



EUROPEAN COMMISSION

Brussels

**SENSITIVE\*** :

**Subject: Your complaint about alleged breaches of the EU Charter of Fundamental Rights, the UN Convention on the rights of persons with Disabilities and the EU Employment Directive concerning facilities for persons with disabilities cofinanced under the Austrian RDP 2014-2020**

Ref.: CHAP(2020) 1883

Dear Mrs Feuerstein and Mrs Kokic,

I refer to your complaint to the Commission registered on 02.07.2020 in which you allege that the facilities for persons with disabilities cofinanced under the Austrian Rural Development Programme 2014-2020 ('RDP') perpetuate the segregation and social exclusion of those persons.

### 1. Subject of the complaint

You refer to six segregated residential facilities and two sheltered workshops for persons with disabilities, listed in your complaint. You indicate that the projects at stake were newly built and cofinanced under the RDP in the State of Upper Austria.

You allege that the approved projects breach Article 26 on integration of persons with disabilities and Article 21 on non-discrimination of the Charter of Fundamental Rights of

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the European Union ('the Charter'). You consider also that the projects at stake breach the United Nations Convention on the Rights of Persons with Disabilities ('the UNCRPD')<sup>1</sup>, in particular Article 19 on living independently and being included in the community and Article 27 on work and employment.

You also refer to the "General Comment No 5 (2017) on living independently and being included in the community"<sup>2</sup>, adopted by the UN Committee on the Rights of Persons with Disabilities on 31 August 2017 ('General Comment No 5 of the UNCRPD') and to the "General Comment No 6 of the UNCRPD on equality and non-discrimination, paragraph 67a ('General Comment No 6 of the UNCRPD')".

In your opinion, the approved projects concerned contravene Council Directive 2000/78/EC on equal treatment in employment and occupation ('the EU Employment Equality Directive')<sup>3</sup>. You indicate that this Directive protects persons with disabilities from discriminations and requires that reasonable accommodation is provided to enable persons with disabilities to "have access to, participate in, or advance in employment" (Article 5). You stress also that principle 17 of the European Pillar of Social Rights on inclusion of persons with disabilities reaffirms the right of persons with disabilities to "services that enable them to participate in the labour market and in society, and a work environment adapted to their needs".

You consider also that the projects listed in your complaint breach Regulation (EU) No 1303/2013 ('the CPR') laying down common provisions on the European Structural and Investment Funds (ESI Funds)<sup>4</sup>, in particular Articles 4 on implementation of the budget allocated to ESI Funds under shared management, Article 6 on compliance of operations supported under ESI Funds with EU and national law and Article 7 on non-discrimination.

In your view, the listed projects have reinforced the segregation, isolation and discrimination of persons with disabilities in Upper Austria. Your main concerns are that, instead of supporting inclusive living arrangements by improving access to housing that is open to the general population and by expanding the provision of mobile support and personal assistance services for persons with disabilities, the State of Upper Austria invested additional substantial resources into expanding special facilities, i.e. the listed projects, where only persons with disabilities may live.

The same applies in your opinion to the two sheltered workshops in question, which are segregating, exclude persons with disabilities from the general labour market and keep individuals and families in poverty.

## **II. Analysis of the complaint**

### **1. General considerations**

In general, the legal provisions referred in your complaint show what Member States should aim for and promote, i.e., the transition from institutional to community-based

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<sup>1</sup><https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx>

<sup>2</sup><https://tbinternet.ohchr.org/lavouts/15/treatybodvexternal/Download.aspx?symbolno=CRPD/C/GC/5&Lang=en>

<sup>3</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000 p.16).

<sup>4</sup> OJ L 347, 20.12.2013, p. 320.

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, all these provisions take into account the fact that moving away from long-stay residential institutions to community-based services is a process that requires the development of individualized services, the planned closure of long-stay residential institutions and making general services (education, health, housing) available to persons with disabilities. In the Commission's view, promoting the transition from institutional to community-based services might require in some cases transitory solutions aiming at securing healthy and secure living conditions all along this process without undermining the overall aim of Article 19 UNCRPD, as long as a transition process from institutional to community-based care has been put in place.

