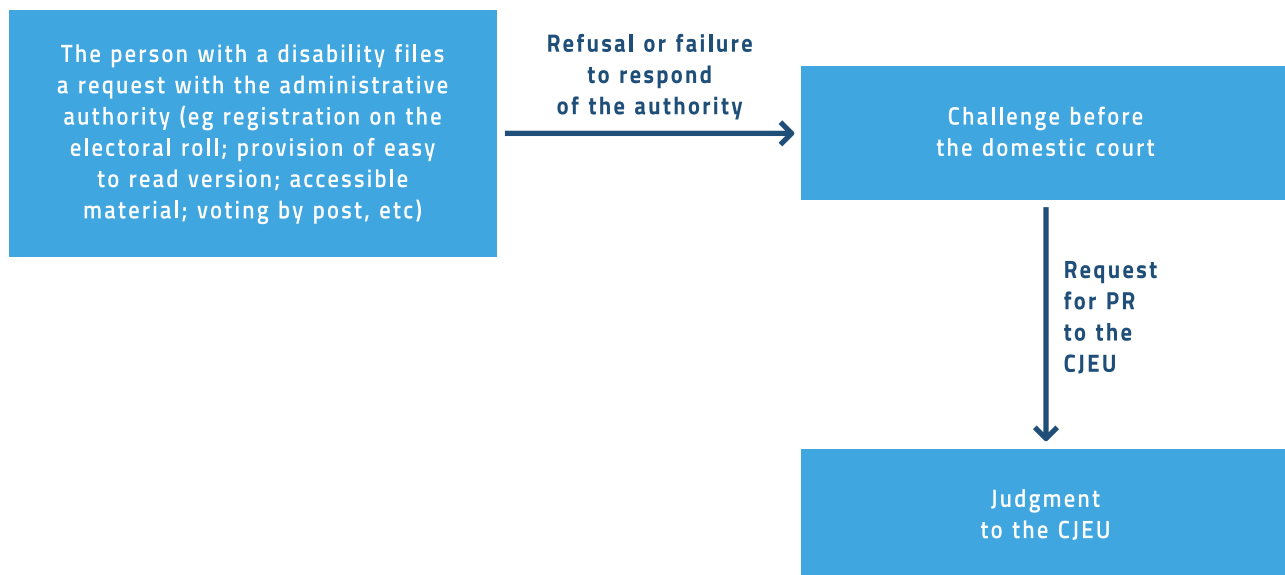
For example, a Hungarian citizen with a disability living in Romania, who has exercised the freedom of movement (i.e. has moved to Romania as opposed to somebody who has dual nationality but has never moved across the EU) should attempt to register for voting in Romania on the basis of

⁶⁵ Interview RO//6, RO//8, RO//11

(arguably) more permissive Hungarian legislation. If this is denied and the case is challenged in court, a request for preliminary references can be filed. It is important to note that the challenge here should be based on freedom of movement rather than on the EU legislation on the right to vote, as the former is more favourable than the latter.

For countries such as Bulgaria where the restriction to the right to vote is extensive (denying the right to vote to persons under guardianship) and is laid down in the Constitution (Article 42 (1)), wider actions could be considered such as the state's liability for damages (as a result of breach of EU law) and/or infringement actions with the European Commission.

In addition, for restrictions of legal capacity as well as other (technical barriers) a similar avenue to that indicated in respect of the Victim's right Directive could be pursued.



The aim would be to clarify before the CJEU, whether the envisaged restrictions are compatible with the relevant EU law and with the EU Charter of Fundamental Rights.

6.3 STRATEGIC LITIGATION FOR THE RIGHT TO INDEPENDENT LIVING FOR PERSONS WITH DISABILITIES

6.3.1 The right to independent living under international and European Union law

Article 19 of the CRPD affirms the right to live in the community of persons with disabilities. This article obliges states to take measures to facilitate the full inclusion and participation by persons

with disabilities in the community. Nevertheless, in practice persons with disabilities, especially those with intellectual or psycho-social disabilities, face many obstacles in exercising their right to autonomy. They are often thought 'unable' or 'incompetent' to live an autonomous life and to be included in the community. Paternalistic and medical models of disability often dominate and may serve as a basis for the placement of persons with disabilities in residential institutions – citing the need for rehabilitation, medical care, therapeutic aims and protection to legitimise the placement.

