



## **Input of the European Network on Independent Living - ENIL into the Strategic inquiry SI/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**

**30 November 2021**

The European Network on Independent Living – ENIL welcomes the launch of the European Ombudsman’s own-initiative inquiry on how the European Commission monitors EU funds used to promote the right of persons with disabilities and older persons to independent living. ENIL has been advocating for the European Structural and Investment Funds (ESI Funds) to be used for supporting the implementation of the right to live independently and being included in the community (as set out in Article 19 of the UN Convention on the Rights of Persons with Disabilities) since 2007, and we have been monitoring compliance with ESI Funds’ use through our “EU Funds for Our Rights” Campaign. During the last programming period 2014 – 2021, we have taken a number of actions to challenge ESI Funds’ investments into institutions, including:

- ) submitting complaints to the European Commission and the Managing Authorities, in cooperation with our members – two official complaints in relation to Austria, one in Romania and Poland; complaints sent via email regarding Bulgaria, Portugal, Hungary, Estonia, Slovenia;
- ) organising meetings with the desk officers at DG Regional Policy, DG Employment and DG Agriculture;
- ) taking a case against the European Commission to the General Court in Luxembourg, jointly with the Validity Foundation and CIL Sofia;
- ) submitting a complaint to the European Ombudsman regarding Hungary, Portugal and the Commission’s Legal Service Opinion;
- ) a petition submitted to the Petitions Committee at the European Parliament in relation to Bulgaria;
- ) sending information to the UN Special Rapporteur on the Rights of Persons with Disabilities and other special mandates;
- ) joining the request for an inquiry on Hungary under the Optional Protocol to the CRPD, together with the Validity Foundation and the Hungarian Civil Liberties Union;
- ) drafting reports (including one commissioned by the GUE/NGL Group at the European Parliament) and awareness raising materials, such as the Myth buster on EU Funding;
- ) more recently, analysing some of the National Recovery and Resilience Plans, as part of our involvement in the European Expert Group on the Transition from Institutional to Community-based Care (EEG).

The information presented below is based on our work on this issue, in cooperation with our members and other NGOs active at the local and national level.

**1. The ‘conditionality’, set out in the regulations on the Cohesion Funds for the programming period 2021-27, that the funds be used to support the transition from institutional to community and family-based services and how best to implement it in practice.**

ENIL has welcomed the introduction of the horizontal and enabling conditions in the new ESI Funds regulations for 2021 – 2027, just as we welcomed the introduction of the *ex-ante conditionalities* in the 2014 – 2020 Regulations. However, in practice, the *ex-ante* conditionalities have not prevented investments in institutions for persons with disabilities and we do not have reason to believe that this will change in the new programming period, for two main reasons:

**A. The European Commission’s Legal Service Opinion**

The Legal Service Opinion (Ref: sj.d (2018)3834515), issued by the European Commission in June 2018, and addressed internally to DG Employment, Social Affairs and Inclusion (DG EMPL) and DG Regional and Urban Policy (DG REGIO), advised that investments into long-stay institutions were permitted, as long as the Member State in question made “progress in general on ensuring independent living and deinstitutionalisation”, that such support was embedded in the “transition process from institutional to community-based care” and in cases of residential institutions “for persons requiring constant care and medical supervision”. This legal opinion has contradicted earlier guidance published by the European Commission and has essentially misinterpreted the European Union’s and the Member States’ obligations under the CRPD.

This Legal Service Opinion was the subject of the letter sent by the president of CRPD Committee, Dr. Theresia Degener, to the president of the European Commission Jean-Claude Juncker in December 2018. In her letter, Ms Degener highlighted that neither the CRPD Committee or rights-holders (i.e., persons with disabilities and their representative organisations) had been consulted during the preparation of this opinion, which is in conflict with the core principles of the CRPD.

The internal Legal Service Opinion was also the subject of a complaint to the European Ombudsman, submitted by ENIL (case 1233/2019/MMO).

