



Dr Johannes Hahn
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DG REGIO
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30 July 2013

Dear Commissioner,

Re: Follow-up to complaint (2012)574322 - 11/05/2012 and request for immediate action

On 22 June 2012 you responded (ref (2012)750557) to our letter (ref (2012)574322) of 3 May 2012 concerning the Hungarian deinstitutionalisation tender (the "Tender"). I am writing with new evidence that the European Commission is actively supporting the Hungarian government's violations of the UN Convention on the Rights of Persons with Disabilities ("CRPD").

Since our last correspondence, the Hungarian government has chosen six large residential institutions to participate in the deinstitutionalisation tender. They will all move their residents to new forms of congregate settings. Such settings are contrary to Article 19 of the CRPD which sets out the 'right to live and be included in the community [...] with choices equal to others'. The European Union ratified the CRPD in 2010 and is therefore under an obligation to ensure that spending of structural funds is in full compliance with the Convention. By making structural funds available to finance the creation of segregating environments, and/or failing to condition Hungary's spending on CRPD compliance, the European Commission is violating its own international obligations under the CRPD. Our enclosed Legal Memorandum details how allowing structural funds to be spent on building congregate living facilities will mean that the EU is violating the CRPD.

I therefore request you to direct the immediate withdrawal of EU funding under the current tender from facilities and services that clearly contravene the CRPD. The EU must act now, since it is under an obligation under Article 4 of the CRPD to take all appropriate legislative, administrative and other measures to make sure the Convention is implemented.

I also ask you to condition all EU funding for current and future deinstitutionalisation efforts on compliance with the CRPD.

It is not only the Commission which is violating the CRPD. The Hungarian government is providing the other half of the funding and is responsible for operationalising the deinstitutionalisation process. I request that the Commission raises Hungary's contravention of the CRPD (which it ratified in July 2007) and the EU Charter, in particular Articles 21 and 26, directly with the relevant Hungarian authorities. If the government fails to act, the Commission should initiate infringement proceedings against Hungary.



MDAC is bringing this case to the attention of key EU officials, the European Parliament and the media. We would appreciate your reply at your earliest convenience.

Yours sincerely,

Oliver Lewis
Executive Director



Enc.

Legal Memorandum on Structural Funds

Copies to

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Members of the Regional Development Committee of the European Parliament

Members of the Subcommittee on Human Rights of the Subcommittee of the Committee on Foreign Affairs of the European Parliament

Members of the Civil Liberties, Justice, and Home Affairs Committee of the European Parliament

Chairpersons of political groups of the European Parliament

Members of the European Parliament for Hungary

Ambassador of Australia to the European Union
Ambassador of Canada to the European Union
Ambassador of the United States to the European Union



Legal memorandum on structural funds and the Hungarian deinstitutionalisation process

Submitted by the Mental Disability Advocacy Center (MDAC)

30 July 2013

Previous correspondence between MDAC and the European Commission

In MDAC's letter to the Commission dated 3 May 2012, we criticised the Tender for its planned furthering of congregate living for people with disabilities, in contravention of Article 19 of the UN Convention on the Rights of Persons with Disabilities (CRPD). Without community-based services in place, any effort to move people out of large institutions will falter as people with disabilities will end up in new institutions or on the streets. Trans-institutionalisation fails the test of offering "choices equal to others" which the CRPD demands. Instead of addressing our concerns, the Hungarian government legalised the creation of new institutions, by amending Act III of 1993 on the social management and social services (Social Act) which now lists group homes and living centres as "protected housing" for people with disabilities.

The Commission's response dated 22 June 2012, it stated that that the managing authority of the Social Infrastructure Operational Programme and the Hungarian National Body of De-institutionalisation (the "Body") should ensure that the projects approved for support guarantee the rights of persons with disabilities, mainly their right to choose their preferred living arrangements, and have access to services and facilities meeting their needs and allowing them to be included in the community." One year later, we now have further evidence that the Commission's failure to intervene to ensure that structural funds are being spent in compliance with the CRPD has led to further non-compliance.

