

Comments of the Commission on the suggestions for improvement from the European Ombudsman in her closing decision - Complaint by Mr ██████████, ref. 417/2018/JN

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

The complaint touched upon the responsibilities of several Directorates-General and the Legal Service of the Commission and required intensive coordination. On 23 October 2017, the Commission sent to MDAC a holding reply, pending the ongoing investigations.

On 26 February 2018, the Ombudsman received a complaint from the Validity Foundation, represented by Mr ██████████, against the European Commission concerning the adequacy of the Commission's response to correspondence from the complainant concerning alleged serious human rights violations in a home for persons with disabilities (Tophaz), co-funded by the EU, in Hungary.

On 23 April 2018, the Ombudsman opened an inquiry into this complaint, suggesting that the Commission would comprehensively reply to the complainant and also send a copy of that reply to the Ombudsman's Office.

On 15 June 2018, the Commission sent its reply on the complaint to the complainant and to the European Ombudsman.

On 13 December 2018, the European Ombudsman sent her preliminary views on the treatment of this complaint and, before taking a decision on this case, the Ombudsman requested the Commission to reply on her preliminary views.

On 4 April 2019, the Commission sent its reply to the preliminary views of the European Ombudsman.

On 17 September 2019, the European Ombudsman sent her decision closing the above case with remarks. The Ombudsman invited the Commission to consider the remarks stated under section II.

II. THE EUROPEAN OMBUDSMAN'S SUGGESTIONS

The European Ombudsman's invites the Commission to:

- Seek to adhere, to the greatest extent possible, to the UN CRPD Committee's guidance that EU funds should not be used to maintain existing institutions;
- Consider the need to address the lack of an appropriate legal basis identified in this case to ensure that the spending of EU funds complies fully with the CRPD;
- Monitor the extent to which the Hungarian authorities adhere to the deinstitutionalisation process referred to in this case, which was to start on 1 July 2018 and finish in December 2020.

III. THE COMMISSION'S RESPONSE

The Commission considers, as stated in its previous reply, that while Article 19 of the UNCRPD requires parties to take measures to ensure that persons with disabilities have the opportunity to choose their place of residence and are not obliged to live in a particular living

arrangement, it does not establish a prohibition to support long-stay residential institutions.

In order to assist State parties in their implementation of Article 19, the UN Committee on the Rights of Persons with Disabilities (the Committee), which is a body of independent experts which monitors the implementation of the Convention by the States Parties, has prepared the General Comment No 5 providing detailed content to the rather generally worded text of this Convention. According to Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), the interpretation is based on various elements, in particular good faith, the ordinary meaning of terms, the context and the object and purpose of the treaty. The General comments prepared by the Committee on the basis of its rules of procedure are used to promote further implementation of the Convention and assist States parties in fulfilling their reporting obligations; they are not legally binding but they do carry policy weight and they should be taken into account when it comes to the implementation of the Convention.

Therefore, the Commission will pay particular attention to ensuring that the provisions of the UNCRPD and the corresponding General Comments are, respectively, respected and adequately considered during the preparation and implementation of the programmes in order to support transition from institutional to community and family-based services. It will be an essential part of the upcoming discussions on the 2021-2027 programmes, supported by the Funds¹ and will be part of corresponding trainings for desk officers responsible for the management of programmes supported by the Funds.

1. As it was stated in the Ombudsman's decision 417/2018/JN under point 12, and following the Commission response dated 15 June 2018, referred to under point 1 above, there is no legal basis to exclude the allocation of EU funds to long-stay residential institutions. At the same time, it is important to highlight that for both the programming period 2014-2020 and for the upcoming 2021-2027 period, the policy focus is on supporting the transition process towards community-based services. Furthermore, a draft guidance for desk officers had been prepared by the Commission services to guide the programming period 2014-2020², emphasising that the building of new institutions should not be supported and that the refurbishment of institutions should be only envisaged under certain conditions.

