

**Reply to European Ombudsman’s inquiry on compliance with fundamental rights at all stages
of the implementation of the EU cohesion policy**

Office of the UN High Commissioner for Human Rights – Regional Office for Europe

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?

In the view of the OHCHR Regional Office for Europe (OHCHR-ROE), the two main problems in practice have been the following:

- The use of the relevant financial instruments (above all the European Regional Development Fund, further “ERDF”) for funding institutional-care services for **persons with disabilities and children**.
- The use of these financial instruments (again, above all the ERDF, but also the European Social Fund, further “ESF”) for financing measures for “**Roma inclusion**” that in fact perpetuate segregation, and for non-inclusive employment measures for persons with disabilities.

The main cause of these problems appears to be the lack of understanding of these issues as human rights issues. On part of some Member States , and sometimes also on part of European Commission officials, there is insufficient understanding that measures which perpetuate institutionalization as a policy “solution” to disability and child vulnerability, or measures that perpetuate segregation of the Roma, are not compliant with fundamental rights. Rather, such measures are perceived as “improving” the living conditions of these persons in material terms. Thus, as documented by a number of civil society organizations, including the Institute for Public Policy in Romania and the European Coalition for Community Living in a number of States, massive resources from EU financial instruments have been spent in the previous programming period on refurbishing institutional care facilities in Member States, particularly in new Member States.

The EU legal landscape changed considerably when the EU in 2010 became party to the Convention on the Rights of Persons with Disabilities (CRPD), the first international human rights instrument ratified by the EU. We recall that the EU Member States are also each States party to the Convention on the Elimination of Racial Discrimination (CERD), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC).

OHCHR-ROE analyzed the use of EU Structural Funds in the 2007 – 2013 programming period from the perspective of the CRPD, in particular its Article 19 (Independent living and inclusion in the community). OHCHR commissioned for this purpose a study by Gerard Quinn and Suzanne Doyle of the National University of Ireland in Galway, *Getting a Life: Living Independently and*

*Being Included in the Community*¹, with the subtitle *Legal Analysis of the Current Use and Future Potential of the EU Structural Funds to Contribute to the Achievement of Article 19 of the UN Convention on the Rights of Persons with Disabilities (2012)*. The authors stated (on p. 11) that while Article 19 does not mention institutions and does not speak directly of deinstitutionalization, “it crafts obligations that are essential steps in making independence and community engagement a reality. This includes the development of appropriate services - especially services that respond directly to personal preferences”. The study highlights that the new ex ante conditionalities (as they were drafted at the time of the preparation of the study) are “an opportunity to build a bridge between the Structural Funds and the CRPD”.

Moreover, the CRPD Committee has also expressed concern about investment of EU funds in institutions. When reviewing the State report of Hungary in 2012, the CRPD Committee concluded with concern, that Hungary ‘has dedicated disproportionately large resources, including European Union funds, to the construction of large institutions, which will lead to continued segregation, in comparison with the resources allocated for setting up community-based support service networks’ (paragraph 33)². The Committee thus recommended that Hungary “re-examine the allocation of funds, including the regional funds obtained from the European Union, dedicated to the provision of support services for persons with disabilities and the structure and functioning of small community living centres, and to ensure full compliance with the provisions of article 19 of the Convention” (paragraph 35). OHCHR-ROE has also learned with concern that ESIF were being used to fund special schools for children with intellectual disabilities in some countries, and to fund non-inclusive employment measures, such as trainings and workshops, which failed to reach the objective, i.e. the effective employment of persons with disabilities.³

In terms of the rights of the child, investment in institutional services for children can also be seen as not compliant with the way in which the Convention on the Rights of the Child (CRC), has been interpreted by the Committee on the Rights of the Child in its general comments and recommendations to Member States, and as specified in the 2009 UN Guidelines on the Alternative Care of Children. For example, in 2013, the UN Committee on the Rights of the Child recommended that Lithuania “take into consideration the Common European Guidelines on the Transition from Institutional to Community Based Care and the quality standards and utilize EU funding to strengthen the implementation of its legal provisions”(paragraph 34).⁴

When it comes to Roma, EU funding of segregated facilities has been reported in several cases (e.g., segregated school in Jarovnice, Slovakia, or segregated and walled-in compound with restrictions of freedom of movement entrusted to a private company, euphemistically identified

¹ http://www.europe.ohchr.org/documents/Publications/getting_a_life.pdf

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http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/HUN/CO/1&Lang=En

³ On the employment issue - Report prepared by a consultant for OHCHR-ROE in September 2013, available on site upon request.

