

Reply of the European Commission on a request for information from the European Ombudsman

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

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

N.A

II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN

N.A

III. EUROPEAN OMBUDSMAN'S INQUIRY

The Ombudsman decided to inquire further into the role of the Commission in ensuring that Member State governments spend European Structural Investment funds (ESI funds) with a view to promoting independent living for persons with disabilities and older persons. The Commission is therefore requested to provide replies in a series of questions raised by the Ombudsman.

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

IV. THE REPLY OF THE EUROPEAN COMMISSION COMMENTS TO THE OMBUDSMAN'S QUESTIONS

Could the Commission please elaborate on its reply to the Ombudsman's suggestions for improvement in cases 417/2018/JN and 1233/2019/MMO on how it intends to monitor the use of ESI funds regarding this matter and what measures are foreseen should ESI funds be used at odds with the requirements under the UN CRPD? Does the Commission, in particular, intend to enhance its monitoring function? Does the Commission envisage any changes or improvements in the practical guidelines to its desk officers and national authorities for dealing with EU-funded projects?

The policy orientation highlighted in the Guidance for the use of ESI Funds for the 2014-2020 period, which emphasises that building or renovating residential care facilities is not supported, regardless of their size, remains valid for the programming period 2021-2027 with regard to investments through the Cohesion Policy funds. In addition, it is important to ensure independent living conditions and access to mainstream services in line with Article 19 UNCRPD, as well as safeguards to prevent segregation in investments. Furthermore, while in the current legal framework applicable to ESI Funds there is no general and absolute

prohibition to support residential care facilities, Member States are required to progress in general on ensuring independent living arrangement and de-institutionalisation.

For the 2021-2027 programming period, the transition from institutional to community and family-based services is part of the enabling conditions provided for by the Cohesion Policy funds regulations. The enabling conditions are the prerequisites to ensure that the requirements for the effective and efficient use of EU Funds¹ are in place. There are two types of relevant enabling conditions:

1. Horizontal enabling conditions are applicable to all EU Funds operations in Cohesion Policy. They require a national framework to be in place to ensure implementation of the UN Convention on the Rights of Persons with Disabilities and of the Charter of Fundamental Rights of the EU in line with specific criteria.²
2. Thematic enabling conditions relevant for the shift from institutional to community-based care are included in “National strategic policy framework for social inclusion and poverty reduction” and “National or regional policy framework for health and long term care” which contain criteria requiring “measures for the shift from institutional to family- and community-based care” and “measures to promote community and family-based services through de-institutionalisation, including prevention and primary care, home-care and community-based services”, respectively.

The enabling conditions have to remain fulfilled throughout the entire programming period. The fulfilment of enabling conditions will have to be discussed in the monitoring committees and annual review meetings. Managing authorities need to ensure that selected operations are consistent with the corresponding strategies and planning documents established for the

¹ The Commission proposal on strategic plans to be drawn up by Member States under the Common agricultural policy (CAP strategic plans), COM(2018)392, recalls (in Article 9 and recital 13) that Member States shall design the programmes supported by the CAP in compliance with the Charter of Fundamental Rights of the EU. Article 94 requires that Member States shall ensure that the monitoring committee, established to monitor the implementation of the CAP strategic plans, includes representatives of bodies responsible for promoting social inclusion, fundamental rights, gender equality and non-discrimination. If a Member State does not comply with these obligations, this can be addressed by not approving the national strategic Plan. In addition, any breach of the fundamental rights after approval of the strategic plan could be addressed by the Commission through the EU Pilot or infringement proceedings.

² For the Charter of Fundamental Rights of the EU the enabling condition provides that effective mechanisms are in place to ensure compliance with the Charter, which include: 1) arrangements to ensure compliance of the programmes supported by the Funds and their implementation with the relevant provisions of the Charter; 2) reporting arrangements to the monitoring committee regarding cases of non-compliance of operations supported by the Funds with the Charter and complaints regarding the Charter submitted in accordance with the arrangements made.

For the UNCRPD, the enabling condition provides that a national framework to ensure implementation of the UNCRPD is in place that includes: 1) objectives with measurable goals, data collection and monitoring mechanisms; 2) arrangements to ensure that the accessibility policy, legislation and standards are properly reflected in the preparation and implementation of the programmes; 2a) reporting arrangements to the monitoring committee regarding cases of non-compliance of operations supported by the Funds with the UNCRPD and complaints regarding the UNCRPD submitted in accordance with the arrangements made pursuant to Article 63(6) of the Common Provisions Regulation.

fulfilment of enabling conditions. When the Commission is of the view that an enabling condition is not fulfilled, it will start a contradictory procedure, which may lead to the conclusion that expenditure related to operations linked to the specific objective may be included in payment applications, but shall not be reimbursed until the Commission considers that the enabling condition is fulfilled.

