

**European Ombudsman own-initiative inquiry OI/8/2014/AN concerning
the respect for fundamental rights in the implementation of the EU
cohesion policy**

**Response by ENIL-ECCL, incorporating comments from the
Open Society Mental Health Initiative**

25 February 2015

Introduction

The European Network on Independent Living – the European Coalition for Community Living (ENIL-ECCL) and the Open Society Mental Health Initiative (MHI) welcome the opportunity to respond to the European Ombudsman’s own-initiative inquiry concerning the respect for fundamental rights in the implementation of the EU cohesion policy. Our particular concern relates to the practice in some Central and Eastern European Member States of investing European Structural and Investment Funds (referred to as ‘Structural Funds’) into institutions for people with disabilities, thereby subjecting them to human rights violations and perpetuating their social exclusion. Over the past decade, numerous reports have highlighted the severe and wide-ranging human rights abuses that form part of daily life in such institutional settings.¹ Moreover, irrespective of any physical or other abuse perpetrated against residents of such institutions, the segregation of people with disabilities in institutions *in and of itself* is a human rights violation. It is contrary to the Article 19 (Living independently and being included in the community) of the UN Convention on the Rights of Persons with Disabilities (CRPD) and Article 26 (Integration of persons with disabilities) of the Charter of Fundamental Rights (CFR). We refer to this right as the right to independent living. Segregation of people with disabilities in long-stay residential institutions also runs against Article 7 of Regulation (EU) No 1303/2013 (‘Common Provisions Regulation - CPR’), which requires the European Commission (EC) and the Member States to take concrete steps to prevent any discrimination based on disability “during the preparation and implementation of programmes”.

As noted below, we have raised concerns about the investment of EU funding to maintain institutional care since 2006. Largely thanks to the European Commission, a number of significant changes have been introduced to the provisions governing the

¹ See, for example, Annex 2 (Selection of reports about institutionalisation of children and adults in countries accessing Structural Funds and IPA) of the *Toolkit on the Use of European Union Funds for the Transition from Institutional to Community-based care*, 2012. See: www.deinstitutionalisationguide.eu

use of Structural Funds for the period 2014 – 2020.² These have the potential to address some of our key concerns. The emphasis on ensuring that Structural Funds are used to promote the transition from institutional care to community-based alternatives is particularly welcome. However, for the reasons outlined below, if these changes are to ensure real and substantial - rather than cosmetic - improvements, the European Commission must take on a greater role in monitoring the implementation of projects funded by Structural Funds.

1. What are the main problems related to the respect of fundamental rights that occur in the implementation of the cohesion policy? What do you think are the causes of these problems?

Main problems: failure to address institutionalisation of people with disabilities

With regard to the investment of Structural Funds in institutional care, the main problems related to the respect of fundamental rights fall into the following areas:

- *Human rights abuses in institutions:* It has long been recognised that 'institutional care is often of an unacceptably poor quality and represents serious breaches of internationally accepted human rights standards'.³ As noted above, there have been numerous accounts of human rights abuses within institutions. For this reason it is a major concern that during the previous financing period (2007-2013) Structural Funds were used to renovate, and/or build new, long-stay residential institutions. For example, an investigation by Al Jazeera in 2014 into the situation of people with disabilities in Romanian institutions noted that Structural Funds had been invested in two of the institutions in which residents were subject to human rights abuses.⁴
- *Investments into institutional care perpetrate the exclusion of people with disabilities, contrary to the right to independent living and policies to promote social inclusion:* It is estimated that between 2007 and 2013 a total of at least 150 million Euros were invested into the renovation or building of new institutions for disabled people in the countries of Bulgaria, Hungary, Latvia, Lithuania, Romania and the Slovak Republic.⁵ Additional information provided to ENIL-ECCL suggests that Structural Funds have also been invested in institutional care in the

² Regulation (EU) No 1303/2013. See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:347:0320:0469:EN:PDF>

³ Mansell, J., Knapp, M., Beadle-Brown, J., & Beecham, J., (2007) *Deinstitutionalisation and community living – outcomes and costs: report of a European Study. Volume 2: Main Report*. Canterbury: Tizard Centre, University of Kent (referred to as "the DECLOC report"), page 2. See: http://www.kent.ac.uk/tizard/research/DECL_network/documents/DECLOC_Volume_2_Report_for_WEB.pdf. This point was also noted in the *Report on the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union*, June 2014, para 100. See: http://ec.europa.eu/justice/discrimination/files/swd_2014_182_en.pdf

⁴ See MDAC website, at: <http://mdac.info/en/content/european-commission-funding-disability-segregation-and-abuse-breaches-international-law>

⁵ This is based on the figures set out in ENIL-ECCL, *Briefing on Structural Funds Investments for People with Disabilities: Achieving the Transition from Institutional Care to Community Living*, December 2013, pages 11 – 12. See: <http://www.enil.eu/wp-content/uploads/2013/11/Structural-Fund-Briefing-final-WEB.pdf>

Czech Republic, Estonia and Poland.⁶ As the Report of the Ad Hoc Expert Group on the Transition from Institutional to Community-based Care, published by the European Commission in 2008, notes, such investment “often makes it more difficult to close institutions in the medium term, as authorities are reluctant to close a service in which a great deal of money has been invested”.⁷

- *A missed opportunity to develop community-based services:* Using Structural Funds to maintain institutional care means that funding is being diverted away from developing community-based services which would enable people with disabilities to live and participate in the community.⁸
- *Services replicate institutional cultures:* ENIL-ECCL’s partners in Hungary and Bulgaria highlight the problem that services referred to as “community-based” or “independent living” are being supported, when in fact they remain institutional in character.⁹ This may be due to a number of factors, such as the number of residents living in one place, the fact that residents are not able to choose where, or with whom, they live, and the fact that the staff are not properly trained to work in the new services.