⁴ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/LTU/CO/3-4&Lang=En

as an “insertion village”, in Saint-Denis, France). In addition to provisions related to non-discrimination in the EU Charter as well as in Directive 2000/43/EC, this can be addressed also from the perspective of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), with its explicit prohibition of segregation in Article 3. In the context of economic, social and cultural rights, in 2014, when reviewing the State report of Romania, the UN Committee on Economic, Social and Cultural Rights raised a concern that “the resources allocated to social sectors, notably health, social protection and education, remain inadequate. In addition, the Committee regrets that the State party has not been able to fully absorb and utilize the funds allocated to it by the European Union owing to limited administrative capacity, excessive bureaucracy and instances of corruption” (paragraph 7). OHCHR-ROE is of the view that massive resources which could be used for improving the enjoyment of economic, social and cultural rights by vulnerable groups such as the Roma (e.g., by providing for access to formal, decent, de-segregated housing outside slums and shantytowns) or families living in poverty, will be returned to the EU budget without being utilized. The Committee recommended that Romania “improve administrative capacity and increase transparency and consultations at all levels of decision-making concerning the distribution and use of structural funds and the ongoing evaluation of their impact on the realization of economic, social and cultural rights” (paragraph 7).⁵

2. Have you ever reported such problems to the European Commission?

In the context of its advocacy on the transition from institutional to community-based care, OHCHR-ROE has raised the above concerns with relevant officials in DG REGIO, DG Employment and DG Justice. As a member of the European Expert Group on Transition from Institutional to Community-based Care (EEG), OHCHR-ROE actively advocated for such concerns to be addressed by the new regulations on the Structural Funds – which have largely been reflected in the final version. The EEG published in 2012 the *Common European Guidelines on the Transition from Institutional to Community-based Care* and the related *Toolkit for the use of EU Structural Funds* to support deinstitutionalization reform.⁶ The publications were endorsed by European Commissioners for Regional Policy (Johannes Hahn) and Employment, Social Policy and Inclusion (László Andor) and have been used by European Commission and EU Member State officials as background documentation for their (informal) negotiations on the Cohesion Policy Package.

⁵ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/ROU/CO/3-5&Lang=En

⁶ <http://deinstitutionalisationguide.eu/>

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

The new legislative framework constitutes a marked improvement from the previous one in terms of alignment with international human rights law. For instance, OHCHR-ROE welcomes the inclusion of ex-ante conditionalities including the reference to the UNCRPD and the adoption of the European Code of Conduct on Partnership (ECCP) as a delegated act to the Common Provisions Regulation (CPR).

OHCHR-ROE also welcomes references to the CRPD in the ESF regulations (recital 19) and to the promotion of the transition from institutional to community-based care (recital 19 and article 8) and that a minimum of 20% of the total ESF resources in each member state shall be allocated to social inclusion (article 4.2).

As to the ERDF regulations, OHCHR-ROE welcomes that the transition from institutional to community-based care has been included under investment priority 9 (on promoting social inclusion – Art 5). In addition, recital 16 also refers to community-based services supporting the right of persons to live in the community, with the aim of preventing them from isolation or segregation from the community.

With the final language of the Regulations, it seems unlikely that European Union Member States will invest ESIF into building new large-scale institutions. There are a number of risks that remain, however, which could lead to continued segregation of vulnerable groups, including children and persons with various disabilities and those who are at risk of being institutionalized. This involves the following scenarios:

