



Decision on the own initiative inquiry into how the European Commission monitors EU Structural and Investment funds to ensure they are used to promote the right of persons with disabilities to independent living and inclusion in the community (OI/2/2021/MHZ)

Decision

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

The inquiry concerned how the European Commission monitors that Member States use EU Structural and Investment (ESI) funds to promote the right of persons with disabilities and older persons to independent living and inclusion in the community (deinstitutionalisation), and whether the Commission applies sanctions if they do not.

In the course of the inquiry, the Ombudsman received contributions from national ombudsmen and civil society organisations.

The Ombudsman found that the Commission could provide clearer guidance about the need to promote deinstitutionalisation in the context of the use of ESI funds. She also considered that the Commission could take steps to improve the monitoring of ESI-funded activities, and that it should take a more proactive approach to enforcement, particularly where concerns are raised that ESI-funded activities are at odds with the obligation to promote deinstitutionalisation. The Ombudsman also pointed to the need to be particularly vigilant in relation to funds deployed under the Recovery and Resilience Facility.

The Ombudsman closed the inquiry, making ten suggestions aimed at improving the guidance issued by the Commission and the monitoring process. She emphasised the need for the Commission to move quickly, given the additional funding programmes created in response to the COVID-19 pandemic, as well as recent changes to the rules in place.

The Ombudsman will consider returning to this issue in future, to assess progress.

Background to the own initiative inquiry

1. The EU is a party to the UN Convention on the Rights of Persons with Disabilities (CRPD), the provisions of which are now an integral part of EU law [1] . Article 19 of the 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 EU has identified independent living and the right to social inclusion as an EU competence. [2]

2. 'Deinstitutionalisation' [3] is a specific objective of the CRPD. The UN Committee on the Rights of Persons with Disabilities [4] has said that continued investment in institutional care hampers the full realisation of the right to live independently and be included in the community. [5] The UN Committee recommended that "*the EU develops an approach to guide and foster deinstitutionalisation and 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 also recommended that the EU should "*suspend, withdraw and recover payments if the obligation to respect fundamental rights is breached*". [6]

3. The 'Common Provisions Regulations' [7] [8] set out the rules governing the European Structural and Investment funds ('ESI funds'). They state that the ESI Funds should be implemented in a way that promotes the transition from institutional to family-based and community-based care. [9]

4. In previous complaint-based inquiries, the European Ombudsman sought to examine how consistently this is applied. [10] Civil society organisations continue to raise concerns about the use of EU funds for the construction of institutional care facilities for persons with disabilities. [11]

5. The COVID-19 pandemic refocused attention on the situation of people in residential care institutions, with evidence that insufficient steps were taken to protect those in institutional care. In May 2020, the then UN Special Rapporteur on the Rights of Persons with Disabilities and the UN Special Rapporteur on the Right to Adequate Housing wrote to the European Commission to raise concerns about the compliance of certain EU-funded projects with Article 19 of the UN CRPD. [12] 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.*"

The inquiry

6. The Ombudsman opened an inquiry on her own initiative to look into how the Commission monitors that Member States use the EU Structural and Investment (ESI) funds to promote the right to independent living of persons with disabilities, and whether the Commission imposes sanctions if they do not.

7. In the course of the inquiry, the Ombudsman received the reply of the Commission to the Ombudsman's specific questions. The Ombudsman asked civil society organisations for their comments on the Commission's reply. [13]

8. The Ombudsman also asked members of the European Network of Ombudsmen (ENO) for



their input about how the right to independent living is being implemented in their Member State, based on complaints they have dealt with or information that has come to their attention. The Ombudsman also asked them whether they find it feasible and desirable to participate in national 'monitoring committees', which would examine the performance of EU-funded programmes in compliance with the EU Charter of Fundamental Rights and the UNCRPD. [14] Thirteen national ombudsmen replied. [15]

Monitoring

The Ombudsman's questions to the Commission

9. The Ombudsman set out detailed questions to the Commission, asking:

(a) Whether the Commission intends to enhance its role in monitoring that ESI funds are used to promote deinstitutionalisation?

(b) Whether the Commission envisages any changes or improvements concerning this issue in the practical guidelines to its staff and national authorities for dealing with EU-funded projects?

(c) Whether the Commission envisages any additional measures or funding with a view to actively promoting deinstitutionalisation based on the acute issues identified in the context of the COVID-19 pandemic?