Causes of these problems: insufficient strategic direction for independent living

The main reasons why Structural Funds have continued to be invested in institutional care are as follows:

- *Lack of strategies for transition to independent living:* a significant reason for the investment of Structural Funds in institutional care in the previous financing period was the lack of clear plans necessary to achieve the transition from institutional care to community-based alternatives that promote social inclusion. ECCL-ENIL’s briefing of 2013 raised concerns about the governments’ lack of vision for the transition to community living in the countries of Bulgaria, Hungary, Latvia, Lithuania and Romania.¹⁰

The Common European Guidelines on the Transition from Institutional to Community-based Care, endorsed by the European Commission, state that governments should prepare a strategy that sets out the overall framework for guiding the necessary reforms in three key areas, namely the closure of institutions, the development of community-based services (including prevention of institutionalisation) and inclusive mainstream services.¹¹

⁶ Personal communication.

⁷ EC, *Report of the Ad Hoc Expert Group on the Transition from Institutional to Community-based Care*, 2008, page 14. See: <http://ec.europa.eu/social/BlobServlet?docId=3992&langId=en>

⁸ A similar point was made by the CRPD Committee in relation to Hungary. See the Concluding observations of the CRPD Committee on Hungary, paragraph 33, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CRPD%2fCO%2fHU%2fCO%2f1&Lang=en

⁹ ENIL-ECCL, *Briefing on Structural Funds Investments for People with Disabilities: Achieving the Transition from Institutional Care to Community Living*, December 2013, pages 9 – 10.

¹⁰ *Ibid*, pages 8 – 11.

¹¹ European Expert Group on the Transition from Institutional to Community-based Care, 2012, *Common European Guidelines on the Transition from Institutional to Community-based Care*. See: <http://www.deinstitutionalisationguide.eu>

- *Lack of clear and precise definitions:* one of the reasons for the continued investment in institutional-like settings appears to be the lack of understanding of what is meant by the terms “institution” and “community-based services”.¹² Clarity on what these terms mean is needed to ensure that services developed by projects supported by Structural Funds enable people to live and participate in the community, as required by Article 19. For example, in the Czech Republic, some of the renovations of existing institutions were regarded as being part of the deinstitutionalisation process, even though the only changes made were to improve the physical environment.¹³ In Romania, the Council of Europe (CoE) Commissioner for Human Rights noted that purported changes to long-stay residential care settings for both children and adults have been cosmetic.¹⁴ For example, having visited a “Centre for Education”, he noted that although the name suggested that this was a mainstream school “for children with and without disabilities”, it was in fact “a residential institution accommodating more than 50 infants, children and young adults with disabilities”.¹⁵
- *Lack of co-ordination between different EU funds:* reports suggest that due to a lack of co-ordination of different EU funds, Structural Funds have been invested through Operational Programmes unrelated to reform in health and social care infrastructure, to meet other targets such as improving accessibility or energy efficiency. For example, in Hungary, two institutions (one with 80 residents and one with 102 residents) received funds for this purpose.¹⁶ While making buildings physically accessible or more energy efficient are in themselves laudable objectives, they make little sense when applied to institutions which a) segregate people from the wider community and b) should be due to be closed as part of the deinstitutionalisation strategy. Such investments delay the closure of the institution. They are also a waste of resources, which could have been invested in the development of community-based services to replace institutional care. These examples also highlight the need for an emphasis on social inclusion in the Member States’ strategies.

**2. Have you ever reported such problems to the European Commission?
a. If yes, was the outcome satisfactory? Please explain if this was not the case. b. If no, why not (problem solved at national level, lack of information, etc.)**

ENIL-ECCL has raised concerns about the use of Structural Funds on numerous occasions. In response to a letter (dated 31 October 2006), sent to the European Commission (Commissioner Hubner), the Commission stated in a letter dated 14 December 2006:

¹² ENIL-ECCL, *Briefing on Structural Funds Investments for People with Disabilities: Achieving the Transition from Institutional Care to Community Living*, December 2013, page 19.

¹³ Information provided by ENIL-ECCL partner organisation in the Czech Republic.

¹⁴ Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Romania from 31 March – 4 April 2014, 8 July 2014, paragraph 58. See: <https://wcd.coe.int/ViewDoc.jsp?id=2208933&Site=COE>

¹⁵ *Ibid*, paragraph 121.

¹⁶ ENIL-ECCL, *Briefing on Structural Funds Investments for People with Disabilities: Achieving the Transition from Institutional Care to Community Living*, December 2013, page 13.

“On the specific question of whether European Union funds should be used, in Romania, for improving existing residential centres, this is primarily a question for the Member State concerned. However, the information that the Commission services have, suggests that in the short term the state of these centres is so poor that it is essential, for the sake of their residents, to improve them as rapidly as possible, notwithstanding a longer term community-based policy. While the funds available for this activity are limited, it would be very difficult to refuse funding in this field when it would directly benefit perhaps the most excluded of all groups in Romania.”