Recent developments

New evidence, set out below, clearly demonstrates that the Commission's initial hope that the tender process would comply with the CRPD was misplaced. The rights of people with disabilities to choose their preferred living arrangements and to have access to appropriate services and facilities are *not* being implemented. The vast majority of residents of the six institutions that will be using structural funds to participate in the deinstitutionalisation process will be moved to new forms of congregate living. They have been deprived of their right to have a meaningful say in where they want to live and with whom.

Disregard for international human rights law - evidence from the UN

In an effort to implement Article 19 the Hungarian government has resorted to the use of EU structural funds to start the process of deinstitutionalisation and ensure "that persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement".¹ However, only a portion of

¹ Article 19(a), CRPD.

these funds will be used in compliance with the CRPD as in addition to apartments, the Tender allows for group homes for up to 12 people and living centres for up to 25 people to be built.

On 27 September 2012 the UN Committee on the Rights of Persons with Disabilities published its Concluding Observations about their review of Hungary's compliance with the Convention. The Committee expressed their concern that Hungary

dedicated disproportionately large resources, including regional EU funds, to reconstruction of large institutions, which will lead to continued segregation in comparison to sufficient resources dedicated to setting up of community-based support service networks. The Committee is concerned that the State party fails to provide sufficient and adequate support services in local communities that would enable persons with disabilities to live independently outside the residential institutions settings.²

The Committee called on Hungary to re-examine the allocation of funds, including EU funds, dedicated to the provision of support services for persons with disabilities, and ensure the full compliance with the provisions of Article 19 of the Convention.³ It further called for community based services and reasonable accommodations to be put in place to support the inclusion of people with disabilities.⁴

Tender process continues to be contrary to EU law

In November 2011 the National Development Agency ("NDA"), which is the body overseeing the use of EU structural funds in Hungary, published a call for consultation making known their intention to start implementing Hungary's deinstitutionalisation plan by means of allocating EU structural funds towards closing down large residential social care institutions. The NDA's definition of deinstitutionalisation clearly allowed for living arrangements failing to comply with CRPD standards, namely living centres and group homes, and as a response a collation of local NGOs and DPOs immediately protested.⁵

In particular, the proposed tender allowed for the establishment of 50-bed living centres and 8-12 bed group homes, both of which are forms of segregated and congregate models of service which are not compliant with Article 19 of the CRPD. This position has been confirmed and strengthened by recent literature:

- The fact of grouping people together already sets the people apart from society as a group of their own, drawing the community's gaze to disability (rather than to each individual person).⁶

² Para 33, UN Committee on the Rights of Persons with Disabilities, Concluding Observations of the Committee: Hungary, 27 September 2012, CRPD/C/HUN/CO/1, available at: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session7.aspx>.

³ Para 35, UN Committee on the Rights of Persons with Disabilities, Concluding Observations of the Committee: Hungary, 27 September 2012, CRPD/C/HUN/CO/1, available at: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session7.aspx>

⁴ Para 34, Ibid.

⁵ <http://tasz.hu/fogyatekosugy/igen-palyazatra-hatarozott-nem-lakocentrumokra-nfu-ugy-6-resz>.

⁶ Page 27, *The Right of People with Disabilities to Live Independently and be Included in the Community*. Office of the Human Rights Commissioner of the Council of Europe. CommDH/Issue Paper (2012)3 (Strasbourg, 13 March 2012),