The partnership with all relevant stakeholders remains a key principle to follow in the design and implementation of cohesion policy programmes. Stakeholders should be involved in the design and implementation of the programmes, and their expertise and inputs should be thoroughly used.

The Charter of Fundamental Rights of the EU (hereafter referred to as ‘the Charter’) enshrines the right of persons with disabilities to live in dignity and independence (Article 26). The EU and the Member States have ratified the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). Principles 15 and 17 of the European Pillar of Social Rights refers to the right of people with disabilities and older people to live in dignity; principle 18 affirms the right to affordable long-term care services of good quality, in particular home-care and community-based services.

In the ‘Strategy to strengthen the application of the Charter of Fundamental Rights in the EU’³ the Commission has reaffirmed its commitment to monitor the application of the Charter and related EU laws, to strengthen its dialogue with the Member States and take appropriate action where there is a breach of EU law which has consequences for the EU budget.

Under the rules applicable to cohesion policy for the programming period 2021-2027, monitoring committees should include fundamental rights bodies to help assess compliance with the Charter. Given their independent status and expertise in monitoring and advising authorities, national human rights institutions (NHRIs) could play a role in ensuring that EU funded programmes are designed and implemented in compliance with the Charter (following criterion 2 of the Charter enabling condition and criterion 2a on the UNCRPD above).

In addition to assessing the fulfilment of the enabling conditions, the Commission will develop a training module and provide technical assistance to ensure a coherent and effective implementation of the ‘enabling condition’ on the Charter provided for in the Common Provisions Regulation for shared management funds⁴.

Regarding programme implementation, the Commission will continue its monitoring through monitoring committee meetings, annual implementation reports, annual review meetings, technical meetings etc. The Commission has also used additional monitoring resources in relation to deinstitutionalisation, as already reported in previous Commission responses⁵ to the Ombudsman, by hiring external experts and organising mutual learning seminars on this topic and training sessions for desk officers.

³ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=COM:2020:711:FIN>

⁴ COM(2020) 711 final, p.8

⁵ Cases 417/2018/JN and 1233/2019/MMO refer

The programmes in the 2021-2027 period will continue to be approved by the Commission and monitored and audited regularly, to ensure compliance with the agreed priorities, the implementing rules and sound financial management principle for spending the EU budget. Under the shared management mode, Member States' designated authorities will continue to have the main responsibility for selecting and monitoring individual projects and they enjoy discretion in setting up and selecting the operations and funding projects, including related to persons with disabilities. All operations shall be selected and implemented while respecting the Charter of Fundamental Rights of the EU and in accordance with the relevant provisions of Common Provisions Regulation. Member States shall ensure the effective examination of complaints. This is without prejudice to the general possibility of citizens and stakeholders to address complaints to the Commission, including with regard to breaches of the Charter. Where the Commission finds that there has been a breach of the Charter, it shall take into account the nature, gravity and financial implications of the breach in its determination of the corrective measures which may be applicable in line with the relevant provisions of the Common Provisions Regulation.

In the area of disability in particular, the Commission continues to pay attention to the promotion of independent living in line with the new Strategy for the Rights of Persons with Disabilities 2021-2030⁶. Notably, the Strategy reaffirms that persons with disabilities, old and young, have an equal right to live independently and be included in the community, with choices equal to others about their place of residence and with whom and how they live. It recognises that developing independent living and reinforcing community-based services requires reinforced action by the Member States and the Commission will support national, regional and local authorities in their efforts for deinstitutionalisation and independent living, including through the 2021-2027 shared management funds. The Commission will, by 2023, issue guidance recommending to Member States improvements on independent living and inclusion in the community.

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

The process of deinstitutionalisation requires the development of individualised services, the planned closure of long-stay residential institutions and making general services available to persons with disabilities.

The Member States enjoy discretion in setting up the operations in accordance with the requirements of the UNCRPD (Article 19 in particular) which they would like to co-finance in the context of the process to ensure independent living arrangements and deinstitutionalisation. Member States argued in several cases for investments in residential care facilities, as part of the process. However, following the policy line adopted in the 2014-2020 period, EU funds investments in the programming period 2021-2027 should continue to

⁶ Cf. <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8376&furtherPubs=yes>

focus on developing community and family-based settings, and conditions for independent living. EU funds investments should also include the closure of residential care facilities and making general services in education, health, social care and housing available to persons with disabilities. The specific objective 4.4 under the European Regional Development Fund (ERDF) should support and promote the transition from institutional to community or family-based care by supporting facilities that would seek to prevent segregation from the community, would facilitate inclusion in society and would seek to ensure independent living conditions.