As a consequence, a total of €41,3 million (out of which €27,6 million were Structural Funds) have been used to renovate or expand institutions for people with disabilities in Romania, including the two institutions where human rights abuses were reported.¹⁷

ENIL-ECCL has further raised its concerns by publishing two reports on investment of Structural Funds into long-stay residential institutions for persons with disabilities in Central and Eastern Europe, and holding events to discuss the reports' findings and conclusions with EC officials, MEPs and civil society representatives:

- *Wasted Time, Wasted Money, Wasted Lives... A Wasted Opportunity? – A Focus Report on how the current use of Structural Funds perpetuates the social exclusion of disabled people in Central and Eastern Europe by failing to support the transition from institutional care to community-based services*, presented in March 2010¹⁸
- *Briefing on Structural Funds Investments for People with Disabilities: Achieving the Transition to Community Living*, presented in November 2013¹⁹

MHI submitted a petition to the Petitions Committee of the European Parliament in 2012 (1459/2012),²⁰ raising concerns about the investment of Structural Funds into institutional care, in particular that the segregation of people with disabilities caused by their institutionalisation is a human rights violation and in contravention of EU policies on social inclusion. On 3rd December 2014, MHI was informed that in the light of the European Commission's response (dated 31st May 2013) and the lack of response from other committees of the European Parliament to its request for further information, the Petitions Committee could take no further action.

In its response to the Petition, the European Commission stated that it was not aware “of any specific cases of abuse of residents in long-stay institutions for people with disabilities and which can be linked to co-financing from the Structural Funds”, and therefore did not agree that the investments co-financed from the Structural Funds in Bulgaria, Hungary, Slovakia and Romania constitute illegal expenditure. At the same time, in its report on the implementation of the CRPD in the EU, the European Commission stated that:

¹⁷ *Ibid*, page 12.

¹⁸ See: <http://community-living.info/wp-content/uploads/2014/02/ECCL-StructuralFundsReport-final-WEB.pdf>

¹⁹ See: <http://www.enil.eu/recommended-readings-2/enil-eccl-briefing-on-structural-funds-investments-for-people-with-disabilities/>

²⁰ See: <http://www.opensocietyfoundations.org/sites/default/files/petition-eu-parliament-20121018.pdf>

“The ERDF [European Regional Development Funds] should as a basic principle not be used for building new residential institutions or the renovation and modernisation of existing ones. Targeted investments in existing institutions can be justified in exceptional cases where urgent and life-threatening risks to residents linked to poor material conditions need to be addressed, but only as transitional measures within the context of a de-institutionalisation strategy.”²¹

The European Commission’s response to the Petition and MHI’s letter requesting that the Petitions Committee reconsider its decision to take no further action are attached.

3. Does the new legislative framework of the cohesion policy contribute to addressing these problems?

The Common Provisions Regulation,²² with its emphasis on using Structural Funds to support the “transition from institutional to community-based care”, as well as social inclusion, accessibility and non-discrimination, is very positive. These new provisions have the potential for ensuring that Structural Funds are effectively used to facilitate independent living of people with disabilities in the EU. However, ENIL-ECCL and MHI are concerned that there is no information on how the EC will assess Member States’ compliance with these requirements. In particular we are concerned about the following:

- *Identifying measures for the shift from institutional to community-based care:* It is unclear how the EC will assess whether the measures for the shift from institutional to community-based care identified by Member States are adequate.²³ Experience shows that, while Member States may have de-institutionalisation strategies in place, they do not necessarily fully support the right to independent living.²⁴ This can inadvertently lead to EC accepting the Member States’ strategies, regardless of their quality, and the Structural Funds being invested into services which replicate an institutional culture.
- *Assessing capacity to comply with the CRPD:* It is not clear how the European Commission intends to assess Member States’ compliance with the general *ex ante* conditionality on disability (which requires the existence of “administrative capacity for the implementation and application of [the CRPD]”). The criteria for fulfilment refer to the involvement of “bodies in charge of protection of rights of persons with disabilities or representative organisations of people with disabilities

²¹ Commission Staff Working Document, *Report on the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union*, June 2014, para 98.

²² Regulation (EU) No 1303/2013

²³ This is discussed in more detail in ENIL-ECCL, *Realising the Right to Independent Living: Is the European Union Competent to Meet the Challenges?: ENIL-ECCL Shadow report on the implementation of Article 19 of the UN Convention on the Rights of Persons with Disabilities in the European Union*, October 2014. See: <http://www.enil.eu/wp-content/uploads/2012/06/Shadow-Report-11-04-2014-final-WEB-1-1.pdf>

²⁴ For example, concerns about the capacity of a de-institutionalisation strategy to support independent living have been raised by the ENIL-ECCL partners in relation to the Czech Republic and Bulgaria, and by the CRPD Committee in relation to Hungary.

and other relevant stakeholders” throughout the process of programmes funded by Structural Funds, training of staff on disability law and policy and practical application of the CRPD and monitoring compliance with Article 9.

- *Inadequate restrictions on the investment of Structural Funds into institutional care:* The EU stated in its *Report on the implementation of the UN Convention on the Rights of Persons with Disabilities* (the CRPD Report)²⁵ that Structural Funds (specifically the European Regional Development Fund) should not be used for building new residential institutions or the renovation and modernisation of existing ones. It added that investments could be justified in exceptional cases “where urgent and life-threatening risks to residents linked to poor material conditions need to be addressed” but “only as transitional measures within the context of a de-institutionalisation strategy”.²⁶ Given its significance, it is important that the European Commission makes all Member States aware of this view. We are concerned that as yet no guidance has been published to clarify the European Commission’s position that, save for exceptional circumstances, Structural Funds should not be invested in institutions. Draft guidance for EC desk officers on the transition from institutional to community-based care,²⁷ which is available on the EU website, does not reflect this position. For example, it states that “*improvements* in existing institutional infrastructure” can be made if “the persons concerned, given the seriousness of their condition, require constant medical supervision”. It therefore needs to be revised.

