



Decision of the European Ombudsman closing her own-initiative inquiry OI/8/2014/AN concerning the European Commission

Decision

Case OI/8/2014/AN - **Opened on** 19/05/2014 - **Decision on** 11/05/2015 - **Institution concerned** European Commission (No further inquiries justified) |

This own-initiative inquiry concerns how the European Commission ensures that the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union are complied with when EU cohesion policy is implemented by Member States. It was launched as the Union embarked on a new seven-year period of funding, covering 2014-2020, under a new legal framework.

EU cohesion policy seeks to reduce disparities between the levels of development of the various regions in the EU. Given the visibility of the Union in the projects that are funded through the cohesion policy – from improving emergency services in Romania to removing minefields in Croatia – the Ombudsman believes that the Commission should do all in its power to ensure respect for fundamental rights as the money is spent. The fact that the Commission is not directly responsible for managing the funds should never be used as a reason for not acting if fundamental rights have been, or risk being violated.

The own-initiative inquiry has involved the Commission, national ombudsmen and representatives of civil society. On the basis of their feedback, the Ombudsman has produced eight guidelines for improvement to support the Commission as it supervises the Member States in this area.

The background to the own-initiative inquiry

1. The EU's cohesion policy seeks to reduce disparities between the levels of development of the various regions in the EU [1] . Particular attention is paid to rural areas, areas affected by industrial transition and regions which suffer from severe and permanent natural or demographic handicaps.

2. The cohesion policy is implemented through the shared management of funds, meaning that the European Commission relies on Member States to implement EU programmes. Member States are primarily responsible, appointing the relevant authorities, selecting projects, making payments and handling complaints. The Commission has a supervisory role, verifying that Member States' management and control systems function effectively and applying sanctions where necessary.



3. In January 2014, a new legislative package entered into force to frame EU cohesion policy for the new funding period 2014-2020. This comprises: (i) an overarching regulation (Regulation 1303/2013) [2] setting out common rules for the several 'European Social and Investment Funds' ('ESI Funds'); (ii) three specific regulations for the European Regional Development Fund, the European Social Fund and the Cohesion Fund; and (iii) two regulations on the European territorial cooperation goal and the European Grouping of Territorial Cooperation ('EGTC'). Among the principles guiding the cohesion policy are compliance with applicable EU and national laws; promoting equality between men and women; and non-discrimination.

4. The new legislative framework does not, however, address in a visible way the need for the rights enshrined in the Charter of Fundamental Rights of the EU (the 'Charter') to be respected when EU cohesion policy is implemented; nor does it provide for measures to be taken if those rights are violated. Past complaints to the Ombudsman have shown significant citizen discontent with how EU cohesion policy has been implemented at the national level, including on the issue of respect for fundamental rights. Citizens highlighted, time and again, that the Commission refused to become involved because it was not directly responsible for managing the funds. [3]

5. The Ombudsman thus opened an own-initiative inquiry with a view to making a constructive, helpful and objective contribution to the Commission's work at the start of the new funding period. The inquiry concerns the means that the Commission has at its disposal to ensure that the fundamental rights enshrined in the Charter are complied with when Member States implement the cohesion policy.

The inquiry

6. The Ombudsman launched this inquiry by asking the Commission to answer a number of questions [4]. Acknowledging the expertise of the Fundamental Rights Agency of the EU ('FRA'), as well as its efforts to promote a human rights culture, the Ombudsman invited FRA to contribute to the inquiry. She also consulted her colleagues in the European Network of Ombudsmen [5].

7. After receiving the Commission's comments [6] and feedback from some national ombudsmen's offices [7], the Ombudsman launched a targeted consultation of public institutions and civil society organisations active in the field of human rights and with experience of the cohesion policy [8]. She received and published responses from the Office of the UN High Commissioner for Human Rights, Eurochild, the European Disability Forum, Lumos Foundation, European Network of Independent Living, European Roma Grassroots Organisation, the Mental Disability Advocacy Centre, Open Society Foundations, and the Fundamental Rights Agency Platform for civil society organisations (FRP) [9].

8. The Ombudsman's decision takes this material into account.

Feedback from the Commission

9. The Ombudsman's questions to the Commission focused on how it can see to it that, in



turn, Member States ensure that their partners (regional and local authorities and civil society) and programme beneficiaries act in accordance with the Charter and what mechanisms are in place to ensure that complaints are dealt with effectively.

