

Decision in case 417/2018/JN on how the European Commission dealt with concerns raised about alleged human rights abuses in a social care institution that had received EU funding

Decision

Case 417/2018/JN - Opened on 23/04/2018 - Decision on 17/09/2019 - Institution concerned European Commission (No further inquiries justified) |

The case concerned how the European Commission dealt with concerns raised about alleged human rights abuses in a social care institution for persons with disabilities, which had received funding from the European Structural and Investment Funds.

While the Ombudsman expressed concerns about the time it took the Commission to provide a comprehensive response to the complainant, she appreciates that the matter was complex and that the Commission engaged extensively with the Hungarian authorities to investigate it.

On the substance, the Ombudsman finds it concerning that the Commission's interpretation of a key provision of the United Nations Convention on the Rights of Persons with Disabilities is at odds with that of the responsible UN Committee. While the Ombudsman accepts that, in this case, the Commission did not have a legal basis enabling it to recover the EU funds spent on the social care institution, this suggests that the Commission might need to address the lack of an appropriate legal basis for the future. The Ombudsman thus made suggestions for improvement to the Commission and will pursue this important matter in the context of another complaint submitted recently to her Office.

Background to the complaint

1. The complainant, a Hungarian NGO [1] contacted the European Commission to raise concerns about serious human rights abuses in a social care institution housing children and adults with disabilities ('the social care institution'). The social care institution had received funding from the European Structural and Investment Funds [2] .
2. The complainant wrote to the Commission on 6 May 2017, including a copy of its report 'Straightjackets and Seclusion', which describes the situation in the social care institution and how people were treated there [3] . The complainant claimed that the situation in the social care



institution breached the EU Charter of Fundamental Rights ('the Charter') and international human rights law [4] . It argued that allocating EU funds to the social care institution breached the Charter and the rules governing EU funds [5] , and it argued that financing institutional care for persons with disabilities is prohibited [6] . The complainant said that, instead of closing existing institutions and moving persons with disabilities to community-based services, Hungary was using EU funds to refurbish old institutions and build new ones. The complainant asked the Commission to take swift action on the issue.

3. The Commission replied on 23 October 2017, informing the complainant that it was carrying out further analysis as to whether the Charter applies to the issues raised by the complainant.

4. Having received no further reply, the complainant turned to the Ombudsman on 26 February 2018.

The inquiry

5. The Ombudsman opened an inquiry concerning the Commission's failure to send a comprehensive reply to the complainant within a reasonable amount of time.

6. In the course of the inquiry, the Ombudsman received a copy of the Commission's reply to the complainant. The Commission also sent to the Ombudsman its internal analysis and correspondence exchanged with the Hungarian authorities, which it had disclosed to the complainant. Subsequently, the Ombudsman received a further reply from the Commission and the complainant's comments.

Arguments presented to the Ombudsman

7. The complainant was concerned, in particular, that the Commission had failed to investigate the matter thoroughly and within a reasonable amount of time. The complainant was further concerned that the Commission had not taken any action against Hungary. It claimed that the Commission should monitor whether projects and organisations that receive EU funds respect fundamental rights.

8. In its reply to the complainant, the Commission apologised for the delay in replying, which it said was due to the complex legal analysis that had been required. The Commission further said that:

- It had looked into how much funding had been allocated to the social care institution and for what purposes. Based on the information received from the Hungarian authorities, a "relatively small amount" had been used to install a lighting system in 2010. In 2015, funding was allocated to address the problematic heating situation of the building, including through better insulation of the facade and replacing windows (around EUR 425 000).
- As regards how the social care institution operates, and thus the treatment of its residents, there seems to be no connection with any provisions of EU law. As such, the Charter does not



apply. Moreover, the funding merely concerned energy efficiency measures, and not the treatment of the residents. Thus, the alleged mistreatment could not be grounds for the Commission to seek to recover funds [7] .

- It had nevertheless contacted the Hungarian authorities to request information and an assessment of the situation, including how residents were treated. The Commission further requested information on remedial actions the authorities would take, should the alleged mistreatment be confirmed. In addition, the Commission reminded the authorities of their responsibilities concerning the respect for fundamental rights in the context of the projects.