In the past, our concern was that Structural Funds were invested inappropriately – by financing the renovation of existing large long-stay institutions. While the European Commission has taken steps that will help to address this, we are concerned that there are insufficient mechanisms in place to enable the European Commission to monitor the implementation of projects funded by Structural Funds to ensure they develop community-based services that promote social inclusion and are not used to create services that replicate institutional care. It is important to be aware that the existence of deinstitutionalisation strategies is not enough, as such strategies must be directed at the closure of institutions and the development of community-based services that fully support the right to independent living.

3.a Are the national means of redress foreseen in the legislative framework sufficient?

We note that Article 74(3) of the Common Provisions Regulation²⁸ states that:

“Member States shall ensure that effective arrangements for the examination of complaints concerning the ESI Funds are in place. The scope, rules and procedures concerning such arrangements shall be the responsibility of Member States in accordance with their institutional and legal framework.”

²⁵ June 2014. See: http://ec.europa.eu/justice/discrimination/files/swd_2014_182_en.pdf

²⁶ Commission Staff Working Document, *Report on the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union*, June 2014, para 98.

²⁷ Draft Thematic Guidance Fiche for Desk Officers, Transition from Institutional to Community-based Care (De-institutionalisation – DI), Version 2 – 27/01/2014. See:

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

²⁸ Regulation (EU) No 1303/2013

Thus, the regulations envisage that the framework for redress is to be decided upon by Member States. The European Commission confirms in its comments to this inquiry that the “scope, rules and procedures concerning such arrangements” are the responsibility of the Member States. On this basis, it is not possible to know whether the means of redress will be sufficient. It would be helpful if the European Commission could clarify whether there are any EU policies or regulations that set out minimum standards for national complaints systems.²⁹ In the absence of these, it is likely that the standards used in different Member States will vary considerably and may be unable to identify all the problems in the use of Structural Funds.

Moreover, with regard to the “examination of complaints”, it should be noted that an important aspect of complaints procedures is ensuring that individuals are aware that they can complain, what they can complain about and how they may do so. It is not clear whether this aspect has been taken into account. ENIL-ECCL and MHI are concerned that there is insufficient awareness amongst the general public, including civil society organisations (non-governmental organisations – NGOs), of how projects funded by Structural Funds are planned and implemented. Thus, given the lack of knowledge about the use of Structural Funds in general, it is unlikely that citizens are aware of their right to complain, or how to do so. Furthermore, those directly affected, namely those placed in institutional settings, face substantial legal and practical barriers to making complaints, such as no access to legal advisers/advocates to assist in making a complaint. In addition, a large number of people in institutional care are under full guardianship and may therefore be regarded as lacking the legal capacity to make any complaint.

3.b What role do you think the Commission can play in supporting national authorities to implement well functioning redress systems?

The Commission could work with the Member States to ensure that there is greater awareness about the use of Structural Funds, particularly amongst NGOs and people with disabilities themselves. We are concerned that there has been an insufficient involvement of NGOs in the programming and implementation of Structural Funds in the financing period 2014 - 2020, despite this being a legal requirement under the European Code of Conduct on Partnership.³⁰ This is a wasted opportunity given that many NGOs have valuable expertise, especially those who provide high quality community-based services.

²⁹ See, for example, Parliamentary and Health Service Ombudsman for England, ‘Principles for Good Complaints Handling’, available at: <http://www.ombudsman.org.uk/improving-public-service/ombudsmansprinciples/principles-of-good-complaint-handling-full>

³⁰ See, for example, ENIL-ECCL *Briefing on Structural Funds Investments for People with Disabilities* (2013), CEE-Bankwatch Network *Partners’ involvement during EU funds programming: left out on crucial questions* (2014), available at: <http://bankwatch.org/publications/partners-involvement-during-eu-funds-programming-left-out-crucial-questions>, Eurochild *Are European Structural and Investment Funds opening doors for Europe’s institutionalised children in the 2014 – 2020 programming period?* (2015), available at: http://www.eurochild.org/fileadmin/public/04_News/Eurochild/Opening_Doors_Esif_Report.pdf and Institute for Public Policy/MHI *Statement on the use of ESI Funds for the disability sector in Romania in 2014 – 2020* (2015), available at: <http://new.ipp.ro/statement-on-the-use-of-european-structural-and-investment-funds-for-the-disability-sector-in-romania-in-2014-2020/>

The Commission should ensure that Member States comply with their partnership requirements in the planning, implementation and evaluation of Structural Funds projects. This should include NGO access to Structural Funds as service providers, and the involvement of service users in the process. Our view is that the Commission should insist that deinstitutionalisation strategies describe how the goals and objectives have been developed and agreed upon, and how relevant individuals and their organisations have been consulted and their views taken into account (including those of people with disabilities themselves). In addition, the Commission should make clear that Member States will need to publicise information on the available complaints procedures in relation to the use of Structural Funds, and what the citizens can complain about. Such information should be accessible to people with disabilities (i.e. provided in accessible formats).

It is also important for the European Commission to ensure that Monitoring Committees established under different Operational Programmes are able to efficiently monitor the use of Structural Funds for the transition from institutional care to community-based services. This has not been the case during 2007 – 2013, due to an almost exclusive focus on financial and technical aspects, rather than the mid and long-term impact of the projects funded, lack of representation of the relevant NGOs on the Monitoring Committees and few opportunities to influence decisions.³¹

3.c Has the Commission's ability to supervise the Member States improved?