10. With regard to the framework for ensuring respect for fundamental rights, the Commission pointed out that the overarching regulation (Regulation 1303/2013) reinforces the principle of non-discrimination by introducing what the Regulation calls an "ex ante conditionality" (hereafter, 'precondition') that arrangements exist to ensure that that principle is respected [10]. Article 4(2) of the Regulation further requires Member States and the Commission to ensure that support from ESI Funds is consistent with principles such as gender equality (Article 7) and sustainable development (Article 8). More generally, Article 6 requires operations supported by ESI Funds to comply with applicable Union law and the national law relating to its application.

11. On the question of the Charter, the Commission stated that the Charter is binding upon Member States only when they implement EU law. Consequently, and in accordance with the case-law of the Court of Justice, it is necessary to examine individually whether in a given case a practical national measure is intended to implement EU law or not.

12. In response to the Ombudsman's questions about the Charter and Partnership Agreements [11], the Commission said that Article 15 of Regulation 1303/2013 sets out the list of elements that need to be included in Partnership Agreements. Some elements overlap with rights and principles enshrined in the Charter and the Commission checks that those elements have been respected. Similarly, the Commission Delegated Regulation [12] on the European code of conduct on partnership in the framework of ESI Funds refers to principles which overlap with rights and principles enshrined in the Charter.

13. In response to the Ombudsman's questions about the Charter and Operational Programmes [13], the Commission referred to Article 96 of Regulation 1303/2013: since that Article does not contain a specific requirement for Member State authorities to act in compliance with the Charter, the Commission cannot subject the approval of operational programmes to such a condition. This does not mean, however, that Member States are not obliged to check that funds are disbursed in a way that complies with the Charter when they implement EU law, notably in relation to the following:

14. First, Regulation 1303/2013 lays down a number of preconditions related to non-discrimination, gender and disability that need to be complied with [14]. Each programme must identify the preconditions applicable and, where one of them is not fulfilled, it must describe who is responsible for ensuring it is fulfilled, how and by when. Failure to complete actions to satisfy applicable preconditions, by the relevant deadline, constitutes a ground for suspending interim payments by the Commission.

15. Second, during the preparation, design and implementation of the operational programme, Member States must set out the specific actions to promote equal opportunities and prevent discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation [15].



16. Third, managing authorities are to draw up and apply non-discriminatory and transparent selection procedures and criteria, taking into account the promotion of equality between men and women and non-discrimination [16] .

17. Finally, failure by a Member State to ensure proper application of the Charter when implementing EU law would constitute an irregularity or even a serious deficiency in the effective functioning of the management and control system of operational programmes. This could result in payments being suspended, cancelled or recovered.

18. With regard to effective complaint-handling arrangements, the Commission stated that this is a legal obligation (Article 74(3) of Regulation 1303/2013). The Commission will assess whether effective arrangements are in place when it reviews the proper functioning of the management and control system at national level (Article 75 of Regulation 1303/2013). Moreover, the Commission may ask Member States to inform it of the results of their examination to enable it to verify how effective arrangements are, for example by assessing random samples of the results and the time needed to finalise replies to complainants. Failure to ensure effective arrangements for the examination of complaints, including those alleging violations of the Charter, constitutes a serious deficiency, giving the Commission the right to interrupt payment deadlines, to suspend payments in case of serious deficiencies, or even to cancel or recover the Union contribution to a programme.

19. The Commission considered that the provisions in Regulation 1303/2013 on effective arrangements for the handling of complaints will ensure that alleged fundamental rights violations are adequately examined. The Commission said it will seek to disseminate good practices in this area.

20. In relation to the Commission's handling of complaints, the Commission said that the aim of Article 74(3) of Regulation 1303/2013 is to ensure that effective systems to handle complaints concerning ESI Funds are in place in the Member States in order to allow for complaints to be dealt with at national level. This, however, does not preclude the submission of complaints to the Commission. When the Commission receives such a complaint, as a general rule, it will ask the Member State to deal with it. The Commission will deal directly only with those complaints which cannot be transferred to Member States under Article 74(3) of the Regulation.

21. Upon request, Member States will have to report within a set deadline on their follow up to a complaint forwarded by the Commission. The Commission will assess whether the Member State has handled the complaint according to the arrangements set up at national or regional level. This complaints' handling system applies to all types of complaints, whether they allege a violation of the Charter when implementing Union law or any other applicable rule.