(d) Whether the Commission intends to apply specific requirements for funding programmes aimed at promoting deinstitutionalisation?

10. The Ombudsman also asked the Commission to share with her its reply to the letter sent jointly to the Commission by the UN Special Rapporteur on the Rights of Persons with Disabilities and the UN Special Rapporteur on the Right to Adequate Housing.

Reply from the Commission

11. In the 2021-2027 funding period, the Commission will continue approving the national programmes and will monitor and audit them regularly to ensure individual projects comply with the agreed priorities, the implementing rules and the principle of sound financial management regarding the EU budget. However, national authorities have the main responsibility and enjoy discretion in selecting and monitoring individual projects for funding, in compliance with the EU Charter and the Common Provisions Regulation.

12. The Commission said that, although using ESI funds for residential facilities is not definitively prohibited, Member States are required to make progress in promoting independent living arrangements and deinstitutionalisation. The Commission's guidance for Member States about the use of ESI funds for the 2014-20 period stated that no funding could be granted to build or renovate residential care facilities, regardless of their size. However, in several cases, Member States sought funding for residential care facilities,



arguing this was part of the process to ensure deinstitutionalisation and independent living. They argued that this process requires the development of individualised services, the planned closure of long-stay residential institutions and making general services available to persons with disabilities.

13. According to the Commission, there should be a clear priority with the European Social Fund Plus (ESF+) being used to support the provision of community and family-based services. As a complementary step in this process, funding could have been allocated under the European Regional Development Fund (ERDF) for infrastructure developments aimed at ensuring independent living.

14. For the programming period 2021-2027, promoting deinstitutionalisation remains a priority for ESI funds. The Commission intends to issue guidance for Member States on promoting independent living and inclusion in the community.

15. The Commission described the prerequisite conditions for the implementation of ESI funds. For the 2014-2020 programming period, they were called 'ex-ante conditionalities'. For the 2021-2027 funding period, they are called 'enabling conditions', with two different categories: horizontal conditions, applicable to all EU funds, and thematic conditions, which are relevant for the shift from institutional to community-based care. [16]

16. The Commission's monitoring encompasses assessing whether these conditions are fulfilled by the Member States. It intends to develop a training module and provide technical assistance to ensure the conditions are implemented. The Commission will monitor the implementation of the programmes through monitoring committee meetings, annual implementation reports, annual review meetings, and technical meetings. The Commission also uses additional monitoring resources such as external experts, learning seminars and training sessions for its own 'desk officers', who follow the funding programmes in the Member States.

17. The Commission stated that the monitoring committees should include fundamental rights bodies such as national human rights institutions, which could play a role in ensuring that EU-funded programmes are designed and implemented in compliance with the Charter. Relevant stakeholders, such as organisations representing persons with disabilities, should be involved in the design and implementation of the programmes, and their expertise and input should be thoroughly used.

18. Regarding the impact of the COVID-19 pandemic on funding decisions, the Commission stated that the Coronavirus Response Investment Initiatives [17] included support for operations aimed at limiting the spread of the virus in residential care facilities and promoting the development of home care and community-based services. The Recovery Assistance for Cohesion and the territories of Europe (REACT-EU) provided additional resources under ESF+ and ERDF for purchasing protective equipment for care workers, as well as for extended health care and social care services, among other things.

19. In its reply to the UN Special Rapporteurs, the Commission stated that promoting the



transition from institutional to community-based services may, in some cases, require transitional solutions aimed at ensuring healthy and secure living conditions. It stressed that it aims to ensure that this does not undermine the overall aim of Article 19 of the CRPD.

20. In reply to the UN Rapporteurs' question on the use of ESI funds to replace large institutions with smaller institutions for persons with disabilities, the Commission said that it is the responsibility of Member States to choose what projects to support, but they had to comply with the prerequisite conditions.

The Ombudsman's assessment

21. The Ombudsman's assessment takes into account the replies of national ombudsmen and of civil society organisations, consulted in the context of the inquiry, which may be found in the annex.

22. The Common Provisions Regulation states that, while Member States are responsible for preparing the operational programmes [18] and the partnership agreements [19], as well as for implementing programmes in compliance with applicable national and EU law [20], the Commission is responsible for monitoring whether the ESI funds are used according to goals and standards defined in the Regulation.

