



EUROPEAN COMMISSION
DIRECTORATE-GENERAL
REGIONAL AND URBAN POLICY
Policy
Legal Affairs

Brussels
REGIO.B.4/

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Subject: Your Complaint registered under CHAP(2019)3261

Dear Mr Allen,

I refer to your complaint to the Commission registered on 15 November 2019 in which you allege that the construction of care homes for persons with disabilities under the project Liikva Päikesekodu (“the project”) in Estonia breaches European and international human rights law.

I. Subject of the complaint

The project in question has been co-financed under the programming period 2014-2020 with 1.020.000 EUR from the European Regional Development Fund (‘ERDF’) under the priority axis number 2 “*Increasing social inclusion*”, investment priority number 2 “*Investing in health and social infrastructure which contributes to national, regional and local development, reducing inequalities in terms of health status, promoting social inclusion through improved access to social, cultural and recreational services and the transition from institutional to community-based services*” of the Operational Programme for Cohesion Policy Funds of Estonia (‘operational programme’). The ERDF support will be used to co-finance the construction of a day-care and training centre for young people and grownups with autism and similar intellectual disabilities. We have understood that the project is not yet functional.

According to you, the construction of three congregate homes for persons with disabilities (each for ten persons), establishing a separate “village”, will result in social segregation, isolation and breach of the residents' fundamental rights and human rights.

Based on the above, you allege that the project breaches the EU Charter of Fundamental Rights (‘the Charter’)¹, in particular Article 6 (*liberty*), Article 20 (*equality before the law*), Article 21 (*non-discrimination*), Article 25 (*rights of the elderly*) and Article 26 (*rights of persons with disabilities*) of the Charter; Article 10 (*non-discrimination on basis of disability*) of the Treaty on the Functioning of the European Union (‘the TFEU’) as well as the United Nations Convention on the Rights of Persons with Disabilities (‘the

¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>

UNCRPD')², in particular Article 4 (*general obligations*), Article 5 (*equality and non-discrimination*) and Article 19 (*independent living and inclusion in the community*).

You also refer to the "General Comment No 5 (2017) on living independently and being included in the community"³, adopted by the UN Committee on the Rights of Persons with Disabilities on 31 August 2017 ('General Comment No 5 of the UNCRPD').

In light of this, you call on the Commission to take urgent action to halt the project.

II. Legal framework

1. TFEU

Article 10 of the TFEU states that, "*In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation*".

2. The Charter

The Charter became legally binding on the EU with the entry into force of the Treaty of Lisbon, in December 2009 and has the same legal value as the EU Treaties.

Article 6 of the Charter states that "*Everyone has the right to liberty and security of person.*"

Article 20 of the Charter upholds the principle of equality of persons before the law.

Article 21 of the Charter on non-discrimination stresses that "[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."

Article 26 of the Charter states that "[t]he 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".

According to Article 51(1) of the Charter, its provisions are addressed to the EU institutions, bodies, offices and agencies, subject to the principle of subsidiarity, and to the Member States when they are implementing EU law. Accordingly, they must respect the rights and observe the principles enshrined in the Charter and promote their application in accordance with their respective powers when adopting and implementing rules. Article 6(1) of the Treaty on European Union and Article 51(2) of the Charter specify that the provisions of the Charter may not extend in any way the competences of the Union as defined in the Treaties.

3. The UNCRPD

The UNCRPD was ratified by both the EU⁴ and its Member States. The Commission is the EU focal point and is responsible for its implementation at the EU level to the extent

² <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx>

³ https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/5&Lang=en

⁴ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010D0048>

of its competences. The UNCRPD is integral part of the EU legal order and thus binding on the EU institutions⁵.

Article 4 of the UNCRPD sets out "*to refrain from engaging in any act or practice that is inconsistent with the present Convention [...]*".

Art 5 of the UNCRPD highlights that "*States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds*".

Article 19 of the UNCRPD on living independently and being included in the community, recognises "*the equal right of all persons with disabilities to live in the community, with choices equal to others*" and states that parties to the Convention "*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*".

