



EUROPEAN COMMISSION

LEGAL SERVICE

Brussels, 29 June 2018
sj.d(2018)3834515

Opinion of the Legal Service¹

NOTE TO

DG REGIO

DG EMPL

Subject : **Programming period 2014-2020**
United Nations Convention on the Rights of Persons with Disabilities –
Eligibility – Investments in long-stay residential institutions

Ref : Ares(2018)2249997

1. BACKGROUND

With the note in reference, the Legal Service is asked its opinion on whether the European Structural and Investment Funds ("ESI Funds") can provide support for long-stay residential institutions such as homes for persons with disabilities, mental health problems and children deprived of parental care.

According to the letter addressed by DG REGIO to the Member States on 30 October 2017², this support is prohibited under the current legal framework and, in particular, by Article 19 of the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD"). This opinion is contested by several Member States.

¹ This document contains legal advice and is only for the use of the services to which it is addressed. It may not be transmitted outside the European Commission and its content may not be reproduced in documents to be sent outside the European Commission.

It may be protected pursuant to Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council and may only be disclosed under the procedures provided for in Commission Decision 2001/937/EC, ECSC, Euratom.

² Ares(2017)5295918.

In this context, the Legal Service is asked the following questions:

- (1) if support from the ESI Funds (under thematic objective 9³ or any other thematic objectives, as they are set out as investment priorities in Article 9 of Regulation (EU) No 1303/2013 laying down common provisions on the ESI Funds – “CPR”) should be considered irregular as regards long-stay residential institutions (question 1), residential institutions for elderly persons who are not disabled (question 1a), social or medical institutions which ensure independent living or are embedded in the transition process from institutional to community-based care (question 2) and residential institutions for persons requiring constant care and medical supervision (question 3),
- (2) what is the legal force of General Comment No. 5 (2017) on living independently and being included in the community ("General Comment 5") and in particular if it creates legal obligations to the State parties and Commission (question 4), and
- (3) if there is the possibility or obligation for the Commission to impose a financial correction or to take other actions when there has been a breach of fundamental rights in residential institutions which received support from the ESI Funds (questions 5 and 6).

2. LEGAL ANALYSIS

2.1 Questions 1, 1a, 2 and 3

The Legal Service is first and foremost asked whether any support (under thematic objective 9 or any other thematic objective) from the ESI Funds in the benefit of long-stay residential institutions should be considered irregular.

In general, the provisions mentioned in the note in reference show what Member States should aim for and promote, i.e., the transition from institutional to community-based services, but do not establish a general and absolute prohibition to support long-stay residential institutions.⁴ This is the case, in particular, of Article 19 UNCRPD.⁵

Indeed, all these provisions take into account that moving away from long-stay residential institutions to community-based services – commonly referred to as

³ Promoting social inclusion, combating poverty and any discrimination.

⁴ Please note also that some of the provisions indicated in the note in reference are not part of Union law (i.e., the United Nation Convention on the Rights of the Child which, according to the note, has not been ratified by the Union). Also, the infringement of the rules concerning the ex-ante conditionalities on anti-discrimination and disability (i.e., Article 19 and Annex XI of the CPR) does not lead to irregular expenditure or the possibility to make a financial correction.

⁵ General Comment 5 interprets Article 19 UNCRPD in the light of ensuring independent living arrangements and restricting investments which are not aligned with this goal. According to paragraph 51 of General Comment 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*" (para. 51). However, General Comment 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 recognizes 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). As regards the legal value of General Comment 5, please see question 4.

“deinstitutionalisation” – can simply not take place from one day to the other. Instead, it is a process which requires the development of individualised services, the planned closure of long-stay residential institutions and making general services (education, health, housing) available to persons with disabilities.

Before deinstitutionalisation is achieved, the persons concerned have to be cared for. As long as they are placed in the available long-stay residential institutions, these have to be kept in good shape. That is why, in light of the fact that promoting the transition from institutional to community-based services is a long-term project, it is perfectly conceivable that also investments into long-stay residential institutions may serve to achieve some of the thematic objectives in Article 9 of the CPR without undermining the overall aim of Article 19 UNCRPD.

