

Decision in case 1233/2019/MMO on how the European Commission ensures that Member State governments spend European Structural and Investment Funds in line with the obligations stemming from the United Nations Convention on the Rights of Persons with Disabilities

Decision

Case 1233/2019/MMO - Opened on 17/10/2019 - Decision on 30/07/2020 - Institution concerned European Commission (No further inquiries justified) |

The case concerned the use of European Structural and Investment Funds (ESI funds) for the construction of institutional care facilities for persons with disabilities in Hungary and Portugal. The complainant considered that the European Commission should have taken action on these projects, as it believed them to be at odds with the EU's obligations to ensure people with disabilities are supported to live independently and to be included in the community.

The Ombudsman already had occasion, in the course of an earlier inquiry, to set out her views on the use of ESI funds on institutions rather than to promote independent living. The Ombudsman was encouraged by the Commission's follow-up to her suggestions in that case, received in the course of this inquiry, and in particular the greater ambition it is showing for the 2021-27 programming period.

In this case, the Ombudsman finds that, as regards the first phase of the 'deinstitutionalisation' process in Hungary, the Commission has not acted in a sufficiently timely manner. Due to the lessons learnt in that phase, however, the Commission has shown greater caution as regards the use of ESI funds to continue the deinstitutionalisation process in that Member State. In the case of Portugal, the Ombudsman trusts that the Commission will act upon the findings and recommendations of the UN and the upcoming expert report in an effective manner.

On this basis, the Ombudsman closes the inquiry. She will now examine with the members of the European Network of Ombudsmen the need for further work in this area, in particular in light of the problems encountered in institutional care facilities during the COVID-19 pandemic. She also sets out three suggestions for improvement to address the issues identified in this case.

Background to the complaint



1. The complainant is a European civil society organisation that works on disability rights [1] . It has been monitoring the use of EU funds for a number of years concerning the respect for the rights of persons with disabilities.
2. According to the complainant, Hungary and Portugal have used European Structural and Investment Funds [2] (ESI funds) in the current funding period (2014-20) to construct segregated institutions for persons with disabilities. This, they say, is at odds with the obligations of the EU, notably under the UN Convention on the Rights of Persons with Disabilities (UN CRPD), to promote the rights of persons with disabilities to live independently and to be included in the community.
3. The complainant contends that the European Commission should have sought to prevent Hungary and Portugal from using ESI funds for building such institutions.
4. In meetings and in correspondence with the Commission, the complainant expressed its concerns about specific projects and infrastructure in Hungary and Portugal, and requested concrete action.
5. Dissatisfied with how the Commission responded to the concerns it had raised, the complainant turned to the Ombudsman in June 2019. It also noted that the Directorate-General for Regional and Urban Policy (DG REGIO) had not yet replied to a letter it had sent on 26 April 2019 concerning the building of residential institutions in Portugal.

The inquiry

6. The Ombudsman opened an inquiry into how the Commission ensures that Hungary and Portugal's use of ESI funds for care facilities for persons with disabilities is in line with the legal obligations stemming from the EU Charter of Fundamental Rights, the ESI funds Regulation [3] and the UN CRPD [4] .
7. In the course of the inquiry, the Ombudsman's inquiry team met the Commission's representatives and inspected the Commission's file on this case. On 1 July 2019, the Commission replied to the complainant's letter of 26 April 2019, thereby settling this aspect of the complaint.

Arguments presented to the Ombudsman

By the complainant

8. The complainant contends that the facilities in question in Hungary and Portugal financed by ESI funds do not support the right of persons with disabilities to live independently and to be



included in the community [5] . By failing to intervene to prevent this, the Commission is directly contributing to the continued ‘institutionalisation’ of persons with disabilities, which is at odds with the EU’s obligations. [6]

- As regards Hungary

9. The complainant contends that the **Hungarian authorities** granted funding to projects to construct 189 new group homes, each for up to 12 persons with disabilities and located in remote areas. This, it says, is manifestly contrary to the EU’s and Hungary’s obligations under the UN CRPD, as many of the group homes are or will be located away from the community, in sparsely inhabited rural areas, lacking public services, with aging communities and declining populations. In many cases, group homes will be built within the grounds of current large institutions or in the immediate proximity of them. Residents of the newly built homes will be transported by minibus to the so-called ‘Service Centres’, which, in many cases, will be established in the area of the former large institutions or in some cases inside of them.