**B. Evaluation of the Member States’ strategies and frameworks for CRPD implementation and deinstitutionalisation (DI)**

In our experience, the European Commission defers to the Member States (i.e., the Managing Authorities) when establishing whether existing strategies and plans are in line with the CRPD and other relevant laws and policies at EU level. Our own monitoring activities, as well as the CRPD Committee jurisprudence, show that many Member States’ strategies and plans are not in line with the Convention. An independent review of these documents, such as by the National Human Rights Institutions (NHRIs) and civil society organisations (primarily organisations of persons with disabilities), would be required to establish whether a strategy,

for example, includes measures that will support the implementation of the right to independent living and prevent all forms of segregation and exclusion.

Should the European Commission continue deferring to the Managing Authorities, as was the case in ENIL's complaints, it is likely that Member States will very easily fulfil all enabling conditions, while at the same time continuing to build and renovate institutions for persons with disabilities.

For example, in its pre-closure letter regarding ENIL and Validity Foundation's complaint against Poland (see *Annex I*), where we challenged the building and/or renovation of 8 institutions for persons with disabilities and older people in the Lodz region<sup>1</sup>, the Commission states, quoting the Managing Authority:

“Poland's de-institutionalisation strategic framework for the period 2014-2020 is included in the National Programme for Combating Poverty and Social Exclusion 2020.

The main objective of this programme is “to permanently reduce the number of people at risk of poverty and social exclusion by 1.5 million people and to increase the social cohesion”. **This Programme mentions the deinstitutionalisation of support for people with intellectual disabilities, chronically mentally ill and seniors as one of the biggest challenges.** It highlights that further deinstitutionalisation should address such risks as: an increase in the number of homeless people, instability in foster care, shortage of sheltered housing and reluctance of local communities to open new forms of day-care facilities.

Furthermore, it includes development and implementation of training schemes on assistance to elderly people for care workers and others (e.g. family members who care for dependents) and development of training standards for care workers and volunteers in the field of assistance to the elderly.” [emphasis added]

Nevertheless, the Commission arrives to the following conclusion about the 7 institutions:

“In light of the above, following the input from the Managing Authority for projects No 2 to 8, **we did not identify any references, neither in the operational programme nor in the documents related to the assessed projects that could be considered as amounting to a legal violation of the above-mentioned principles of the Charter, neither a legal breach of the provisions of the Treaties, nor of the UNCRPD, nor of the relevant ESI Regulations** above indicated.” [emphasis added]

At the same time, following receipt of the Commission's pre-closure letter, we wrote to the Polish Commissioner for Human Rights, whose opinion was NOT sought by the European Commission during investigation of our complaint. This despite the fact that the Commissioner acts as the designated national independent mechanism for monitoring implementation of the

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<sup>1</sup> The European Commission's decision, regarding project No.1 is still pending, despite our complaint being registered on 30 July 2020.

CRPD under Article 33(2), and is further mandated to perform the tasks of the National Preventive Mechanism under the Optional Protocol to the Convention against Torture.

Having received ENIL's request for an opinion and a copy of the Commission's pre-closure letter, the Polish Commissioner for Human Rights expressed serious concerns about the process of deinstitutionalisation in Poland and its compliance with the Polish, European and international human rights standards. The Commissioner also noted that it is essential to ensure that activities funded by the EU "*do not reinforce the segregation or isolation, discrimination of their target groups*", and that NHRIs such as his have the knowledge and mandate to conduct such assessments. The Commissioner's Assessment is enclosed as *Annex III*.

**In conclusion, we are seriously concerned that the enabling conditions set out in the 2021 – 2027 Cohesion Policy Regulations will fail to prevent the building of new institutions for persons with disabilities and older people in the European Union. As the first step, therefore, the Commission's Legal Service should withdraw, as a matter of priority, its "internal" opinion of June 2018 and issue a new opinion fully in line with the CRPD, its General Comments and the Committee jurisprudence on Article 19 CRPD. This should be done in consultation with persons with disabilities and their representative organisations. Furthermore, when establishing the fulfilment of enabling conditions, the Commission must prioritise the views of independent human rights bodies (NHRIs) at the national level and international human rights bodies, such as the CRPD Committee and the UN special procedures, as well as organisations of persons with disabilities, as opposed to those of the Managing Authorities.**

## **2. The Commission's monitoring role as regards the use of Cohesion Funds and the tools it has at its disposal to ensure the funds are used to support deinstitutionalisation.**

ENIL is concerned that the existing monitoring systems – in the Member States and at the European level – are not robust enough to prevent the use of ESI Funds for projects that perpetuate the social exclusion and segregation of persons with disabilities. In this respect, we have identified the following problems:

### **A. The "shared management excuse"**

In decisions in relation to ENIL's complaints, the European Commission regularly states: "Under the shared management mode, it is not in the Commission's competence to select the operations to be supported by the ESI Funds."