9. The Commission further provided a copy of its correspondence with the Hungarian authorities:

- In its two letters of 30 May 2018, the Commission reminded the Hungarian authorities that EU funding should be granted only on condition that the final recipient respects fundamental rights in how the funds are used. Moreover, the Commission invited the Hungarian authorities to reflect on how better to monitor fundamental rights in projects receiving EU funds.
- In its reply dated 28 June 2018, the Hungarian authorities informed the Commission of the actions taken further to the complainant's report. They said that the Ministry of Human Capacities, which is the supervisory body for the social sector, carried out an inspection of the social care institution, involving independent experts. The inspection revealed that the complainant's conclusions were inaccurate. However, the investigation also revealed the need to improve the “ *human, professional and material conditions* ” in the social care institution. The Hungarian authorities therefore prepared an action plan to improve the conditions and ensure adequate care. Part of that plan was the progressive ‘deinstitutionalisation’ [8] of all residents who do not require institutionalised care, as well as transferring the running of the social care institution to the Order of Malta. The deinstitutionalisation process was to start on 1 July 2018 and finish in December 2020. The Hungarian authorities further emphasised that staff resources had been improved and that, together with the energy efficiency improvements, this had improved the quality of the services provided in the social care institution.

The Ombudsman's preliminary assessment

10. The Ombudsman informed the Commission of her preliminary view that the delay in replying to the complainant constituted maladministration. She also set out the preliminary view that the Commission should not grant EU funds to institutions that, according to the United Nations, should be closed [9] . The Ombudsman referred to the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD) [10] and a report from the EU Agency for Fundamental Rights, which recommended that the European Structural and Investment Funds should be used to promote community-based living for persons with disabilities, instead of supporting existing institutional structures [11] .

11. Regarding the **delay in replying** , the Commission stated that:

- It had treated the complainant's email as a complaint [12] , and had largely met the deadlines set out in its internal rules for assessing and replying to such complaints.
- The issues raised by the complainant were complex and required input from different sections



of the Commission. The Commission had also needed to consult the Hungarian authorities to determine the facts of the case.

- In May 2017, the Commission had asked the Hungarian authorities to provide information about projects receiving EU funds under the related funding programme. In October 2017, the Commission had sent an initial reply to the complainant. It then analysed the information it received from the Hungarian authorities to determine whether the matters entailed a breach of the Charter. In May 2018, the Commission requested further information from the Hungarian authorities, which finally sent this information on 15 November 2018.
- The time needed to reply had no impact on the situation of the residents of the social care institution, since this was the responsibility of the Hungarian authorities. The Hungarian authorities had carried out an investigation and concluded that the situation in the social care institution did not breach human rights.

12. Regarding the **substantive assessment**, the Commission stated that:

- Article 19 of the UN CRPD recognises “ *the equal right of all persons with disabilities to live in the community, with choices equal to others* ”. However, parties to the Convention are not prohibited from funding long-stay residential institutions. Moreover, there is no formal, legal definition of what qualifies as an institution.
- Long-stay residential institutions received EU funding in many countries during programming period 2007-2013. For the 2014-2020 programming period, the new European Structural and Investment Funds regulations [13] were amended to promote the shift from institutional to community-based care [14]. However, neither of the relevant regulations explicitly excludes allocating EU funds to long-stay residential institutions. Thus, the Commission does not have a legal basis to exclude support from the European Structural and Investment Funds or the concerned specific funds to long-stay residential institutions.
- Deinstitutionalisation is a gradual process, which requires the development of individualised services and making general services (education, health, housing) available to persons with disabilities. Until it can be fully achieved, there will still be people in institutional care, and there may be situations where investments in such institutions could receive European Structural and Investment Funds, without undermining the overall aim of Article 19 of the UN CRPD.
- In the context of the shared management of EU funds, Member States are responsible for drawing up the programmes and selecting the projects to be co-financed by EU funds. Member States are, however, required to make progress on ensuring independent living arrangements and deinstitutionalisation.

13. The complainant sent detailed comments in support of the Ombudsman's preliminary views. The complainant considered that the delay in replying was not justified in the circumstances. The complainant further challenged the Commission's substantive assessment, claiming that the EU should not fund institutions such as the social care institution as this undermines the goal of deinstitutionalisation and the fundamental rights of persons with disabilities.

The Ombudsman's assessment

14. The European Union is committed to safeguarding fundamental rights, including freedom



from inhuman and degrading treatment [15] , the prohibition of arbitrary deprivation of liberty [16] and of discrimination, including on grounds of disability [17] . Article 26 of the Charter specifically states that: “ *[t]he 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* ”.

15. The EU has approved the UN CRPD, whose provisions are therefore now an integral part of the EU legal order [18] . Article 19 of the UN CRPD specifically states that the parties to the Convention “ *recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community* ”.