Article 28 of the UNCRPD recognises "*the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.*"

General Comment 5 of the UNCRPD is adopted by the UN Committee on the Rights of Persons with Disabilities which is a body of independent experts monitoring the implementation of the UNCRPD by the States parties. Comments adopted by that body do carry policy weight and should be taken into account when it comes to the implementation of the UNCRPD. However, General Comment No 5 does not create legal obligations for the State parties under the UNCRPD.

4. Regulation (EU) No 1303/2013 ('CPR')⁶ (and Regulation (EU, Euratom) 2018/1046⁷)

In accordance with Article 4(7) CPR, as a general rule, the part of the budget of the Union allocated to the European Structural and Investment (ESI) Funds "*shall be implemented within the framework of shared management between the Member States and the Commission, in accordance with Article 63 of the Financial Regulation*".

The Financial Regulation establishes in its Article 63(1) that where the Commission implements the budget under shared management, tasks relating to budget implementation shall be delegated to Member States. According to Article 63(2) of the Financial Regulation, when executing tasks relating to budget implementation, "*Member States shall take all the necessary measures, including legislative, regulatory and administrative measures, to protect the financial interests of the Union*" while "*the*

⁵ ECJ judgment of 11.04.2013 in case C-335/11, HK Danmark:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=136161&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1023924>

⁶ Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ L 347, 20.12.2013, p. 320).

⁷ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1).

Commission shall monitor the management and control systems established in Member States".

According to Article 6 CPR, "*Operations supported by the ESI Funds shall comply with applicable Union law and the national law relating to its application ("applicable law")."*

Article 7 CPR stipulates that, "*The Member States and the Commission shall take appropriate steps to prevent any discrimination [...]. In particular, accessibility for persons with disabilities shall be taken into account throughout the preparation and implementation of programmes".*

Regarding the organisation of calls for proposals and selection of operations, Article 125(3)(a) CPR requires the managing authority to "*draw up and, once approved, apply appropriate selection procedures and criteria that [inter alia] ensure the contribution of operations to the achievement of the specific objectives and results of the relevant priority [and] are non-discriminatory and transparent".* The managing authority shall also ensure, according to Article 125(3)(b) CPR, that a selected operation falls within the scope of the Funds concerned.

According to Article 125(4)(i) CPR, the managing authority shall verify that *inter alia* the operation comply with the applicable law, the operational programme and the conditions for support of the operation⁸.

Additionally, in accordance with Article 19 CPR, as a precondition for using the ESI Funds for period 2014-2020, the Member States were required to meet the applicable ex-ante conditionalities⁹.

5. Regulation (EU) No 1301/2013 ('ERDF Regulation')¹⁰

Article 3(1)(d) ERDF Regulation on the scope of support from the ERDF states that, "*in order to contribute to the investment priorities set out in Article 5" among other activities the following should be supported: "investment in social, health, [...] infrastructure".*

⁸ See, in the same sense, judgment of the General Court of 4 May 2017, JYSK v Commission, T-403/15, EU:T:2017:300, paragraphs 29 and 31.

⁹ Thematic ex-ante conditionality 9.1 on the existence and the implementation of a national strategic policy framework for poverty reduction aiming at the active inclusion of people excluded from the labour market in the light of the Employment Guidelines covering the measures for the shift from institutional to community- based care.

General ex-ante conditionality No 3 on 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. This ex-ante conditionality was considered to be fulfilled upon of 3 criteria:

- Arrangements in accordance with the institutional and legal framework of Member States for the consultation and involvement of bodies in charge of protection of rights of persons with disabilities or representative organisations of persons with disabilities and other relevant stakeholders throughout the preparation and implementation of programmes;
- Arrangements for training for staff of the authorities involved in the management and control of the ESI Funds in the fields of applicable Union and national disability law and policy, including accessibility and the practical application of the UNCRPD as reflected in Union and national legislation, as appropriate;
- Arrangements to ensure monitoring of the implementation of Article 9 of the UNCRPD [on accessibility] in relation to the ESI Funds throughout the preparation and the implementation of the programmes.