The emphasis in the Common Provisions Regulation on the transition from institutional care to community-based services, the need to promote social inclusion, as well as including a general *ex ante* conditionality to comply with the CRPD has improved the Commission's ability to supervise Member States. It is therefore very welcome. However, we are concerned that the Commission has placed an overly restrictive interpretation of its role. In particular, in its CRPD report, the Commission states the while it has a responsibility for ensuring that Member States' Operational Programmes comply with EU law, implementation is the responsibility of Member States.³²

This is likely to mean that the Commission will not monitor the use of Structural Funds effectively. For example, if the Commission does not have some responsibility for the implementation of projects, it would not be able to take action in cases where Structural Funds are used to fund services that are institutional in character, are located on the outskirts of towns, with poor transport links, or projects for the provision of housing that is inaccessible to people with disabilities, even though such projects would be failing in the objective of promoting the transition from institutional to community-based care.

In relation to accessibility of mainstream services (Article 7, CPR), it is not clear how compliance with these provisions will be monitored, or who would assess for compliance. As of yet, there are no accessibility standards at the EU level, and

³¹ ENIL-ECCL, *Wasted Time, Wasted Money, Wasted Lives... A Wasted Opportunity?*, page 35 – 36.

³² Commission Staff Working Document, *Report on the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union*, June 2014, para 99.

Member States' standards vary. If this is to be monitored by civil society groups, additional funding will be required. Furthermore, it is not clear what would happen if projects supported by Structural Funds are not accessible.

Given that the funds are being provided by the EU, it is argued that the European Commission has a responsibility not just during the programming phase of Structural Funds use, but also for monitoring the implementation of the specific projects. This is necessary to ensure that Structural Funds are not being invested in projects that conflict with the EU's obligations under the CRPD³³ or the CPR. However, no details are provided on how the necessary monitoring will be undertaken in 2014 - 2020.

4. Are the measures mentioned in the Commission's reply appropriate to deal with possible problems?

4. a Please consider, in particular, the Commission's approach to the establishment of "effective arrangements for the examination of complaints" and the role it sees for itself in that context.

We note that the Commission plans to include the examination of complaints when assessing the Member States' management and control systems. However, as noted in response to question 3, we have concerns about the efficacy of the national redress systems. It is not clear whether the arrangements will include ensuring that capacity building activities have been carried out to enable NGOs and people with disabilities to submit complaints or that the existence of complaints mechanisms is made publically available. Such information would need to include matters such as what can be complained about, how to submit a complaint and the independence of the body investigating the complaints. Any information provided should also be accessible to people with disabilities (i.e. provided in accessible formats).

In relation to the possibility to submit complaints directly to the Commission, referred to in the response to this inquiry, it is unclear whether any steps will be taken to make this complaints system more accessible to citizens. Similarly to the Member States' complaints systems, this would require providing information, in an accessible way, on what can be complained about, how to submit a complaint etc. At the very least, such information should be easily accessible on the websites of DG Regional Policy and DG Employment, which is not the case at the moment.

4.b If the answer to this question is negative, please explain which other measures the Commission could consider under the existing legal framework.

In response to question 3, we noted that the Commission has taken an overly restrictive view of its powers to supervise Member States. We suggest that this needs to be reviewed.

In the past, the Commission was reluctant to take action even where concerns were raised that significant amounts of European Union funds were invested in institutional care (the renovation of existing institutions and building new long stay

³³ Open Society Foundations, *The European Union and the Right to Community living*, 2012, page 70. See: <http://www.opensocietyfoundations.org/sites/default/files/europe-community-living-20120507.pdf>

facilities). It is therefore very positive that the Commission has made clear that it will use its powers to suspend or withdraw payments if it finds that Member States have failed to comply with certain requirements. (In its response to this inquiry the Commission refers to suspension of payments if a Member State failed to establish a complaints handling procedure and in its report to the CRPD Committee, the Commission states that it will use its powers to suspend or withdraw payments in the future, if there is a lack of compliance with EU law, including the CRPD.) However, if the Commission is to be in a position to use this power to suspend or withdraw payments, an effective monitoring mechanism (covering all EU funded projects) for ensuring that Structural Funds are used in accordance with the CRPD, is required.

As noted in question 3, monitoring of the implementation of projects is essential. ENIL-ECCL found that in the previous programming period, Monitoring Committees in the Member States were unable to prevent Structural Funds being invested into institutional care.

5. If you have any comments on the topic which are not addressed by the above questions, please mention them briefly.

While recognising that it is the responsibility of Member States to inspect their institutional care settings, where Structural Funds are used to maintain such places, we consider that it is the EC's responsibility to ensure that EU funds do not perpetuate human rights violations.

In its response to the MHI Petition, the Commission noted that "in accordance with shared management arrangements, it is the task of the Member State and the relevant programme managing authority to provide information on and publicise projects and co-financed programmes". Considering that this has not been the practice in the previous financing period, it is unclear whether the Commission plans to issue any guidance to the Member States in order to ensure that they comply with this obligation in the current period, and how this will be monitored.