The CRPD Committee has issued extensive guidance aimed at supporting Member States in the deinstitutionalisation process, including [General Comment No. 5](#) and its [Guidelines on deinstitutionalization, including in emergencies](#). Litigation efforts can also aim to embed these documents into national and international court practices.

The right to live independently is also recognised under Article 26 of the EU Charter of Fundamental Rights. Furthermore, the European Union plays an active role in this field by disbursing large sums of money to Member States through the European Structural and Investment Funds (the "ESI" Funds). By providing ESI funds, the EU aims to contribute to the deinstitutionalisation processes and to assist Member States in the development of community-based services.

The disbursement of ESI funds falls under [Regulation No 1303/2013](#) and the [Common Provisions Regulation 2021/1060](#). Both Regulations affirm the EU's obligation to observe the principle of non-discrimination. Recital 6 of the Common Provisions Regulation includes the duty of the EU and of Member States to take into account the EU Charter of Fundamental Rights and the CRPD Convention whenever they disburse EU Funds. The obligation to respect the EU Charter in the payment of the Funds is reiterated in Recital 95 and Articles 9 and 73 of the Common Provisions Regulation.

This notwithstanding, the EU's commitment to deinstitutionalisation and the right to independent living by persons with disabilities has been questioned in recent years. In their [Concluding Observations](#) on the Initial Report of the European Union, the CRPD Committee recommended that the EU strengthen its monitoring of the use of European Structural and Investment Funds. In particular, the EU was to ensure that such funds are used for the development of community-based services and not for the redevelopment or expansion of institutions.

In his [visit](#) to the EU in March 2022, the UN Special Rapporteur on the rights of persons with disabilities touched upon the allocation of EU Funds. He highlighted the conclusion arrived at by the EU Commission's Legal Services: that spending money on institutions was permissible under the ESI funds regulations. He noted that the EU Commission did not rule out the issue of EU funds falling within the material scope of competence of the EU. The UN Special Rapporteur

recommended that EU money is spent in helping Member States build a different model, one which does not involve the institutionalisation of persons with disabilities.

Within the EU, both the European Ombudsman and the Fundamental Rights Agency (the FRA) have highlighted the problematic usage of EU funds by Member States, and the EU Commission's role in supervising the spending of EU money. In its [decision](#) of 27 April 2022, the EU Ombudsman found that the Commission should provide clearer guidance on the need to promote deinstitutionalisation through the use of EU funds. The Ombudsman recommended that the Commission be more proactive in its monitoring and enforcement obligations, specifically when concerns are raised on the use of EU funds for purposes that are contrary to the goal of deinstitutionalisation.

On 19 December 2023, FRA published a [report](#) on the use of EU funds. Its three main findings are as follows:

- (1) It is important to ensure greater and more meaningful involvement of civil society organisations specialising in fundamental rights;
- (2) The role mentioned under (1) can only be ensured if CSOs are provided with extra human, financial and technical resources;
- (3) Complaints procedures within Member States should be more effective so as to better identify and address violations.

However, the justiciability of the EU's allocation of its funds remains questionable. To-date, Validity Foundation, Center for Independent Living and The European Network on Independent Living have unsuccessfully challenged these awards. In a judgment delivered on 2 September 2020, in Case T-613/19, the General Court annulled as inadmissible, the action brought by these organisations.

This judgment is the result of a strategic litigation campaign aimed at preventing Bulgaria's investment of EU funds in renovating and investing in building further institutions. In practice, the applicant organisations sent a letter to the Bulgarian Managing Authority requesting they suspend a Call for Proposals on the grounds that the housing structure to be developed perpetuated the segregation and isolation of persons with disabilities, and as such was contrary to Article 19 of the CRPD.