For example, the Commission states in its pre-closure letter regarding ENIL's complaint against the MA in Romania (see *Annex IV*):

"Based on all the above, it is clear that there is no general and absolute prohibition for the ESI Funds to support long-stay residential institutions. Member States are required to make progress in general on ensuring independent living arrangement and deinstitutionalisation. **However, it is up to Member States to set up the operations within the framework of applicable rules.**" (p.6, emphasis added)

However, the “shared management” does not imply shifting the sole responsibility for the projects co-financed by ESI Funds to the Member State. According to the ESI Funds Regulations, the European Commission has a responsibility to monitor and control if ESIF is used according to the goals and standards defined in the respective Partnership Agreement and the Operational Programmes.

## **B. No prohibition of investing in institutions**

What is monitored by the European Commission is whether the projects funded are used in line with the Partnership Agreement and the Operational Programmes. Both documents tend to be broad and vague enough to allow for a range of investments, including institutions for persons with disabilities or older people.

Moreover, as is clear from the above example and other correspondence, the Commission’s official position is that there is no absolute prohibition of investing in institutions, as long as the Member State presents such investments as part of their version of “deinstitutionalisation”. This despite the fact that building new institutions can under no circumstances be considered as part of the deinstitutionalisation process, and is in breach of the CRPD and the General Comment 5.

For example, Poland’s operational programme, quoted by the European Commission to explain why investing in institutions is not in breach of EU law, includes the following justification:

“The programme states that interventions will be linked to the process of social integration, vocational activation and de-institutionalisation of services (including stationary forms), but **in cases where it is more appropriate to use institutional forms (when taking care of a given group of people is not possible in another form due to the state of their health or other important reasons) such support will also be possible.**” (page 12)

## **C. European Commission’s competence to interpret the CRPD**

Based on the Commission’s handling of our complaints, and the Legal Service Opinion, it is clear that the European Commission’s legal services find themselves more competent to interpret international law requirements than the UN treaty bodies or the special mandates. For example, the Commission states in relation to investments in institutions in Romania:

“In addition, neither Article 69(3) of the CPR, nor Article 3(3) of the ERDF Regulation, exclude the provision of support from the ESI Funds or the concerned specific Funds into long-stay residential institutions.” [...]

The above is also supported by General Comment No 5 of the UNCRPD. **According to paragraph 51 of General Comment No 5, “State parties should ensure that public or private funds are not spent on maintaining, renovating, establishing building or creating any form of institution or institutionalization”.** However, General Comment No 5 also highlights that the right to access services and facilities is progressively applicable (see para. 39) and requires structural changes (para. 41), as well as to enter into strategic planning (para. 42). **In this regard, it expressly recognises a margin of appreciation to**

**State parties in relation to programmatic implementation (para. 42).** State parties must adopt a strategy and a concrete plan of action for deinstitutionalization (para. 57 and 58).” [emphasis added]

While quoting the requirement of absolute ‘prohibition of investing in institutions’, explained in the General Comment 5, the Commission manages to come to a conclusion that such investments are in fact allowed by the Convention, because of “progressive realisation”. Yet, paragraph 39 of the General Comment makes it very clear that:

“Article 19 (a), the right to choose one’s residence and where, how and with whom to live, is immediately applicable as it is a civil and political right.”