For additional information, please contact [REDACTED] Policy officer and Coordinator of the European Coalition for Community Living [REDACTED]



31.5.2013

NOTICE TO MEMBERS

Subject: Petition 1459/2012 by [REDACTED] (Hungarian) on behalf of Open Society Foundations, with the support of 12 associations, concerning the investment of EU funds in residential centres for the disabled in certain Member States of Central and Eastern Europe

1. Summary of petition

The petitioner indicates that in Europe around 1.2 million people with disabilities are being forced to live in long-term residential centres under totally inhuman conditions, suffering abuse and being denied any form of therapy or rehabilitation. A number of central and eastern European Member States are investing EU funds in such residential centres. The petitioner points out that investment in the projected maintenance or extension of such institutions constitutes an infringement of the European Union Charter of Fundamental Rights and the UN Convention on the Rights of Persons with Disabilities, runs counter to EU policies concerning equal opportunities, social inclusion and non-discrimination and should therefore not be eligible for funding.

The petitioner calls for the use of structural funds to be made subject to strict conditions and for the urgent adoption of measures to guarantee compliance by the Commission and Member States with their obligations under EU and international human rights law.

2. Admissibility

Declared admissible on 29 April 2013. Information requested from Commission under Rule 202(6).

3. Commission reply, received on 31 May 2013

The Commission is not aware of any specific cases of abuse of residents in long-stay institutions for people with disabilities and which can be linked to co-financing from the Structural Funds. It does not, therefore, agree that the investments co-financed from the Structural Funds in the four Member States referred to in the petition constitute illegal expenditure.

The transition from institutional to community-based care, including for people with disabilities, is nevertheless an issue which has recently received considerable attention within the Commission. First of all, it was the subject of a report drafted by a group of independent experts convened in 2009 by Vladimir Spidla, the then Commissioner for Employment, Social Affairs and Equal Opportunities. This report contained a series of recommendations addressed both to Member States and the Commission, including on how Structural Funds could be used in the transition process.

An immediate subsequent emanation from the work of the expert group was a collaborative exercise launched in 2009 by the Commission with Bulgaria, as a result of which this Member State undertook an integrated approach, financed by structural Funds, to address the issue of children in institutions and embarked on a comprehensive strategy for the closure of 130 existing residential institutions and their gradual transition to community-based services within a fifteen-year horizon.

The “small group homes” referred to by the petitioner in fact correspond to the ERDF co-financed scheme for constructing family-type housing centres and protected homes for children in Bulgaria. These aim at securing suitable and effective social infrastructure to help provide a new type of residential and auxiliary services within the community as a replacement for institutional care. The newly built infrastructure will be combined in an integrated manner with ESF co-financed social services that are suitable to the specific needs of each child. These measures are implemented in combination with a project which focuses on foster care and which has as its main objective the implementation of a new approach in the provision of voluntary, professional and respite foster care.

Including complementary financing from the EAFRD, over EUR 100 million of EU funds are allocated to the deinstitutionalisation process in Bulgaria during the 2007-2013 period. The Commission anticipates that the shift to community-based services will remain a key investment priority for the 2014-2020 period.

The Commission is also fully aware of current developments on this issue in Hungary. In 2009, in the absence of a clear strategy regarding deinstitutionalisation, the Commission recommended that a strategic document be drawn up, in particular with regard to people with disabilities living in large institutions. A first draft national strategy was discussed at a seminar in late 2010, where both the Commission and a number of experts, including the signatories of the petition, drew attention to substantial problems in the Hungarian proposals.

The Commission subsequently addressed a letter to Mr Soltesz, Secretary of State for Social, Family and Youth Affairs in December 2011, expressing its concerns. In particular, it underlined the importance of involving the representatives of people with disabilities in the implementation of the strategy, expressed its concerns regarding the setting up “home centres” for 50 people and recommended carrying on with the deinstitutionalisation process in order to comply fully with article 19 of the UN Convention on the rights of persons with

disabilities (UNCRPD).

Given the shared management nature of Structural Funds, the terms of the calls for proposals and choice of individual projects is the responsibility of the relevant programme managing authority. In the Hungarian case, the newly established National Body of Deinstitutionalisation, which includes civil society and academics, as well as government representation, will assess applications before EU funding is granted and ensure that persons with disabilities have the right to choose their preferred living arrangements.

In the case of Slovakia, the relevant Regional Operational Programme was modified in 2011 following discussions between the Commission and the national authorities. The remaining available finance for social infrastructure measures is being exclusively devoted to pilot deinstitutionalisation projects, notably for children. The Commission has also welcomed the efforts communicated by the national authorities to prepare a national deinstitutionalisation strategy/action plan and has recommended that this be achieved in partnership with the authorities and bodies concerned.

With regard to Romania, 50 projects involving disabled persons as the target group are financed from ERDF in the current period for a total value of EUR 25 million. These include investments in multifunctional social centres providing a wide span of services, which are complemented by improvements in already existing residential centres. For the 2014-2020 period, the Commission's position is that EU funds should support the transition from institutional to community-based care for a number of target groups, including people with disabilities.

With regard to the 2014-2020 period, the Commission has tabled legislative proposals which will channel future investments from Structural Funds towards supporting the deinstitutionalisation process. The draft ERDF regulation provides for investing in health and social infrastructure which contributes, inter alia, to the transition from institutional to community-based services. The draft ESF regulation identifies facilitating this transition as part of its promotion of equal opportunities and non-discrimination.

Additionally, the proposed Common Provisions Regulation contains relevant ex-ante conditionalities that need to be fulfilled by Member States in relation to such investments. Firstly, measures for the shift from residential to community based care should be part of a national poverty reduction strategy. Secondly, a mechanism needs to be in place which ensures effective implementation of the UNCRPD. These provisions are currently under discussion in the Parliament and Council.