The Bulgarian Managing Authority replied that the Call for Proposals (i.e. the award of grants financed from EU funds) met all national and international law requirements. This was then brought to the Commission's attention and the Commission was invited to suspend the Call for Proposals and any related payments, to ensure that the Managing Authority's future actions would comply with Article 19 of the CRPD.

The Commission declined to take action and their letter informing the NGO's of this decision was subsequently challenged before the EU General Court under Article 263 of the TFEU. The General Court had to identify whether the submitting organisations had standing to file these proceedings. Under well-established case law, actions for annulments are admissible if the act whose annulment is sought "produces binding legal effects capable of affecting the applicant's interests by bringing about a distinct change in their legal position."

The General Court dismissed this action as it believed that the binding legal effect of a Commission decision to suspend payments of ESI funds is aimed at the Member State to which the European Fund contribution was addressed.

The General Court left open some questions on the admissibility of such an action for annulment. In paragraph 41, the General Court ruled that the applicant organisations did not demonstrate that they were acting on behalf of specific persons with disabilities who were entitled to bring an action for annulment individually. As the Court indicated, such applicants could be persons with disabilities currently residing in institutions in Bulgaria. *Per a contrario*, litigation strategies could consider actions for annulment of disbursement of EU funds when they are filed on behalf of an identifiable group of persons with disabilities residing in institutions financed by EU funds. The same reasoning was endorsed in the appeal to this judgment, decided by the CJEU on 15 April 2021 (Case C-622/20, P. 15 April 2021).

In addition to challenging the disbursement and allocation of the funds themselves, it is important that civil society organisations understand how these funds are allocated and monitor the transparency of the process. Issues of transparency can in and of themselves form the object of litigation strategies; transparency proceedings may require domestic authorities to demonstrate how they will spend the EU funds.

Given the European Union dimension, EU law can be used to ensure Member States disclose information of public interest. Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001, regarding public access to European Parliament, Council and Commission documents, is particularly relevant in this field. Validity Foundation has been actively engaged in requesting official correspondence between the European Commission and the Government of Hungary regarding a call for proposals. After having challenged an initial refusal by the Commission, Validity Foundation succeeded in obtaining several documents concerning the consultation process and discussions between the Commission and the Hungarian Government on the deinstitutionalisation of persons with disabilities. These documents are paving the way for advocacy strategies aimed at ensuring a more effective engagement with persons with disabilities in the process of EU funds allocation.

It is important to note that the relevance of Regulation No. 1049/2001 is not limited to the right to independent living. Litigation strategies concerning the disclosure of public information could also focus on other areas of law that are relevant to persons with disabilities. For example, public information requests could target the use of EU funds in respect of the rights of victims with disabilities or the right to vote. The overall aim is to ensure transparency, to monitor how states invest EU money in accordance with the human rights of persons with disabilities.

6.3.2 The right to independent living at the national level

ESI Funds play an important role in the deinstitutionalisation process of all Member States included in the research for the present Guidebook.

Slovakia has created several national strategies and action plans, such as the Strategy for Deinstitutionalisation of the System of Social Services and Substitute Care, to guide the shift from institutional care to community-based living. The implementation of these strategies has been financially supported by allocations from the ESI Funds, specifically the European Social Fund (ESF) and the European Regional Development Fund (ERDF).

In Czechia, ESI funds have been allocated to various operational programmes, which are designed to address specific country-wide priorities and needs. The use of ESI Funds in the Czech Republic is governed by the national authorities in accordance with a regulatory framework established by the European Commission.

In Bulgaria, ESI funds in the field of independent living were organised under the operational programme "Regions Growth 2014-2020." Between 2014-2020, 3 billion Leva have been made available to Bulgaria for 8 priority agreements. Deinstitutionalisation of persons with disabilities falls under Priority Axis no 5 "Regional social infrastructure" which has a total budget of 50,8 million EUR.

