



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

Brussels
REGIO.B.4/

Mrs Bulic Cojocariu Ines,
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1000, Brussels
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Subject: Your Complaint registered under CHAP(2019) 3555

Dear Mrs Bulic Cojocariu,

I refer to your complaint to the Commission registered on 12 December 2019 in which you complain about the Ministry of Public Works, Development and Administration of Romania ('the Managing Authority') with regard to the call for tenders P.O.R/8/8.1/8.3/B/1 [*Vulnerable Group: persons with disabilities*] concerning the construction of sheltered housing units and day-care centers for people with disabilities ('the call').

I. Subject of the complaint

The call in question has been launched during the programming period 2014-2020 under the priority axis 8 "Development of Health and Social Infrastructure", investment priority 8.1. "Investment in health and social infrastructures which contribute to national, regional and local development, reducing inequalities in terms of health status and promoting social inclusion through improved access to social, cultural and recreational services, and transition from institutional to community-based services" of the operational programme "Regional Operation Programme for Romania" ('operational programme'). The call has resulted in selection of 16 operations to be supported with 11.618.011 EUR from the European Regional Development Fund ('ERDF'). The ERDF support will be used to co-finance the construction of sheltered housing units and day care centres.

In your complaint, you allege that the approved projects under the call breach Article 26 of the Charter of Fundamental Rights of the European Union ('the Charter')¹ and Article 19 of the United Nations Convention on the Rights of Persons with Disabilities ('the UNCRPD')². Furthermore, in your opinion they also contravene Articles 4 and 6 of Regulation (EU) No 1303/2013³.

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

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

³ 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

You also refer to Articles 5 and 12 of the UNCRPD and to the "General Comment No 5 (2017) on living independently and being included in the community"⁴, adopted by the UN Committee on the Rights of Persons with Disabilities on 31 August 2017 ('General Comment No 5 of the UNCRPD').

In your view, the newly built sheltered housing units and day care centres will not fulfil the objective the of the call, which is "to facilitate the process of integrating disabled adults in the community, achieve the transition from old style residential facilities, through acquiring skills and abilities needed for integration".

Your main concerns are that the projects approved under the call, aimed at moving persons with disabilities from large into smaller facilities, will result, due to the latter's characteristics, in the continued segregation and social exclusion of disabled adults and, accordingly, will perpetuate the institutional culture in Romania.

Specifically, you allege that the planned operations will be located in small villages or towns lacking any employment and social opportunities as well as proper public transport network that are, instead, necessary to ensure the independent living of these persons, and that, at the stage of the project selection, the tendering procedure did not require a scoping exercise to look at the opportunities available in the community.

You consider the number of persons with disabilities living in the same environment disproportionate as most of the applicants would build the sheltered housing units on the same perimeter.

You also stress that sheltered housing has a hierarchical staff structure in place, with beneficiaries clearly being in receipt of services provided without any real choice and possessing very little autonomy. In fact, you mention that there is an obligatory sharing of assistants with others and no/or limited influence over whom one has to accept assistance from, lack of control over day-to-day decisions and lack of choice over whom to live with.

Furthermore, you highlight that the format of the services planned suggests that beneficiaries will spend their whole time in highly regimented and identical activities between the sheltered housing and the day-care centres, with little or no access to the outside world, resulting in a rigidity of routine irrespective of personal will and preferences.

Finally, taking the above into consideration, you conclude that the residents of these facilities will be deprived of their liberty and self-determination and will not be subject to individual-centred treatments and care, with a high likelihood of human rights abuses taking place.

II. Legal framework

1. 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.

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).

⁴https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/5&Lang=en

Article 21 of the Charter on non-discrimination stresses that "*Any 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.

2. The UNCRPD

The UNCRPD was ratified by both the EU⁵ and its Member States. The Commission is the EU focal point and is responsible for its implementation at the EU level to the extent of its competences. The UNCRPD is integral part of the EU legal order and thus binding on the EU institutions⁶.

Article 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 12 of the UNCRPD enshrines the right of person with disabilities to their recognition as persons before the law. Accordingly, the parties "*shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life*" and "*take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity*".

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 recognizes "*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 No 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

⁵ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010D0048>

⁶ 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>

implementation of the UNCRPD. However, General Comment No 5 does not create legal obligations for the State parties under the UNCRPD.

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

In accordance with Article 4(7) of the 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 Commission shall monitor the management and control systems established in Member States"*.

According to Article 6 of the 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 of the 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) of the 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) of the CPR, that a selected operation falls within the scope of the Funds concerned.

According to Article 125(4)(i) of the 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 of the CPR, as a precondition for using the European Structural and Investment Funds ('ESI Funds') for period 2014-2020, the Member States were required to meet the applicable ex-ante conditionalities⁹.

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).

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 No 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

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

Article 3(1)(d) of the 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*".

Article 5 of the 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) of the 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 its turn, the recital (16) of the 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) of the 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

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 the compliance with three 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).

