

Letter from the European Ombudsman to the European Commission concerning the strategic inquiry OI/2/2021/MMO into how the European Commission monitors EU funds used to promote the right of persons with disabilities and older persons to independent living

Correspondence - 10/05/2022

Case OI/2/2021/MHZ - **Opened on** 03/02/2021 - **Decision on** 27/04/2022 - **Institution concerned** European Commission (No further inquiries justified) |

Ms Ursula von der Leyen

President

European Commission

Strasbourg, 03/02/2021

Subject: Strategic inquiry [1] OI/2/2021/MMO into how the European Commission monitors EU funds used to promote the right of persons with disabilities and older persons to independent living

Dear President,

One of the primary objectives of transitioning away from institutional care is to enable individuals in such facilities to live their lives with dignity and participate in the community. However, the COVID-19 crisis has given added impetus to the pressing need to prioritise independent living for persons with disabilities and older persons. Recent reports that the number of persons living in institutional settings has not dropped over the past ten years in the 27 Member States give particular cause for concern.

During the pandemic, residential institutions for persons with disabilities and older persons were particularly affected. It proved very difficult, if not impossible, to protect the health and lives of people in those institutions. There is emerging evidence that the relevant authorities took



insufficient measures to protect those living in such facilities. In many Member States, instead of prioritising emergency measures to reintegrate people into the community, many institutions were locked down, with devastating consequences. [2] Annex II to this letter explores these issues in greater detail.

I have previously looked into the issue of how the European Structural and Investment Funds (ESI funds) are used in the context of the right to independent living and ending institutional care (deinstitutionalisation). This right is set out in the UN Convention on the Rights of Persons with Disabilities (UN CRPD) [3] , to which the EU is a party [4] . However, the issue of deinstitutionalisation is relevant not only to persons with disabilities but also to older persons, and other vulnerable groups in institutional facilities, as the Commission itself recognises [5] . In my decisions in two cases concerning EU-funded projects relating to residential institutions in Hungary and Portugal, I emphasised that the ESI funds must be used to uphold the rights of the most vulnerable in our society. Annex III to this letter gives more detail on this issue and the Ombudsman's previous inquiries. I would, in this context, like to thank the Commission for its encouraging follow-up to my suggestions for improvement in case 1233/2019/MMO, which my Office received recently and which has been taken into account below.

I have now decided to inquire further into the role of the Commission in ensuring that Member State governments spend ESI funds with a view to promoting independent living for persons with disabilities and older persons.

As the management of the ESI funds is a shared responsibility of the Commission and the national authorities [6] , I will ask my counterparts at national level through the European Network of Ombudsmen (ENO) to provide their input. This could possibly be based on complaints they have received about the conditions in institutional care facilities.

I believe that this inquiry will contribute to improving the living conditions of vulnerable groups, and thus to the implementation of the rights enshrined in the EU Charter of Fundamental Rights [7] and in the UN CRPD.

I would be grateful to receive your reply to the issues set out in Annex 1 by 30 April 2021 and, unless you object, would propose to publish it. I would like to thank you in advance for the Commission's reply.

The case handler responsible for this inquiry is Maria Moustakali.

Yours sincerely,

Emily O'Reilly European Ombudsman



Enclosures:

- Annex I
- Annex II
- Annex III

Annex I EO Questions in OI/2/2021/MMO

It would be helpful if the Commission could provide information on the following issues regarding the forthcoming funding period (2021-27):

(i) Could the Commission please elaborate on its reply to the Ombudsman's suggestions for improvement in cases 417/2018/JN and 1233/2019/MMO on how it intends to monitor the use of ESI funds regarding this matter and what measures are foreseen should ESI funds be used at odds with the requirements under the UN CRPD?

Does the Commission, in particular, intend to enhance its monitoring function? Does the Commission envisage any changes or improvements in the practical guidelines to its desk officers and national authorities for dealing with EU-funded projects?

(ii) Does the Commission intend to apply specific requirements for funding relating to programmes promoting deinstitutionalisation?

(iii) Does the Commission envisage any additional measures or funding with a view to actively promoting deinstitutionalisation based on the acute issues identified above in the context of the COVID-19 response?

(iv) Could the Commission please inform my Office about the status of the infringement complaints regarding institutional care facilities in Austria and Poland [8] , which we understand are co-financed by ESI funds?

(v) Could the Commission please explain in what circumstances, if at all, it would consider initiating an infringement procedure against a Member State concerning the use of ESI funds if, in its view, there is no general and absolute prohibition for the use of ESI funds to support long-stay residential institutions?

(vi) In May 2020, the UN Special Rapporteur on the Rights of Persons with Disabilities and the UN Special Rapporteur on the Right to Adequate Housing wrote to the Commission. In their letter, they raised concerns about the systematic use of EU funds to promote disability-based institutionalisation across Europe. Has the Commission replied? If so, could the Commission share its reply with the Ombudsman?