As regards the proposal for a Regulation laying down common provisions and financial rules for certain Funds for the 2021-2027 period (proposal COM (2018)375)³, the Commission introduced the enabling conditions to ensure the necessary prerequisites are in place for the effective and efficient use of Union support granted by those Funds. It has proposed to include a horizontal enabling condition for the implementation and application of the UNCRPD in accordance with the Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC)⁴. To assess the fulfilment of this horizontal enabling condition, the Member State should assess whether it

¹ Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument [COM(2018) 375]

² https://ec.europa.eu/regional_policy/sources/docgener/informat/2014/guidance_deinstitutionalisation.pdf

³ Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument

⁴ OJ L 23, 27.1.2010, p. 35-36

has a national framework for implementing the UNCRPD in place that includes objectives with measurable goals, data collection and monitoring mechanism and that there are arrangements to ensure that the accessibility policy, legislation and standards are properly reflected in the preparation and implementation of the programmes supported by the Funds. In accordance with the Commission proposal, where the enabling condition is not fulfilled, the expenditure related to the operations under the related specific objective should not be included in payment applications.

In addition, the Commission has proposed thematic enabling conditions that are linked to specific types of support and promote deinstitutionalisation and community-based services:

- support from the European Regional Development Fund (ERDF) and the European Social Fund Plus (ESF+) for the integration of marginalised communities should fulfil an enabling condition on a national strategic policy framework for social inclusion and poverty reduction. This national strategic policy framework should contain, *inter alia*, measures for the shift from institutional to community-based care;
- support from the ERDF and the ESF+ for equal access to health care should fulfil an enabling condition on a national or regional strategic policy framework for health that should contain, *inter alia*, measures to promote community-based services.

Recital 5 of the proposed Regulation for the European Regional and Development Fund and the Cohesion Fund (COM(2018) 372) states clearly that those Funds should not support actions that contribute to any form of segregation.

Therefore, the Commission's proposals for the post-2020 programming period have further strengthened the focus on the transition from institutional to community and family-based services in accordance with the UNCRPD. In order to better understand the challenges which Member States may face in designing the new operational programmes for the 2021-2027 period, a series of trainings and seminars are being organised both internally in the Commission and at national level.

2. The Commission reiterates that the Tophaz institution has originally received EU funding in the 2007-2013 programming period for improving the energy efficiency of the building, not for deinstitutionalisation. Nevertheless, the Commission services requested information about the development of the Tophaz institution from the responsible national authorities. Through various ways of communication, the Commission also reminded the national authorities of their obligations in relation to the UNCRPD. According to the official communication of the Hungarian authorities (Ares(2018)5847107), the Hungarian government decided that the maintenance of Tophaz should be taken over by the Hungarian Charity Service of the Order of Malta, which came into force 1 July 2018 (<https://malta.hu/godiotthon>). They are now responsible for the proper and rightful deinstitutionalisation of Tophaz.

Since the ongoing deinstitutionalisation of Tophaz is not co-financed by the EU funds, the Commission does not monitor developments in this respect. However, the national authorities are regularly reminded that deinstitutionalisation projects need to live up to the national and international obligations once they are selected for financing from any EU co-

funded programme.

Overall, the Commission monitors programme implementation in Hungary through monitoring committee meetings, annual implementation reports, annual review meetings, technical meetings etc. Besides that, the Commission is also using additional monitoring resources in relation to deinstitutionalisation. For example, in February 2019, the Commission contracted an external expert to collect information and study the implementation of ongoing deinstitutionalisation projects in the 2014-2020 programming period in Hungary co-financed by the EU. The expert has already formulated her final recommendations based on her desk analysis, interviews and on-site visits. In addition, the Commission has organised a mutual learning seminar about deinstitutionalisation taking place in Hungary 27 November 2019 (which is the third event on this topic and organised previously in 2010 and 2015 with Commission participation). The national authorities and relevant national stakeholders are strongly involved as participants and co-speakers in this seminar.

IV. CONCLUSIONS

The Commission considers, as stated in its previous reply, that Article 19 of the UNCRPD does not establish a prohibition to support long-stay residential institutions. However, these investments should not contribute to any form of segregation and should be in line with the objectives and goals of the UNCRPD and other measures for shift from institutional to community-based and family-based services to respect the fundamental rights and freedom of persons with disabilities. Moreover, Member States are required to progress in general on ensuring independent living arrangements and deinstitutionalisation.

The Commission closely follows programme implementation in accordance with the applicable regulatory framework. It will also pay particular attention to specific investments related to deinstitutionalisation in the framework of the discussions on the 2021-2027 programmes.

Done at Brussels, 22.1.2020.

*For the Commission Elisa
FERREIRA Member of the
Commission*