22. In the event of continued failure by a Member State to handle complaints effectively, or evidence that the system does not work properly, the matter should be discussed at the annual review meeting between the Commission and the Member State. Furthermore,



should the failure to handle complaints effectively provide evidence to suggest a significant deficiency in the Member State's management and control system, or if the Commission's investigation of a complaint reveals failure to ensure respect for a relevant provision of the Charter, the Commission may interrupt interim payments and, in the case of serious deficiencies, suspend, cancel or recover the payments [17] .

23. Finally, in order to raise awareness among Member States of the importance of the Charter in the context of disbursing ESI funds, the Commission intends to (i) write formally to Member States to remind them of their obligations as regards respecting the Charter when implementing EU law; (ii) draw their attention to the possibility to use technical assistance from ESI Funds to support arrangements for handling complaints; (iii) disseminate good practices in effective complaint handling; (iv) issue a guidance document as regards respect for the Charter when Member States implement EU law in the context of disbursing ESI Funds; and (v) after this guidance has been issued, organise training in the Member States on the Charter, its applicability and its relevance in the context of ESI Funds.

Feedback from national ombudsmen

24. Most national ombudsmen who replied to the European Ombudsman's request for information about complaints handled during the 2007 to 2013 programming period explained that most problems occur at the stage of payment to final beneficiaries. One office stated, however, that problems occur at every stage of the spending procedure.

25. In terms of the possible infringement of fundamental rights, national ombudsmen said that they have dealt with cases concerning the principle of equal treatment, the right to social security, social assistance and health care, and the right to be heard. As regards the right to be heard, the Portuguese ombudsman explained that he has tried to raise awareness within the national administration about the importance of hearing beneficiaries when payment disputes arise. The Portuguese ombudsman's office is, however, largely satisfied with the national authorities' follow-up to its decisions concerning ESI Funds.

The targeted consultation

26. The Ombudsman asked interested parties about the main fundamental rights problems that occur when EU cohesion policy is being implemented, what the causes are and whether they have ever reported such problems to the Commission. She further asked what role the Commission can play in supporting national authorities to implement well-functioning redress mechanisms and whether the measures mentioned in the Commission's reply are appropriate to deal with possible problems [18] .

27. On a general note, many respondents highlighted the good cooperation NGOs have had with the Commission during the 2007 to 2013 programming period and the fact that they participated in drafting the current legislative framework.



28. Based on their experience, however, respondents identified a number of problems in the national implementation of ESI Funds:

(i) Several respondents referred to the use of ESI Funds to maintain or extend the institutionalisation of children and disabled persons, in breach of Article 9(9) of Regulation 1303/2013. Respondents pointed to recurring abuses and ill-treatment which occur in such institutions and which are generally detected by third parties, not the responsible authorities.

(ii) Respondents pointed out that specific categories of the population, such as LGBTI [19] people, disabled persons or Roma communities, are often ignored in the drafting of partnership agreements or operational programmes.

(iii) One respondent referred to increasing barriers to women's associations' access to ESI Funds, due to an unreasonable restriction of the relevant rules. Respondents also argued that many of the programmes which are supposed to foster the integration of women in fact encourage their exclusion, due to "*poor design and even poorer implementation*".

29. With one exception, respondents acknowledged that – by referring to certain rights and including the generally applicable principle of non-discrimination - the new legislative framework is a step forward as far as protecting fundamental rights is concerned. They further mentioned the new preconditions and provisions concerning partnership agreements and complaint-handling arrangements. Monitoring of compliance with the applicable preconditions from the outset of projects is seen as beneficial, in that it may result in a more effective response to discrimination or fundamental rights violations. Moreover, the Commission's assessment of programmes under Article 29 of Regulation 1303/2013 [20] might also contribute to preventing or addressing difficulties that might arise during programme implementation.

30. Some respondents pointed out, however, that these new provisions, which are rather broad, have been transposed in very generic terms in Partnership Agreements. Coupled with what many contributors perceive as the Commission's narrow interpretation of its obligations in the context of the cohesion policy, some feel that, in fact, the Commission avoids most of its obligations under EU law in this area.

