



Protecting Children. Providing Solutions.

March 2015

Lumos' response to Consultation by the European Ombudsman on compliance between the EU Cohesion Policy and the EU Charter on Fundamental Rights

Lumos is an international NGO¹, founded by author J.K. Rowling, working to end the institutionalisation of children around the world by 2050. We support governments and communities to transforming education, health and social care systems for children and their families, assisting children to move from institutions to family-based care. We are a founding member of the European Expert Group on the Transition from Institutional to Community-based Care. Lumos also sits on the Leaders' Council of the Washington-based Global Alliance for Children, a coalition of US government departments, the World Bank, the Canadian government, major foundations and experts.

The UN estimates that 8 million children currently live in residential institutions², over 80% of whom are not orphans³, but have been separated from their families because of poverty, a lack of access to services, or discrimination. This is in violation of several international human and child rights instruments⁴.

More than sixty years of research demonstrates the harm caused by institutionalisation. In spite of the best intentions, institutions do not protect children or provide them with a safe environment; instead they leave children more vulnerable to violence, abuse and neglect. Institutions are not an effective means of providing education, health or other services to children. The outcomes for children raised in institutions are dire⁵ with a dramatic reduction in their future life chances and significantly limiting the potential to achieve mainstream development goals⁶. The impact of institutionalisation can last a lifetime with some research suggesting that these children are 10 times more likely than their peers to be involved in prostitution; 40 times more likely to have a criminal record; and 500 times more likely to

¹ Lumos Foundation (Lumos) is a company limited by guarantee registered in England and Wales number: 5611912 | Registered charity number: 1112575

² P S Pinheiro, (2006) *World Report on Violence against Children*, UNICEF: New York

³ Csaky, C. (2009) *Keeping Children out of Harmful Institutions Save the Children UK: London*

⁴ Csaky, C. (2014) *Why Care Matters: The Impact of Inadequate Care of Children and on Society. Family for Every Child: London.*

⁵ Browne, K. (2009) *The Risk of Harm to Young Children in Institutional Care, Save the Children UK: London*

⁶ Delap, E. (2010) *Protect for the future. Placing children's protection and care at the heart of achieving the MDGs. London: EveryChild*

commit suicide⁷. For more information, please see the [Lumos Factsheet: How institutions are harmful to children](#)⁸.

In 2013, the European Union took a major step towards ending the institutionalisation of children with the introduction of an ex-ante conditionality on social inclusion (9: 9.1.) in the Regulation 1303/2013 on the European Structural and Investment Funds. The Investment priorities under this ex-ante conditionality include "...the transition from institutional to community-based services". In effect with the adoption of the Regulation it is forbidden for the European Structural and Investment Funds to be used for the maintenance or renovation of existing large residential institutional settings or indeed the construction of new ones.

The United Nations Convention on the Rights of Persons with Disabilities (UN CRPD), to which the EU is a party, requires that persons with disabilities have the right to live in the community (Article 19), are protected from any form of torture or cruel, inhuman or degrading treatment or punishment (Article 15) and exploitation, violence and abuse (Article 16). Such treatment is a common occurrence in long-stay residential institutions across Europe. As regards children with disabilities, Article 23(1) of the UN CRPD provides that they have equal rights with respect to family life, and Article 23(5) states that where the immediate family is unable to care for them, State Parties shall "undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting."

In addition, the United Nations Convention on the Rights of the Child (UN CRC) sets out clearly a range of rights that, taken together, should ensure that children develop to their full potential and then can, as adults, live independently in the community. This includes the right to know and be cared for by their parents (Article 7) and to be protected from abuse and neglect (Article 19).

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?

