

**Response to the European Ombudsperson in relation to  
the own-initiative inquiry on  
respect for fundamental rights in the implementation of the EU cohesion policy**

**Case reference: OI/8/2014/AN**

**Submitted by the Mental Disability Advocacy Center (MDAC)**

**14<sup>th</sup> of March 2015**

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## **Introduction**

1. The Mental Disability Advocacy Center (MDAC) is an international human rights organisation which uses the law to secure equality, inclusion and justice for people with mental disabilities worldwide. MDAC's vision is a world of equality, where emotional, mental and learning differences are valued equally; where the inherent autonomy and dignity of each person is fully respected; and where human rights are realised for all persons without discrimination of any form.
2. This submission will address the use of European Union Structural and Investment Funds (hereinafter "ESI Funds"). In this submission, we will address the specific questions of the EU Ombudsman and will focus on the misuse of ESI Funds to violate the fundamental rights of persons with disabilities by funding their segregation in institutions. This situation violates EU law, including its obligations under the UN Convention on the Rights of Persons with Disabilities (CRPD).
3. MDAC has special consultative status at the UN Economic and Social Council (ECOSOC), participatory status at the Council of Europe, and standing to file collective complaints under the Revised European Social Charter.

**Q1. 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?**

**Problem:**

4. ESI Funds have been and continue to finance residential institutions for people with disabilities, including people with mental disabilities, in numerous Member States. ESI Funds are being spent to maintain and, in some cases, build new institutions where people with disabilities are segregated from their communities, often for life. It is a legitimate public concern that the EU has no structure in place to monitor how public finances are spent, especially given that ESI Funds represented 35% of the Community budget for the 2007-2013 period and are the second largest EU budget item.<sup>1</sup>
5. This denial of the rights to independent living in the community for persons with disabilities, their autonomy and choice violates EU law, in particular its obligations under Article 19, CRPD. Evidence supports allegations that institutions financed by the EU perpetrate torture, ill-treatment, exploitation, violence and abuse against residents, as has been documented in Romania,<sup>2</sup> and Bulgaria.<sup>3</sup>
6. *The case of Hungary:* Bulldozers are at work in Hungary even now, creating new institutions for people with disabilities.<sup>4</sup> Around 12 million EUR from ESI Funds have been and are being spent in the country on maintaining and building new long-term institutions for persons with disabilities.<sup>5</sup> The creation of such institutions takes place in the context of the national 'deinstitutionalisation' policy. Over 25,000 people with disabilities are institutionalised in Hungary – an incredibly large number of people compared with the total population,<sup>6</sup> and this figure has not substantially changed in the last decade, despite and indeed because of the

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<sup>1</sup> European Union, Summary of EU Legislation, Glossary, Structural Funds and Cohesion Funds, available at [http://europa.eu/legislation\\_summaries/glossary/structural\\_cohesion\\_fund\\_en.htm](http://europa.eu/legislation_summaries/glossary/structural_cohesion_fund_en.htm).

<sup>2</sup> See, for example, the Al Jazeera's documentary 'Europe's Hidden Shame' (April 2014), available online at <http://www.aljazeera.com/programmes/peopleandpower/2014/04/europe-hidden-shame-2014414124139195247.html/>; Center for Legal Resources, *Summary Report: Monitoring Visits, October 2013-March 2014* (Bucharest: 2014, CLR), available online at <http://www.crj.ro/userfiles/editor/files/summary-report%20-%20eng%281%29.pdf>.

<sup>3</sup> Bulgarian Helsinki Committee, *Report of the Bulgarian Helsinki Committee following Inspection of the Home for Children with Intellectual Disabilities, Krushari, Dobrich Region* (Sofia: 2010, BHC, Bulgarian language), available online at [http://forsakenchildren.bghelsinki.org/wp-content/uploads/2010/09/Doklad-DDMUI-Krushari\\_bd.pdf](http://forsakenchildren.bghelsinki.org/wp-content/uploads/2010/09/Doklad-DDMUI-Krushari_bd.pdf).

<sup>4</sup> Hungarian Civil Liberties Union, 'HCLU warns to stop EU investments in institutions in Hungary', available online at: <http://tasz.hu/en/fogyatekosugy/hclu-warns-stop-eu-investments-institutions-hungary>.