In its reply⁷ to the UN Special Rapporteur on the Rights of Persons with Disabilities and the UN Special Rapporteur on the Right to Adequate Housing, the Commission stressed that promoting the transition from institutional to community-based services might require in some cases transitory solutions aiming at securing healthy and secure living conditions all along this process, without undermining the overall aim of Article 19 UNCRPD, as long as a transition process from institutional to community-based care has been put in place.

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

The Commission continues to pay close attention to the impact of COVID-19 on health and wellbeing, including of persons residing in institutions. The Strategy for the Rights of Persons with Disabilities 2021-2030 acknowledges that the COVID-19 pandemic has amplified inequalities. It underlines that the EU's long-term budget, coupled with NextGenerationEU⁸, represents the largest stimulus package ever which will support a disability-inclusive response and recovery from the pandemic⁹.

The Coronavirus Response Investment Initiatives allowed for great flexibility in the use of the European Regional Development Fund (ERDF) and the European Social Fund (ESF), including to support operations aiming at limiting the spread of the virus in residential care facilities and promoting the development of homecare and community-based services as a less risky alternative, in line with the general policy in favour of independent living.

The Recovery Assistance for Cohesion and the Territories of Europe (REACT-EU) provides for additional resources to be made available under the cohesion policy funds in 2021-2022, including under the ESF and the ERDF. The additional resources can be used for purchasing the necessary health care equipment, including protective material for health care and long-term care workers, recruiting additional staff for more and extended health care and social care services, as well as communication and information to the public.

⁸ Commission Communication COM/2020/442 final): [The EU budget powering the recovery plan for Europe](#); [Next Generation EU](#).

⁸ Commission Communication COM/2020/442 final): [The EU budget powering the recovery plan for Europe](#); [Next Generation EU](#).

⁹ As called for in the [Joint Statement](#) by the High Representative of the Union for Foreign Affairs and Security Policy and Vice-President Borrell, Vice-President Jourova and Commissioner Dalli.

For the programming period 2021-2027, promoting deinstitutionalisation remains a priority for the cohesion funds. To prevent investments in institutions (institutional care) and to make quality services available for all people in need, the provision of community and family-based services and human capacity in the scope of de-institutionalisation should come first (supported by ESF+), followed by infrastructure developments ensuring independent living conditions (supported by ERDF). This process would also require a strong coordination mechanism between the two funds, both at the programming and implementation level. In other words, Member States should not invest in infrastructure (via the ERDF) if there are no investments in community-based service provision (via the ESF+).

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

The Austrian complaint concerns the facilities for persons with disabilities co-financed under the Austrian Rural Development Programme supported by ERDF in 2014-2020. The complaint is currently under examination by the Commission services. The complaint regarding the eight projects in Poland financed by ERDF is also under examination by the Commission services.

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

Should the Commission identify a breach of the Charter of Fundamental Rights of the EU and the UNCRPD in an institution which received support from the cohesion policy Funds, it may apply an interruption or suspension of payments or make a financial correction if the irregular expenditure has not been corrected by the Member State. However, as the EU Charter is applicable to Member States only when they are implementing Union law, the Commission could consider to open an infringement procedure or take financial management measures (interruption of payment deadline, suspension of payments or a financial correction) only if it establishes that there is a breach, and, as far as financial management measures are concerned, that the breach has an impact on the financing received.

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

The Commission replied to this letter on 13 August 2020 (Ref. Ares(2020)4239124, enclosed).

*For the Commission
Helena DALLI
Member of the Commission*

List of enclosures

- Commission's response to the UN rapporteurs-Ares(2020)4239124



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR EMPLOYMENT, SOCIAL AFFAIRS AND INCLUSION

The Director-General

Brussels
EMPL.C.3/

Dear Ms Devandas-Aguilar,
Dear Mr Rajagopal,

Thank you for your letter of 18 May.

The European Commission attaches great importance to the situation of persons with disabilities in all Member States of the European Union (EU) and is committed to uphold and protect their rights.

The Charter of Fundamental Rights of the EU enshrines the right of people with disabilities to live in dignity and independence (Article 26). The EU and Member States have ratified the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). The European Pillar of Social Rights¹ includes principles 15 and 17 referring to the right to independent living for people with disabilities and older people.