Hungary received 25 billion EUR in ESI funds between 2014-2020, for 9 national and regional programmes.⁶⁶ A total of 26.1 billion EUR (21.7 billion EUR EU and 4.4 national contribution) has been allocated for 2021-2027.⁶⁷ Part of this funding has been blocked by the EU due to rule of law and other concerns. The Hungarian Government⁶⁸ announced that it had already received an initial payment of 445 million Euros. The funding specifically targets measures to help disadvantaged groups and to tackle inequalities.

66 https://ec.europa.eu/regional_policy/sources/policy/what/investment-policy/esif-country-factsheet/esif_funds_country_factsheet_hu_hu.pdf

67 <https://cohesiondata.ec.europa.eu/countries/HU/21-27>

68 <https://kormany.hu/hirek/megekerzett-a-2021-2027-es-kohezios-forrasok-also-reszlete>

While the ESI funds are designed to support deinstitutionalisation and the creation of community based services for persons with disabilities, all the national reports indicate that these funds have been consistently used, not to support a genuine deinstitutionalisation process, but rather to refurbish old institutions or to build smaller institutions for up to 50 persons with disabilities.

For example, according to the guidelines approved by an order of Bulgaria's Ministry of Regional Development and Public Works, the EU grants will be used for the construction, repair, reconstruction, or renovation of building stock of 'residential services for persons with disabilities and older persons'. A table on page 15 of the guidelines states that 6 day centres and 68 accommodation centres for people with various disabilities will be built as residential services.⁶⁹

Meanwhile, the Czech Republic has been transforming large-scale facilities into community-based outreach services; though, in its National Recovery Plan, the government has contributed to renovating and modernising large-scale facilities. An NGO representative interviewed for the purposes of the present report declared: "While the EC emphasises community-based services, national authorities often prioritise institutional settings due to entrenched interests"

In Hungary, ESI funds have mostly been distributed to EFOP (*Emberi Erőforrás Fejlesztési Operatív Program Plusz*) or VEKOP projects⁷⁰; the EFOP project's outline expressly mentions promoting independent living for persons with disabilities. The EFOP Plusz programme has been launched for 2021-2027 and priority 4 mentions independent living.⁷¹ The EFOP-1.9.1-VEKOP-15 project also specifically mentions deinstitutionalisation.⁷²

As the CRPD Committee pointed out, in 2011, Hungary launched a strategy to move persons with disabilities living in institutions of more than 50 people to small group homes.⁷³ As a result, 655 persons with disabilities were moved to smaller residential settings.

A second phase of this process, targeting 10,000 persons with disabilities, started in 2017 and is due to finish in 2036. Both phases rely mainly on the European Regional Development Fund, which has been used primarily to build smaller residential settings.⁷⁴

Official statistics reveal that the public budget allocation for persons with disabilities in the social sector prioritises the provision of specialised institution-based social services, is funded primarily

69 See for example the Bulgarian Government's submissions to the Council of Europe Committee of Ministers in the context of the execution of the Stanev/Stankov group of cases (available [here](#)).

70 <https://www.palyazat.gov.hu/programok/szechenyi-terv-plusz/efop-plusz>

71 https://archive.palyazat.gov.hu/emberi_eroforras_fejlesztési_operatív_program_plusz and <https://www.palyazat.gov.hu/programok/szechenyi-terv-plusz/efop-plusz>

72 Government decision 1037/2016. (II. 9.).

73 Assisted living, Act no. III. of 1993 on Social Care, Section 75.

74 CRPD Inquiry Opt. Prot. Art. 6.

by the European structural and investment funds and is not being used to develop community-based support for independent living in compliance with article 19 of the Convention.⁷⁵

Public funds, including funding from the European structural and investment funds, continue to be invested in building, renovating and expanding large- and small-scale institutions, thus removing resources that support independent living and the development of accessible, community-based services which foster inclusion⁷⁶