16. The UN Committee on the Rights of Persons with Disabilities (‘the Committee’) has said that continued investment in institutional care hampers the full realisation of the right to live independently and be included in the community [19] . It considers that the parties to the Convention “ *need to phase out institutionalization. No new institutions may be built ..., nor may old institutions be renovated beyond the most urgent measures necessary to safeguard residents’ physical safety* ” [20] . Moreover, in the Committee’s view, EU funds should not be used to maintain existing institutions [21] and there is a need “ *to strengthen the monitoring of the use of the European Structural and Investment Funds so as to ensure that they are used strictly for the development of support services for persons with disabilities in local communities and not for the redevelopment or expansion of institutions* ” [22] . The Committee further recommended that “ *the European Union suspend, withdraw and recover payments if the obligation to respect fundamental rights is breached* ” [23] .

17. The Commission, for its part, maintains that (i) parties to the Convention are not prohibited from funding long-stay residential institutions; (ii) the rules governing the European Structural and Investment Funds do not explicitly exclude allocating EU funds to long-stay residential institutions; (iii) there may be situations where investments in such institutions could receive European Structural and Investment Funds, without undermining the overall aim of Article 19 of the UN CRPD.

18. On (i) and (iii), it is not for the Ombudsman to issue a definitive interpretation of Article 19 of the UN CRPD. However, the Ombudsman finds it concerning that the Commission’s interpretation is at odds with that of the UN Committee. While the General Comments issued by the UN Committee are not legally binding, they should be seen as an authoritative source when it comes to determining what is appropriate and advisable under the CRPD.

19. On (ii), the Ombudsman accepts that, in this case, the Commission does not have a legal basis that enables it to recover the EU funds spent on the social care institution. This suggests, however, that the Commission might need to address the lack of an appropriate legal basis for the future.

20. On this basis, the Ombudsman considers that no further inquiries are justified in this case



[24] . To address the issues that have been identified, however, the Ombudsman invites the Commission to:

- seek to adhere, to the greatest extent possible, to the UN CRPD Committee's guidance that EU funds should not be used to maintain existing institutions;
- consider the need to address the lack of an appropriate legal basis identified in this case to ensure that the spending of EU funds complies fully with the CRPD;
- monitor the extent to which the Hungarian authorities adhere to the deinstitutionalisation process referred to above, which was to start on 1 July 2018 and finish in December 2020.

21. The Ombudsman makes corresponding suggestions for improvement below.

22. Regarding the delay in replying to the complainant, the Ombudsman notes that, in spite of the important issues raised by the complainant on 6 May 2017, the Commission did not send an initial reply until 23 October 2017 and did not send a substantive reply until 15 June 2018, after the Ombudsman opened an inquiry. The Ombudsman further notes that, in spite of the alleged legal complexity of the matter, the Commission apparently did not consult its Legal Service until 25 April 2018, shortly after the Ombudsman opened an inquiry.

23. Given the exceptional circumstances of this case, the Commission should have dealt with the case swiftly and as a matter of priority, rather than referring to the general one-year time limit for assessing infringement complaints [25] .

24. The Ombudsman is, however, mindful of the fact that several Directorates-General of the Commission were involved, and that the issues raised by the complainant concerned both social policy and the applicable law, and were complex. Moreover, as the Commission has apologised, has informed the complainant of its position and has also attempted to address the situation in the social care institution by engaging extensively with the Hungarian authorities, the Ombudsman considers that no further inquiries into this aspect of the case are justified. Should there be similar complaints or reports in the future, the Ombudsman trusts that the Commission will act on them with greater urgency.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

No further inquiries are justified.

The complainant and the European Commission will be informed of this decision .

Suggestions for improvement



The Ombudsman invites the Commission to:

- **seek to adhere, to the greatest extent possible, to the UN CRPD Committee's guidance that EU funds should not be used to maintain existing institutions;**
- **consider the need to address the lack of an appropriate legal basis identified in this case to ensure that the spending of EU funds complies fully with the CRPD;**
- **monitor the extent to which the Hungarian authorities adhere to the deinstitutionalisation process referred to in this case, which was to start on 1 July 2018 and finish in December 2020.**

Emily O'Reilly

European Ombudsman

Strasbourg, 17/09/2019

[1] The Validity Foundation (formerly the Mental Disability Advocacy Centre).