10. Despite this, the Commission has failed to take concrete action to prevent EU funds going to these projects.

11. The complainant also points to a recent UN report [7] that found that Hungary has been violating Article 19 of the UN CRPD on independent living. The complainant claims that this demonstrates that the Commission’s approach has failed.

- As regards Portugal

12. According to the complainant, in **Portugal** , a new 16-person residential institution for young people and disabled adults “ *temporarily or permanently prevented from residing in their family environment*”, was built on the Azores islands with the support of ESI funds. The complainant states that the persons living in the Azores institution do not have the possibility to live independently in the community with personal assistance. By continuing to invest in institutional care, Portugal is acting against the recommendations of the UN. [8] The complainant points out that in 2016 the UN had recommended that Portugal adopt a national strategy for living independently undertaking the necessary investments. This has not taken place to date.

13. The complainant raised concerns about this and other similar projects and met with the Commission to discuss this issue. The Commission’s responses were not satisfactory, the complainant continues, as they reveal a lack of understanding of the obligations under Article 19 of the UN CRPD. In brief, independent living cannot be organised within an institution, it said.

- As regards the Opinion of the Commission’s Legal Service

14. The complainant also takes issue with an opinion of the Commission’s Legal Service, according to which ESI funds may continue to be used for institutional care. To support its viewpoint, the complainant referred to the views of the UN Committee on the Rights of Persons with Disabilities (the UN Committee [9]). [10] The complainant argued that the Commission



should revise the legal opinion.

15. As the Commission and the Member States have shared management over the ESI funds, the complainant considers that the Commission should verify, from the outset, projects that receive these funds, with a view to preventing and addressing such irregularities. It could, for example, seek to recover such funds. It should work with the Hungarian authorities to revise the projects in question, and prevent the construction of institutional facilities. Ultimately, the Commission should launch infringement proceedings against Hungary and Portugal for denying persons with disabilities their rights to live independently and in the community.

By the Commission

- As regards Hungary

16. For its part, the Commission says that it has supported the transition from institutional to community-based living for persons with disabilities in **Hungary** during both the 2007-2013 and 2014-2020 financial periods. The Commission pointed out that those individuals to be moved to the new, EU funded, facilities would be transferred from much larger residential institutions.

17. In particular, the Hungarian authorities launched a call for proposals [11] in early 2017 to support the transition of 23 residential institutions with more than 50 persons into new housing solutions of up to 12 person apartments or houses. In some projects under this call, the construction of newly built homes for supported living has been finished and the individuals can move in. In other cases, the construction is ongoing.

18. An expert review of some of the projects funded in Hungary, delivered to the Commission in 2019, confirmed some of the weaknesses the complainant had identified and set out recommendations for the future.

19. The Commission's aim is to ensure compliance with the UN CRPD, the right to independent living and that the deinstitutionalisation [12] process is pursued in Hungary. The second stage of that process was to be implemented through a second call for proposals [13], with a view to moving in total 27 000 persons living in residential institutions to other housing solutions.

20. Given the lessons learnt during the first phase and the shortcomings identified, the Commission has raised concerns in relation to that call for proposals, in particular about the housing model and the locations of the new settings as well as the social service provision.

21. The Hungarian authorities have agreed to re-launch this call to address the Commission's concerns. The Commission will closely follow this.

22. Finally, the Commission explained in general how it monitors ESI funds. This includes discretionary monitoring measures, such as requesting expert opinions, technical meetings and information seminars with the relevant authorities.



- As regards Portugal

23. The Commission stated that the delay in replying to the complainant's letter of 26 April 2019 was due to internal consultations. Following these consultations, on 1 July 2019, the Commission informed the complainant that the current legal framework does not prevent Member States from using EU funds for residential institutions, as long as they do not obstruct the "*progress on ensuring independent living arrangements and deinstitutionalisation*". [14]

24. The Commission stated that it has not received any formal complaints as regards persons with disabilities living in institutions co-financed by EU funds in Portugal. However, it met with the Portuguese authorities and visited different regions in Portugal to get a better understanding of the situation. During these meetings, the Commission stressed the importance of Article 19 of the UN CRPD and its ultimate goal of independent living and being included in the community. Moreover, it underlined that all investments made with EU funds must comply with the Convention.

25. The Portuguese authorities have not yet transmitted sufficient information to show that their commitment towards community-based living is being implemented in line with the UN CRPD requirements.