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 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) is stating, "*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

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

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>

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 Romania's obligations under the UNCRPD and the Charter, as well as of the provisions of the CPR you allege, it should be firstly stressed 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 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 3, 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 above-mentioned operations to be financed under it.

Therefore, it can be thus stated that Romania 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 Managing Authority to ask for additional information and

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.

explanations with regard to your allegations. It has examined the documents related to those operations, to establish whether the possible allegations described by you, which may indeed amount to a violation of the provisions referred to above, took place when granting the support of ESI Funds to these operations.

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

- (a) Romania has adopted a national strategy for deinstitutionalisation¹⁴ ‘A society without barriers for persons with disabilities 2016-2020’, laying down, among others, the specific objective ‘*to deinstitutionalise and prevent the institutionalisation of persons with disabilities, and at the same time to develop alternative support services for living independently and being included in the community*’(‘national deinstitutionalisation strategy’)¹⁵ which constitutes an eligibility criterion for projects funded by call POR/8/8.1/8.3/B/1¹⁶.
- (b) The operational programme addresses the needs identified as priorities in the national deinstitutionalisation strategy. The need to ensure the respect of horizontal principles, including principles of non-discrimination and accessibility for persons with disabilities, is indeed stressed in the operational programme.

The call falls within the scope of the operational programme and ensures the achievement of specific objectives of the relevant priority. The objective of the call complies with the national deinstitutionalisation strategy.

The Managing Authority also confirmed that the operations selected under the call contribute to the achievement of the objectives of the call and fall within the scope of the operational programme. It should be also noted that the National Authority for Persons with Disabilities, Children and Adoptions (‘ANDPDCA’) has been involved in drawing up the Guide for Applicants for the call and was also represented when selecting the operations under the call, to make sure that the selected operations contribute to the achievement of its objectives, through compliance with the rules established for the deinstitutionalisation process.

- (c) Concerning the location of the planned houses and day care centres, the Managing Authority explained that technical support from the ANDPDCA was used when identifying the location of the housing to prevent isolation or segregation from the community and, hence, for pursuing the ultimate goal of independent living of persons with disabilities. Emphasis was placed on the respect of the following requirements: (i) the location of the social service must allow beneficiaries access to all resources and facilities (healthcare, education, work, culture, leisure); (ii) access to public transport; and (iii) access to community services.

Moreover, the existing legislative framework does not allow deviations from the above requirements. Romanian Law No 197/2012 on quality assurance in the field of social services¹⁷ provides that the operating license may only be issued to planned sheltered housing or day care centers financed under the call, on the basis of the on-site assessment confirming that the minimum standards are met. Based

¹⁴Ex-ante conditionality 9.1.

¹⁵ Approved by Government of Romania 14 September 2016 with the Decision No 655/2016: <http://legislatie.just.ro/Public/DetaliuDocumentAfis/181892>

¹⁶ Point 3.2.1 of the Guide for Applicants for the call: <http://www.inforegio.ro/ro/axa-prioritara-8/apeluri-lansate>

¹⁷Adopted by the Romanian Parliament 1 November 2012: <http://legislatie.just.ro/Public/DetaliuDocument/142677>

on this, the Managing Authority trusts that the operations financed under the call will be able to provide the conditions necessary for persons with disabilities to benefit from everything that the communities in which they are located have to offer. They also believe that residents of these houses will be able to benefit from the same services of general interest which are provided and offered by the community in the area in which they are built.

Furthermore, sheltered housing financed under the call has to comply with national mandatory minimum quality standards for social services for adults with disabilities, approved by Order No 82/16.01.2019 of the Ministry of Labour and Social Justice of Romania¹⁸. The activities planned in day care centres or sheltered housing will be organised, carried out and monitored in accordance with these standards that aim at ensuring respect for human rights and fundamental freedoms and constantly improving the quality of social services.

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

Based on the consideration above, we do not see an indication that operations selected under the call would result in the continued segregation and social exclusion of disabled adults. On the contrary, the Managing Authority believes that the sheltered housing and day care centres financed under the call will provide the conditions necessary for persons with disabilities to live independently and to be socially included in community with equal opportunities of others and therefore, ensuring compliance with Romania's national strategy put in place to back up the deinstitutionalisation process and, hence, with Romania's obligations under the relevant Union law

Concerning your allegations "*that the residents of these facilities will be deprived of their liberty and self-determination and will not be subject to individual-centered treatments and care, with a high likelihood of human rights abuses taking place*". Firstly, we note that your allegations are not based on actual factual situations (as the facilities supported under the call are not yet functional), but are referring to future possibilities. Therefore, it is not possible to establish a concrete breach of applicable legal provisions under the Charter or the UNCRPD.

Secondly, 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 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.

¹⁸ <http://anpd.gov.ro/web/wp-content/uploads/2019/02/standarde-calit.-dizabilit-100-bis.pdf>

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

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) 3555 reference indicated).

Yours sincerely,

e-signed

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