<sup>5</sup> Hungarian Central Statistical Office, Table 2.4.15., 'A tartós bentlakásos és átmeneti elhelyezést nyújtó szociális intézményekben ellátottak az intézmény típusa szerint (1993–2013)' (The number of residents in residential social care homes according to the type of institution (1993-2013)), available at [http://www.ksh.hu/docs/hun/xstadat/xstadat\\_eves/i\\_fsi001.html](http://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_fsi001.html).

<sup>6</sup> Ibid.

misuse of ESI Funds.<sup>7</sup> The country is one of the largest net recipients of ESI Funds per capita in the European Union.<sup>8</sup> Allocation and use of ESI Funds for these purposes violates Articles 2, 3 and 6, amongst others, of the Treaty on European Union (TEU), Articles 1, 21 and 26, amongst others, of the Charter of Fundamental Rights of the EU ('the Charter'), and Article 19, amongst others, of the UN CRPD.

7. *The case of Romania:* 24 million EUR from ESI Funds have been granted for the renovation and refurbishment of institutions segregating persons with disabilities in Romania.<sup>9</sup> Some of these institutions are notorious for tying people to their beds, forced labour,<sup>10</sup> physical and sexual abuse, and suspicious deaths which have not been investigated. MDAC estimates that over 30,000 adults with disabilities are currently institutionalised on a long-term basis in Romania in institutions which have received ESI Funds.<sup>11</sup> The use of ESI Funds for funding Romanian institutions was also documented in Al Jazeera's film "Europe's Hidden Shame".<sup>12</sup> Allocation and use of ESI Funds for these purposes violates Articles 2, 3 and 6, amongst others, of the TEU, Articles 1, 21 and 26, amongst others, of the Charter, and Article 19, amongst others, of the UN CRPD.
8. A growing body of evidence suggests the picture is similar in other Member States, including Lithuania, Bulgaria, Latvia, the Czech Republic and Slovakia.<sup>13</sup> The dehumanising practice of institutionalising people with disabilities in Europe continues unabated, with an estimated 1.2 million people with disabilities still warehoused for prolonged periods in isolating institutions.<sup>14</sup>

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<sup>7</sup> Ibid.

<sup>8</sup> Nicolaus Heinen, *EU net contributor or net recipient. Just your matter of standpoint?* (May 2011, Deutsche Bank Research).

<sup>9</sup> For more details see <http://mdac.org/en/content/european-commission-funding-disability-segregation-and-abuse-breaches-international-law>.

<sup>10</sup> Arad Online, 'Grave abuzuri în centrul de asistență socială Tântava', available online at: <http://www.aradon.ro/grave-abuzuri-in-centrul-de-asistenta-sociala-tantava/aradon-news-editor6-20070721-110355>.

<sup>11</sup> Mental Disability Advocacy Center, 'European Commission Funding of Disability Segregation and Abuse Breaches International Law' (April 2014), available online at: [www.mdac.org/romania](http://www.mdac.org/romania).

<sup>12</sup> Al Jazeera, "Europe's Hidden Shame", available online at: <http://video.aljazeera.com/channels/eng/videos/people-and-power---europe-hidden-shame/3477936586001;jsessionid=4B7E3B814DB651A1276B4E2C141566BB>.

<sup>13</sup> Camilla Parker and Ines Bulic, *Briefing on Structural Funds Investments for People with Disabilities: Achieving the Transitions from Institutional Care to Community Living* (Budapest: ENIL-ECCL, December 2013).

<sup>14</sup> Open Society Foundations, *The European Union and the Right to Community Living* (New York: OSF, 2012), available online at <http://www.soros.org/sites/default/files/europe-community-living-20120507.pdf>, p. 20.

9. The use of ESI Funds to segregate people with disabilities in institutions constitutes a violation of, among others, the following key legal provisions which are binding for all institutions of the EU and Member States in the application of EU law, namely:
  - a. Article 1 of the Charter on human dignity, according to which:

“Human dignity is inviolable. It must be respected and protected.”
  - b. Article 26 of the Charter on the integration of persons with disabilities, according to which:

“The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.”
  - c. Article 19 of the CRPD on the right to independent living and inclusion in the community, according to which:

“Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community [...]”