Thus, it is possible to conclude that the focus should be put on assessing the existence of an institutional character and the lack of independent living in a residential setting. As stated in Article 19 UNCRPD, independent living means that persons with disabilities have the opportunity to choose their place of residence and where and with whom they live, have access to a range of in-home, residential and other community support services, including personal assistance and to community services and facilities available for the general population on an equal basis and that these are responsive to their needs.

Furthermore, it has to be stressed that 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".

Under the principle of shared management, Regulation (EU) No 1305/2013 ('the Rural Development Regulation')<sup>5</sup> laying down the general rules governing EU support for rural development financed by the European Agricultural Fund for Rural Development ('EAFRD'), provides that each Member State must submit its rural development programmes ('RDPs') to be approved by the European Commission and that those programmes should implement a strategy to meet the Union priorities for rural development (Article 6). According to Article 8 of the Rural Development Regulation, the RDPs include the measures selected by the Member States ("measure" according to Article 2 of the Regulation means a set of operations contributing to one or more of the Union priorities for rural development).

On the basis of the abovementioned provisions of the CPR and the Rural Development Regulation, it appears that it is in line with the significant functions of Member States when implementing the Union budget under shared management, that Member States are responsible for the drawing up of the rural development programmes and selecting the operations which will be co-financed by the ESI Funds<sup>6</sup>. The CPR provides that the managing authority should verify that the co-financed projects comply with the applicable law, the programme and the conditions for support of the operation<sup>7</sup>.

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<sup>5</sup> Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the EAFRD OJ L 347, 20.12.2013.

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

<sup>7</sup> See Regulation (EU) No 1303/2013, Article 125(3) on the functions of the managing authority.

Therefore, it is up to Member States to set up the operations they would like to cofinance in the context of the process to ensure independent living arrangements and deinstitutionalisation. Additionally, in accordance with Article 19 of the CPR and Article 9 of the Rural Development Regulation, as a precondition for using the ESI Funds for the period 2014-2020, the Member States were required to meet the applicable ex-ante conditionalities<sup>8</sup>.

As concerns the EU Employment Equality Directive, it has to be stressed that that Directive prohibits discrimination on certain grounds, including disability. It covers employment and occupation and applies to employment and working conditions (Article 2 and 3). It also obliges employers to provide reasonable accommodation for disabled persons (Article 5).

However, the Directive applies to persons who are considered to be 'workers', i.e. to 'persons who pursue activities which are real and genuine'. In this respect, the Court has held that 'activities cannot be regarded as a real and genuine economic activity if they constitute merely a means of rehabilitation or reintegration for the persons concerned' (see, in this regard by analogy, ECJ judgments in cases 344/87 *Bettray*, C-1/97 *Birden*, C-456/02, *Trojani*).

## **2. Assessment of your allegations**

*LA's regards your grievances regarding to the specific breaches of the EU and Austria's obligations under the UNCRPD and the Charter as well as of the provisions of the CPR:*

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.

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 (in the present case the Austrian RDP). The selection of operations to be funded by EAFRD falls under the competence of Member States, therefore, this is not in the Commission's remit.

Supporting the facilities in question through the RDP indeed involves implementing Union law since the Member State in question, as indicated, had to draw up the rural development programme as well as select the above-mentioned operations to be financed under it. Thus, it can be stated that Austria is implementing and acting in the scope of EU law.

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<sup>8</sup> 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 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.

It has to be underlined, however, 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 infrastructure<sup>9</sup>. 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.

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.

Please note that our services asked the Managing Authority of the Austrian RDP to provide us additional information as concerns the eight approved projects at stake.