23. In monitoring the ESI funds, the Commission should assess whether the Member States follow the guidelines it sets out. In its *Strategy for the rights of persons with disabilities 2021-30* [21], the Commission announced that, in 2023, it would adopt guidance "recommending to Member States improvements on independent living and inclusion in the community". It is of the greatest importance that the Commission draft this guidance in consultation with organisations representing persons with disabilities.

24. In addition, the Ombudsman takes the view that the Commission should provide its own staff with updated and unambiguous guidance to enable them to monitor rigorously that Member States' use of EU funds complies with Article 19 of the CRPD. The only publicly available guidance for Commission staff on deinstitutionalisation dates from 2014 [22]. It does not include a checklist of elements that the Commission's desk officers should take into account when assessing national documents. The guidance is descriptive and would benefit from being made more practical. [23]

25. The issuance of new guidance to the Member States and to the Commission's own staff is a matter of priority, given the changes in the new Common Provisions Regulation and the additional funding programmes created in response to the COVID-19 pandemic. Once adopted, they should be published online to facilitate public scrutiny.

Guidance for Member States

26. The Commission approves the partnership agreements and, subsequently, the



programmes implementing the related funds [24] . For the 2014-2020 funding period [25] , approval was conditional on the existence of administrative capacity for the implementation and application of the CRPD [26] and the existence of a strategic policy framework for poverty reduction including measures to promote the shift from institutional to community-based care. [27]

27. National programmes [28] do not always explicitly confirm the existence of a specific national strategy concerning deinstitutionalisation. The Commission should seek to address this for the current programming period 2021-2027 [29] , for example by asking the Member States to provide clear information on their deinstitutionalisation strategies.

28. For the programming period 2021-2027, the Commission is obliged to verify that the national programmes comply with the enabling conditions. [30]

29. Regarding compliance with the horizontal conditions, the Ombudsman notes that the Commission has already issued guidance, including a checklist on compliance with the Charter of Fundamental Rights in the use of ESI funds [31] . This came in response to a previous Ombudsman inquiry [32] .

30. Regarding the two thematic conditions relevant for deinstitutionalisation [33] , the criteria for fulfilling these two conditions are general. The forthcoming guidance for Member States should seek to address this by, for instance, providing examples of possible measures that could support deinstitutionalisation and the transition to family and community-based care. Organisations representing persons with disabilities should be consulted on this and asked to propose possible features of such measures.

31. The Ombudsman also encourages the Commission to see to it that Member States ensure their use of funds under the EU Recovery and Resilience Facility also promotes deinstitutionalisation.

Guidance for Commission staff

32. In its *Strategy for the rights of persons with disabilities 2021-30* , the Commission said that in the past programming period the use of ESI funds for building or renovating long-stay residential institutions was excluded. However, the Commission admits that, in practice, it accepts the use of ESI funds for institutions if the Member States can demonstrate that the funding is part of ‘the process of deinstitutionalisation’. [34]

33. This risks being problematic, when seen against the clear statements and recommendations from the UN CRPD Committee. In the guidance for its staff, the Commission would therefore need to define very clearly what such a process entails [35] , setting out indicators on how to define it. In addition, the Commission should verify that the process is transparent so that it is subject to public scrutiny. The guidance should make clear that any exceptions to the prohibition on funding institutions should be interpreted narrowly and reflect the comment of the UN Committee that no new “ *long term institutions*” should be



built and that older *“long term care residential institutions”* should not be renovated beyond *“the most urgent measures necessary to safeguard residents’ physical safety”*. [36]

Monitoring tools

34. The progress made under national programmes can be assessed only if the Commission is provided with meaningful and timely information on their performance. While the Commission must rely on the information provided by national authorities, it should also take independent sources of information into account to a greater extent. To this end, it should systematically use the reports of national and regional ombudsmen, many of whom are also part of the CRPD monitoring frameworks [37]. The Commission could also contact them directly about specific matters to enrich its assessment.

35. The Commission emphasised the importance of the national monitoring committees. [38] Since the information included in the national programmes is general, the Commission may need information on the calls for proposals to be able to assess compliance with the requirement that funded actions contribute to deinstitutionalisation. The monitoring committees discuss and comment on the proposals. They are also involved in establishing the methodology and criteria used to select projects.