#### **Causes of these problems:**

10. The problems represent widespread, grave and systemic violations of the fundamental rights of a significant proportion of the European population.
11. Deficiencies and inadequacies in the EU legislative and policy framework governing ESI Funds allow the Commission to finance these violations.
12. Article 7 of Regulation 1303/2013/EU places a general obligation on the Commission and Member States to “prevent any discrimination based on sex, racial or ethnic origin, religion or belief, *disability*, age or sexual orientation during the preparation and implementation of

*programmes*" (emphasis added).<sup>15</sup> General statements have been included in Partnership Agreements concluded with Member States in relation to ESI Funds.<sup>16</sup>

13. The provisions themselves are overly broad, and the narrow interpretation by the Commission of its obligations in respect of these provisions avoids its substantive obligations under EU law as set out above in paragraph 9. These provisions have proven to be insufficient as significant amounts of ESI Funds are still being spent on the institutionalisation of people with disabilities.
14. The Commission's control mechanism is neither sufficient nor adequate to effectively prevent the misuse and misapplication of ESI Funds in violation of the EU legal and regulatory framework. These inadequacies accentuate the lack of accountability at the level of the EU and Member States, and deny redress to victims.
15. Another cause is a serious lack of transparency in the application, monitoring and control of ESI Funds, and a failure to make comprehensive, accessible information available in the public domain. It must be noted that the evidence of the misuse of Funds referred to above has only come into the public domain as a result of forensic research conducted by civil society organisations.
16. It is MDAC's submission that the European Commission has explicit obligations under Article 4 of Regulation 1303/2013/EU that cannot be delegated in their entirety to Member States. These obligations require the Commission to implement its role in conformity with the Treaties, the Charter and the CRPD. The Commission's insistence on delegating accountability to Member States causes human rights violations.

**Q2. Have you ever reported such problems to the European Commission? If yes, was the outcome satisfactory? Please explain if this was not the case. If no, why not (problem solved at national level, lack of information, etc.)**

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<sup>15</sup> Regulation 1303/2013/EU published in the Official Journal of the European Union on 20 December 2013, entering into force on the 21 December 2013, and becoming effective on 9 January 2014, includes as an ex-ante conditionality the existence of administrative capacity for the implementation and application of the CRPD in the field of the European Structural and Investment Funds ("ESI Funds").

<sup>16</sup> European Commission, Romania Partnership Agreement, available at [http://www.fonduri-ue.ro/res/filepicker\\_users/cd25a597fd-62/2014-2020/acord-parteneriat/Partnership\\_Agreement\\_2014RO16M8PA001\\_1\\_2\\_ro.pdf](http://www.fonduri-ue.ro/res/filepicker_users/cd25a597fd-62/2014-2020/acord-parteneriat/Partnership_Agreement_2014RO16M8PA001_1_2_ro.pdf), pp. 228, 334-345, 347; European Commission, Hungary Partnership Agreement, available online at [http://palyazat.gov.hu/szechenyi\\_2020](http://palyazat.gov.hu/szechenyi_2020), p. 112.

17. MDAC, as well as other organisations, have approached the Commission on numerous occasions to inform them that ESI Funds have been misused to fund gross and systemic human rights violations. The responses have been unsatisfactory and have failed to address the issues described.
18. The case of Hungary: After approaching Hungarian authorities with no satisfactory result, MDAC and other organisations wrote to the Commission on two occasions in relation to Hungarian calls for tender under ESI Funds which violated EU law, the Charter and the CRPD. The Commission's response stated that the managing authority in Budapest was responsible for the terms of calls for tender and selecting individual projects to receive ESI Funds. The Commission refused to assume any meaningful responsibility and stated that it was the responsibility of the Hungarian authorities to "ensure the compliance of programmes or of single projects with the provisions of national and international laws and rules, including, in this case, the UNCRPD and the Charter."<sup>17</sup> It thereby abrogated responsibility for implementation of EU law.
19. In 2014, the Directorate-General Justice of the European Commission and László Andor, Commissioner for Employment, Social Affairs and Inclusion, both stated the Commission's commitment to supporting Member States in implementation of the CRPD, but failed to accept any meaningful responsibility for its own actions and compliance with EU law.<sup>18</sup>
20. What the Commission did do was to "point out the critical issue of setting up 'home centres' for 50 people" and recommended compliance with Article 19 CRPD to the Hungarian authorities.<sup>19</sup> The recommendation was not mandatory, no enforcement action was taken against the Hungarian government, and Hungarian legislation continues to allow for such institutions to be constructed. The Hungarian government continues to construct institutions using ESI Funds in violation of EU and international law.
21. The outcome of our complaints to the Commission were unsatisfactory because:

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<sup>17</sup> Letter from the European Commission Directorate-General Regional and Urban Policy, dated 3/10/2013, Commission ref. Ares(2013)3177332.