In addition, the Commission continues to maintain that independent living can be realised in institutional care settings. For example, the pre-closure letter regarding Romania states, on page 9:

“Based on the consideration above, **we do not see an indication that operations selected under the call would result in the continued segregation and social exclusion of disabled adults.** On the contrary, **the Managing Authority believes that the sheltered housing and day care centres financed under the call will provide the conditions necessary for persons with disabilities to live independently and to be socially included in community with equal opportunities of others** and therefore, ensuring compliance with Romania’s national strategy put in place to back up the deinstitutionalisation process and, hence, with Romania’s obligations under the relevant Union law.” [emphasis added]

This flawed interpretation of its international obligations is also evidence by the Commission’s ignoring of the Concluding Observations, in respect of both the European Union and a number of Member States, where the Committee has explicitly called on governments not to use public funding to build or renovate new institutions (*see Table below*).

In addition, as the European Ombudsman is aware, two UN Special Rapporteurs have written to the Commission President, highlighting the rights violations caused by the systemic misuse of ESI Funds for investments in institutions. It is clear from the Commission’s response to the Special Rapporteurs that such correspondence is simply disregarded, with the Commission services preferring to defer to their own interpretation of the CRPD and their obligations.

**Table: Recommendations under Article 19 CRPD relating to the use of ESI Funds and public funds in general<sup>2</sup>**

Country	Recommendation (i.e. the Committee urges the State party to):
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<sup>2</sup> UN Treaty Body Database, available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5)

Belgium CRPD/C/BEL/CO/1	The Committee recommends that the State party work towards deinstitutionalization by reducing investment in collective infrastructure and promoting personal choice.
Bulgaria CRPD/C/BGR/1	<p>Significantly expedite the transition process ensuring all persons with disabilities living in any form of institution, including psychiatric hospital units, and small community-based group homes, the right to and possibility of living independently within the community, paying particular attention to persons with psychosocial disabilities, intellectual disabilities, children with disabilities, and elderly persons with disabilities.</p> <p>Use financial national and international resources from the European Union to advance inclusion of persons with disabilities in society, and introduce efficient remedies and guidelines to avoid spending national and international funds on establishing infrastructure, housing and/or services which are not accessible and affordable for all persons with disabilities.</p>
Cyprus CRPD/C/CYP/CO/1	Redirect resources allocated to institutionalization and earmark and allocate them to community-based services and increase the budget enabling persons with disabilities to live independently across the State party with access to individually assessed and adequate services, including personal assistance, within the community.
Czech Republic CRPD/C/CZE/CO/1	The Committee urges the State party to step up the process of deinstitutionalization and to allocate sufficient resources for development of support services in local communities that would enable all persons with disabilities, regardless of their impairments, gender or age, to choose freely with whom, where and under which living arrangements they will live, in line with the provisions of article 19 of the Convention.
Denmark CRPD/C/DNK/CO/1	The Committee recommends that the State party end the use of State-guaranteed loans to build institution-like residences for persons with disabilities; that it amend the legislation on social services so that persons with disabilities may freely choose where and with whom they live, while enjoying the necessary assistance to live independently; and that it take measures to close existing institution-like residences and to prevent the forced relocation of persons with disabilities, in order to avoid isolation from the community.
Estonia CRPD/C/EST/CO/1	The Committee recommends that the State Party enact a moratorium on the institutionalization of persons with disabilities, revise its deinstitutionalization strategy, redirect the use of public funds, including the European regional development funds, to the development of individualized support for living independently and