31. Some respondents argued that the problems are due to a lack of hands-on expertise, both at national and EU level and to excessive and bureaucratic reporting obligations, rather than the lack of an appropriate legal framework. The fact that the Commission rarely makes field visits to verify the reality of the reported information does not improve the situation. Nor does the fact that significant funding is used for non-tangible actions, the results of which are hard to measure and even harder to evaluate.

32. Related to this, some contributors pointed to the absence of a transparent mechanism through which civil society representatives can inform the Commission of potential shortfalls in planned or executed projects. This could reduce the scope for local NGOs or communities reporting these cases to the EU [21] and thus reduce the chances of the Commission



identifying problems. Most respondents identified, to a greater or lesser extent, a lack of transparency in the application, monitoring and control of ESI Funds, and a failure by the Commission to make comprehensive, accessible information available in the public domain.

33. With regard to the new provisions on complaint-handling, some respondents doubted whether the Commission's willingness to disseminate good practice, and offer technical assistance to resolve complaints, would be sufficient. Member States are not obliged to act on any guidance received from the Commission, they said. Nor does the Commission assume any obligation to undertake an effective monitoring function in this area. The risk exists that Member States establish purely formal mechanisms of no avail to victims of human rights violations, in much the same way as ineffective redress mechanisms have existed during the previous funding periods.

34. One respondent suggested that the new framework might in fact allow the Commission "*to further abdicate its own roles and responsibilities*" in the area of monitoring. While in the past the Commission would at least have considered initiating an infringement procedure, it will now automatically refer victims to the Member State, which is given sole responsibility to investigate and resolve complaints related to ESI Funds. The Commission also has discretion as to whether or not to request a Member State to report on the follow up to a complaint. Victims will therefore have no guarantee that their individual case will be properly assessed and that remedies will be granted where appropriate.

35. Finally, some respondents mentioned that there are no clear guidelines as to when the Commission will use its right to conduct on-the-spot audits, as it is entitled to do under Article 75(2) of Regulation 1303/2013. Nor is there any indication of what the Commission's auditing methodology is and whether human rights compliance will be taken into account. Similarly, it is as yet unclear when and how the Commission will use its powers to, for instance, require a Member State to take the necessary action to ensure that its management and control systems (including complaint-handling arrangements) function or to suspend, cancel or recover payments.

The Ombudsman's assessment

36. The range of opinions submitted in the context of this own-initiative inquiry supports the Ombudsman's initial position that the multi-layered implementation of EU cohesion policy is a thorny issue, in which situations are rarely black and white. One example given by a respondent is particularly telling in this regard: a Member State used ESI Funds to renovate a large institution housing disabled persons. Since ESI Funds are meant to finance the closure of such institutions and the transition to community-based living, the Member State was manifestly at fault and, one would argue, the Commission should have taken measures. Yet, the institution in question was in a pitiful state and new community-based centres would take a long time to build. Was it not appropriate, in the meantime, to use ESI Funds to improve the living conditions of the residents? Would it have been more humane to let the residents endure a grim "today" while waiting for the prospect of a better "tomorrow"?

37. The purpose of this inquiry is to see to it that the Commission does all in its power to ensure that EU funds do not finance actions which violate fundamental rights. The fact that the Commission is not directly responsible for managing ESI Funds should never be used as



a reason for not acting if fundamental rights have been, or risk being, violated. By applying the fundamental rights contained in the Charter as the minimum standard of protection, the Commission can signal to Member States that it will take fundamental rights seriously when assessing their activities under the cohesion policy. This is a necessary first step in persuading Member States to take seriously their obligations under the Charter when they are implementing EU law. In addition, the Commission must seek to dissuade Member States, and indeed itself, from ignoring violations of fundamental rights on the grounds that the Member State activity in question is not undertaken in the course of "*implementing EU law*".

38. With regard to which Member States' actions involve the implementation of EU law, the Court of Justice recently said [22] that a national Monitoring Committee overseeing operational programmes is implementing EU law when it draws up a guide for the assistance of grant applicants. In reaching this conclusion, the Court took into account that (i) the creation of the Committee was required by EU law, although it acted within the institutional, legal and financial framework of a Member State; (ii) all the measures intended to support the operational programme, including the document adopted by the Committee, had to comply with the relevant EU regulations.