36. The participation of organisations representing persons with disabilities in monitoring committees could play a crucial role in this process. The Commission should therefore urge the Member States to facilitate the participation of representatives of such organisations. The Commission should also require the Member States to ensure that monitoring committee decisions, in particular recommendations to the national authorities on funding, are published on the websites of the relevant national authorities in an accessible format. The Commission could also encourage Member States to invite national ombudsmen to take part in the monitoring committees in an appropriate role (as advisers or members).
Corrective measures and infringement proceedings

The Ombudsman’s questions to the Commission

37. In 2020, the Commission received infringement complaints against Austria and Poland concerning the construction of institutional care facilities, which were co-financed by ESI funds. [39] The Ombudsman asked the Commission about the status of these infringement complaints.

38. The Ombudsman also asked in what circumstances, if at all, the Commission would consider initiating an infringement procedure against a Member State concerning the use of ESI funds.

39. Finally, the Ombudsman wanted to know what measures are foreseen should ESI funds be used at odds with the requirements under the CRPD.



Reply from the Commission

40. The Commission said that the Austrian complaint concerns the facilities for persons with disabilities co-financed under the Austrian Rural Development Programme, which was supported by the ERDF in 2014-20. The Polish complaint concerns eight projects co-financed under the ERDF. The Commission is in the course of examining both complaints.

41. The Commission stated that if there is a breach of the Charter or CRPD in an institutional care facility that received support from the ESI funds, and if that breach was linked to funded activities and the Member State did not seek to correct this, the Commission may apply 'financial management measures' (interrupting or suspending payments or a financial correction). In doing so, the Commission takes into account the nature, gravity and financial implications of the breach in determining which corrective measures to apply, as set out in the Common Provisions Regulation.

42. If the enabling conditions are not fulfilled, the Commission may decide not to reimburse the relevant expenditure.

The Ombudsman's assessment

43. The Ombudsman's assessment takes into account the replies of national ombudsmen and of civil society organisations, consulted in the context of the inquiry, which may be found in the annex.

44. The CRPD [40] and the EU Charter of Fundamental Rights [41] prohibit discrimination on the ground of disability. The CRPD establishes the right to independent living. [42] The Charter sets out the right for persons with disabilities to benefit from measures ensuring independence. [43] The Common Provisions Regulations state that the Member States and the Commission should ensure respect for EU law [44], including compliance with the Charter and CRPD [45], in the implementation of the ESI funds.

45. In 2021, the UN Committee expressed concerns with how EU funds are used in several EU Member States, and made recommendations aimed at ensuring funds are used in compliance with Article 19 of the CRPD. [46] However, the Ombudsman is not aware that the Commission has formally launched infringement proceedings against any Member State for using ESI funds for activities that do not comply with the CRPD, or that it has decided to suspend interim payments based on a reasoned opinion issued by the Commission pursuant to Article 258 TFEU. [47]

46. The Commission has made it clear that it will formally launch infringement proceedings only as a last resort, where no agreement can be reached with the Member State suspected of failing to comply with EU law. [48] To this end, it stressed the role of national courts in enforcing EU law, including by referring cases to the Court of Justice of the EU. [49]

47. In the context of a previous inquiry [50], the Ombudsman emphasised the usefulness of



infringement proceedings in seeking to ensure Member State comply with their fundamental rights obligations and to avoid individual fundamental rights violations. This takes on particular significance given the vulnerable situation many persons with disabilities are in and the challenges they may face in pursuing judicial proceedings at national level.

48. The Ombudsman regrets that the Commission does not appear to have followed this approach, in particular with a view to using infringement proceedings as a tool to ensure Member States promote, and do not hamper progress towards, deinstitutionalisation and, by doing so, comply with the Charter and the CRPD in using EU funds.

49. In the context of a previous Ombudsman inquiry [51] , it emerged that the Commission engaged in intensive dialogue with the Hungarian authorities concerning an EU-funded project that had failed to comply with the obligation to promote deinstitutionalisation, after concerns were raised by the UN Committee [52] . The Ombudsman believes that the Commission could adopt this approach more systematically.

50. Even though Member States are responsible for selecting and implementing projects that receive ESI funds, the Commission has a responsibility to intervene if it becomes aware that a project does not comply with the CRPD and the Common Provisions Regulations, notably as regards the obligation to promote deinstitutionalisation. In particular, if the UN Committee raises concerns about the compliance of EU-funded activities with the provisions of the CRPD on deinstitutionalisation, the Commission should actively raise the matter with the Member State concerned and consider imposing financial sanctions, as foreseen in the Common Provisions Regulation [53] .