[2] The European structural and investment funds are: European regional development fund, European social fund, Cohesion fund, European agricultural fund for rural development, European maritime and fisheries fund. The purpose of all these funds is to invest in job creation and a sustainable and healthy European economy and environment. More information:

<https://ec.europa.eu/info/funding-tenders/funding-opportunities/funding-programmes/overview-funding-programmes>
[Link].

[3] The report details signs of malnutrition, untreated wounds, people in metal caged beds, the use of chemical and physical restraints, damaged bedding and furniture, and poor sanitary conditions, among other things.

[4] The complainant referred to the European Convention on Human Rights, the United Nations Convention against Torture, and the United Nations Convention on the Rights of Persons with Disabilities.

[5] Regulation 1303/2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund:



<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R1303> [Link].

[6] The complainant referred to the United Nations Convention on the Rights of Persons with Disabilities, as well as the 'Toolkit on the use of European Union Funds for the Transition from Institutional to Community-based Care' (more information:

https://ec.europa.eu/regional_policy/en/policy/themes/social-inclusion/desinstitut/ [Link]).

[7] The Commission also sent the Ombudsman a copy of the opinion of its Legal Service, which had been disclosed to the complainant. This distinguished between the “*funding of infrastructure works at the building*” of the social care institution, which involves implementing EU law, and how the social care institution operates, which does not automatically constitute implementation of EU law merely because EU funds were used for works at the social care institution.

[8] According to the Fundamental Rights Agency (see report at footnote 11 below), “*there is no internationally accepted definition of deinstitutionalisation. The UN Office of the High Commissioner for Human Rights (OHCHR) has described it as ‘a process that provides for a shift in living arrangements for persons with disabilities, from institutional and other segregating settings to a system enabling social participation where services are provided in the community according to individual will and preference.’*”

[9] The United Nations Committee on the Rights of Persons with Disabilities has taken the view that long-stay residential facilities for people with special needs should be closed down and replaced by community-based support services allowing those concerned to live in their communities. See: *General Comment No. 5*, 27 October 2017, para. 1, 15, 42, 49, 51 and 58; *Concluding observations on the initial report of the European Union*, 2 October 2015, para. 50-51; and *Concluding observations on the initial periodic report of Hungary*, 22 October 2012, para. 33-35.

[10] Article 19 of the United Nations Convention on the Rights of Persons with Disabilities sets out to all persons with disabilities the right to live independently in the community.

[11] *From institutions to community living for persons with disabilities: perspectives from the ground*, Opinion 3, page 9.

[12] More information on the infringement procedure:

https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en [Link].

[13] Regulation 1304/2013 on the European Social Fund:

<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32013R1304> [Link]; and Regulation 1301/2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal:

<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32013R1301> [Link].



[14] Article 5(9)(a) of Regulation 1301/2013 sets as a priority the use of funds for “ *promoting social inclusion, combating poverty and any discrimination by investing in health and social infrastructure [...], promoting social inclusion through improved access to social, cultural and recreational services and the transition from institutional to community-based services* ”.

Article 8 of Regulation 1304/2013 suggests that “ *the Member States and the Commission shall promote equal opportunities for all [...]* ”, and also support specific actions, which “*shall aim to combat all forms of discrimination as well as to improve accessibility for persons with disabilities, with a view to [...] facilitating the transition from institutional to community-based care, in particular for those who face multiple discrimination* ”.

[15] Article 4 of the Charter.

[16] Article 6 of the Charter.

[17] Articles 20-21 of the Charter.

[18] C-335/11 and C-337/11, *HK Danmark v. Dansk almennyttigt Boligselskab and HK Danmark v. Dansk*

Arbejdsgiverforening , judgment of 11 April 2013, para. 30, C-363/12, *Z. v. A Government department, The Board of management of a community school* , judgment of 18 March 2014, para. 73.

[19] General Comment No. 5, 27 October 2017, paragraph 15 and 15(e).

[20] General Comment No. 5, paragraph 49, emphasis added by the Ombudsman.

[21] Concluding observations on the initial report of the European Union, 2 October 2015, paragraph 50-51.

[22] Concluding observations on the initial report of the European Union, paragraph 51.

[23] Concluding observations on the initial report of the European Union, paragraph 51.

[24] The Ombudsman will pursue some of the issues raised on the basis of a complaint lodged recently by the European Network for Independent Living.

[25] Communication from the Commission, EU law: Better results through better application (2017/C 18/02), Annex, Administrative procedures for the handling of relations with the complainant regarding the

application of European Union law, section 8:

[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0119\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0119(01)&from=EN)



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