	ensure that programmes based on congregated settings, such as “ home-like institutions ” , “ family type houses ” and “ special care villages ” , are amended so as to prioritize inclusion in the community.
European Union CRPD/C/EU/CO/1	The Committee recommends that the European Union develop an approach to guide and foster deinstitutionalisation, to strengthen the monitoring of the use of ESI Funds - to ensure they are being used strictly for the development of support services for persons with disabilities in local communities and not the re-development or expansion of institutions. It further recommends that the European Union suspend, withdraw and recover payments if the obligation to respect fundamental rights is breached.
France CRPD/C/FRA/CO/1	The Committee recommends that the State Party, in consultation with organisations of persons with disabilities, end the institutionalization of children and adults with disabilities, including in small residential homes, and launch a national strategy and action plans to end the institutionalization of persons with disabilities, with time-bound benchmarks, human, technical and financial resources, responsibilities for implementation and monitoring, and measures to support the transition from institutions to life in the community.
Germany CRPD/C/DEU/CO/1	Allocate sufficient financial resources to facilitate de-institutionalisation and promote independent living, including increased financial resources to provide community-based outpatient services providing the required support to persons with intellectual or psychosocial disabilities based on the free and informed consent of the individual concerned across the whole country.
Hungary CRPD/C/HUN/CO/1	The Committee further calls upon the State party to re-examine the allocation of funds, including the regional funds obtained from the EU, dedicated to the provision of support services for persons with disabilities, and the structure and functioning of the small community living centres, and ensure the full compliance with the provisions of article 19 of the Convention.
Italy CRPD/C/ITA/CO/1	The Committee recommends that the State party implement safeguards to retain the right to autonomous independent living across all regions, and redirect resources from institutionalization to community-based services and increase budget support to enable persons with disabilities to live independently across the country and have equal access to services, including personal assistance.

<p>Latvia CRPD/C/LVA/CO/1</p>	<p>Reinforce the engagement of municipalities in implementing the deinstitutionalization strategy, including through raising awareness about independent community-based living for persons with disabilities and ensuring sustainable provision of services to promote independent living following termination of European structural funds.</p>
<p>Lithuania CRPD/C/LTU/CO/1</p>	<p>The Committee is concerned that the national budget and European Union structural funds have been used in renovating existing institutional facilities and in constructing new ones.</p> <p>The Committee recommends that the State party further prioritize investing in a social service system for independent living in the community, and immediately refrain from using national and structural funds of the European Union to renovate, maintain or construct residential institutions for persons with disabilities.</p>
<p>Malta CRPD/C/MLT/CO/1</p>	<p>Ensure that all projects supported by public funds are carried out in a community setting, do not contribute to seclusion of persons with disabilities, are monitored by organizations of persons with disabilities, and are provided with sustainable continuous funding.</p>
<p>Poland CRPD/C/POL/C/1</p>	<p>Design and adopt concrete action plans for deinstitutionalisation and a time bounded transition to independent living schemes for persons with disabilities within the community, and ensure that adequate funding is allocated to this process after termination of European Union funds allocated specifically for this purpose.</p> <p>Ensure spending of the European Union funds allocated for deinstitutionalisation on measures that is consistent with the Convention; as well as monitoring of spending of the European Union funds allocated for deinstitutionalisation, with the effective participation of persons with disabilities and/or their representative organisations, to ensure that spending is in line with requirements of persons with disabilities themselves.</p>
<p>Portugal CRPD/C/PRT/CO/1</p>	<p>The Committee recommends that the State party, in close consultation with representative organisations of persons with disabilities, adopt a national strategy for independent living, including increased investment in living independently in the community rather than in institutions, regulate in the field of personal assistance, and offer wider access to sign language interpreters and deafblind sign language interpretation in its public services. Furthermore, the Committee urges the State party to establish community-based support services for persons with intellectual and psychosocial disabilities.</p>

Slovakia CRPD/C/SVK/CO/1	The Committee recommends that the State party provide and implement a timetable to ensure that the implementation of the deinstitutionalization process is expedited, including by putting in place specific additional measures to ensure that community-based services are strengthened for all persons with disabilities, in particular women with disabilities and older persons with disabilities. Furthermore, the State party should ensure that the use of European structural and investment funds complies with article 19 and that new follow-up national action plans on the transition from institutional settings to community-based support are initiated with the comprehensive involvement of organizations of persons with disabilities and civil society organizations, including in the area of monitoring. The Committee also recommends that the State party no longer allocate resources from the national budget to institutions and that it reallocate resources into community-based services in accordance with the investment priorities of the European Regional Development Fund (art. 5.9 (a) of European Union regulation No. 1303/2013).
Slovenia CRPD/C/SVN/CO/1	Prevent any form of trans- and re-institutionalisation, and provide sufficient funding for developing community-based independent living schemes.
Spain CRPD/C/ESP/CO/2-3	Discontinue the use of public funds for building residential institutions for persons with disabilities and invest in independent living arrangements in the community as well as in all general services to make them inclusive, guaranteeing their accessibility and availability for all persons with disabilities, to enable their inclusion and participation in all spheres of life.