Moreover, in line with the significant functions of Member States when implementing the Union budget under shared management, Member States are responsible for the drawing up of the programmes and selecting the projects which will be co-financed by the ESI Funds.⁶ Member States enjoy discretion in setting up the operations they would like to co-finance in the context of the process to ensure independent living arrangements and deinstitutionalization.

The note in reference does not bring evidence that each and every long-stay residential institution, irrespective of its characteristics and circumstances, is incompatible with the freedom of the residents to choose and control or may not be needed for certain kinds of services (e.g., permanent medical services for the elderly).

Further, neither Article 69(3) of the CPR, nor Article 3(3) of Regulation (EU) No 1301/2013 on the European Regional Development Fund, Article 2(2) of Regulation (EU) No 1300/2013 on the Cohesion Fund and Article 13(4) of Regulation (EU) No 1304/2013 on the European Social Fund contain any explicit statement excluding support from the ESI Funds or the concerned specific Funds into long-stay residential institutions.

Operations for the benefit of long-stay residential institutions could support thematic objective 9 (i.e., promoting social inclusion, combating poverty and any discrimination) or other applicable thematic objectives such as 4 (i.e., supporting the shift towards a low-carbon economy in all sectors), 5 (i.e., promoting climate change adaptation, risk prevention and management), 6 (i.e., preserving and protecting the environment and promoting resource efficiency), 8 (i.e., promoting sustainable and high quality employment and supporting labour mobility), 10 (i.e., investing in education, training and vocational training for skills and lifelong learning) and even 11 (i.e., enhancing institutional capacity of public authorities and stakeholders and efficient public administration).

In fact, the note in reference does not identify any difference between these objectives as regards a difference in treatment concerning the possibility to support long-stay residential institutions.

To conclude as regards question 1, there is no prohibition for the ESI Funds to support (under thematic objective 9 or under any other objective) long-stay residential institutions.

⁶ See, e.g., para. 81 to 84 of the Opinion of the Advocate General in case C-417/04.

Member States are however required to progress on ensuring independent living arrangements and deinstitutionalization.

In view of the reply to question 1, question 1a is not applicable.

Also, in view of the reply to question 1, the same reasoning applies to support from the ESI Funds to social or medical institutions which ensure independent living or are embedded in the transition process from institutional to community-based care (question 2) and residential institutions for persons requiring constant care and medical supervision (question 3). In the absence of any provision in that regard, it must be concluded that funding for such activities is allowed.

2.2 **Question 4**

DG REGIO and DG EMPL ask what the legal force of General Comment No. 5 is and in particular whether this General Comment creates legal obligations to the parties.

General Comment 5 interprets Article 19 of the UNCRPD and provides detailed content to the rather generally worded text of this human rights treaty. It has been prepared by a United Nations human rights expert committee, the Committee on the Rights of Persons with Disabilities, in order to assist State parties in their implementation of Article 19.

The General Comment 5 is a not treaty provision and does not require ratification by State parties.

It is therefore not legally binding.

Treaties are interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). Interpretation is based on various elements, in particular good faith, the ordinary meaning of terms, the context and the object and purpose of the treaty.

The General Comments cannot alter the legal interpretation of the Convention in accordance with these provisions of the VCLT. However, since they are prepared by the Committee - which is a body of independent experts which monitors the implementation of the Convention by the States Parties - they do carry policy weight and should be taken into account when it comes to the implementation of the Convention.

To conclude, General Comment 5 does not create legal obligations for the parties.

2.5 **Questions 5 and 6**

Questions 5 and 6 ask in essence if there is the possibility to impose a financial correction or to take other actions when there has been a breach of fundamental rights in residential institutions which received support from the ESI Funds.

The Legal Service addressed this issue in its note Ares(2018)2638816 in connection with the programming period 2007-2013 and the support given to an establishment caring for persons with mental and intellectual disabilities, the Tophaz Special Home, which was later accused of violations of fundamental rights.

The reasoning of the mentioned note also applies to the programming period 2014-2020.