- Despite being physically located in the community, both living centres and group homes may operate as a closed-circuit system and be as isolated as an old-style institution. The chance for connecting with the community and making individual choices decreases. Because of size, strong forces are at play to bring services onsite, such as medical, employment-related or recreational services, or to transport the group as a whole to access such services in the community, thereby reducing the chances for meaningful interaction with the community.⁷
- Special segregated solutions for persons with disabilities, by their nature, limit the possibilities of people with disabilities to make their own decisions about their lives and reduce their opportunities to participate in society on equal terms.⁸
- Set against the imperatives of Article 19 which accentuates choice and preference, all institutions or congregate settings are presumptively unjust regardless of size.⁹
- When the only option for supports requires a person to live in a group home then it restricts a person's choices about where and with whom to live with. People with disabilities may require individualised supports and adjustments which they can take into the housing market to access rental or other tenure just like other citizens, this however should not prevent them from making their own choices about their living arrangements.¹⁰
- Sometimes the principle of community living is understood narrowly as being a resident in the community. This may lead to a model of service provision which perpetuates the isolation of people with disabilities from the community by focusing on developing residential services as the main alternative to the system of institutional care.¹¹

In our own efforts to draw the attention of the Hungarian government to the inconsistencies of the tender with Hungary's obligations under the CRPD as well as the EU Charter under Article 21 on non-discrimination and Article 26 on the integration of persons with disabilities, MDAC met with Deputy State Secretary at the Ministry of National Resources to reiterate concerns in early 2012. Despite these repeated concerns the Hungarian government published the tender (entitled "Deinstitutionalisation –

<https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=2258644&SecMode=1&DocId=1880316&Usage=2>.

⁷ Ibid.

⁸ Page 9, Townsley, R. with Ward, L., Abbott, D., & Williams, V. (2010). *The Implementation of Policies Supporting Independent Living for Disabled People in Europe: Synthesis Report*. ANED: University of Leeds: <http://www.disability-europe.net/content/aned/media/ANED-Task%205%20Independent%20Living%20Synthesis%20Report%2014.01.10.pdf>.

⁹ Page 28, Quinn, G. & Doyle, S. (2012). *Getting a Life – Living Independently and Being Included in the Community: A Legal Study of the Current Use and Future Potential of the EU Structural Funds to Contribute to the Achievement of Article 19 of the United Nations Convention on the Rights of Persons with Disabilities*. Office of the United Nations High Commissioner for Human Rights Regional Office for Europe:

http://www.nuigalway.ie/cdlp/documents/getting_a_life_art_19_crpd_and_eu_structural_funds.pdf.

¹⁰ *The Right of People with Disabilities to Live Independently and be Included in the Community*. Office of the Human Rights Commissioner of the Council of Europe. CommDH/Issue Paper (2012)3 (Strasbourg, 13 March 2012), (p.27):

<https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=2258644&SecMode=1&DocId=1880316&Usage=2>.

¹¹ European Expert Group on the Transition from Institutional to Community-based Care (2012) *Common European Guidelines on the Transition from Institutional to Community-Based Care*. (p.83): <http://deinstitutionalisationguide.eu/wp-content/uploads/2012/12/2012-12-07-Guidelines-11-123-2012-FINAL-WEB-VERSION.pdf>.

Social care homes component A" reference TIOP.3.4.1.A-11/1.¹²⁾ on 27 January 2012 completely disregarding the recommendations of civil society. The tender provided for a total of 24 million EUR to finance the closure of a number of large residential social care institutions and replace them with "community-based housing", including living centres and group homes.

In early 2012, the applications for funding were all preapproved by the Ministry of Human Resources and then forwarded to the Deinstitutionalisation Body, which makes recommendations to the National Development Agency, on which institutions should be given the funds. The selection process was done in two rounds of call for applications. In the first round the Body reviewed seven applications and recommended funding for four applications, namely the institutions in Bélapátfalva, Berzence, Szakoly and Szentes. All four of the institutions included living centres and group homes in their applications, in addition to apartments.

Despite continued advocacy efforts by civil society for an amended tender that would only allow for apartments, a new round of calls was sent out by National Development Agency on 31 October 2012 with *unchanged application criteria*. In a response to MDAC dated 14 November 2012, the state secretary responsible for social affairs Miklós Soltész asserted that in the government's view "the approved feasibility studies [of the institutions] were in accordance with the [government's 30-year deinstitutionalisation] strategy, the legal provisions in place, including the already accepted rules of protected housing, as well the professional recommendations." Following the second round for calls, two additional institutions, Mérk and Kalocsa were recommended by the Body for funding. Both included the two congregate living options for their residents.