Conclusion

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

This inquiry is closed as no further inquiries are justified at this stage. A series of suggestions for improvement are set out below.

The European Commission, the members of the European Network of Ombudsmen, and the members of EU Framework under Article 33(2) of the UNCRPD will be informed of this decision .

Suggestions for improvement

Guidance

(i) The Commission should provide clearer guidance to Member States and to its own staff about the need to promote deinstitutionalisation in the context of the use of ESI funds, as well as funds deployed under the RRF. The issuance of new guidance is a matter of priority, given the changes in the new Common Provisions Regulation and the additional funding programmes created in response to the COVID-19 pandemic. Once adopted, the guidance should be published online to facilitate public scrutiny.

... to the Member States



(ii) In the guidance, foreseen for 2023, the Commission should provide clear and unambiguous information on the need to promote deinstitutionalisation and how this can be achieved, notably in the context of the thematic enabling conditions under the Common Provisions Regulation. The guidance should contain examples of possible measures that could support deinstitutionalisation and the transition to family and community-based care.

(iii) In drafting this guidance, the Commission should seek input from organisations representing persons with disabilities.

(iv) The guidance should instruct Member States to:

(a) include in their national programmes information on their strategies concerning deinstitutionalisation;

(b) see to it that the 'partnership agreements' and operational programmes they submit to the Commission for approval are sufficiently detailed so that there is no scope therein to cover the building of institutions for persons with disabilities and older persons;

(c) ensure that activities they fund under the EU Recovery and Resilience Facility contribute to promoting deinstitutionalisation;

(d) endeavour to include organisations representing persons with disabilities systematically in the design, selection, implementation, monitoring and evaluation of the projects covered by ESI funds.

... for Commission staff

(v) In its assessment of whether national strategies and plans are in line with the CRPD and EU law and policies ('horizontal enabling conditions'), the Commission should:

(a) consult national human rights institutions and civil society organisations as early as possible in the process;

(b) where possible, take into account investigations by national ombudsmen into whether the use of EU funds is compatible with the objective of promoting deinstitutionalisation;

(c) give priority to opinions concerning Member States of the UN CRPD Committee.

(vi) The Commission should set out indicators on how to define the process of deinstitutionalisation, including the need to verify that Member States' deinstitutionalisation processes exist and are transparent.

(vii) The guidance should make clear that any exceptions to the prohibition on funding institutions should be interpreted narrowly and reflect the comment of the UN Committee that no new "*long term institutions*" should be built and that older "*long term care residential institutions*" should not be renovated beyond "*the most urgent measures necessary to safeguard*



residents' physical safety" .

Monitoring committees

(viii) The Commission should encourage Member States to facilitate the participation of organisations representing persons with disabilities in the monitoring committees. The Commission should also encourage Member States to invite national ombudsmen to take part in the work of the monitoring committees in an appropriate role (as advisers or members).

(ix) The Commission should require the Member States to ensure that monitoring committee decisions, in particular recommendations to the national authorities on funding, are published on the websites of the relevant national authorities in an accessible format.

Enforcement

(x) The Commission should take a more proactive approach to enforcement, including via infringement procedures, particularly where concerns are raised that ESI-funded activities are at odds with the obligation to promote deinstitutionalisation.

Emily O'Reilly European Ombudsman

Strasbourg, 27/04/2022

ANNEX I: Replies from ombudsmen and civil society organisations in the context of the Ombudsman's inquiry Monitoring

Replies from national ombudsmen

51. Some respondents stated that the ESI funds have been used to fund the shift from big to smaller institutions, and that they expect funds will continue to be used for improving existing institutions or building new ones.

52. Several respondents considered that their national authorities should develop a specific strategy for deinstitutionalisation. [54] Small social service providers should have better access to ESI funds to help promote deinstitutionalisation. [55] Organisations representing persons with disabilities should be systematically included in design, selection, implementation, monitoring and evaluation of the projects covered by ESI funds.



53. In relation to the possible participation of ombudsmen in the monitoring committees, respondents who were supportive of the idea emphasised the need to review the current methodology to ensure that monitoring is effective. If ombudsman's mandates do not foresee participation in committees, and this involves additional resources, this would have to be taken into account. [56] Most respondents said that the monitoring of funds is outside of their mandate but that they can supervise the monitoring bodies. [57] Some pointed out that participation in the monitoring committees could hamper their institutional independence.