The Slovak report is the only one to mention that ESI funds have actually contributed to the development of community-based services for persons with disabilities. According to a participant in the Slovakian focus group: "It has become increasingly evident that community services are lacking in some way. This has been addressed in several strategic documents, not only in the deinstitutionalisation strategy, as well as other associated strategies. It would be great to see a continued effort to develop these services."⁷⁷

Ensuring that persons with disabilities are involved in the allocation of ESI funds is key to successful deinstitutionalisation. However, except for Slovakia, the national reports indicated that governments have approached the community participation of persons with disabilities in a formal manner. Additionally, some national authorities have consulted with organisations that are also service providers in the deinstitutionalisation process, and thus are the direct recipients of the envisaged funds and have little interest in criticising the process of resource allocation.

For example, an interviewee in Bulgaria (BG/I/8) declared: "As a member of the working group on deinstitutionalization of adults with disabilities at the Ministry of Labour and Social Policy, I have observed from within that the group includes several NGOs for and of people with disabilities, which are traditionally perceived as representative and/or are themselves service providers, [...]. It strikes me that not all organisations advocating for people with disabilities are included in this group, but I am not aware of the reasons for this. In this sense, some groups of persons with disabilities are consulted in this process partially and selectively."

Bulgaria's draft programme "Building the community infrastructure for the provision of social services", was published by the Ministry of Labour and Social Policy without prior community consultation or with persons with disabilities. Information about this programme has never been published in an easy to read manner.

75 Ibid. para 72.

76 Conclusion of CRPD inquiry Opt. Prot. 6.

77 LITIGATE focus group, 26/3/2024. 1:54:53-1:55:23

In Hungary it was noted that the Government regularly says that NGOs are to be consulted vis-à-vis deinstitutionalisation.⁷⁸ However, in its Inquiry proceedings against Hungary, the CRPD Committee concluded that “available information indicates that organisations of persons with disabilities receiving public funding are less inclined to express openly dissenting opinions about government policies.”

In November 2018, several members of the National Council of Organizations of Persons with Disabilities signed a partnership agreement with the Government aimed at reviewing the transition from large-scale institutions to deinstitutionalisation. However, grass-roots organisations and the persons concerned do not appear to have been meaningfully involved.

Civil society organisations had also informed the CRPD Committee that they had experienced reprisals for criticising governmental disability-related policies, such as restrictions in their independent monitoring of social services – including institutions – for persons with disabilities.⁷⁹

In Czechia, a non-governmental organisation (JDI) whose comments to the government’s deinstitutionalisation plan were not taken into account, successfully engaged with the European Commission. After sending the Commission a letter detailing their concerns, the Czech Government agreed to meet with the organisation and to change the way funding calls were handled.

As a final point, significant problems with the transparency of proceedings at the national level were highlighted in the Hungarian report. The European Commission has identified bid rigging, or collusive tendering, as one of the most frequent problems in public procurement; representing 60% of corruption forms encountered in Hungary.⁸⁰

Over the past few years, numerous contracts have reportedly been awarded to a relatively small number of companies, which may be an indicator of insufficient competition or potential corruption.⁸¹

The focus group HU/FG/1 also raised similar concerns, citing corruption and a lack of oversight and accountability as key issues. The focus group also highlighted that – at this time – Hungary is not part of the European Public Prosecutor’s Office. Furthermore, they added that “*projects are often held below the threshold of EU level monitoring, often breaking down projects into separate smaller funds*”.

78 See Government decisions on the tasks related to deinstitutionalisation no. 1257/2011. (VII. 21.), 1023/2017. (I. 24.), 1295/2019. (V. 27.)