¹⁰ Regulation (EU) No 1301/2013 of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No 1080/2006 (OJ L 347, 20.12.2013, p. 289).

Article 5 ERDF Regulation defines 40 investment priorities under 11 thematic objectives set out in the first paragraph of Article 9 CPR. It is therefore understood that Article 3(1)(d) on investments in social infrastructure applies to all investment priorities.

Article 5(9)(a) ERDF Regulation in particular sets one investment priority for "*promoting social inclusion, combating poverty and any discrimination by investing in health and social infrastructure [...] and the transition from institutional to community-based services*".

In turn, recital (16) ERDF Regulation clarifies that, "*community-based services should cover all forms of in-home, family-based, residential and other community services which support the right of all persons to live in the community, with an equality of choices, and which seek to prevent isolation or segregation from the community*".

In addition, recital (15) ERDF Regulation states that, "*in order to promote social inclusion [...] it is necessary to improve access to social, cultural and recreational services, through the provision of small-scale infrastructure, taking into account the specific needs of persons with disabilities and the elderly*".

III. Analysis of the complaint

1. General considerations

In general, the legal provisions referred to above, show what Member States should aim for and promote, i.e, the transition from institutional to community-based services, without undermining their obligation to combat any discrimination as well as to ensure the respect and promotion, in particular, of the rights of persons with disabilities with regard to their independence, social and occupational integration and participation in the life of the community.

However, these provisions do not establish a general and absolute prohibition to support long-stay residential institutions. Furthermore, all these provisions take into account the fact that moving away from long-stay residential institutions to community-based services cannot simply take place from one day to the next. 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.

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.¹¹ It is up to Member States to set up the operations they would like to co-finance in the context of the process to ensure independent living arrangements and deinstitutionalisation.

In addition, neither Article 69(3) of the CPR, nor Article 3(3) of the ERDF Regulation, exclude the provision of support from the ESI Funds or the concerned specific Funds into long-stay residential institutions.

The above is also supported by General Comment No 5 of the UNCRPD. According to paragraph 51 of General Comment No 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*". However, General Comment No 5 also

¹¹ See, e.g., para. 81 to 84 of the Opinion of the Advocate General in case C-417/04.

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 recognises 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).

Based on all the above, it is clear that there is no general and absolute prohibition for the ESI Funds to support long-stay residential institutions. Member States are required to make progress in general on ensuring independent living arrangement and deinstitutionalisation. However, it is up to Member States to set up the operations within the framework of applicable rules.

Furthermore, the General Comment No 5 of the UNCRPD in its paragraph 16(c) states, “*Neither large-scale institutions with more than a hundred residents nor smaller group homes with five to eight individuals, nor even individual homes can be called independent living arrangements if they have other defining elements of institutions or institutionalisation.*”. The same can be concluded from the report by the Ad-Hoc Expert Group on the Transition from Institutional to Community-based Care, where the institutions were not defined primarily by their size but by features of "institutional culture", that segregates people (depersonalisation, rigidity of routine, block treatment, social distance, paternalism)¹².

Thus, it is possible to conclude that the size of a facility is not key for assessing if it is a long-stay residential facility preventing the personal choice and autonomy or a community based care housing that is providing for independent living. Focus should rather be put on assessing the existence of an institutional character and the lack of independent living in a residential setting.

Independent living (as stated in Article 19 UNCRPD) means that persons with disabilities:

- 1) have the opportunity to choose their place of residence and where and with whom they live;
- 2) have access to a range of in-home, residential and other community support services, including personal assistance; and
- 3) have access to community services and facilities available for the general population on an equal basis and that these are responsive to their needs.

2. Assessment of your allegations

With regard to the specific breaches of the EU and Estonian’s obligations under the TFEU, the Charter and the UNCRPD, it should be firstly recalled that:

Under the Treaties on which the European Union is based, the European Commission has no general powers to intervene with the Member States in the area of fundamental rights. It can only do so if an issue of European Union law is involved. This is reflected in the scope of application of the Charter, which, according to its Article 51(1), applies to Member States only when they are implementing Union law.