In November 2012, the European Expert Group on the Transition from Institutional to Community-Based Care, made up of representatives 10 NGOs, published Common European Guidelines on the Transition from Institutional to Community-Based Care, together with a toolkit on the use of EU funds in this process. Commissioners Andor and Hahn co-signed a foreword to these guidelines, which they welcomed as an extremely useful input as regards the future use of structural funds in this area.

The Commission is currently working on guidance on this topic and in so doing is drawing on the work of the Expert Group. In this context it is also examining the extent to which long-

stay institutions are by their nature contrary to article 19 of the UNCPRD and article 26 of the Charter of Fundamental Rights, as well as under what circumstances the financing of upgrading existing institutions can continue to be justified.

Attention is drawn to the fact that, given that negotiations have not yet been completed, the provisions of the European Convention for the Protection of Human Rights are not at this juncture binding on the EU.

With regard to information about the projects concerned, the Commission recalls that, in accordance with shared management arrangements, it is the task of the Member State and the relevant programme managing authority to provide information on and publicise projects and co-financed programmes. This principle is maintained in the draft legislation for the forthcoming period.

Conclusion

The Commission does not have any evidence leading it to believe that the investments referred to by the petitioner constitute illegal expenditure.

If the petitioner has evidence of specific cases of abuse that are attributable to the Structural Funds support granted, she is invited to inform the relevant managing authority or to file a complaint to the Commission, which will then examine the case.

Budapest, 2 February 2015

European Parliament Committee on Petitions

President of the European Parliament

Rue Wiertz

B-1047 Brussels

Belgium

SUBJECT: Petition 1459/2012

Dear Mr. [REDACTED],

Thank you for your email addressed to my colleague [REDACTED] of the Open Society European Policy Institute on December 3, 2014, and for sharing the European Commission's reply to this Petition. I am responding as author of the Petition on behalf of the Open Society Foundations Mental Health Initiative (MHI). MHI's comments, to the European Commission's reply and to the petition procedure are set out below. A number of organizations supported this Petition, and their comments have been included in this response. The reason for outlining concerns now is to ensure that Structural Funds investments in institutions that arose during the previous programming period are avoided in the current period (2014-2020).

We are pleased that since the European Commission's reply of 31 May 2013, significant and positive developments have taken place, in particular the adoption of the Common Provision Regulation governing the use of Structural and Investment Funds (Structural Funds). We also understand that as a result of the Commission's negotiations with Member States on the Operational Programmes, several have now taken steps to accelerate the transition from institutional to community-based care. Such developments address some important aspects, but not all, of the concerns raised in the Petition.

Observations on the reply of the European Commission, dated 31 May 2013

The Petition provided details of our concerns about the investment of Structural Funds into institutions, in particular that the segregation of people with disabilities caused by their institutionalization is a human rights violation and in contravention of EU policies on social inclusion. Furthermore, we stated that the investment of Structural Funds to perpetuate this situation is contrary to EU law (setting out the relevant EU and international obligations, including the EU Charter of Human Rights and the UN Convention on the Rights of Persons with disabilities (the CRPD)). The Petition asked the Petition Committee to consider four key actions. These are discussed below.

1. *Call upon the European Commission (in its role of ensuring the correct application of EU Law by the Member States) and on the European Parliament (in its role of budgetary control) to ensure clear compliance by the Member States and the Commission itself with the above-mentioned EU and international legal obligations with regards to protecting the equal rights of persons with disabilities.*

We sought this commitment because during the previous programming period Structural Funds were invested in institutions in certain Member States. It is estimated that in Bulgaria, Hungary, Latvia, Lithuania, Romania and the Slovak Republic alone, at least 150 million Euros were invested in the renovation of existing institutions, or in the building of new institutions for disabled people.¹

We note that the European Commission stated in its reply that it ‘was not aware of any specific cases of abuse of residents in long-stay institutions for people with disabilities and which can be linked to co-financing from the Structural Funds’ and therefore did not agree that the investments referred to in the Petition constituted illegal expenditure. However, the Commission also stated that it would examine ‘the extent to which long-stay institutions are by their very nature contrary to Article 19 of the UNCRPD and article 26 of the Charter of Fundamental Rights’.

As stated in the Petition, we are of the view that irrespective of any physical or other abuse perpetrated against residents of such institutions, the segregation of people with disabilities in institutions *in and of itself*, is a violation of Article 19 of the UN Convention on the Rights of Persons with Disabilities (CRPD). The investment of EU funding to maintain institutions therefore results in the violation of a fundamental right. For this reason, we welcome the statement in the EU’s report to the UN Committee on the Rights of Persons with Disabilities (paragraph 98) of June 2014, that supports MHI’s view:

‘The ERDF [European Regional Development Funds] should as a basic principle not be used for building new residential institutions or the renovation and modernisation of existing ones. Targeted investments in existing institutions can be justified in exceptional cases where urgent and life-threatening risks to residents linked to poor material conditions need to be addressed, but only as transitional measures within the context of a de-institutionalisation strategy’.

Since this statement is made in a report to the UN CRPD Committee, it may not be widely known. We therefore call upon the Petitions Committee to ask that the European Commission issue a statement reiterating its position. Furthermore, given the Commission's statement that Structural Funds should not be invested in institutions save for the specific exceptional cases outlined by the Commission, we call upon the Petitions Commission to ask that the Commission acknowledges that Structural Funds were inappropriately used in the previous programming period of 2007-2013.