Replies from civil society organisations

Support under ESI funds for the transition to community and family-based care

54. The European Disability Forum (EDF) stated that the thematic condition concerning deinstitutionalisation is interpreted differently in different Member States. The guidelines foreseen by the Commission should be very clear and ambitious, and be drafted with the input of organisations representing persons with disabilities.

55. The European Network on Independent Living (ENIL) stated that the ex-ante conditionalities in the 2014-2020 programming period have not prevented investments in institutions for persons with disabilities. In their view, this will not change with the enabling conditions applicable to the programming period 2021-2027 because:

(i) The Commission has taken the position that investments are permitted for long-stay residential institutions for persons requiring constant care and medical supervision, as long as the Member States make progress on ensuring independent living and deinstitutionalisation. [58]

(ii) In its assessment whether the enabling horizontal conditions are fulfilled by the Member States, the Commission relies on the views of national managing authorities and does not seek the views of national human rights institutions and civil society organisations.

Monitoring by the Commission

56. The EDF said that the Commission appears to be "overstretched". There is also an overreliance on local and national civil society organisations to report on the misuse of funds. But these organisations have limited capacity to conduct such intensive work. In addition, they cannot easily access information on actions foreseen for EU funds, and therefore they often can submit observations only after the building/refurbishment of institutions has started, which is too late.

57. The ENIL said that the monitoring systems in the Member States and at EU level are not robust enough to prevent the use of ESI funds for projects that perpetuate the social exclusion and segregation of persons with disabilities. The Commission should take greater responsibility for ensuring projects that are selected by Member States to receive ESI funds



comply with priorities like deinstitutionalisation. However, 'partnership agreements' and operational programmes submitted to the Commission for approval are often vague enough to cover the building of institutions for persons with disabilities and older persons.

Role of civil society in the national monitoring committees

58. The EDF said that this involvement of civil society organisations in national monitoring committees varies by Member State. Disability organisations (national disability councils and local organisations) should be involved in the selection and monitoring of EU-funded actions, particularly as regards investments to ensure deinstitutionalisation.

59. ENIL considers that the organisations representing persons with disabilities are not sufficiently involved in the implementation, monitoring and evaluation stages of projects. There are no funds to provide technical support enabling their participation. Many small organisations do not have sufficient information about the work of monitoring committees or how to become members. There is also a lack of transparency about the investments covered by ESI funds, with information also often not provided in an accessible format. Even where civil society organisations invest considerable effort in contributing to consultations on these matters, their comments are often dismissed without explanation.

60. Organisations that are members of monitoring committees find that the meetings take place too rarely, cover too many fields and are very technical. As a result, the organisations are not able to discuss issues that concern them. The meetings often take place too late, after potentially problematic actions/projects receiving ESI funds have already started.

Impact of the pandemic on deinstitutionalisation

61. The EDF said that there is a real risk that disproportionate health impacts in institutional care settings during the pandemic will result in Member States seeking to invest more in institutional care. This would severely undermine the progress towards deinstitutionalisation. While the EDF acknowledges that the Commission has sought to oppose proposals for investments in institutions included in some National Recovery and Resilience Plans, it fears that these investments may still go ahead. Given the greater flexibility given to Member States under the Recovery and Resilience Facility when compared to the ESI funds, the EDF urges the Commission to "drastically" step up its own monitoring as well as to offer financial assistance to civil society organisations that could assist it in monitoring.

62. ENIL expressed concern that funds under the Recovery and Resilience Facility will be used to reinforce institutional care, specifically for older persons. These EU funds could be used to provide isolation or physical distancing facilities, for example. ENIL found evidence in some draft National Recovery and Resilience Plans of planned investments in institutions in some countries.

63. ENIL also pointed out that large institutions for persons with disabilities (for children, adults and older persons) continue to benefit from ESI funds. Many children with disabilities



were moved into smaller residential facilities instead of being returned to their families or provided with other forms of family-based care. There is not enough investment for personal assistance and accessible housing under ESI funds. In most of the Member States, which have had *the transition from institutional to community-based care as a funding priority*, persons with disabilities have been moved from large into smaller institutions (given different names). The Commission should use the second review of the EU by the UN Committee on the Rights of Persons with Disabilities, taking place in 2022, as an opportunity to learn lessons from 2014-20 programming period.