39. On the basis of this clear indications by the Court, which differs from the generic criteria it had previously provided to distinguish the two categories of actions, the Ombudsman considers that **most, if not all, Member State actions which arise in the context of programmes funded under the EU's cohesion policy involve the implementation of EU law**. This is so because the vast majority of the Member States' main obligations are defined in detail in Regulation 1303/2013 (and other relevant Regulations) and are subject to the rules and principles laid down therein, from which they cannot validly depart.

40. For instance, Partnership Agreements are defined in point 20 of Article 2 of Regulation 1303/2013; the procedure for drawing them up is outlined in detail in Article 14; their content is established in Article 15; the criteria to select partners and their involvement in the programme are clearly defined in Article 5; the code of conduct for establishing such partnerships is adopted by the Commission by means of a delegated act; and Partnership Agreements are subject to approval by the Commission. It is thus hard to understand how a Member State may be seen as doing anything other than implementing EU law when it drafts a Partnership Agreement, or when it adopts an operational programme "*in compliance with [Regulation 1303/2013] and the Fund-specific rules*" [23], making sure that it contains the elements required throughout that Regulation, particularly in Article 96. To take one last example, the assessment and choice of applicable preconditions by Member States is subject to detailed guidance in Article 19 of Regulation 1303/2013. Bound by so many clear and detailed requirements imposed by EU law, a Member State's choice of applicable preconditions, which is moreover subject to the Commission's assessment of consistency and adequacy, will in all likelihood require "*a degree of connection [with EU law] above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other*" [24].

41. In such cases, the Charter should be seen as the standard with which the Member States'



actions should comply, whether the fundamental rights at issue are specifically referred to in Regulation 1303/2013 - gender equality, disability - or not - social rights, the right to be heard, the rights of the elderly, etc.

42. For those few situations in which Member States' actions in relation to cohesion funding do not constitute the implementation of EU law, it should still be possible for the Commission to use its influence so as to promote respect for the Charter. **The Commission is obliged to respect the Charter in its entirety, in all its activities, including in the distribution and monitoring of ESI Funds.** The Commission should interpret its rights under the cohesion policy in light of its obligations under the Charter, the principles of which should be understood as complementing the provisions of Regulation 1303/2013. Thus, the Commission should ensure that all Member State actions, which are funded under the EU cohesion policy, should respect fundamental rights' principles whether or not, strictly speaking, they are actions taken in the implementation of EU law.

43. Two comments should be made in this context.

44. On the one hand, the Ombudsman disagrees with the Commission's statement that it could not make the approval of Partnership Agreements conditional upon the inclusion of a clause stipulating respect for human rights. Contrary to the Commission's argument, Article 15 of Regulation 1303/2013 does not exhaustively list the elements that must feature in such an Agreement. It merely sets out the minimum requirements, " *including* " a non-exhaustive list of mandatory elements. Nothing prevents the Commission from adding respect for the Charter in general among those requirements.

45. On the other hand, the Commission should interpret as widely as possible the Regulation provisions which specifically refer to fundamental rights recognised by the Charter. No violation of those provisions, whatever its form or the level at which it occurs, should be allowed.

46. In short , it all comes down to the fact that the Commission should not **allow itself to finance, with EU money, actions which are not in line with the highest values of the Union, that is to say, the rights, freedoms and principles recognised by the Charter .** The Commission regularly subjects cooperation with third countries, which are not bound by the Charter, to a clause concerning respect for human rights. The standard required from Member States necessarily needs to be significantly higher.

47. The Ombudsman's own-initiative inquiry has involved several categories of stakeholders - the Commission, national ombudsmen, NGOs and the Fundamental Rights Agency Platform for civil society. The Ombudsman believes that her consultation with these stakeholders provides a solid overview of the relevant issues. On this basis, therefore, the Ombudsman closes her own-initiative inquiry and thanks all the parties involved for their honest, constructive and valuable feedback. It is on the basis of this feedback that the Ombudsman proposes the following guidelines for improvement to the Commission.
The Ombudsman's guidelines for improvement

48. The Commission should:



(i) Proactively define, by applying the criteria established by the Court of Justice, which of the Member States' actions in the context of EU cohesion policy are understood to implement EU law [25] and apply to those actions the strictest standard of scrutiny in terms of compliance with the Charter.

In identifying actions which implement EU law, the Commission should bear in mind the need identified by the Court of Justice " *to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved (...)* " [26] .