Therefore, in order for DG REGIO to assess eventual infringements of the Charter, it is fundamental to establish whether the Charter is applicable to the Member State in

¹² Ad-Hoc Expert Group on the Transition from Institutional to Community-based Care was convened by Mr Vladimír Špidla, then Commissioner for Employment, Social Affairs and Equal opportunity: <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=614&furtherNews=yes>

question according to Article 51(1), namely, to assess whether the Member State is implementing Union law and acting in the scope of it¹³.

As also stated under Chapter II point 4, in accordance with the current ESI funds legislative framework and under the principle of shared management, Member States are generally responsible for the design and implementation of national dedicated strategies and operational programmes. The selection of operations to be funded by the ESI funds falls under the competence of Member States, therefore this is not in the Commission's remit.

Supporting the facilities in question through an operational programme indeed involves implementing Union law since the Member State in question, as indicated, had to draw up the operational programme as well as select the operations to be financed under it.

Therefore, it can be stated that Estonia is implementing and acting in the scope of Union law.

It should be also recalled that, like any international treaty, the primary responsibility to implement the UNCRPD lies with the State Parties. Signing and ratifying the Convention obliges the State Parties to ensure that all existing and future legislation, policies and programmes are aligned with its provisions.

In light of the above, the Directorate-General for Regional and Urban Policy (DG REGIO) has contacted the Estonian Managing Authority to ask for additional information and explanations with regard to your allegations. It has examined the documents related to the project, to establish whether the possible allegations described by you, took place when granting the support of ESI Funds to that project.

On the basis of our analysis, DG REGIO considers that:

- (a) Estonia's deinstitutionalisation goal is part of two national strategies:
 - i. Special Care and Welfare plan 2014-2020¹⁴; and
 - ii. Welfare Strategy 2016-2023¹⁵

According to these plans, in 2014-2023 large service institutions will be reorganised with some support from the ERDF, including acquisition of housing for community living and development of social services that support independent coping and life in society for preventing institutionalised care and enabling people to live independently. Focus is on the assurance of equal treatment of all the social groups, while enhancing the protection of fundamental rights and the adherence to the non-discrimination principle, and, in particular, of the welfare and rights of the elderly, disabled, and people with special mental needs.

- (b) The operational programme describes the needs and objectives and how these fit into the deinstitutionalisation concept.

The project falls within the scope of the operational programme and ensures the achievement of specific objectives of the relevant priority. The objective of the project complies with the strategies referred to in point (a).

¹³ Please see Commission notice C/2016/4384 "Guidance on ensuring the respect for the Charter of Fundamental Rights of the European Union when implementing the European Structural and Investment Funds ('ESI Funds')", *OJ C 269, 23.7.2016, p. 1*, which gives examples on when and how Member State implement Union law with regard to funding coming from the Union budget.

¹⁴ https://www.sm.ee/sites/default/files/content-editors/eesmargid_ja_tegevused/Sotsiaalhoolekanne/Puudega_inimetele/special_care_2014-2020.pdf

¹⁵ https://www.sm.ee/sites/default/files/content-editors/eesmargid_ja_tegevused/welfare_development_plan_2016-2023.pdf

It should be clarified, that according to the information received from the Managing Authority, the aim of the project is to provide community-based living services through day-care services and training for young people and grownups with autism and similar intellectual disabilities. The term “*community living service*” is defined in § 97 of the Social Welfare Act of Estonia¹⁶. According to the explanations given by the managing authority, the premises where such a service is provided, is not considered as place of residence for the person staying there. Furthermore, it is also explained on the homepage of the project¹⁷ that a person can stay in the premises for a limited time¹⁸. However, according to the project application, every person would have his/her own bedroom in the house with the possibility to use the common areas to independently cook, do the laundry etc.