<sup>18</sup> Letter from the European Commissioner Directorate-General Justice, dated 30/01/2014, ref. Ares(2014)215103; and letter from László Andor, Commissioner for Employment, Social Affairs and Inclusion, dated 14/05/2014, ref. Ares(2014)1542233.

<sup>19</sup> Letter from the European Commission Directorate-General Regional Policy, dated 22/06/2012, ref. Ares(2012)750557.

- a. The only formal outcome was that the Commission denied any meaningful role or responsibility in relation to controlling ESI Funds. It limited its role to “overseeing compliance with the EU regulatory requirements” and checking that “the management and control systems are in place in the Member States and that they function properly”. It did not specify how the Commission would stop ESI Funds being used in violation of EU law, the Charter or the CRPD.
  - b. Even if we assume a connection between our complaints and the steps taken by the Commission:
    - i. These steps did not follow any formal or transparent procedure; and
    - ii. The steps did not end the continued use of ESI Funds in violation of the right to independent living in the community for persons with disabilities in Hungary.
22. *The case of Romania:* After releasing the data regarding Romania referred to in paragraph 7 of this submission, MDAC engaged in dialogue with the former European Commissioner for Regional Policy, Johannes Hahn, while he was still in office. The Commissioner was also approached by a journalist working on Al Jazeera’s film who brought to his attention the fact that ESI Funds were being used to directly fund institutions which were perpetuating grave human rights abuses.
23. The response to these endeavors was a promise to follow-up, and a statement of the spokesperson for the European Commissioner for Regional Policy<sup>20</sup> which contains a commitment to “mainly” direct European Regional Development Funding to “projects supporting the commitment to de-institutionalisation” in the 2014 – 2020 funding period. The statement went on that “[t]his means that for 2014 – 2020 we won’t be funding the BIG traditional residential centres and we will be asking for a clear strategy that foresees the transition from big capacity institutions to the more community-based services” (capitalisation original).
24. This outcome to our endeavours is unsatisfactory because:

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<sup>20</sup> Email from [REDACTED], Spokesperson for the Commissioner for Regional Policy, sent 11/04/2014 at 20:01, subject ‘ROMANIA Institutions’.

- a. The commitment made by the Commissioner's spokesperson contains no prohibition on using ESI Funds to perpetuate the institutionalisation of persons with disabilities and/or violations of EU law, the Charter or the CRPD;
- b. It refers purely to the future, without addressing the problem of ESI Funds which are currently being used to build, maintain and refurbish residential institutions in Romania – a situation which continues to the present day;
- c. Wrongfully interprets the CRPD by only referring to "BIG traditional residential centres" and suggesting the using ESI Funds to "improve conditions" is compatible with the Convention; and
- d. Even if we assume a connection between our complaints and the steps taken by the Commission:
  - i. These steps did not follow any formal or transparent procedure; and
  - ii. The steps did not end the continued use of ESI Funds in violation of the right to independent living in the community for persons with disabilities in Romania.

**Q3. Does the new legislative framework of the cohesion policy contribute to addressing these problems? Are the national means of redress foreseen in the legislative framework sufficient?**

25. As the measures foreseen by the new framework are forward-facing and are yet to be implemented, any assessment of the new framework can only be done at a theoretical level. MDAC submits that the new legislative framework is unlikely to be sufficient for the following reasons:

- a. It is an established fact that ESI Funds have been and continue to be used in significant quantities to finance the building, maintenance and refurbishment of residential institutions for people with disabilities, and there is no evidence that the Commission has taken concrete action thus far;
- b. Experience shows that leaving these matters to the sole discretion of Member States is not sufficient to prevent ongoing violations, ensure accountability and provide effective redress for victims, and the new framework fails to provide any additional enforcement mechanisms; and