#### **D. Exclusion of national human rights institutions and civil society from assessment**

As noted above, under question 2, the European Commission fails to seek the views of the national human rights institutions (NHRIs) when establishing whether a breach of the EU has occurred in a particular case. When making complaints, ENIL regularly quotes reports and opinions by NHRIs to support our allegations that the proposed ESI funded measures will lead to human violations – however, these are ignored.

In the pre-closure letter regarding our first complaint against Austria (CHAP(2020) 1883) (see *Annex VII*), the European Commission defended Austria’s investments in institutions by stating:

**“Furthermore, in terms of the implementation of the RDP, these authorities pointed out that members of disability organisations, specifically the Austrian Disability Council, are represented and have voting rights on the supervisory committee, provided under the Upper Austrian Equal Opportunities Act, and are therefore**

**able to actively participate in all discussions and decisions.** This also has an impact on the design of the programme and of the selection criteria of the projects.” [emphasis added]

However, ENIL and Independent Living Austria contacted the Austrian Disability Council after receiving this pre-closure letter and learned that not only have they not approved this investment in institutions, but had complained about it to the relevant authorities in Austria. We have been able to include their statement in our response to the pre-closure letter by the European Commission (*see Annex VIII*), and are still waiting for the final result of this complaint (submitted on 2 July 2020!). Neither the pre-closure letter or our response (including a statement from the Austrian Disability Council) are public, having been marked as “Sensitive” by the European Commission.

### **E. Application of UN’s findings on Hungary across other Member States**

In March 2020, the CRPD Committee published the results of a 3-year inquiry into the implementation of Article 12 and Article 19 in Hungary<sup>3</sup>, under the Optional Protocol to the CRPD. A substantial part of the inquiry has focused on the “supported housing” facilities for persons with disabilities, co-funded by the EU. They have been visited personally by members of the CRPD Committee and the UN OHCHR delegation during a mission to Hungary.

This report highlighted a number of features of these facilities, which made them institutional, and provided an opportunity for the European Commission to learn about the impact its funding decisions have on persons with disabilities in the Member States. However, despite the detailed analysis and the comprehensive recommendations, the Commission has so far failed to learn from this report and apply its findings in the process of ESI Funds use. The only visible outcome of this report is that the Hungarian Government has allegedly reallocated funding originally intended for an additional number of supported housing facilities, for another purpose.

**In conclusion, it is clear from the actions taken by ENIL and our partners that the monitoring (and complaints) system set up by the European Commission and the Member States is not fit for purpose. In our view, having challenged the building and renovation of a large number of institutions for a number of years and using multiple actions, the European Commission actively condones and encourages the segregation of persons with disabilities in the European Union, with funding provided by the EU taxpayers.**

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<sup>3</sup> See:

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsnbHatvuFkZ%2bt93Y3D%2baa2q6qfzOy0vc9Qie3KjjeH3GA0srJgyP8IRbCjW%2fiSqmYQHwGkfikC7stLHM9Yx54L8veT5tSkEU6ZD3ZYxFwEgh>

### **3. The involvement of relevant stakeholders in the design and implementation of Cohesion Policy programmes at national level, including what role they should play with regard to the national monitoring committees.**

Despite the obligation to involve civil society organisations (CSOs) in all the stages of ESI Funds use, Member States still fail to involve persons with disabilities and their representative organisations in decisions about the use of ESI Funds. This is especially true during the implementation, monitoring and evaluation stages. Those that are more open to CSO participation do not provide funding (i.e., technical support) to all organisations to ensure they have the necessary capacity to be a part of this process. The COVID-19 pandemic has also had an impact on the DPO involvement in the planning of the 2021 – 2027 programming period and in relation to the Recovery and Resilience Facility.

Some of the reasons which make participation difficult or impossible are:

Exclusion from the Monitoring Committees: While some organisations take part in the relevant Monitoring Committees, many do not have any information about the work of the Monitoring Committees or how to become a member. This is especially true of grassroots organisations, as opposed to larger, umbrella organisations or those regularly consulted by the Government. Those that are part of the Monitoring Committees find that the meetings are held too infrequently, cover many fields and are very technical, therefore not allowing discussion on issues that concern them. Also, they may be held post factum, when it is too late to make changes in relation to a particular call or action.