Corrective measures and infringement proceedings

Comments from civil society organisations

64. ENIL stated that the infringement proceedings against Austria and Poland (as well as proceedings against Romania from the previous year) have gone on for more than one year. The Commission informed ENIL that it intends to close all three proceedings. ENIL contended that the Commission relies exclusively on the views of the national authorities. It did not ask for the opinions of the Polish or Austrian ombudsmen, for example. ENIL consulted the Polish Ombudsman about the infringement complaint concerning Poland. According to ENIL, the Polish Ombudsman expressed concern about the process of deinstitutionalisation in Poland and its compliance with human rights standards. According to ENIL, the Polish Ombudsman has the capability to assess whether EU-funded activities undermine progress towards deinstitutionalisation.

65. ENIL said that the Commission has so far not found a breach of EU law or applied any other sanctions in relation to ESI-funded actions related to institutions for persons with disabilities and older persons.

[1] See, for example: 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 <https://curia.europa.eu/juris/liste.jsf?num=C-335/11&language=EN> ; and

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

[2] 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 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010D0048>

[3] The UN Office of the High Commissioner for Human Rights has described deinstitutionalisation 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*". See: United Nations General Assembly (2014), Thematic study on the right of



persons with disabilities to live independently and be included in the community: report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/28/37, para.25.

[4]

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

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

<https://digitallibrary.un.org/record/1311739?ln=en>

[6] Concluding observations on the initial report of the European Union, dated 2 October

2015, paragraph 51: <https://digitallibrary.un.org/record/812354?ln=en>

[7] Regulation (EU) 2021/1060 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund, and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R1060>

[8] Regulation (EU) 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 the 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>

[9] Preamble, recital 13 of Regulation 1303/2013, and Preamble, recital 6, and Article 9.3 of Regulation 2021/1060.

[10] Case 417/2018/JN and 1233/2020/MMO.

[11] The EU Fundamental Rights Agency has assessed the use of ESI Funds by the Member States for building and renovating institutional care facilities:

https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-independent-living-part-ii-funding-budgetin

[12]

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

[13] Their replies may be found at:

<https://www.ombudsman.europa.eu/en/doc/correspondence/en/155220>

[14] Member States are required to appoint monitoring committees to check that operational programmes, which use ESI funds, are being correctly implemented. The committees are chaired by the national managing authority and comprise regional, economic and social partners. The European Commission has an advisory role within the committee.



[15] Ombudsmen from Austria, Basque Country, Belgium, Czech Republic, Croatia, Denmark, Estonia, Finland, France, Iceland, Latvia, Malta, Portugal, Romania, Slovenia, Spain, Sweden and Trento in Italy replied. Their replies may be found at:

<https://www.ombudsman.europa.eu/en/doc/correspondence/en/155220>

[16] The enabling conditions are set out in Regulation 2021/1060: 'Horizontal enabling conditions': Member States should have in place a national framework for implementing the UN CRPD, including objectives with measurable goals, data collection and monitoring mechanisms, and 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': (i) To be eligible for funding for the integration of marginalised communities, Member States must 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. (ii) To be eligible for funding for equal access to healthcare, Member States must have a national or regional strategic policy framework for health, which contains measures to promote community-based services.

[17] An emergency funding programme set up under the European Structural and Investment Funds:

https://ec.europa.eu/regional_policy/en/information/publications/factsheets/2020/coronavirus-response

[18] Preamble, recital 13 and Articles 21-24 of Regulation 2021/1060 . *"Each programme shall set out a strategy for the contribution of the programme to the policy objectives (...) shall consist of one or more priorities (...)."*

[19] Preamble, recital 18 and Articles 10-14 of Regulation 2021/1060. *" The Partnership Agreement should be concise and strategic document guiding the negotiations between the Commission and the Member State concerned on the design of programmes (...)."*

[20] Preamble, recital 55 Regulation 2021/1060.