- c. Despite the fact that State recipients of ESI Funds have ratified the CRPD<sup>21</sup> and are Members of the EU, and are bound by the Charter and EU law, they have failed to effectively self-regulate to date, and have merely continued with policies to segregate large numbers of people with disabilities in institutions. The new framework still relies primarily of a self-regulatory framework.
26. Under the former legislative framework, Member States were obliged to have complaints mechanisms in place to provide remedies to victims of fundamental rights violations (*C-562/12 Liivimaa Lihaveis MTÜ v. Eesti-Läti programmi*). States generally have complaints mechanisms at the national level, whether of general domestic application, or specifically in relation to ESI Funds. Regulation 1303/2013/EU merely reiterates this obligation. The Regulation provides no further detail on the form or functioning of such mechanisms, and there are no clear criteria which Member States must apply to ensure that these mechanisms are effective, or that they provide remedies.
27. The Regulation does provide an ex-ante conditionality on the necessity to ensure the existence of “administrative capacity for the implementation and application of the United Nations Convention on the rights of persons with disabilities (UNCRPD) in the field of ESI Funds in accordance with Council Decision 2010/48/EC”.
28. However, the criteria for fulfilment established to assess this ex-ante conditionality focuses on the outcome of the arrangement, rather than the procedures for implementing the condition, or how the condition will be met. This continues to grant wide discretion to Member States and there is accordingly a lack of certainty as to the nature of the requirements at the EU level. No clarity is provided by the ex-ante conditionality regarding “administrative capacity”, or how this is to be achieved.
29. The Regulation itself limits the criteria for fulfilment of the ex-ante by referring to “arrangements to ensure monitoring of the implementation of Article 9 of the CRPD (accessibility)”. This limitation is completely arbitrary and does not touch upon the institutionalisation of people with disabilities which has repeatedly been brought to the attention of the Commission. We do not foresee that this will address the problems related to ESI Funds.

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<sup>21</sup> For example, Hungary ratified the CRPD in 2007 and Romania in 2011.

Q4. What role do you think the Commission can play in supporting national authorities to implement well-functioning redress systems? Has the Commission's ability to supervise the Member States improved?

#### The role the Commission can play in supporting national authorities

30. According to the Commission, its role in supporting national authorities consists of two elements: The first is disseminating “good practices” (no criteria provided) of effective arrangements for the treatment of complaints. This is not obligatory. The second is to offer technical assistance concerning complaints resolution, but only on the request of a Member State pursuant to a special ESI Funding scheme.<sup>22</sup>
31. These measures are insufficient. Firstly, the Commission does not assume any obligation to provide guidance, or undertake an effective controlling function in the establishment of complaints mechanisms by Member States. Secondly, States have no obligation to act on any guidance if it is provided. The Commission has no enforcement powers. We would prefer to see in place a mandatory system where the Commission actively obliges Member States to have complaints systems that comply with EU law, the Charter and the CRPD.
32. The inefficiency of a system where guidance might be provided and is not mandatory has already been proven. In 2009, the Commission funded a Toolkit for the use of ESI Funds<sup>23</sup> in which it specifically stated that:

*“The UN Convention as a whole, and specifically Article 19, favours independent living in the community instead of expanding residential institutions. This means, for example, that investing EU Funds in solutions which oppose and hamper community living of people with disabilities would act against the Convention.”*

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<sup>22</sup> As explained in Comments of the Commission on the European Ombudsman's Own-initiative inquiry – Ref. OI/8/2014/AN, while answering Q5.

<sup>23</sup> European Commission, DG Employment, Social Affairs and Equal Opportunities, ‘Ensuring accessibility and non-discrimination of people with disabilities: Toolkit for using EU Structural and Cohesion Funds’, January 2009, available online at:

<http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=174&furtherPubs=yes>.

33. Funds were nevertheless used specifically for opposing and hampering community living for people with disabilities against the Convention.
34. As an authority responsible for the implementation of EU law, the Commission has a role to support, but also to compel, Member States to implement well-functioning, effective complaints and redress systems. Specifically, EU law requires that bearers of rights and obligations are guaranteed legal certainty when complaining about fundamental rights violations,<sup>24</sup> and the Commission must lead the way in providing this clarity to a system which is currently insufficiently clear and precise.

### **Has the Commission's ability to supervise improved?**

35. The new framework does not in any way improve the Commission's ability to supervise Member States in addressing complaints and providing or implementing well-functioning systems of redress. MDAC submits, instead, that the new framework in some ways exacerbates and aggravates the previous deficiencies by allowing the Commission to further abdicate its own roles and responsibilities.
36. In the previous programming period, the Commission divided complaints which it received relating to ESI Funds into two distinct groups: those alleging a violation of EU law and which were dealt with directly by the Commission, and those which it deemed to be the responsibility of Member States.<sup>25</sup>
37. According to the new framework, Member States bear sole responsibility for investigating and resolving all complaints related to ESI Funds. When victims complain directly to the Commission, the Commission will automatically refer them to the relevant State in all instances. The Commission reserves the right, at its own discretion, to request that a State report on the follow up to the complaint.<sup>26</sup> Given the lack of engagement of the Commission under the previous framework and its failure to address systemic human rights violations, there

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<sup>24</sup> See, for example, *Case C-201/08, Plantanol GmbH & Co. KG v. Hauptzollamt Darmstadt*, 10 September 2009, ECR I-8343.