Lack of capacity and funding: The level of knowledge among DPOs about ESI Funds is still very low. ENIL is concerned that DPOs are not being supported sufficiently by the Managing Authorities (support could be provided, for example by utilising funds for technical assistance or civil society development).

Difficulties in accessing information: Although transparency is one of the requirements for ESI Funds, ENIL is concerned about the barriers imposed by some of the Managing Authorities in relation to information on ESI Funds' investments. This makes it more difficult to detect problems, but also to find good practices. In some Member States, CSOs are denied access to social care or psychiatric institutions, therefore reliable, impartial information about the practices in residential facilities is not available. In many Member States, information is not available online or in an accessible format.

Legal capacity and failure to build on good practice: Many persons with disabilities who live in institutions are under guardianship (i.e. are deemed to lack legal capacity), which means that they are not able to make important decisions, such as where they will live or with whom. Nor are they consulted in the process of ESI Funds implementation, monitoring or evaluation, even if the use of such funds directly affects them.

Quality of public consultation: When laws, strategies or calls are open for public consultations, some DPOs put considerable effort in providing comments. However, as a matter of rule, these are dismissed without any explanation. Therefore, rather than just opening something for public consultation, there should be clear communication as to how comments were used to amend

the document. Failure to communicate this results in perception that public consultation is simply a box ticking exercise.

**4. How deinstitutionalisation is taken into account in and impacted by the funds supporting Member States to recover after the COVID-19 pandemic, such as the Recovery and Resilience Facility and REACT-EU, and the Member States' flexibility in this respect, in particular in view of a possible lack of conditionality.**

As part of our membership of the EEG, we have analysed a number of draft National Recovery and Resilience Plans. Based on this analysis<sup>4</sup>, and having in mind there is no prohibition of building or renovating institutions using EU funds, ENIL is concerned that the Recovery and Resilience Facility and REACT-EU will contribute to further segregation of persons with disabilities and older persons.

Namely, we have found evidence of planned investments in institutions in Bulgaria, Latvia, the Czech Republic and Slovenia, which we have raised in meetings with the Cabinet members of Commissioner Dalli, and some of the desk officers. To our knowledge, this has not led to changes in the final RRF plans.

In Slovenia, for example, a call was published in May 2021 under the title “REACT EU: Investments in institutions”<sup>5</sup>. It foresees the investment of 93 mil Euros into the renovation and building of 3 new institutions for older persons, with a total capacity of up to 300 beds. The call was closed in August.

We are also aware that there was a communication from the UN Special Rapporteur on the Rights of Persons with Disabilities to Commission President in relation to this issue, this year, but we have not seen a copy of this communication or the response. We would suggest for the Ombudsman to request this from the Commission.

**In summary, we are concerned that both REACT-EU and the Recovery and Resilience Facility will be used to reinforce institutional care provision – by additional investments into human resources, equipment and institutional infrastructure, especially for older persons. There are also concerns that EU funds could be used provide conditions for social distancing in institutions, to build new facilities for isolation of COVID-19 positive residents or to further medicalise the provision of care in these settings. With monitoring of institutions by the NHRIs and NGOs severely restricted during the pandemic, there is a real danger that such investments may go undetected.**

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<sup>4</sup> See: <https://deinstitutionalisationdotcom.files.wordpress.com/2021/09/summary-of-the-findings-final-rr-plans-1.pdf>

<sup>5</sup> See: <https://www.gov.si/novice/2021-05-28-93-milijonov-evrov-eu-za-vecjo-kakovost-bivanja-starejsih/>

## **5. Any other matter you consider relevant for the Ombudsman’s inquiry.**

In December 2020, we published a report “Lost in Translation”, with key concerns relating to the use of ESI Funds during 2014 – 2020. We include a summary of these concerns below:

### **A. Replacing large institutions for adults with disabilities with smaller institutions**

In most of the Member States which have had “transition from institutional to community-based care” as a funding priority, and some which did not, persons with disabilities have been moved from large into smaller institutions. Such facilities are referred to as group homes, small group homes, supported housing, protected or sheltered housing, independent living centres and other names. According to information available to ENIL, in 2014 – 2020, this has been the case for Austria, Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Lithuania, Poland, Portugal, Romania and Slovenia.