One of the main problems, from the perspective of children's fundamental rights that occurred in the implementation of the cohesion policy during the previous programme period was the use of the Structural Funds for the renovation and modification of the buildings of existing residential institutions and the construction of new ones. In Bulgaria, in 2007 €140,000 of Europe Aid funding earmarked for deinstitutionalisation was spent on renovating one institution for children and adults with severe disabilities.⁹ In spite of the improvements to the building, in 2010, the same institution was the subject of an investigation into high levels of mortality due to malnutrition, which was highlighted in a report of the UN Committee Against Torture.¹⁰ Other practices that continued in the institution include: placing children

⁷ Pashkina (2001). *Sotsial'noe obespechenie*, 11:42-45. Cited in Holm-Hansen J, Kristofersen LB, Myrvold TM eds. *Orphans in Russia*. Oslo, Norwegian Institute for Urban and Regional Research (NIBR-rapport 2003:1).

⁸ <http://wearelumos.org/sites/default/files/Lumos%20factsheet%20-The%20harm%20caused%20the%20children%20through%20institutions.pdf>

⁹ *Written Question by MEPs Elly de Groen-Kouwenhoven and Katty Sinnott to the European Commission (12 Feb 2008 E-0644/08)*, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2008-0644+0+DOC+XML+V0//EN&language=HU>

¹⁰ United Nations (2011) 47th session, Concluding observations of the Committee against Torture, Bulgaria, http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.BGR.CO.4-5_en.doc

and adults together; children rarely leaving the building; children with severe disabilities rarely leaving their cots; tying children up to prevent self-harm; using psychiatric medication to control behaviours, where no psychiatric diagnosis exists.¹¹

In one county in the Czech Republic from 2008 – 2012, more than €5.6 million of Structural Funds was spent on renovating baby institutions, children's homes and institutions for children and adults with disabilities. In spite of this expenditure, the following practices continue in the institutions: placing adults and children with disabilities together in the same institution, with insufficient procedures to prevent children being abused by adults¹²; placing babies in institutions for longer than six months¹³ – this practice is proven to cause permanent damage to early brain development¹⁴; placing emotionally vulnerable children, who have committed no offences, together with young offenders, including those who have committed serious violent offences, as well as young people with a psychiatric diagnosis.¹⁵

The causes for these problems were the lack of awareness, at both EU and national level, of the harm institutions cause to children, the lack of national strategies and action plans for transition from institutional to community-based care, the lack of proper monitoring and control on the use of EU funding and the subsequent impact is on the fundamental rights.

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

a. If yes, was the outcome satisfactory? Please explain if this was not the case.

b. If no, why not (problem solved at national level, lack of information, etc.)

Yes. Lumos was part of the group that researched and authored the "Report of the Ad Hoc Expert Group on the Transition from Institutional to Community-based Care"¹⁶, commonly

¹¹ Bulgarian Helsinki Committee (2010) Report of the Bulgarian Helsinki Committee following Inspection of the Home for Children with Intellectual Disabilities, Krushari, Dobrich Region (available in Bulgarian only), http://forsakenchildren.bghelsinki.org/wpcontent/uploads/2010/09/Doklad-DDMUI-Krushari_bd.pdf

¹² Report of the Czech Ombudsman. Veřejný ochránce práv: Zpráva z návštěv, Domovů pro osoby se zdravotním postižením [on-line]. Available at: http://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/2009/SZ_zarizeni_pro_osoby_s_mentalnim_postizenim.doc. Checked July 23, 2013.

¹³ Report of the Czech Ombudsman. Veřejný ochránce práv: Zpráva ze systematických návštěv, Zdravotnická zařízení poskytující péči ohroženým dětem do 3 let věku, Kojenecké ústavy [on-line]. Available at: http://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/2013/NZ-25_2012-kojeneckeustavy.pdf. Checked July 23, 2013.

¹⁴ Rutter M et al. (1998). Developmental catch-up, and deficit, following adoption after severe global early privation. *Journal of Child Psychology & Psychiatry*, 39(4):465– 476.

¹⁵ Report of the Czech Ombudsman. Veřejný ochránce práv: Zpráva ze systematických návštěv, Školských zařízení pro výkon ústavní a ochranné výchovy [on-line]. Available at: http://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/2012/2012_skolskazarizeni.pdf. Checked July 23, 2013.