26. As it is currently not possible to conclude whether the planned institutions and the general approach towards deinstitutionalisation in Portugal is in line with its obligations under the UN CRPD, the Commission has decided to send an expert to analyse the situation of institutions for persons with disabilities supported by EU funds in Portugal. The expert report is expected to be submitted later in 2020. [15]

- As regards the Opinion of its Legal Service

27. The Commission emphasised that EU funding aims to support the shift from institutionalised to independent and community-based living. However, as its Legal Service's opinion has made clear, using ESI Funds to support long-stay residential institutions is not prohibited. In any event, the Commission stated that it could not engage in further discussions on the topic, as it is awaiting the decision of the General Court in a case brought in 2019 by the complainant concerning the support from ESI funds to institutions in Bulgaria. [16]

28. The Commission also referred to the checks it carries out at different points in time when a project financed by ESI funds is being implemented. It also mentioned Member States' obligations as regards the principle of non-discrimination, including giving particular attention to accessibility for persons with disabilities throughout the preparation and implementation of projects. [17]

The Ombudsman's assessment



29. The establishments that the complainant takes issue with in this inquiry risk being the homes for some of the individuals in question for the rest of their lives. The information provided by the complainant, according to which some of the newly built homes are in the grounds of the former institutions, confirms that progress towards community-based living is being hampered. Similarly, the fact that some are located in rural, sparsely-populated areas with little public transport availability further suggests that the opportunities for the individuals concerned to integrate, to secure employment and to live a life in the community are even less likely.

30. The EU has approved the UN CRPD, whose provisions are now an integral part of the EU legal order [18]. Article 19 of the UN CRPD 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*”. The UN Committee on the Rights of Persons with Disabilities 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]

31. The Ombudsman agrees. The Commission’s statement that the current legal framework does not prevent Member States from using EU funds for residential institutions, as long as they do not obstruct the “*progress on ensuring independent living arrangements and deinstitutionalisation*” is difficult to comprehend. It seems obvious that EU funds spent maintaining, or worse still building, institutions cannot but obstruct progress on ensuring deinstitutionalisation.

32. The Ombudsman has already had occasion to set out her views on this matter in her decision in case 417/2018/JN [20]. In that case, the Ombudsman invited the Commission to: (i) 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; (ii) consider the need to address the lack of an appropriate legal basis to ensure that the spending of EU funds complies fully with the UN CRPD; (iii) monitor the extent to which the Hungarian authorities adhere to the deinstitutionalisation process, which was to start on 1 July 2018 and finish in December 2020. It is important to emphasise that the funds at issue in that case were used to renovate an existing institution and not, as in this case, to build new institutions, which is even more problematic.

33. The Commission followed up on this case positively [21], in particular on the Ombudsman’s suggestion that EU funds should, to the greatest extent possible, not be used to maintain institutions and should instead be used to support deinstitutionalisation. It also expressed greater ambition for the future, saying that its proposals for the 2021-2027 programming period have further strengthened the focus on the transition from institutional to community and family-based services in accordance with the UN CRPD.

34. As regards the specific projects in this case, the Ombudsman notes that the Commission has taken steps to ensure that the national authorities in question comply with their obligations. For instance, the Commission carried out on-site monitoring for the project in Portugal. It has engaged actively with the Hungarian and Portuguese authorities, and commissioned expert



reports on the situation in both Member States.

35. The Ombudsman regrets that the Commission did not act sooner as regards the first call for proposals in Hungary. The expert report, dated December 2019 [22] , identified elements that are at odds with the requirements under the UN CRPD, including weaknesses in terms of the location of the new facilities. The UN Committee has also found violations of the right to live independently under the UN CRPD in Hungary, also in projects financed by the ESI funds [23] . In addition, UN Special Rapporteurs have recently written to the Commission about the inappropriate use of ESI funds to maintain institutional care [24] . It is not clear why the Commission did not seek to suspend funds once problems were identified. [25]

36. The Ombudsman understands that the projects are now well advanced. Moreover, it appears that, in view of the lessons learnt from the implementation of this project, the second call for proposals prepared by the Hungarian authorities was suspended.

37. Concerning the projects in Portugal, the expert report analysing the nature and organisation in a sample of institutions for persons with disabilities supported by ESI funds is yet to be delivered. The fact remains, however, that the UN Committee already in 2016 recommended that Portugal adopt a national strategy for independent living [26] and the UN Special Rapporteurs have addressed the Commission as regards the use of EU funds for refurbishing two of the projects in Portugal raising concerns [27] .