<sup>25</sup> As explained in Comments of the Commission on the European Ombudsman's Own-initiative inquiry – Ref. OI/8/2014/AN, while answering Q8.

<sup>26</sup> As explained in Comments of the Commission on the European Ombudsman's Own-initiative inquiry – Ref. OI/8/2014/AN, while answering Q6.

is no evidence to suggest the new system has improved the Commission's ability to supervise Member States.

38. The Commission's role under the new framework has essentially been reduced to carrying out ad hoc, "on-the-spot" audits. During these audits, it can require Member States to provide additional information, to "take the actions necessary to ensure the effective functioning of their management and control systems or the correctness of expenditure in accordance with the Fund-specific rules"<sup>27</sup>, and to suspend or cancel part or all of the Funds where it considers States have failed to put in place effective complaint mechanisms.<sup>28</sup>
39. For complainants and victims of human rights violations there is a complete lack of transparency and certainty inherent in this system. It remains unclear, for example, when the Commission will act. The new framework provides no direct route of redress for individual victims and no guarantee of individual remedies. The Commission has not presented any of its auditing methodology, and it is therefore impossible to assess whether and to what extent human rights compliance will be taken into account.

**Q5. Are the measures mentioned in the Commission's reply appropriate to deal with possible problems? Please consider, in particular, the Commission's approach to the establishment of "effective arrangements for the examination of complaints" and the role it sees for itself in that context.**

40. According to Article 74(3) of Regulation 1303/2013/EU, the Commission may verify the effectiveness of Member States' handling of complaints by:
- a. Asking Member States to inform it of the results of the examination of specific complaints; and
  - b. Assessing random samples of the results of examinations and the time needed to finalise replies to complainants.
41. The Commission has also stated that it has adopted a "proactive approach" whereby it is "systematically asking the participating Member States to explain the planned complaints

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<sup>27</sup> See Article 75 of Regulation 1303/2013/EU and Comments of the Commission on the European Ombudsman's Own-initiative inquiry – Ref. OI/8/2014/AN, while answering Q4.

<sup>28</sup> Regulation 1303/2013/EU, Articles 83, 142 and 144, as underlined in Comments of the Commission on the European Ombudsman's Own-initiative inquiry – Ref. OI/8/2014/AN, while answering Q7.

handling procedure” with reference to Article 8(4)(a)(iv) of Regulation 1299/2013/EU.<sup>29</sup> We assume they are referring, rather, to Article 8(4)(a)(v). We have seen no outcome to this approach, which therefore lacks transparency and credibility.

42. The Commission has also said that it will “disseminate good practices of what are effective arrangements for the treatment of complaints”, provide trainings, and formally write to Member States to remind them of their obligations as regards respect for the Charter, and issue a guidance document.<sup>30</sup> These measures constitute awareness-raising on the Charter, but do not reference the CRPD.
43. Each of these actions are discretionary within the sole obligation of the Commission to satisfy itself that management and control systems that comply with Regulation 1303/2013/EU and the Fund-specific rules have been set up and function effectively. They do not constitute binding obligations or undertakings. They are insufficient, lack legal certainty, and are persuasive rather than controlling functions.
44. The Commission argues, under Article 15 of Regulation 1303/2013/EU, that binding obligations regarding complaints mechanisms could not be inserted in Partnership Agreements because the list of arrangements to ensure effective implementation under Article 15(1)(b) are exhaustive. In our interpretation, the use in the text of the word “including” implies that this list is non-exhaustive and provides discretion to the Commission to include additional requirements where necessary.
45. The Commission consistently chooses restrictive interpretations of its monitoring and control obligations with reference to Regulation 1303/2013/EU. This is insufficient to discharge its legal obligations under EU law, the Charter, and the CRPD. Compliance with Regulation 1303/2013/EU must be interpreted in light of these higher European legal standards. Both the Charter and the CRPD are binding on EU institutions, including the Commission. In addition, such agreements prevail over provisions of EU law, such as regulations, directives, decisions, recommendations and opinions, and EU legislation must be interpreted and

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<sup>29</sup> As underlined in Comments of the Commission on the European Ombudsman's Own-initiative inquiry – Ref. OI/8/2014/AN, while answering Q4, para. 3.