- Investments presented by Governments under the heading of “transition from institutional to community-based care” may lead to the **emergence of smaller institutions, or services in segregated areas** under the label of “community-based” services, and where service users continue being excluded and segregated. Although this would appear to be contrary to Art. 19 CRPD as well as Art. 7 CPR and Art. 8 of the ESF Regulation, some European Commission officials in charge of EU funds continue to endorse this method by operating under an “incremental improvement” paradigm (“half-way is better than nothing”). OHCHR-ROE is of the opinion that the harm of investing in segregated services or ‘mini-institutions’ (rather than in real community-based services) should not be underestimated, since violations could continue and chances of ‘real’ reform in the near future will be considerably slimmer.
- Despite the obligation of EU Member States to have in place a strategic framework for investments into the transition from institutional to community-based care (through ex-ante conditionality 9.1), there is a concern that some plans may be labeled as “reform”

plans, but are unambitious in terms of their duration (some spanning 30 years) or do not espouse a **holistic approach to reform in the States concerned**. They often leave out certain user groups (such as for instance persons with psychosocial disabilities who are excluded from de-institutionalization policies in many European Union Member States – and this could be seen as discrimination on the ground of disability and thus, violation of the CRPD), or that some community-based services are developed while other services (education, health, employment, transport, housing), which are fundamental to the success and viability of community-based services, continue to be inaccessible. Moreover, OHCHR-ROE recalls the importance (and obligation under the CRPD) of including all persons with disabilities (be they physical, intellectual or psychosocial) in all measures undertaken to promote growth and access to the labour market during the entire programming period.

- **There is a risk that States will invest disproportionately in existing institutions** under the pretext of the complexity of the de-institutionalization process: i.e., not all institutions can close down at the same time, and the conditions are so poor in existing institutions that they need to be addressed immediately. Indeed, there are some situations in existing institutions which require immediate attention (e.g., the failure to properly feed persons with intellectual disabilities, the use of restraints etc.) but the argument can be – and has been – abused for justifying costly investment into crumbling buildings, the build-up of new rehabilitation facilities which are not used because there is no qualified staff to operate them, or even the renovation of staff quarters (while the residents continue to live in degrading conditions). The European Commission has repeatedly asked the European Expert Group for advice on what is an acceptable ratio of investments in maintenance of existing institutions as opposed to the development of community-based alternatives. According to the Common European Guidelines on the Transition from Institutional to Community-based Care, investments in improvement of institutions are only acceptable in life-threatening situations⁷. While this may not be a realistic scenario in countries where no community-based alternatives have been developed yet, investments in existing institutions should be proportionate and only address basic maintenance. However, States and European Commission desk officers may have differing definitions of what is proportionate in this context; With this in mind, OHCHR-ROE recommends that additional training on the implications of the CRPD for the content, understanding and implementation of the ESIF be offered to relevant European Commission officials (particularly in the aftermath of the review of the EU by the UN CRPD Committee).

⁷ <http://deinstitutionalisationguide.eu/wp-content/uploads/2012/12/2012-12-07-Guidelines-11-123-2012-FINAL-WEB-VERSION.pdf>

- **There are concerns about the implementation of the ‘Partnership Principle’ (Art. 5 CPR and ECCP).** OHCHR-ROE has noticed a tendency of partial or fragmented involvement of NGOs representing rights holders and service providers adequately in the ESIF process in EU Member States, and is concerned that the European Commission is not in a position to impose (financial) corrections on Member States if the partnership principle is not (fully) respected (Art 5.5 CPR). OHCHR-ROE believes that it is essential, and in line with CRPD obligations, that rights-holders, particularly those directly affected by ESIF investments are included in the design process of ESIF programmes, and that they have an active role (with voting rights) on the Monitoring Committees.
- **Austerity measures in the context of the financial crisis may prevent national or local authorities and other beneficiaries in some EU Member States from co-funding ESIF supported projects.** An analysis of the 2007-2013 ESIF programming period shows that insufficient ability at national level to co-finance EU projects, generally decreases the absorption rates of ESIF.⁸ For instance in Bulgaria, budgetary restraints (as well as political instability) led to difficulties in implementing EU funded projects in relation to the transition from institutional to community-based case in the 2007 – 2013 period. In the case of Greece, OHCHR-ROE learned that ESF investments in the mental health care de-institutionalisation reform (part of the ‘Psychargos programme’) are likely to be discontinued in the 2014 – 2020 programming period of ESIF. This decision carries the risk of re-institutionalisation of those persons with psychosocial disabilities who were previously de-institutionalised or may not receive any services at all.

⁸ <http://www.europarl.europa.eu/eplibrary/The-low-absorption-of-EU-Structural-Funds.pdf>