It should also be noted that Estonian Chamber of Disabled People and many smaller target group organisations were involved in the elaboration of the support measure "Reorganisation of special care institutions". Projects under the call, from which the operation was funded, were evaluated by the committee including a member from Estonian Chamber of Disabled People;

Furthermore, the project is initiated by a civil society group Autismifond (in English: *Autism fund*), where most of the members are the parents of children with autism spectre disorder. Therefore, many parents of persons who will be using the services planned under the project will also be actively involved in the development of services and activities, as well as in the implementation.

It should be also noted, that the ERDF deinstitutionalisation measures in the operational programme are complemented by the European Social Fund (‘ESF’) interventions, which help local municipalities and other actors to develop supportive services and raise the quality of existing ones. The ESF sub-measures on welfare services for elderly and for people with special needs support a package of activities, including support to persons, personal assistance and home care. These measures aim to facilitate also independent living, as there are conditions created for persons with disabilities to have access to a range of services.

- (c) Concerning the location of the planned day care centres and, more in general, the inclusion of the persons in the community, the conditions for support stipulate that the settlement/city where investments are made must have at least 300 inhabitants. New service places cannot constitute more than 10% of the inhabitants, and focus is on encouraging active participation in the society. Liikva is a typical fast-growing village near Tallinn currently with 510 inhabitants. All inhabitants in this city live in scattered housing as very often is the case in Estonia outside big cities.

¹⁶ <https://www.riigiteataja.ee/en/eli/504042016001/consolide>:

§ 97(1) *The community living service means the creation of a mode of life similar to a family favourable for the satisfaction of the basic needs and for the development of a person together with accommodation and catering in order to increase the person’s ability to cope independently and to develop the skills of the organisation of everyday life activities through participation in joint activities.*

¹⁷ <https://www.autismifond.ee/liikva-erihoolekandekuela>

¹⁸ - *Day- and week care service: the service is available 24 hours a day, up to 21 days a month, except for weekends.*

- *Day care service: the service is available up to 10 hours during the day, up to 21 days per month, except for weekends.*

Liikva is connected to towns close by and to Tallinn (the capital) through regular public transport service. Additionally, according to the information from the managing authority, the project will be also using five rented busses to provide access to services further away.

In general, in accordance with point 6 of § 83(1) and § 85 of the Social Welfare Act of Estonia, the provider of special care services is required to prepare an activity plan to establish the objectives for the person and the recommended activities taking into account person's needs and abilities. This plan should be updated once per year. According to the explanations from the managing authority, this means that for each person receiving special care service it will be analysed what are the options to actively involve him/her in the community.

As for the project, inclusion in the community is planned through various activities outside the centre including possibilities for occupation in accordance with the abilities of a person.

As an outcome of this analysis, we have not found any references neither in the operational programme nor in the documents related to the project that could be considered a violation of the above-mentioned principles of the Charter. Neither did we find a breach of the Treaty nor of the UNCRPD provisions.

Based on these considerations, we do not see an indication that the project would result in social segregation, isolation and breach of its residents' fundamental and human rights. On the contrary, the Managing Authority believes that the day care and training centre financed under the project will ensure better living, learning and working condition for people with special mental needs by creating high-quality special care units and services and therefore, ensuring compliance with Estonia's deinstitutionalisation process and, hence, with Estonia's obligations under the relevant Union law.

Furthermore, it should be noted that the mere fact that a given infrastructure has been 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 infrastructure¹⁹. 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.

3. Conclusion

In conclusion, on the basis of our assessment of the information received, DG REGIO does not consider that there is any breach of the applicable Union law for the Commission to pursue.

DG REGIO will therefore close this case unless you provide us with additional and precise information that will establish a breach of EU law, within four weeks of the date of this letter by e-mail return to REGIO-B4-HEAD-OF-UNIT@ec.europa.eu (with the CHAP(2019) 3261 reference indicated).

Yours sincerely,
e-signed
Eveline PETRAT-CHARLETY
Head of Unit

¹⁹ See, by analogy, case C-1 17/14, *Nisttahuz Podava*, point 42