<sup>30</sup> As underlined in Comments of the Commission on the European Ombudsman's Own-initiative inquiry – Ref. OI/8/2014/AN, while answering Q5.

applied in a manner that is consistent with international agreements.<sup>31</sup> As an EU institution, the Commission has to respect the Charter and the CRPD when performing its tasks, including in the distribution and monitoring of ESI Funds.

46. Further, the Commission is mandated as the EU focal point for implementation of the CRPD at EU level. It therefore has a broader mandate, with reference to Article 33(1) CRPD, which requires it to “promote cross-sectoral coordination between its departments, with the other EU institutions and bodies, and between the EU and Member States”.<sup>32</sup> Unfortunately, the Commission’s restrictive approach regarding control of ESI Funds seems to be limited to the text of the Regulation, rather than reflecting the corpus of EU law.

47. Moreover, according to the Commission itself, the Commission’s InterService Group on Disability (ISG) “[...] plays an important role in ensuring that the needs and rights of people with disabilities are taken into consideration in all relevant policy areas when formulating new legislative proposals and initiatives as well as in the implementation, monitoring and evaluation of EU policies and actions.”<sup>33</sup> We have not seen this approach consistently applied in relation to accountability for the misuse of ESI Funds.

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

48. As explained above, the Commission has to act according to its obligations established under EU law, including the Treaties, the Charter and the CRPD.

49. It is within the mandate of the Commission to create control mechanisms which ensure the protection of fundamental rights. It is therefore incumbent on the Commission to create an effective control mechanism for ESI Funds that is transparent, independent, accountable and accessible to victims of human rights violations, at the European level. This must include a structured, transparent auditing mechanism regarding Member State actions in relation to ESI

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<sup>31</sup> See, for example, in the context of discussion on the CRPD, *Joined Cases C-335/11 and C-337/11, HK Danmark, acting on behalf of Jette Ring, v. Dansk almennyttigt Boligselskab, and HK Danmark, acting on behalf of Lone Skouboe Werge, v. Dansk Arbejdsgiverforening*, 11 April 2013, paras. 29-32.

<sup>32</sup> Report on the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union, European Commission, para. 211, available at [http://ec.europa.eu/justice/discrimination/files/swd\\_2014\\_182\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/swd_2014_182_en.pdf).

<sup>33</sup> *Ibid.*, at para. 27.

Funds, and an effective complaints mechanism. These mechanisms must be capable of leading to redress for violations and protection for fundamental rights in individual cases, and effective enforcement.

50. It must be clear as to when control processes will be triggered, what criteria will be applied, and what measures will be adopted as a result.
51. Furthermore, complaint mechanisms at the Commission level must be capable of addressing systematic abuses of human rights in the distribution and implementation of ESI Funds.
52. Where the Commission lacks legal provisions detailing expressly how it is to discharge its obligations under EU law, the Charter or the CRPD, it must propose legislative and other amendments/proposals to the European Council, Parliament and other EU institutions. These amendments/proposals should include proposals to strengthen guarantees of fundamental rights.
53. We recommend that the Commission publish documents setting out the details of its control function over the national mechanisms, and release comprehensive and detailed information about all control measures taken thus far in respect of ESI Funds and fundamental rights. This should include disaggregated data on complainants, outcomes and assessment processes. The highly technical nature of this information poses a real challenge, and the Commission should take steps to ensure that information is published consistently in one central repository, in accessible formats which include easy-read, and disseminates this information to all relevant stakeholders, including persons with disabilities themselves, their representative organisations, civil society, public authorities, etc.
54. The evidence in the public domain clearly shows that tens of thousands of people with disabilities have suffered the effects of the misuse of ESI Funds. While the present inquiry is limited to the new cohesion policy, it is important to recognise that funds from the previous framework continue to be spent now. Those victims have a right under international law to remedies and reparations.<sup>34</sup>

**Q6. If you have any comments on the topic which are not addressed by the above questions, please mention them briefly.**

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<sup>34</sup> UN General Assembly, Resolution 60/147 of 16 December 2005 on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