Annex II Deinstitutionalisation and the implications of the COVID-19 pandemic

1. In May 2020, the [UN Special Rapporteur on the Rights of Persons with Disabilities](#) and the [UN Special Rapporteur on the Right to Adequate Housing](#) wrote to the President of the Commission [\[Link\]](#) raising concerns about the compliance of certain EU-funded projects with Article 19 of the UN CRPD. In particular, they stated:

“ By continuing to provide financial support to projects that promote and entrench the institutionalization of persons with disabilities, the European Commission endorses, legitimises and actively contributes to the continuation of the medical model of disability, thus undermining the progress achieved with the adoption of the CRPD, and encourages states to maintain out-dated, ineffective and discriminatory frameworks that violate the rights of persons with disabilities. ” [9]

2. The Commission has also recently [10] received two infringement complaints concerning the construction of institutional care facilities, which were supposedly co-financed by ESI funds. A complaint submitted in July concerned eight newly-constructed institutions for persons with disabilities in Austria [11] ; a complaint submitted in August concerned the construction of institutional facilities in Poland [12] .

3. Related to this, a recent [report \[Link\]](#) from the European Expert Group on the transition from institutional to community-based care [13] set out the progress (or rather the lack thereof) in the area of deinstitutionalisation in the 27 Member States over the past ten years. One of the key findings is that the number of persons living in institutional settings has not dropped in that period.

4. The impact of the COVID-19 pandemic was particularly marked on institutional care facilities for older persons. It is recalled that the protection of older persons is a standalone obligation under the EU Charter on Fundamental Rights: discrimination on the grounds of age is prohibited under Article 21 of the Charter, while Article 25 sets out the rights of older persons.

5. A large number of older persons are persons with disabilities due to conditions such as reduced physical strength, cognitive and sensory impairments. To this end, the UN Special Rapporteur on the rights of persons with disabilities has highlighted the specific needs of this particularly vulnerable group in the context of the UN CRPD, and emphasised the need for them to be able to access “ *accessible, appropriate and affordable community-based support services* ”. [14]

6. There is evidence that older persons were negatively discriminated against, in terms of access to healthcare, with arbitrary triaging systems put in place, in some cases prematurely. In various Member States older persons that contracted COVID-19 in institutional facilities were never transferred to a hospital, with under-equipped and resourced staff in those facilities forced to provide frontline healthcare. [Amnesty International documented \[Link\]](#) this discrimination against older persons in institutions in Belgium, which had devastating consequences. [15] The difficulties of controlling pathogens in institutional care facilities for older persons shows that there is an urgent need to transition to a different model of care for this particularly vulnerable



group.

7. One of the primary objectives of transitioning away from institutional care is to enable those individuals to live their lives with dignity and participate in the community. However, the COVID-19 pandemic has brought into sharp focus some of the other major issues with institutional care. During the pandemic, residential institutions across the European Union were subject to major outbreaks [16] , with often devastating consequences. There is emerging evidence that the relevant authorities took insufficient measures to protect those living in such facilities, with likely tens of thousands COVID-19 deaths in institutional care facilities in the EU. In many Member States, instead of prioritising emergency measures to reintegrate people into the community, many institutions were locked down. [17]

Annex III Background based on cases 417/2018/JN and 1233/2020/MMO

8. The Ombudsman recently concluded two inquiries into the use of European Structural and Investment Funds (ESI funds) for projects relating to residential institutions for persons with disabilities. [18] The decisions in those cases were based on the following considerations.

9. The European Union is committed to safeguarding fundamental rights, including freedom from inhuman and degrading treatment, the prohibition of arbitrary deprivation of liberty and of discrimination, including on grounds of disability [19] . 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* ”.

10. Moreover, the EU has approved the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD), the provisions of which are therefore now an integral part of the EU legal order. 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* ”. Finally, 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. [20] [21]

11. According to EU regulation setting out the rules governing the European Structural and Investment Funds Regulation (Common Provisions Regulation) [22] , “*[i]n the context of its effort to increase economic, territorial and social cohesion, the Union should, at all stages of implementation of the ESI Funds, aim at eliminating inequalities and at promoting equality between men and women and integrating the gender perspective, as well as at combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation as set out in Article 2 of the Treaty on the European Union (TEU), Article 10 TFEU and Article 21 of the Charter of Fundamental Rights of the European Union , taking into account in particular accessibility for persons with disabilities , as well as Article 5(2) of the Charter of Fundamental Rights stating that no one is to be required to perform forced or compulsory labour* ” (emphasis added). [23]



12. In the context of the inquiry in case 1233/2019/MMO, the Commission stated that the Common Provisions Regulation contains specific provisions [24] concerning inclusion and forbidding discrimination against persons with disabilities. The Commission continued that ESI funds *actively* promote the right to independent living through investments into the process of transition from institutional /residential care to family and community based care services. Moreover, the Regulation on the European Social Fund (ESF Regulation) [25] explicitly provides for actions facilitating the transition from institutional to community-based care, in particular for those who face multiple discrimination (Article 8).