The Commission supports Member States' efforts to ensure the transition from institutional to community-based care, individualised support and adequate housing, notably through the European Structural and Investment Funds (ESI Funds) and in close cooperation with the organisations active in the field of disability. To this end, the Commission works closely with the 'European Expert Group on the Transition from Institutional to Community-based Care'².

Member States are responsible for the design and implementation of dedicated strategies and programmes pursuing the ultimate goal of independent living and inclusion in the community for persons with disabilities. The selection of the projects to be funded by the ESI funds falls under the competence of Member States.

¹ https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en

² <https://deinstitutionalisation.com/>

Ms Catalina Devandas-Aguilar
UN Special Rapporteur on the rights of persons with disabilities

Mr Balakrishnan Rajagopal
UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context

The coronavirus crisis has affected the Member States in a sudden and dramatic manner, with a major impact on people in vulnerable situations. The COVID-19 has had a disproportionate impact on older people and persons with disabilities, particularly and as you say on those living in institutions. As an immediate and short-term response to the crisis, the Commission's Corona Response Investment Initiatives³ introduce extraordinary flexibility to allow that all non-utilised support from the European Structural and Investment Funds can be mobilised to the fullest. In this context, the Commission urged Member States to make sure that social distancing and confinement measures would not affect the continuity of services for all beneficiaries, including those living in institutions.

A number of EU funded programmes for the 2014-2020 period are under revision to allocate more resources to support healthcare systems and other COVID-19 related actions. The Commission is regularly publishing a state of play on the measures it has taken, also in accessible formats including easy-to-read format⁴.

The above aims to provide you with additional information and comments regarding your general observations, as requested by you in **question 1** [*Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations*]. As regards your further questions, I would like to point out the following.

Question 2 [*Please provide information on the steps taken by the European Commission to protect the rights of persons with disabilities and older persons and to address the deeply ingrained discrimination, social exclusion and segregation experienced by these groups.*]

The European Disability Strategy 2010-2020 is the main tool and framework at EU level to promote the rights of persons with disability, including through the implementation of the UNCRPD. As the Strategy is soon reaching its end, it is important to underline first some of its main achievements, such as the adoption of the European Accessibility Act⁵ the Web Accessibility Directive⁶, the strengthening of passenger rights in all transport modes⁷ or the Cross-Border Healthcare Directive⁸, which allows easier access for people with disabilities to quality medical care across EU countries. A full evaluation of the Strategy, assessing its various actions and results, is about to be finalised and shall be made publicly available by the end of this year.

Furthermore, in 2019 the European Commission launched an awareness raising campaign on equal access to employment and non-discrimination based on gender, age, sexual

³https://ec.europa.eu/regional_policy/en/newsroom/news/2020/04/04-02-2020-coronavirus-response-investment-initiative-plus-new-actions-to-mobilise-essential-investments-and-resources;
https://ec.europa.eu/regional_policy/en/newsroom/coronavirus-response/

⁴ https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response_en;

⁵ Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services;
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0882>

⁶ Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies;
<https://eurlex.europa.eu/eli/dir/2016/2102/oj>

⁷ https://europa.eu/youreurope/citizens/travel/transport-disability/reduced-mobility/index_en.htm

⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0024>

orientation, ethnic origin, faith and belief, and disability. A specific part of this campaign has been devoted to non-discrimination based on disability and reasonable accommodation, with a strong focus on the role of employers.

Question 3 [*Please explain the rationale for approving the disbursement of funding through the European Structural and Investment Fund for the replacement of large institutions with smaller institutions for persons with disabilities, and whether any human rights assessments were made prior to taking such decisions*]

ESI funds are implemented in a shared management mode which gives the main responsibility for selection and monitoring of individual projects to Member State designated authorities. This is based on Operational programmes, identifying national priorities that are linked to the challenges underlined in the process of assessment of national policies. The programmes are approved by the Commission and monitored and audited regularly, to ensure the compliance of individual projects to the agreed priorities, the implementing rules and sound financial management principle for spending of the EU budget. Under the shared management mode, it is not in the Commission's competence to select the operations to be supported by the ESI Funds.

The above is valid also for selecting the operations and funding projects related to persons with disabilities (if any). As part of the rules for using EU funds, Member States need to comply with so-called ex-ante conditionalities (see answer to question 4).

In the event of an alleged breach of the Charter of Fundamental Rights or the UNCRPD in relation to an entity which received support from the ESI Funds, the Commission may apply an interruption or suspension of payments or make a financial correction if the irregular expenditure has not been corrected by the Member State. It can be only applied *ex post* if the Commission establishes that there is a breach of applicable legal provisions under Union law and that the breach has an impact on the financing received.