38. The Ombudsman trusts that the Commission will take on board the concerns raised by the UN Committee and the UN Special Rapporteurs and study thoroughly the findings of the expert reports on the deinstitutionalisation process in Portugal, and will act upon them.

39. While the Ombudsman has identified shortcomings in this case, she is of the view that the Commission has taken action to address many of the problems identified. No further inquiries are therefore justified at this stage.

40. Having said that, the Ombudsman considers that the issue of deinstitutionalisation is of particular significance, not least because of the problems that the ongoing COVID-19 crisis have revealed. While it has proved difficult to collect data on the effect of the pandemic on persons living in institutions, research suggests that public authorities have taken insufficient measures to protect these individuals. [28] During the pandemic, innumerable deaths have taken place in institutional care facilities across the Member States. [29] People living in those facilities have faced discrimination in terms of access to treatment and support. [30]

41. In an effort to help Member States tackle the crisis, the EU has revisited the rules governing the use of ESI funds, making it easier to access them [31] . It is essential that those funds are used to uphold the rights of the most vulnerable citizens, in particular the elderly and persons with disabilities. [32] The Ombudsman now intends to examine, together with the members of the European Network of Ombudsmen, the need for further work in this area.



Conclusion

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

While the Ombudsman has identified shortcomings in this case, the Commission has taken action to address many of the problems identified. No further inquiries are justified at this stage.

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

Suggestions for improvement

To seek to address the shortcomings identified in this case, the Ombudsman makes the following suggestions:

The Commission should verify, from the outset, projects that receive ESI funds, with a view to preventing and addressing the type of issues that are described in detail in this case. It should seek to suspend funding, when necessary.

The Commission should follow up on the reports drawn up by the relevant experts in the cases of Hungary and Portugal and set out in detail the action it intends to take to address the recommendations made.

The Commission should inform the Ombudsman of the latest developments as regards the 2021-2027 programming period and how the Commission intends to strengthen the focus on the transition from institutional to community and family-based services in accordance with the UN CRPD.

Emily O'Reilly European Ombudsman

Strasbourg, 31/07/2020

[1] European Network on Independent Living (ENIL)

[2] More information on the European Structural and Investment (ESI) funds:

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

[3] Regulation (EU) No 1303/2013 on the ESI funds, available at:

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



[4] The UN CRPD, which is a legally binding treaty, came into force for the European Union as an international organisation in 2011:

<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> [Link].

[5] This right is set out in Article 19 of UN CRPD.

[6] The complainant bases its arguments on Article 26 of the EU Charter of Fundamental Rights on the Integration of Persons with Disabilities; on Article 19 of the UN CRPD on the right of persons with disabilities to live independently and be included in the community as further explained in General Comment 5 of the UN Committee; and on Articles 4, 6 and 7 of Regulation 1303/2013 on the common provisions for the ESI funds. It also refers to the decision on the own-initiative inquiry by the European Ombudsman OI/8/2014/AN:

<https://www.ombudsman.europa.eu/en/decision/en/59836> [Link].

[7] UN Committee on the Rights of Persons with Disabilities, Inquiry concerning Hungary carried out by the Committee under article 6 of the Optional Protocol to the Convention, UN CRPD/C/HUN/IR/1, 13 September 2019, paragraphs 101(f) and 101(g), which also states: “*[p]ublic funds, including European Structural and Investment Funds continue to be invested in building, renovating and expanding large and small-scale institutions. This removes resources for independent living and developing accessible, community-based services that foster inclusion*”.

[8] In 2016, the UN Committee on the Rights of Persons with Disabilities in its Concluding Observations on the initial report for Portugal (CRPD/C/PRT/CO/1) recommended that Portugal “*adopt a national strategy for living independently, including increased investment to facilitate living independently in the community rather than in institutions, that is regulate personal assistance [...] establish support services in the community for persons with intellectual and psychological disabilities*” (para. 39)

[<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsgS19RWfPJldrCFmn>]

[9] The Committee on the Rights of Persons with Disabilities (UN CRPD) is the body of independent experts, which monitors the implementation of the Convention by the States Parties [<https://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx>].

[10] The complainant points out that the UN Committee, in its letter of 10 December 2018 to the Commission (attached as annex to the complaint), essentially disagrees with the interpretation of the obligations under the UN CRPD by the Commission’s Legal Service and argues that there is an obligation on the EU to ensure that ESI funds do not go to institutional care.