(ii) Use every means at its disposal to raise awareness of the fact that the Charter applies to every Member State action taken in the implementation of EU law.

The Commission's proposed guidance for Member States is an excellent starting point. The guidance should include a clear reference to the requirement to respect fully the Charter's provisions in the preparation, evaluation and implementation of programmes co-financed with ESI Funds. The Commission could include in the guidance examples of actions which are taken in the implementation of EU law, as outlined above.

Moreover, through its political and administrative cooperation channels with Member States, the Commission should actively encourage, as good practice, the application of the Charter standards in all Member States' action in the context of EU cohesion policy.

(iii) Focus its guidance, support and enforcement efforts on preventive measures, to ensure that Member States comply with the Charter from the outset.

Even when remedies are effective, by their very nature they come when the harm has already been done. When remedies are ineffective and the Commission chooses to impose economic penalties on Member States, this not only fails to ensure redress for victims of fundamental rights violations but may even aggravate their situation. While the new focus on monitoring and complaint-handling arrangements is more than welcome, more emphasis should be placed on avoiding harm in the first place.

For instance, according to Article 19(4) of Regulation 1303/2013, the Commission is involved in the choice of applicable preconditions relating to the specific objectives of a national programme priority. The Commission should systematically make use of this prerogative to promote the inclusion of fundamental rights-related preconditions whenever they are applicable. As some respondents mentioned, there may be cases in which awareness of such issues is lacking at national level, and therefore the Commission should support Member States in choosing the right preconditions.

The Commission also needs to bear in mind that Article 7 of Regulation 1303/2013 obliges not only Member States but also the Commission to " *prevent any discrimination...* " when preparing and implementing programmes.

Several contributors highlighted the importance of monitoring mechanisms, training,



technical assistance and reinforcing Member States' administrative capacity in order to prevent fundamental rights violations from occurring. The Ombudsman considers that the Commission should focus its training, technical assistance and capacity building efforts on Member States which, on the basis of the Commission's assessment, have a less positive track record of compliance with fundamental rights in the implementation of EU cohesion policy [27] .

A positive development that deserves to be praised is that in its Guidance for Member States on Designation procedure [28] , which contains checklists for the designation of certifying and managing authorities and intermediate bodies, the Commission included specific points regarding the existence of adequate procedures at the selection stage to ensure compliance with certain EU policies (non-discrimination, promotion of equality between men and women, accessibility for disabled persons) [29] . The checklist also requires a description, where applicable, of the Member State's arrangements for examining complaints as regards both the certifying [30] and the managing authority [31] .

(iv) Include, in its assessment of the success of programmes and actions financed through ESI Funds, consideration of how they have contributed to the promotion of respect for the fundamental rights enshrined in the Charter.

Some contributors suggested that, in addition to ensuring that fundamental rights are respected throughout the implementation of ESI Funds, it would be useful for the Commission to assess to what extent the use of ESI Funds has enhanced awareness of and respect for the fundamental rights specifically mentioned in Regulation 1303/2013 and also of other Charter rights. The Commission could promote the adoption of adequate equality and fundamental rights indicators and draft checklists to evaluate the use of the funds to promote fundamental rights and non-discrimination in the broader sense.

(v) Apply strictly and without exception the obligation to verify that the management and control systems, including complaint-handling arrangements, are adequate and efficient, that they remain so for as long as programmes are implemented and that weaknesses are duly corrected. This includes systematically requiring that Member States inform the Commission of the results of all complaints concerning ESI Funds, whether they were initially submitted to the Commission or not.

In the words of one respondent, as an authority responsible for the implementation of EU law, the Commission has a role to play in supporting, but also compelling, Member States to implement well-functioning, effective complaints and redress systems. This is all the more important considering that, in the absence of an effective redress mechanism at national level, the Commission does not have, and is unlikely to obtain in the future, any competence allowing it to provide individual redress for victims of fundamental rights abuses. In other words, the Commission's strict and tireless enforcement of its supervisory prerogatives is the only guarantee for such victims [32] .

Article 75(1) of Regulation 1303/2013 requires the Commission to "*satisfy itself*" that complaint and redress systems comply with the Regulation and the Fund-specific rules. The



guidance which the Commission intends to provide to Member States should define what the Commission understands by an effective redress mechanism and, equally importantly, which mechanisms are deemed ineffective or purely formal. The guidance should include clear indications about when monitoring processes will be triggered, what criteria will be applied, and what measures will be adopted as a result, thus ensuring transparency and legal certainty.