[21] <https://ec.europa.eu/social/main.jsp?catId=1484>

[22] There are two sets of guidance for the Commission's staff relating to deinstitutionalisation. The first provides general advice on applying the *ex-ante conditionalities* , including those related to deinstitutionalisation:

https://ec.europa.eu/regional_policy/sources/docgener/informat/2014/eac_guidance_esif_part2_en.pdf

. The second guidance focuses on how to 'operationalise' deinstitutionalisation through the funds. It identifies examples of measures to be funded by the ESF and ERDF, such as developing deinstitutionalisation strategies and adapting infrastructure to provide community-based services:



https://ec.europa.eu/regional_policy/sources/docgener/informat/2014/guidance_deinstitutionalisation.pdf

[23] In November 2019, the European Experts Group on the transition from institutional to community-based care drafted an exhaustive document: a Checklist to ensure EU-funded measures contribute to independent living by developing and ensuring access to family-based and community-based services.

[24] Article 23 of Regulation 2021/1060

[25] Covered by Regulation 1303/2013

[26] Regulation 1303/2013 - general ex-ante conditionality 3.

[27] Regulation 1303/2013 - thematic ex-ante conditionality 9.1.

[28] Available at https://ec.europa.eu/regional_policy/en/atlas/programmes

[29] Covered by Regulation 2021/1060

[30] Article 15.4 Regulation 2021/1060.

[31] Annex III to the Guidelines on ensuring the respect for the charter of the Fundamental Rights of the European Union when implementing ESI Funds:
[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016XC0723\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016XC0723(01))

[32] OI/8/2014/AN <https://www.ombudsman.europa.eu/en/decision/en/59836>

[33] Annex IV, point 4.4 and 4.6 of Regulation 2021/1060: 'Strategic policy framework for health and long term care' and 'National strategic policy framework for social inclusion and poverty reduction'

[34] See paragraph 13 of his decision.

[35] The UN Special Rapporteur on the rights of persons with disabilities noted, after having visited the European Commission (and other EU institutions) in March 2022, that "*the equality/non-discrimination provision in the CRPD (and indeed in the EU Charter) is not amenable to 'progressive realization'*".
<https://www.ohchr.org/en/press-releases/2022/03/un-expert-hails-eu-commitment-disability-rights>

[36] General Comment No. 5, 27 October 2017, paragraph 49:
<https://digitallibrary.un.org/record/1311739?ln=en>

[37] Article 33.2 of the UNCRPD requires that the states parties set up a framework in order to promote, protect and monitor implementation of the Convention.



[38] According to Article 38-40 of Regulation 2021/1060, the Commission participates in these committees in an advisory capacity.

[39] In 2019, the Commission also received an infringement complaint against Romania about the same matter.

[40] Article 5 of the CRPD.

[41] Article 21 of the Charter.

[42] Article 19 of the CRPD states that parties should take measures to ensure the right of persons with disabilities to live independently and be included in the community.

[43] Article 26 of the Charter provides for the right of persons with disabilities to benefit from any measures to ensure their independence, social and occupational integration and a participation in the life of community.

[44] Preamble, recital 55, Regulation 2021/1060, and preamble, recital 12, and Article 6 of Regulation 1303/2013.

[45] Article 9 of Regulation 2021/1060.

[46] UN Treaty Body Database, available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocType=

[47] The Commission can issue a reasoned opinion and suspend payments, provided "*there is a sufficiently direct link between the matter addressed by the reasoned opinion and the expenditure at stake so as to put at risk its legality and regularity*". Preamble, recital 70 of Regulation 2021/1060

[48] Communication from the Commission, EU law: better results through better application: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2017.018.01.0010.01.ENG

[49] Ibidem, para. 2.

[50] OI/8/2014/AN <https://www.ombudsman.europa.eu/en/decision/en/59836>

[51] Case 1233/2019/MMO: <https://www.ombudsman.europa.eu/en/case/en/55112>

[52] CRPD/C/HUN/IR/1, 17 September 2020 at: <https://bit.ly/3elqo31>

[53] As provided for under Regulation 2021/1060. For example, interrupting the payment deadline (article 96) or suspending payments (article 97).



[54] Ombudsmen of Austria, Basque Country, Czech Republic , Estonia, Latvia, Slovenia

[55] Ombudsmen of Austria, Croatia, Czech Republic, Estonia and Slovenia

[56] Denmark, Estonia, Finland, Malta, Portugal,

[57] Austria, Basque country, Czech Republic, Croatia, Romania, Slovenia, Spain, Sweden

[58] ENIL referred to a legal opinion that was the subject of a previous complaint to the Ombudsman (417/2018/JN): <https://www.ombudsman.europa.eu/en/case/en/52034>