¹ Based on figures provided in ENIL-ECCL *Briefing on Structural Funds Investments for People with Disabilities: Achieving the Transition from Institutional Care to Community Living, December 2013*, pp 11-12 Available at: <http://www.enil.eu/wp-content/uploads/2013/11/Structural-Fund-Briefing-final-WEB.pdf>

2. *Urge the prompt approval of EU legislation that includes clear rules of conditionality concerning the use of Structural Funds that ensure strict compliance by the Member States with the above-mentioned EU and international legal obligations. In particular, such rules should make clear that:*
 - (a) *The European Commission and Member States (in accordance with the CRPD) are under an obligation to safeguard the right of people with disabilities to live in the community by investing Structural Funds in programs that promote their inclusion in the community.*
 - (b) *Projects that propose to invest Structural Funds in the maintenance or extension of institutions are contrary to the CRPD, as well as to the EU's own policies on equal opportunities, social inclusion and discrimination, and are therefore not eligible for funding.*

The Common Provisions Regulation concerning Structural and Investment Funds that has been adopted emphasizes the importance of investing Structural Funds to support the ‘transition from institutional to community-based services’ and the need to promote social inclusion, as well as including a general *ex ante conditionality* to comply with the CRPD. While welcoming this important positive reform, MHI is concerned that it may be undermined in the implementation of projects. It is not clear what mechanisms are in place to enable the European Commission to monitor Member States compliance with these requirements. We are concerned that without effective monitoring mechanisms, investments in institutions rather than community-based alternatives will continue. We share ENIL-ECCL’s concerns that:

‘Experience shows that, while Member States may have deinstitutionalisation strategies in place, they do not necessarily fully support the right to independent living. This can inadvertently lead to EC accepting the Member States’ strategies, regardless of their quality, and the Structural Funds being invested into services which replicate an institutional culture.’²

3. *Call on the European Commission and Member States to collect and publish data about the projects funded with Structural Funds (including a description of activities, information about the organization being funded and the target group, project results and the budget).*

The Commission’s response to this request is that ‘in accordance with shared management arrangements, it is the task of the Member State and the relevant programme managing authority to provide information on and publicise projects and co-financed programmes’. We are disappointed by this response given the concerns raised in the Petition about the lack of

² *Realising the Right to Independent Living: Is the European Union Competent to Meet the Challenges? ENIL-ECCL Shadow report on the implementation of Article 19 of the UN Convention on the Rights of Persons with Disabilities in the European Union* p. 30 October 2014, available at: <http://www.enil.eu/news/is-the-european-union-competent-to-ensure-access-to-independent-living/>

transparency in relation to projects in which Structural Funds are invested and the need to ensure accountability on the part of both the European Commission and the Member States. We therefore call upon the Petitions Committee to ask that the European Commission explain what information, if any, it provides about projects and what information it expects Member States to provide.

4. *Seek assurances from the European Commission that it will make full use of appropriate sanctions, such as suspension of, or reimbursement of, misused funds.*

The European Commission states in its report to the UN Committee on the Rights of Persons with Disabilities:

‘According to the principle of shared management to which the Funds are subject, the Commission has the responsibility to ensure that the Member States’ operational programmes comply with EU law, including EU legislation and the CRPD, and their strategies are in line with EU strategies and policies, including the Disability Strategy. Implementation, on the other hand, lies with the Member States. The Commission is committed to suspending or withdrawing payments in the event of this principle being breached.’

This statement suggests that the European Commission considers that its obligation to ensure that projects implemented with Structural Funds comply with its obligations under the CRPD and the EU Charter of Fundamental Rights ends once the operational programmes have been agreed with Member States, and that it will only suspend or withdraw payments where national strategies fail to observe these human rights obligations at the outset. MHI is extremely concerned with this approach. It suggests that the Commission has no system in place, and does not regard it as its responsibility, to verify that the agreed operational programmes are properly implemented by Member States. In fact, it is crucial to ensure that projects aimed at moving from institutional to community-based care actually result in people being supported to live and participate in the community as equal citizens. We consider that the EU has a responsibility to ensure that European funds are invested in accordance with the CRPD, and this will require the EU to monitor the implementation of Structural Funds projects to ensure that they promote the right to live in the community.

We therefore request the Petitions Committee to call on the European Commission to:

- a) confirm that it has a system in place through which it can monitor and verify that projects approved at national level concerning the transition from institutional to community care with EU funds genuinely replace institutional care with community-based services that support independent living.
- b) ask that the Commission issues guidance to Member States (in particular for managing authorities) to explain what action needs to be taken to ensure the transition from institutional

care to community based services and that EU funded projects are in line with EU law (including the CRPD). Such guidance should also set out the requirements on Member States to publish information on EU funded projects. Such information must be sufficient to verify that these projects support the implementation of independent living as required under the CRPD, in particular Article 19 (as noted in point 3 above we are concerned that insufficient information is published on projects funded by Structural Funds).

Petition procedure - delay and lack of information

Finally, we would like to express our disappointment that the Commission's reply was not communicated to us in a timely manner. The reply was delivered to the Petitions Committee in May 2013, and we were only informed of it in December 2014 because we actively made inquiries as to the status of our petition. This came as a surprise to us, as we had previously received information that our petition was still under consideration.

We understand from your email that the Petitions Committee can take no further action on this, and ask that you reconsider this decision in light of the concerns we have raised here. In addition, given the considerable length of time that has passed since the opening of this petition, we request the Petitions Committee repeat its call to other European Parliament committees to provide their views on the issues raised in the petition.

I look forward to hearing from you.

Sincerely,