In particular, with a view to establishing an irregularity according to Article 2(36) CPR which could lead to a financial correction, three elements must be fulfilled: (1) a breach of Union law (or of national law relating to its application), (2) that the breach stems from an act or omission by an economic operator, and (3) that the breach has the effect of prejudicing the budget of the Union.

Questions 5 and 6 concern the cases where the breach of Union law refers to the Charter of Fundamental Rights. Therefore one would need first to establish whether the Charter is applicable. Pursuant to its Article 51 the Charter is applicable to Member States only when they are implementing Union law. As explained in the mentioned note, the sheer fact that a given infrastructure has been co-financed by the Union does not mean that the Member State implements Union law within the meaning of Article 51 of the Charter also with regard to the establishment using that infrastructure.

The question whether the operation of such an establishment constitutes implementation of Union law within the meaning of that provision would have to be assessed separately and on its own merits, in the light of any normative or functional connection between that operation and provisions of Union law.

This assessment cannot be done in abstract but on a case-by-case basis in view of the specific circumstances of the case.

Moreover, the other two elements of an irregularity (i.e., an act or omission by an economic operator, and that the breach has the effect of prejudicing the budget of the Union) should also be established in order to have the possibility to make a financial correction.

In the event of an irregularity, in general the measures available to protect the Union budget are interrupting or suspending interim payments or making a financial correction if the irregular expenditure has not been corrected by the Member State.⁷ In principle, Member States should in the first instance be responsible for investigating irregularities and for making the financial corrections required.⁸ The Commission is also entitled to carry out audits and checks, as provided in Article 75(2) CPR.

In the event of a breach of fundamental rights which does not constitute an irregularity or has no impact on the financing received, these actions to protect the Union budget are not available. For the sake of completeness, it is to be said that, beyond the requirement of an existing irregularity, Article 19 and Article 142(e) of the CPR allow the Commission to suspend payments in case a Member State fails to fulfil an ex-ante conditionality. However, it is to be noted that the actions required for the fulfilment of the ex-ante conditionality with regard to the UNCPRD, Annex XI, Part II, point 3, are mainly based on the existence of the required administrative capacity in the Member State and are thus not related to breaches of fundamental rights in residential institutions. Likewise, the actions required for the fulfilment of the ex-ante conditionality with regard to the promotion of social inclusion, Annex XI, Part I, point 9.1, refer to having in place a national strategic policy framework for poverty reduction which includes measures for the shift from institutional to community-based care and are thus not related to breaches of fundamental rights in residential institutions. Further, in order for the Commission to avail itself of this right to

⁷ Articles 83(1)(b), 142(1)(b) and 144(1)(c) CPR.

⁸ Article 143(1) CPR.

suspend, it would have had to take the relevant procedural steps set out in Article 19 of the CPR, namely make observations in that regard to the annual implementation report or the progress report already in 2017.

However, taking into account the potential reputational harm for the Commission if it is perceived to finance infrastructures which are then used in a manner not respecting fundamental rights, the Commission may still use its political influence in situations when Member State's actions do not constitute the implementation of Union law, and promote respect for the fundamental rights of the Charter even outside its scope of application.

3. CONCLUSION

In the view of the Legal Service, Member States can choose to co-finance infrastructures and services concerning long-stay residential institutions with ESI Funds (under thematic objective 9 or under any other objective) (question 1). Member States are however required to progress in general on ensuring independent living arrangements and deinstitutionalization.

Support from the ESI Funds to social or medical institutions which ensure independent living or are embedded in the transition process from institutional to community-based care (question 2) and to residential institutions for persons requiring constant care and medical supervision (question 3) is also allowed.

General Comment 5 does not create legal obligations for the parties (question 4).

In the event of an alleged breach of the Charter of Fundamental Rights in an institution which received support from the ESI Funds, the Commission may proceed with an interruption or suspension of payments or a financial correction, but only if the Commission establishes this breach (taking into account that the Charter is applicable to Member States only when they are implementing Union law) and then that the breach had an impact on the financing received (questions 5 and 6).

In the absence of these elements, the Commission could – and should – still use its political influence to promote respect for the fundamental rights of the Charter (even outside its scope of application).



cc :

- DG REGIO

- DG EMPL

- LS