Question 4 [*Please explain how the funding of institutions complies with the European Commission's obligations, in particular those under the Convention on the Rights of Persons with Disabilities.*]

For the implementation of ESI Funds 2014-2020, pursuant to Regulation (EU) No 1303/2013¹², Member States are required to fulfil the applicable ex-ante conditionalities¹³. The ex-ante conditionalities require the existence of administrative capacity for the implementation and application of the UNCRPD in the field of ESI Funds and the existence of a strategic policy framework for poverty reduction. In addition and through the various guidance documents provided to Member States¹⁴, the Commission stresses that irrespective of the size, building or renovating long-stay residential institutions does not constitute a priority under the ESI funds. On the contrary, and while there is no general and absolute prohibition for the ESI funds to support longstay residential institutions under the Regulation (EU) No 1303/2013, Member States are being constantly reminded of the EU obligation and their obligation under the UNCRPD to progress on ensuring independent living arrangements and deliver deinstitutionalisation.

Nevertheless, Member States enjoy discretion in setting up the operations. The process of deinstitutionalisation is a process that requires the development of individualised services, the planned closure of long-stay residential institutions and making general services available to persons with disabilities. Before deinstitutionalisation is achieved, the persons concerned have to be cared for. Promoting the transition from institutional to community-based services might require in some cases transitory solutions aiming at securing healthy and secure living conditions all along this process. Some exceptional investments into long stay residential institutions may serve to achieve some of the thematic objectives in Article 9⁹ of the CPR without undermining the overall aim of Article 19 UNCRPD, as long as a transition process from institutional to community-based care has been put in place.

Question 5 [*Please explain what safeguards are being taken to ensure that funding from the European Commission does no longer support projects that are incompatible with the EU's obligations under international human rights law.*]

The Commission's proposal for the programming period 2021-2027 includes the transition from institutional to community and family-based services under the scope of enabling conditions. The enabling conditions are the prerequisites to ensure the necessary conditions for the effective and efficient use of EU Funds. There are two sets of relevant enabling conditions:

- Horizontal conditions¹⁰ will be applicable to all EU Funds operations in Cohesion Policy and include criteria to ensure the compliance with the UNCRPD and the EU Charter of Fundamental Rights.
- Thematic conditions¹¹, relevant for the shift from institutional to community-based care will be included in "National strategic policy framework for social inclusion and poverty reduction" and "National and regional policy framework for health".

The fulfilment of enabling conditions is to be closely monitored by the monitoring committees and discussed in annual review meetings with the Commission. Managing authorities need to ensure that selected operations are consistent with the corresponding strategies and planning documents established for the fulfilment of enabling conditions. In the event of an enabling condition being no longer fulfilled, the Commission will start a contradictory procedure, which may lead to financial sanctions to the relevant programme.

In addition, the partnership with all relevant stakeholders will remain a key principle to design and implement the EU cohesion policy. Relevant stakeholders including disability organisations will be involved in the design and implementation of the programmes. Their expertise and input will be essential for the monitoring and implementation of the operations throughout the programming period.

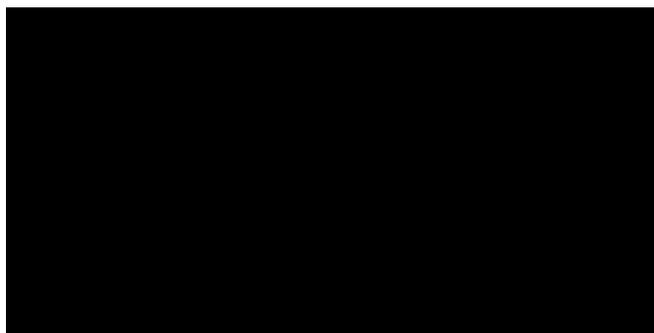
⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1303&from=EN>

¹⁰ COM/2018/375 final - 2018/0196 (COD) Annex III

¹¹ COM/2018/375 final - 2018/0196 (COD) Annex IV

Let me conclude by informing you that the Commission is currently preparing the new European Disability Strategy 2021-2030. The current preparation follows a process of an extensive public consultation to which we have already received extensive feedback. I can assure you that independent living and inclusion in the community for people with disabilities will be in the focus of the preparations for the new European Disability Strategy to be presented early 2021 with the view of deepening and improving the implementation of the UNCRPD and the respect of the rights of persons with disabilities.

Yours faithfully,



Joost KORTE