Similarly, Article 75(2) and (3) empower the Commission to carry out on-the-spot checks and to require a Member State to take the necessary actions. The Ombudsman shares some respondents' view that on-the-spot visits need to be more frequent and thorough, as in many cases they constitute the only real means to verify the situation on the ground. The Commission's staff working in its representations in the Member States could contribute to this task.

Moreover, receiving systematic information from Member States concerning the results of ESI Funds-related complaints will enable the Commission to have a complete picture of the complaint-handling situation and the effectiveness of the relevant arrangements at all times and in all Member States, and to detect anomalies on time.

(vi) Apply strictly and consistently its sanctioning prerogatives when applicable ex ante conditionalities (preconditions) are not complied with within the deadlines.

Article 19(2) of Regulation 1303/2013 states that applicable **preconditions** must be fulfilled by 31 January 2016, thus setting down a clear and unconditional requirement to achieve a specific result. Article 19(5), in turn, empowers the Commission to suspend interim payments if **actions to fulfil the preconditions** have not been taken by that deadline. The Commission should interpret very strictly any exceptions invoked by Member States for not achieving the goal. This will avoid a situation in which purely formal actions, which scarcely contribute to the fulfilment of the preconditions, are invoked as a defence by Member States.

(vii) Consider maintaining, in addition to the new system of complaint-handling, the practice of initiating infringement proceedings against a Member State if its actions in the framework of the cohesion policy amount to a violation of EU law, including the Charter.

The fear of funding being cancelled or recovered via financial corrections and of interim payments being suspended are likely to constitute an effective deterrent when it comes to clear violations of specific provisions of Regulation 1303/2013 and the Partnership Agreements. However, infringement proceedings grant the Commission a wider margin of negotiation and power of persuasion to tackle widespread breaches of fundamental rights which may go beyond the implementation of the cohesion policy as such [33]. Moreover, a declaration of infringement by the Court of Justice is a powerful argument for citizens to claim compensation for any damage they may have suffered before national courts.

The Commission could thus use its discretion in choosing one procedure over another with the objective of better protecting citizens' fundamental rights.



(viii) Create a clear and transparent framework in which civil society can contribute to the Commission's supervisory role, in addition to the existing working and expert groups and committees.

In order to encourage civil society to monitor the implementation of ESI Funds, the Commission should launch an online platform where civil society, particularly small organisations which do not easily come into contact with the Commission, could report abuses of Funds and Charter violations and submit complaints and shadow reports [34] on complaint-handling mechanisms and Member States' compliance with the European Code of Conduct on Partnership. The Commission could also consider establishing mixed working parties on specific subjects made up of Commission representatives, Member States and civil society [35] ; and systematically inform persons and organisations that raised the alarm of the Commission's final findings and follow-up.

In addition, as some respondents suggested, the Commission should publish documents setting out the details of its monitoring role over national mechanisms and release comprehensive and detailed information about all monitoring measures taken thus far in respect of ESI Funds and fundamental rights.

Emily O'Reilly

Strasbourg, 11/05/2015

[1] Article 174 of the Treaty on the Functioning of the European Union provides as follows: "*1. In order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion. 2. In particular, the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions. 3. ... particular attention shall be paid to rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps...*"

[2] Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 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 (OJ 2013 L 347, p. 320).

[3] In the absence of specific grounds on which the Commission might intervene, none of these complaints resulted in a substantive outcome.

[4] Available at:

<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54419/html.bookmark>



[5] The Network includes the national and regional ombudsmen and similar bodies of the EU Member States, the candidate countries for EU membership, and other European Economic Area countries, as well as the European Ombudsman and the Committee on Petitions of the European Parliament.

[6] Available at:

<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/58451/html.bookmark>

[7] The replies came from the Offices of the Federal Ombudsman of Belgium, the Bulgarian, Finnish and Portuguese Ombudsmen.

[8] The consultation questions are available at:

<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/59264/html.bookmark>

[9] The FRP forwarded replies sent by the Women's sector in Northern Ireland, ILGA Europe, European Roma Rights Centre, Social Platform, the European Disability Forum, the Hungarian LGBT Alliance and an anonymous contribution.