### **B. Failure to invest into community-based services, such as personal assistance, and accessible housing**

Personal assistance is recognised as a key tool for independent living, yet not many Member States use ESI Funds to facilitate access to personal assistance. Those that do are not making it available to persons with disabilities leaving institutions. In Member States where personal assistance is funded through the European Social Fund (such as Croatia and Portugal), this service is aimed at people living in the community and is limited in coverage and scope (i.e. the maximum number of hours a person can have assistance for). ESI funds have also not been used to significantly increase availability of housing options for persons with disabilities, such as social housing, or accessible and affordable houses and apartments in the community. Instead, many persons with disabilities have been forced to choose between a large institution and a group home, or another segregated setting.

### **C. Replacing large institutions for children with disabilities with smaller institutions**

Whereas the closure of institutions for children has progressed faster, many children with disabilities were moved into smaller residential facilities (referred to, among other, as family-like homes, family homes and small group homes), rather than being returned to their biological families or provided with other forms of family-based care. According to information available to ENIL, in 2014 – 2020, this has been the case for Austria, Bulgaria, Estonia, Lithuania and Romania.

### **D. Building and renovation of large institutions, in some cases under the pretext of improving “energy efficiency”**

Large institutions for persons with disabilities – accommodating children, adults and older people – continue to benefit from ESI Funds’ investments. In some Member States, funds from ERDF have also been used to renovate institutions. While such investments have been difficult to monitor, ENIL is concerned that improving “energy efficiency” of institutions has been wide-spread during 2014 – 2020 and that such projects have typically been multi-million Euro investments.

## **6. Recommendations to the European Ombudsman**

As part of this own-initiative inquiry, the European Ombudsman has an opportunity to find that the way the European Commission is managing ESI Funds, which continue to be invested into various segregating services for persons with disabilities and older people, amounts to maladministration.

Among other, the European Commission should:

- a. Commit to fully implementing the UN Convention on the Rights of Persons with Disabilities, in particular the obligation to ensure access of all persons with disabilities to live independently and being included in the community, and the absolute prohibition of using public or private funds for the building or renovation of institutions. The Commission should use General Comments, as authoritative guidance on the implementation of the CRPD, and the Concluding Observations by the CRPD Committee, to formulate measures and actions necessary to implement the Convention. Moreover, the Commission should use the second review by the CRPD Committee in 2022 as an opportunity to learn lessons from the 2014 – 2020 programming period.
- b. Withdraw the 2018 Legal Opinion as a matter of priority and draft new guidance to the European Commission departments and the Member States which fully respects the EU and Member States' obligations under the CRPD. This must be done in consultation with persons with disabilities and their representative organisations.
- c. Ensure that the monitoring and complaints systems is able to ensure compliance with the CRPD, in particular prevent any further investment in institutions (of any size, for any group of people) and other segregating settings, such as sheltered workshops and day care centres. An inquiry should be carried out as to why the European Commission has not found a single case of breach of EU law nor applied any sanctions in relation to investments in institutions for persons with disabilities and older people.
- d. Prioritise assessments by the NHRIs and independent civil society when deciding whether a measure or an action complies with EU law, rather than on official assessments by Governments in whose interest it is for EU Funding to be spent with the least oversight and accountability as possible.
- e. Ensure that there is accountability for human rights violations of the rights of persons with disabilities at EU level, including through the use of EU funding for external action and by the likes of the European Investment Bank, and that persons with disabilities in institutions are able to access justice in their fight to achieve the right to live independently and to be included in the community.
- f. Learn from the tragedy of the COVID-19 pandemic, whereby thousands of persons with disabilities and older people perished in residential care settings across Europe, and commit to ensuring that each person has an opportunity to choose where and with whom they live, and is able to access personal assistance and/or other forms of community-based support.