The six selected institutions house a total of 900 people¹³, 650 will be moved 'to the community'. All six of these institutions will move the majority of current residents into new forms of congregate living, ie. living centres and group homes, and restrict their freedom of movement by requiring them to stay within the county boundaries, irrespective of the residents' original place of residence.¹⁴ The Body has managed to lobby the six institutions to reduce the number of residents in living centres from 50 to 25; however, one living center in Berzence will house 30 people. Sharing a house with 24-29 people still amounts to living in an institution, in violation of the CRPD. Out of the 650, only 97 will live in apartments; the vast majority (408) people will have to live in group homes with 8-12 people, and 145 will live in living centres with up to 25 or 30 people.¹⁵

¹² The tender is accessible in Hungarian at

http://www.nfu.hu/download/38466/Palyazati_utmutato_Bentlakasos_intezmenyek_kivaltasa_A.pdf.

¹³ See the comprehensive study of the Hungarian Civil Liberties Union (Társaság a Szabadságjogokért) on the applications of the six institutions, *Elbírálás alatt a kitagolási pályázatok. Olvasson megvalósíthatósági tanulmányokat! (NFÜ ügy, 8. rész) / Deinstitutionalisation applications under consideration. Read the applications! (NDA case, part 8)*. 3 May 2013. Available at: <http://tasz.hu/fogyatekosugy/elbiralas-alatt-kitagolasi-palyazatok-olvasson-megvalosithatosagi-tanulmanyokat-nfu>. In lack of a publicly available application form, the information about the Szakoly social care home comes from a press conference held in the institution on 24 April 2013, which was attended by both MDAC and HCLU.

¹⁴ Ibid.

¹⁵ Ibid.

Residents' lack of choice

The residents of the six relevant institutions have been offered very limited choice in terms of both geographical diversity and household autonomy. As well as guardians still deciding *for* the residents of the institutions, the other underlying cause of this continued institutionalisation is the breach of Article 19(b): “persons with disabilities” do *not* “have access to a range of in-home, residential and other community support services” as the state operates very few community-based support services that could cater to a pool of clients with disabilities who live in diverse living arrangements.

The applications are now before the NDA, which needs to finally approve them in the coming weeks. The decision of the NDA is final and will not be subject to any form of revision. Once the NDA approves the selected applications (to MDAC’s knowledge this approval is a matter of formality, the heads of these six institutions will sign the contracts on allocation of funds, and their transfer will follow shortly. The contracts between the NDA and the six institutions may be signed as early as August 2013.

The European Commission’s Obligations

The European Commission must act in a manner that ensures that the rights of persons with disabilities are respected, protected and fulfilled. The European Union ratified the CRPD in December 2010; thus the CRPD became a part of the EU legal order. As set out in various external legal reports (see Annex), it is clear that the regulations governing structural funds must be interpreted consistently with the requirements of the CRPD.

Article 72 of Council Regulation (EC) No 1083/2006 requires the EU, as a party to the CRPD, to assess and implement projects funded by the European Regional Development Fund (“ERDF”) in a manner which does not discriminate against persons with disabilities.

According to Article 216(2) of the Treaty on the Functioning of the European Union (“TFEU”) (former Article 300(7) EC), international agreements concluded by the EU are binding on both EU institutions and the Member States. CRPD being a “mixed agreement” both Member States and the EU are responsible for its implementation. As the Court of Justice (“CJEU”) has already held “in accordance with case law, mixed agreements concluded by the Community [now the EU], its Member States and non-member countries have the same status in the Community legal order as purely Community agreements in so far as the provisions fall within the scope of Community competence.”¹⁶ An international agreement does not require further acts of implementation, as is the case for secondary EU law such as regulations or directives.¹⁷

¹⁶ Case 12/86 *Demirel* [1987] ECR 3719, Case C-13/00 *Commission v Ireland* [2002] ECR I-2943, and Case C-239/03, *Etang de Berre* at [25]].