## EU law prohibits the institutionalisation of persons with disabilities

55. The EU ratified the CRPD in December 2010 as a 'regional integration organisation'. The CRPD therefore has binding effect on all institutions of the EU and Member States in the application of EU law.<sup>35</sup>
56. Article 19 of the CRPD guarantees that all persons with disabilities have the right to live independently in the community, including the right to choose where and with whom they live. The obligation on the EU as a regional integration organisation is to recognise this right, and to ensure that all EU laws, policies, programmes and funding streams support this right. This means, at a bare minimum, not to fund services which segregate and isolate people from the community. Refurbishing and maintaining institutions do precisely this. Where the EU chooses to provide funding in the area of Article 19 CRPD rights, it must ensure that this is provided for the purposes of accessing community housing stock, individualised support services, and ensuring access to general public services for persons with disabilities on an equal basis with others.
57. The Charter and TEU must be interpreted in light of the CRPD, in particular, Articles 2, 3 and 6 TEU and the rights to non-discrimination, human dignity and integration of persons with disabilities contained in, respectively, Articles 1, 21 and 26 of the Charter. Article 216(2) TFEU creates the legal foundation to support this link.
58. However, the CRPD can no longer be regarded as having merely interpretive value in terms of EU law. It is binding and must be treated as such by all EU institutions, including the Commission, and all Member States, in the application of EU law.
59. The CRPD Committee has already established as a matter of international law that fulfilment of Article 19 requires the closure of residential institutions (deinstitutionalisation), and the allocation of resources towards community-based services to enable persons with disabilities to live independently in their communities, for example, in its Concluding Observations on Paraguay,<sup>36</sup> Australia,<sup>37</sup> Austria,<sup>38</sup> and Costa Rica<sup>39</sup>.

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<sup>35</sup> Article 216(2) of the Treaty of the Functioning of the European Union.

<sup>36</sup> UN Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Paraguay, 15 May 2013, CRPD/C/PRY/CO/1, para. 50.



60. Article 6 of Regulation 1303/2013/EU requires that operations supported by ESI Funds must comply with applicable Union law.

61. Article 7 of Regulation (EU) No 1303/2013 sets out that Member States and the Commission must take appropriate steps to prevent any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation during the preparation and implementation of programmes. Institutionalisation of people with disabilities constitutes disability discrimination within the meaning of Article 2 CRPD. The Commission, as well as Member States, must take effective steps to end institutionalisation, including by stopping ESI Funds from perpetuating this form of disability discrimination.

### **Cohesion policy 2007-2013**

62. This inquiry does not address the distribution of ESI Funds under the previous cohesion policy. However, these Funds are currently being used to perpetuate the institutionalisation of people with disabilities. The Commission should not enjoy impunity for past and ongoing gross and systemic human rights violations.

63. MDAC calls on the Commission to provide restitution, compensation, rehabilitation and satisfaction to victims of human rights violations. In particular, the Commission should:

- a. Finance a Reparations Fund;
- b. Establish a Reparations Agency to administer the Reparations Fund, chaired by a person of high standing who is independent from the Commission and who has the trust of all parties, with members drawn from civil society and the EU Agency for Fundamental Rights;
- c. Engage in a process of restorative justice in line with UN General Assembly Resolution 60/147; and
- d. Suspend and/or cancel all ESI Funds immediately which are being used now by Member States to build, maintain and refurbish institutions for persons with disabilities,

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<sup>37</sup> UN Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Australia, 24 October 2013, CRPD/AUS/CO/1, para. 42.

<sup>38</sup> UN Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Austria, 7 October 2013, CRPD/AUT/CO/1, para. 37.

<sup>39</sup> UN Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Costa Rica, 11 May 2014, CRPD/CRI/CO/1, para. 46.



and take action to promote the closure of such institutions and inclusion of residents back into their communities.

## Concluding comments

64. MDAC welcomes the Ombudsman's timely and necessary inquiry into respect for fundamental rights in implementation of EU cohesion policy.
65. As has been described above, there are serious concerns that huge amounts of EU funding have been and continue to fund violations of fundamental rights. MDAC recommends that the Ombudsman widens the scope of this inquiry in order to hear from victims of the previous funding regime. This is not an historical matter, as Member States including Hungary and Romania, are building new institutions right now with funding from the previous stream.
66. As the only independent body with the power to investigate these matters, and to hold the Commission accountable in a comprehensive manner, we implore the Ombudsman to address all aspects of the misuse of ESI Funding. The voices of the victims who are central to the issues that this inquiry probes have yet to be heard.
67. MDAC remains at your disposal for any further information or discussion, and is committed to fully participating in the reform of ESI Funds.

## Contact details:

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