[11] EFOP-2.2.2-17

[12] Deinstitutionalisation is the process of moving individuals from institutional facilities to community-based solutions, which allow independent living.



[13] EFOP-2.2.5-17.

[14] The Commission is of the opinion that it could not “ *be excluded that investments into long-stay residential institutions may serve to achieve some of the thematic objectives in Article 9 of the Regulation (EU) No 1303/2013 [14] without undermining the overall aim of Article 19 UN CRPD* ”. Article 9 of Regulation 1303/2013 refers in particular to thematic objective “ (9) *promoting social inclusion, combating poverty and any discrimination* ”
[<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R1303>]

[15] The Commission is aware of another expert study recommending that Portugal should strengthen the implementation of community-based care and set up regular monitoring mechanisms and an independent evaluation of the personal assistance schemes in place to ensure their future sustainability (*Study on Independent Living and Inclusion in the Community conducted by the Academic Network of European Disability Experts* , available here: <https://www.disability-europe.net/search?searchphrase=all&start=40>).

[16] Case T-613/19 *ENIL Brussels Office and others v Commission*
[<https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:62019TN0613>]

[17] Article 7 of Regulation 1303/2013.

[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:
<http://curia.europa.eu/juris/liste.jsf?num=C-335/11&language=EN> [Link]; C-363/12, *Z. v. A Government department, The Board of management of a community school* , judgment of 18 March 2014, para. 73: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-363/12>.

[19] General Comment No. 5, 27 October 2017, paragraph 15 and 15(e):
<https://www.ohchr.org/en/hrbodies/crpd/pages/gc.aspx>. Moreover, in the UN Committee's view, EU funds should not be used to maintain existing institutions 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* ”. The Committee further recommended “ *the European Union suspend, withdraw and recover payments if the obligation to respect fundamental rights is breached* ” [Concluding observations on the initial report of the European Union, paragraph 51].

[20] Decision in case 417/2018/JN on how the Commission dealt with concerns raised about alleged human rights abuses in a social care institution in Hungary that had received EU funding: <https://www.ombudsman.europa.eu/en/decision/en/119185> [Link].

[21] See <https://www.ombudsman.europa.eu/pdf/en/125982>



[22] “ *Assessment of the EU funded process of deinstitutionalisation for persons with disabilities in Hungary (2017-2019)* ”, dated 18 December 2019.

[23] United Nations, Committee on the Rights of Persons with Disabilities, Inquiry concerning Hungary carried out by the Committee under article 6 of the Optional Protocol to the Convention, CRPD/C/HUN/IR/1, 13 September 2019, paragraphs 101(f) and 101(g).

[24]

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25267>
[Link]

[25] Article 6 of that Regulation provides that “ *operations supported by the ESI funds shall comply with applicable Union law and the national law relating to its application* ”. Article 7 states that “ *the Commission shall take appropriate steps to prevent any discrimination based on sex, [...] disability, age or sexual orientation during the preparation and implementation of programmes* ”. According to Article 63(8) of that Regulation, “ *the Commission shall [...] (b) exclude from Union financing expenditure for which disbursements have been made in breach of applicable law; (c) interrupt payment deadlines or suspend payments where provided for in sector-specific rules. The Commission shall end all or part of the interruption of payment deadlines for suspension of payments after a Member State has presented its observation and as soon as it has taken any necessary measures [...]* ”.

[26] See footnote 8 above.

[27]

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25267>
[Link]. The two projects in Portugal listed in the letter are the following: (i) ALT20 06 4842 FEDER 000157 and (ii) ALT20 06 4842 FEDER 000087.

[28] <https://www.covid-drm.org>

[29] See, for instance,

<https://www.euronews.com/2020/05/08/the-deadly-impact-of-covid-19-on-europe-s-care-home>
[Link];

<https://www.brusselstimes.com/all-news/belgium-all-news/105848/nearly-half-of-belgiums-coronavirus-deaths-are-n>

[30] Reported also by the complainant,

<https://enil.eu/news/urgent-appeal-requesting-access-to-medical-care-in-romania/>

[31]

<https://www.consilium.europa.eu/en/press/press-releases/2020/04/22/covid-19-more-flexibility-for-deploying-eu-bud>

[32] See

<https://www.irishtimes.com/opinion/nursing-homes-must-be-made-a-thing-of-the-past-1.4257422>