79 https://efoesz.hu/wp-content/uploads/2017/09/Feljegyz%C3%A9s-kiv%C3%A1lt%C3%A1s_G%C3%B6d_2.pdf

<https://www.meosz.hu/blog/meosz-a-fogyatekos-emberek-jogainak-ervenyesiteert-kuzda-kitagolas-folyamataban/>

80 European Commission (2013), Identifying and reducing corruption in Public Procurement in the EU

81 Anticorrp (2015), Project Anti-Corruption Policies Revisited, WP8 - Corruption, assistance and development, D8.1.4 The political economy of grand corruption in public procurement in the construction sector of Hungary, available at: <http://anticorrp.eu/wp-content/uploads/2015/06/D8.1.4-Hungary.pdf>

While there are no official statistics available, cases related to public data requests are typical in Hungary. According to a report by the Supreme Court (Kúria) on judicial public data request cases⁸², 70% are successful, meaning that the court orders the defendant to provide or publish the data requested.

The prevalence of such cases is partly due to the lack of published public data and voluntary fulfilment of transparency requirements by public bodies. Another key reason is that public data requests are generally declined by organisations and public entities; therefore, individuals and NGOs must turn to the courts to gain access to public data. It is common practice for public authorities refuse the request for public data without providing a reason. They may cite a legal basis for their decision, sometimes referring to multiple, even contradictory legal bases (e.g. the data does not exist and it is not public data; the data is used for decision-making and it is not public data).

Even though the courts tend to reverse decisions made by public authorities, it is important to note that court proceedings are costly and lengthy, and having to initiate transparency proceedings for each case affects the advancement of the substance of the cause: in this case the creation of CRPD compliant community-based services.

In Bulgaria, calls for tenders for the use of ESI funds are not available in accessible formats and they are poorly publicised.

6.3.3 Strategic litigation avenues

Litigating the right to independent living through the use of EU funds is challenging in that, despite the funding, the EU Commission does not accept that it has competence in these matters. At the same time, as shown in the Case T-613/19, the General Court and later the CJEU seem to accept that beneficiaries of the funding are the Member States rather than individuals.

However, we should highlight that the door has been left open for persons with disabilities directly affected by the measures; persons with disabilities living in institutions (including small group homes) may have standing to challenge the allocation of EU funds before the CJEU. So far, such cases have not been brought to the CJEU because persons with disabilities living in EU funded group homes face reprisals should they wish to challenge the use of these funds. For example, in Bulgaria where there is no opportunity for subsidised housing or other forms of independent living, challenging the use of EU funds for persons with disabilities living in group homes exposes them to homelessness.

82 2017.EI.II.J.GY.P.3. A „közérdekű adatok kiadásával kapcsolatos perek” bírósági gyakorlata tárgykörére felállított joggyakorlat-elemző csoport összefoglaló véleménye – available in Hungarian only.

At the time of writing, in Bulgaria a case is pending where persons with disabilities, acting as self-advocates, have filed administrative proceedings. They argue that the construction of accommodation centers ('residential services') and day centers ("segregated day services") exclusively for persons with disabilities constitutes disability-based discrimination. It is argued that this removes persons with disabilities from the community and results in the creation of an infrastructure enabling the institutionalisation of persons with disabilities. The case is currently pending before the Sofia Administrative Court. So far, the request to the court to refer questions to the CJEU has not yielded positive results.

More litigation strategies seeking to engage the CJEU could be explored in this area. In addition to preliminary reference proceedings, the area is suitable for the initiation of infringement proceedings, if national reports can adequately document the systematic nature of the misuse of EU funds.

Furthermore, strategic litigation avenues commencing with freedom of movement are equally important for the right to independent living. The relevance of freedom of movement has been discussed previously in the case of the right to vote and is equally relevant here. The example given below is a case in point.

EXAMPLE

Freedom of movement and personal assistance in higher education, when studying in another Member State

A, C-679/16, 28 July 2018

This case concerned a Finnish person with a disability, living in Estonia. The student was denied a personal assistant on the grounds that living in a foreign country meant that he could no longer be considered an habitual resident in Finland. The CJEU, ruled that the restriction on personal assistance affected the student's freedom to move and reside within the territory of the Member States. Here, freedom of movement was used to extend the rights of a person with disabilities across borders.

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LITIGATE

STRATEGIC LITIGATE GUIDEBOOK