[10] Definition 33 in Article 2 of Regulation 1303/2013 defines an applicable ex ante conditionality as "*a concrete and precisely pre-defined critical factor, which is a prerequisite for and has a direct and genuine link to, and direct impact on, the effective and efficient achievement of a specific objective for an investment priority or a Union priority.*"

[11] A Partnership Agreement is a mandatory document "*prepared by a Member State with the involvement of partners ... which sets out that Member State's strategy, priorities and arrangements for using the ESI Funds in an effective and efficient way ... and which is approved by the Commission following assessment and dialogue with the Member State concerned*".

[12] Commission Delegated Regulation (EU) No 240/2014 of 7 January 2014 on the European code of conduct on partnership in the framework of the European Structural and Investment Funds. OJ 2014 L74, p.1.

[13] Operational Programmes are detailed plans in which Member States set out how money from the ESI Funds will be spent during the programming period.

[14] Part II of Annex XI of Regulation 1303/2013.

[15] Article 96(7)(b).

[16] Article 125(3)(ii).

[17] Articles 83, 142 and 144 of Regulation 1303/2013, respectively.

[18] The own-initiative inquiry does not concern the conduct of national administrations. Consequently, respondents' arguments concerning alleged maladministration at national



level will be mentioned only to the extent necessary to assess the Commission's behaviour. Moreover, the scope of this own-initiative inquiry is to identify the means by which the Commission can ensure compliance with the Charter for the period 2014-2020. Arguments relating to the past will be addressed only to the extent that they are also relevant for the future.

[19] "LGBTI" stands for lesbian, gay, bisexual, transgender and intersex.

[20] "*The Commission shall assess the consistency of programmes with this Regulation and with the Fund-specific rules, their effective contribution to the selected thematic objectives and to the Union priorities specific to each ESI Fund, and also the consistency with the Partnership Agreement...*"

[21] Two NGOs mentioned the case of a planned segregated neighbourhood for Roma people, publicly advertised as benefitting from ESI Funds. While the Commission was receptive and reactive to the information received from the NGOs and stated that the planned settlement was contrary to the principles of the Funds, it did not take a "*decisive and transparent*" public position and the uncertainty as to whether the settlement will be built and/or financed by ESI Funds remains. Moreover, the two NGOs consider that it is not sufficiently clear to whom and through which means they should report such cases. Feedback on the outcome of any investigation by the Commission is not always forthcoming.

[22] Judgment of the Court of 17 September 2014, Case C-562/12, *Liivimaa Lihaveis v Eesti-Läti*, paragraphs 64 and 65.

[23] Article 4(4) of Regulation 1303/2013.

[24] Case C-562/12, *Liivimaa Lihaveis v Eesti-Läti*, paragraph 62.

[25] Bearing in mind that the vast majority of Member State actions, taken in the context of EU cohesion policy, will be actions taken in the implementation of EU law.

[26] Judgment of the Court of 10 July 2014, case C-198/13 *Hernández and others v. Spain*, para. 47.

[27] Article 58 of Regulation 1303/2013 empowers the Commission to take the initiative in providing technical assistance.

[28]

http://ec.europa.eu/regional_policy/sources/docgener/informat/2014/guidance_ms_designation_en.pdf
. The Guidance was adopted after the Commission replied to the Ombudsman's questions.

[29] Points 2.2.3.6, 3.4 and 3.12.

[30] Point 3.2.2.4.



[31] Point 2.2.3.16.

[32] Some respondents suggested that the Commission should create a mechanism at EU level to provide redress in individual cases.

[33] Some respondents welcomed the Commission's decision to launch infringement proceedings against the Czech Republic for discrimination against the Roma population in the field of education, a situation that would, in their view, have been more difficult to tackle in the context of the cohesion policy alone.

[34] Shadow reports are NGOs reports which supplement or present alternative information to the periodic official reports that Member State are required to submit.

[35] Several respondents pointed to the unclear ways in which organisations, particularly small ones with limited resources, can access and interact with the Commission when they become aware of problems at national level. A case of partially fruitful cooperation was reported as regards the planned construction, in Naples, of a segregated neighbourhood for Roma people which the authorities intended to finance with ESI Funds. Civil society's early warning allowed the Commission to state from the outset that the planned action did not comply with the applicable rules. However, the Commission has not yet publicly taken any action.