13. The Commission also [responded in a positive manner to the Ombudsman's suggestions for improvement in both cases 417/2018/JN \[Link\]](#) and 1233/2019/MMO. In particular, the Commission set out the changes it has proposed to the Common Provisions Regulation (and the Regulations of the individual funding programmes) [26] for the upcoming funding period in order to ensure that national programmes that are co-financed through the ESI funds comply with the UN CRPD. The Commission said that the focus is on supporting the transition towards community-based services and that, in its guidance to the Member States, it has emphasised that, irrespective of the size, building and renovating long-stay residential institutions is not a priority under the ESI funds.

14. For the upcoming programming period, the Commission has introduced 'enabling conditions' to ensure the necessary prerequisites are in place for this. In particular, the Commission proposed:

- *A horizontal enabling condition* for the implementation and application of the UN CRPD. To assess the fulfilment of this horizontal condition, Member States should assess whether they have in place a national framework for implementing the UN CRPD, including objectives with measurable goals, data collection and monitoring mechanisms. Member States also need to assess whether there are arrangements to ensure that their policies, legislation and standards concerning the rights of persons with disabilities and older persons are properly reflected in the preparation and implementation of programmes that receive ESI funds. If such an enabling condition is not fulfilled, the proposal is not eligible for funding.

- *Thematic enabling conditions* linked to specific types of support that promote deinstitutionalisation and community-based services. This includes: (i) support for the integration of marginalised communities, which is subject to the enabling condition that Member States have in place a national strategic policy framework for social inclusion and poverty reduction, which contains measures for promoting the shift from institutional to community-based care; and (ii) support for equal access to healthcare, which is subject to the enabling condition on a national or regional strategic policy framework for health, which contains measures to promote community-based services.

15. Monitoring committees will monitor closely and discuss with the Commission the fulfilment of the enabling conditions and their application throughout the programming period. If an enabling condition is no longer fulfilled, the Commission services will start a contradictory procedure, which may lead to financial consequences, the Commission stated.



16. The Commission said that it organises training both for its own staff and at national level in order to raise awareness in this area.

17. The Commission reiterated, however, that there is no legal basis to exclude the allocation of EU funds to long-stay residential institutions and that it is the Member States' responsibility, and not the Commission's, to select and implement the individual operations supported by the ESI funds.

[1] The Ombudsman undertakes strategic inquiries on her own initiative where she finds grounds to do so. As well as inquiring into any possible maladministration, these inquiries are intended to be helpful to the particular institution and to promote good administrative practice.

[2] There are various sources of evidence to demonstrate this, for example, the COVID-19 Disability Rights Monitor Report <https://covid-drm.org/assets/documents/Disability-Rights-During-the-Pandemic-report-web.pdf> and the Amnesty International Report on the impact of COVID-19 on care homes for older persons in Belgium https://www.amnesty.be/IMG/pdf/20201116_rapport_belgique_mr_mrs.pdf.

[3] The UN CRPD is a legally-binding convention to which the EU is a party since 2011. Article 19 of the CRPD sets out the right to independent living of persons with disabilities: <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>,

[4] <https://ec.europa.eu/social/main.jsp?langId=en&catId=1138> [Link]

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

[6] According to Regulation 1303/2013.

[7] In particular in its Articles 21, 25 and 26.

[8] CHAP(2020) 02159 and CHAP(2020) 01883 respectively.

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

[10] In addition to the infringement complaint against Romania, which has been submitted over a year ago [CHAP(2019) 3555] and in which the Commission has already sent a pre-closure letter to the complainant.

[11] CHAP(2020) 01883

[12] CHAP(2020) 02159



[13] <https://deinstitutionalisation.com/2020/05/29/one-step-forward-two-steps-back/>

[14]

<https://www.ohchr.org/EN/Issues/Disability/SRDisabilities/Pages/SupportingTheAutonomyOlderPersons.aspx>
[Link]

[15] https://www.amnesty.be/IMG/pdf/20201116_rapport_belgique_mr_mrs-3.

[16] As also mentioned in the letter of the UN Special Rapporteurs to the Commission in May 2020.

[17] See for example, the COVID-19 Disability Rights Monitor Report, Part 3,
<https://covid-drm.org/assets/documents/Disability-Rights-During-the-Pandemic-report-web.pdf>.

[18] Case 417/2018/JN <https://www.ombudsman.europa.eu/en/case/en/52034> and case 1233/2020/MMO <https://www.ombudsman.europa.eu/en/case/en/55112> .

[19] Articles 20 and 21 of the Charter.

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

[21] 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].

[22] Recital 13 of Regulation (EU) No 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>.

[23] See also Article 7 of the Common Provisions Regulation.

[24] **Ex-ante conditionality 9.1** requires the existence and the implementation of a national strategic policy framework for poverty reduction aims at the active inclusion of people excluded from the labour market in the light of the Employment Guidelines covering the measures for the shift from institutional to community- based care. **General ex-ante conditionality No 3 requires** the existence of administrative capacity for the implementation and application of the



United Nations Convention on the rights of persons with disabilities (UNCPRD) in the field of ESI Funds in accordance with Council Decision 2010/48/EC.

[25] Regulation (EU) No 1304/2013 on the European Social Fund:
<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32013R1304>.

[26] Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument [COM(2018) 375]:
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A375%3AFIN> [Link].