¹⁶ *European Commission (2008) Report of the Ad Hoc Expert Group on the Transition from Institutional to Community-based Care [on-line]. Available at: <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=614&furtherNews=yes>*

known as the Spidla report. The then Commissioner Spidla requested the report and this cited numerous examples of inappropriate use of the Structural Funds that had, in spite of the best of intentions, resulted in prolonged institutionalisation of children and adults across Europe. The Spidla report was welcomed positively by both Commissioners responsible for the Structural Funds, as well as DG Empl and DG Regio. Both DGs worked with the European Expert Group and Lumos to develop Guidance¹⁷ and a Toolkit¹⁸ on the better use of the Structural Funds. This process also informed the change in Regulations that introduced the specific ex ante into the ESI Regulations for the new programming period.

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

The introduction of an ex-ante conditionality on social inclusion (9: 9.1.) and a general ex-ante conditionality in the area of disability, foreseeing the “implementation and application of the United Nations Convention on the rights of persons with disabilities (UNCRPD) in the field of ESI Funds”, in the Regulation 1303/2013 was a huge step in the right direction. The Investment priorities under the ex-ante conditionality 9:9.1 include “...the transition from institutional to community-based services”. In effect with the adoption of the Regulation it is forbidden for the European Structural and Investment Funds to be used for the maintenance or renovation of existing and the construction of new large residential institutional settings.

a. Are the national means of redress foreseen in the legislative framework sufficient?

The national means of redress foreseen in the legislative framework provide a base for positive change but they do not appear to be entirely sufficient to achieve the intended aim of ensuring the transition from institutions to community based services. For example, it is left to the Member States to decide which ex-ante conditionalities are applicable to the specific objectives pursued within the priorities of Member States' programmes. Therefore if a Member State does not recognise institutionalisation of children as a breach of their human rights and a practice which is threatening their lives, it may not include the transition from institutional to community-based care in their programmes. Another pitfall is a criterion for fulfillment under ex-ante conditionality 9:9.1 – “depending on the identified needs, includes measures for the shift from institutional to community based care”. This text makes the obligation to begin a process of transferring resources from one system (institutionalisation) to another (community living) appear to be conditional. In fact the legal obligation is not (and should not be made to appear) contingent on ‘identified needs.’ It is a categorical imperative both under international law and even within stated EU policy. Even if it were a question of needs and not rights (which it is not) the language is too permissive or open-ended as to who assesses the needs and (if an assessment is required – which it is not) in accordance with what standards and criteria? For more information, please, see the [JOINT MEMORANDUM](#)¹⁹ launched by Lumos together with the Centre for Disability Law and Policy (NUI Galway) and a number of other key organisations during the time of the negotiations on Regulation 1303/2013.

¹⁷ *European Expert Group on the Transition from Institutional to Community-based Care (November 2012) Common European Guidelines on the Transition from Institutional to Community-based Care. [on-line]. Available at: <http://deinstitutionalisationguide.eu/>*

¹⁸ *European Expert Group on the Transition from Institutional to Community-based Care (November 2012) Toolkit on the Use of European Union Funds for the Transition from Institutional to Community-based Care – Revised edition (June 2014) [on-line]. Available at: <http://deinstitutionalisationguide.eu/>*

¹⁹ <http://wearelumos.org/sites/default/files/131016%20Joint%20Memo%20Community%20Living%20For%20AIL%20-%20English.pdf>

b. 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 Commission should ensure full implementation of the ESI Funds Regulation related to ending institutionalisation and vigorous monitoring of its implementation in line with the EU Charter on Fundamental Rights. This could include the following actions:

- Issue a high-level statement on deinstitutionalisation / transition from institutional to community based care to all those responsible for administering ESI Funds
- Develop some form of EU-wide statement on the harm caused by institutionalisation and the commitment of the EU to the transition to community based services and community living.
- Feature indicators on deinstitutionalisation within the overall ESI Funds impact monitoring processes
- Include a chapter in guidance documents addressed to the Member States on ex-ante conditionality 9:9.1 and particularly on the investment priority on “transition from institutional to community-based services”, explaining how the ESI Funds can be used for successful deinstitutionalisation processes.
- Provide clarification regarding the criterion for fulfillment “depending on identified needs”, making it clear that the sheer existence of institutions in a country means that there are “identified needs”. This would also require an agreed definition of institutionalisation; this should be included in any EC guidance on the matter.
- Encourage, enable and support civil society to contribute to the design, monitoring and implementation of ESI fund programmes and closely monitor Member States’ compliance with the European Code of Conduct on Partnership in this regard.
- Encourage, enable and support civil society to monitor of the implementation of ESI Funds for example through the submission of complaints and shadow reports.
- Increase the understanding of deinstitutionalisation within the European Commission and send unified and clear messages to the Member States on what a successful transition process means in practice, using tools such as the European Expert Group on the Transition from Institutional to Community Based care (EEG) Guidelines and Toolkit
- Add a module on deinstitutionalisation in the planned training sessions in the Member States on the Charter, its applicability and its relevance in the context of the disbursement of ESI funds.
- Make sure that the European Code of Conduct on Partnership is indeed being respected and implemented.

4. Are the measures mentioned in the Commission's reply appropriate to deal with possible problems?

The measures mentioned in the Commission’s reply appear to be appropriate for strengthening the base for dealing with possible problems, once they arise. There is a need, in terms of ending institutionalization, to ensure that problems do not arise in the first place

that can be avoided, through a thorough examination of all partnership agreements to ensure that the transition from institutional to community based services and community living is adequately included. For example, the draft Partnership Agreement for the Czech Republic did contain significant reference to the establishment of community based services that prevent admission to institutions. However, there was no commitment to dismantling the current institutional system and encouraging the actual transition out of institutions for the most vulnerable and marginalised citizens currently living in them.

There is also a need for these measures to contain clear messages to be used by all the EC DGs and Managing Authorities in Member States who do not work on the topic of institutionalisation. Without such coherence and synergy it would not be realistic to expect the Member States to deal with any problems in an adequate and consistent way. A crucial measure which appears to be missing is ensuring follow up of the listed actions and indicators and measures for the monitoring of their outcomes.

a. 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.

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

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

In order to be consistent in its policies a logical next step for the Commission would be to build on the ex-ante conditionality 9:9.1 by initiating the creation of a similar mechanism forbidding the use of Neighbourhood, Eastern partnership, pre-accession, development & cooperation funding for the renovation or construction of institutions while introducing an investment priority on the transition from institutional to family and community based care. It should be noted that if the EU has agreed that institutionalisation of children (and others) is a breach of their human rights, this applies to all children, not just those in Europe. The EC's funding and policy influence outside the Union is a powerful force. As citizens of the Union, we need to be sure that our international assistance funds are not being used in a way that, in spite of good intentions, could be detrimental to children elsewhere in the world. In addition, the EC's work in this regard would provide an example of good practice that could influence other major bilateral and multi-lateral funding bodies. It should be noted that the new ESI Regulations in relation to the transition from institutions to community-based services are currently influencing efforts in the USA, to ascertain whether a similar spirit of regulations could be applied to US foreign assistance funding.

The EU should ensure that the spirit of the Charter of Fundamental Rights (and Article 32 CRPD) is also applied to the EC's other aid streams and also to its approach to global debates as well as that any Fundamental Rights monitoring system should also look at this point. For example, they could make certain that in each EEAS EU embassy/delegation there is a named contact who is responsible for ensuring that EU's approach in that country is in line with the Charter.

Another recommended action would be to make sure that the European Investment Bank is also respecting the Charter and gives loans only for projects which are in line with it. A revision of EIB policy documents (2009 EIB Statement of Environmental and Social Principles and the Environmental and Social Handbook) and list of Excluded Activities would provide an opportunity to strengthen their human rights side. It would also make sense the relevant ex-ante conditionalities to be added to the EU Social Source Book. In addition, the EU could use its influence to ensure that EEA funding is not used to continue the practice of institutionalising the most vulnerable and marginalized members of our European society.

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