¹⁷ Case 181/73, *Haegeman / Etat Belge*.

Furthermore, international agreements are secondary conventions and agreements that must comply with the founding Treaties of the EU (i.e. the TFEU and TEU). However, they have greater value than 'unilateral' secondary EU law, e.g. regulations, directives or decisions.¹⁸ Therefore, to be lawful, the regulations governing structural funds, as well as any use of these funds, must be interpreted consistently with the requirements of the CRPD.¹⁹

In the process of spending the structural funds Hungary has failed to comply with the requirements of Article 19 of the CRPD, even though the core purpose of the entire enterprise was aimed to bringing the situation in Hungary in full compliance with this provision. By implying structural funds into such an enterprise, the EU is not only failing to support deinstitutionalization, but is also failing to fulfil its own international obligations which it undertook under the CRPD, and eventually also the EU legislation.

Request for immediate action by the European Commission

To reiterate, recent developments clearly indicate that the Hungarian government is intent on using EU structural funds in a way that will ensure that many more people with disabilities for generations to come live in segregated and congregate settings, with choices removed and with community services not provided. Since MDAC's complaint to the Commission of May 2012 was registered, Hungary has not taken any action to change the tender process and the contracts will be signed imminently. Based on the evidence provided in MDAC's initial complaint and this follow-up to that complaint, by making structural funds available to fund the creation of new forms of congregate living and failing to condition Hungary's spending on compliance with the CRPD, the EU is violating the Convention.

The European Commission is under an obligation in Article 4 of the CRPD to adopt all appropriate measures, including amending or adopting laws and regulations, to ensure the implementation of the rights enshrined in the CRPD. The Commission needs to be proactive in preventing human rights violations against people with disabilities.

In view of the European Commission's commitment to implement the CRPD and tackle disability discrimination across the EU as well as in order to remedy both Hungary's and the Commission's breaches of EU law by proceeding with the Tender and/or approving structural funds for this Tender, we request that the Commission:

- 1. immediately withdraws EU funding from facilities and services funded within the current Tender, which are in contravention with the CRPD as outlined above and puts in place regulations which facilitate such withdrawal procedures in the future;**
- 2. provides any EU funding for future deinstitutionalisation efforts in full compliance with the CRPD, which can be ensured by the inclusion of ex ante conditionalities in structural funds regulations;**

¹⁸ See http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/ai0034_en.htm.

¹⁹ The European Union and the Right to Community Living, Open Society Foundations, May 2012, p.11.



3. raises Hungary's contravention of the CRPD and EU Charter directly with Hungary, and if it fails to act facilitate potential infringement proceedings against Hungary.

We are exploring all legal channels to bring justice to people with disabilities in Hungary, should the European Commission fail to act in accordance with its legal duties.

ANNEX - KEY REPORTS AND SOURCES OF EVIDENCE

1. "Getting a Life – Living Independently and Being Included in the Community" commissioned by the Office of the High Commissioner for Human Rights (accessible online at www.europe.ohchr.org/Documents/Publications/Getting_a_Life.pdf)
2. Open Society Fund Mental Health Initiative's "The European Union and the Right to Community Living" (accessible online at <http://www.soros.org/sites/default/files/europe-community-living-20120507.pdf>.)
3. *The Right of People with Disabilities to Live Independently and be Included in the Community*. Office of the Human Rights Commissioner of the Council of Europe. CommDH/Issue Paper (2012)3 (Strasbourg, 13 March 2012),(p.27):
<https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=2258644&SecMode=1&DocId=1880316&Usage=2>
4. UN Committee on the Rights of Persons with Disabilities, Concluding Observations of the Committee: Hungary, 27 September 2012, CRPD/C/HUN/CO/1, available at: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session7.aspx>