The national authorities stressed that in the context of the deinstitutionalisation, large facilities have been closed and new support services have been created in Upper Austria, amongst which the projects in question, so that persons with disabilities, in particular those requiring a high degree of assistance, are able to live with as much independence and autonomy as possible. For each of the projects at stake, these authorities confirmed that the persons concerned are able to choose for themselves which housing and services they need. According to the national authorities, Upper Austria is currently pursuing and implementing a series of strategies in the area of accommodation and mobile services. The aim is to offer persons with disabilities a variety of different services tailored to their personal needs in order to support them in their everyday life.

Furthermore, in terms of the implementation of the RDP, these authorities pointed out that members of disability organisations, specifically the Austrian Disability Council, are represented and have voting rights on the supervisory committee, provided under the Upper Austrian Equal Opportunities Act, and are therefore able to actively participate in all discussions and decisions. This also has an impact on the design of the programme and of the selection criteria of the projects.

As an outcome of the analysis of your allegations and taking into consideration the additional information our services received from the competent national authorities, we have not found any references in the Austrian RDP that could be considered a violation of the above-mentioned principles of the Charter. Neither did we find a breach of the provisions of the UNCRPD nor CPR and Rural Development Regulation.

Thus, we do not see an indication that the operations selected would result in the continued segregation and social exclusion of persons with disabilities. On the contrary, the Managing Authority confirms that all the projects in question provide the conditions necessary for persons with disabilities to live independently and to be socially included in the community with equal opportunities to others and therefore, ensuring compliance with Austria's national strategy put in place to back up the deinstitutionalisation process and, hence, with its obligations under the relevant Union law.

Therefore, since the projects cofinanced are selected and implemented under the responsibility of the Member States, I would like to suggest to seek a solution at national level which is the competent level in accordance with the approach of complementarity

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<sup>9</sup> See, by analogy, case C-117/14, *Nisttahuz Podava*, point 42

and partnership between the Commission and the Member States provided in the CPR and the Rural Development Regulation.

*As regards your grievance regarding an alleged breach of the EU Employment Equality Directive (2000/78/EC),*

On the basis of the information the Managing Authority of the Austrian RDP sent to our services, the Province of Upper Austria offers the following services of integrated occupation in the context of work and occupation:

- Skill-oriented activity offers services providing daily structure in the context of jobs for people who cannot pursue gainful employment due to a disability. The people with disabilities receive an allowance for this work. Accident insurance has been obligatory since 2011.
- Sheltered employment provides the opportunity for gainful employment in the context of a sheltered workplace. This can be in a separate workshop or through temporary employment integrated in the business. The people are protected under social security legislation. Remuneration is above the low income threshold.

The national authorities informed our services that they are currently pursuing the following strategies in the field of work and occupation:

- There will be no further expansion of workshops in skill-oriented activity;
- The forms of integrated occupation in skill-oriented activity and work accompaniment in sheltered employment will be intensified;
- The target figures for integrated occupation to 2023 will be 30% in skill-based activity and 70% in sheltered employment;
- Support for protection under social security legislation and appropriate remuneration will be actively carried out and national rules will be worked towards.

It has to be underlined that the EU Employment Equality Directive applies to persons who are considered to be 'workers', i.e. to 'persons who pursue activities which are real and genuine'. It is for the national authorities, in particular for the national courts to examine whether the condition of the pursuit of a real and genuine activity is satisfied. The competent court must base its examination on objective criteria and make an overall assessment of all the circumstances of the case relating to the nature both of the activities concerned and of the employment relationship at issue (see, by analogy, ECJ judgments in cases C-413/01 Ninni-Orasche, C-456/02, Trojani).

According to settled ECJ case-law (see aforementioned judgments), the national court must in particular ascertain whether the services actually performed by the person concerned are capable of being regarded as forming part of the normal labour market. For that purpose, account may be taken of the status and practices of the workplace, the content of the social reintegration programme, and the nature and details of performance of the services.

It should also be stressed that Austria has transposed the EU Employment Equality Directive into its national legal order. It is for the national authorities including the courts to assess, in each particular case on the basis of all pertinent facts, whether there is discrimination on the grounds of disability at work and/or whether the employer has complied with his/her obligation to provide reasonable accommodation to the persons with disabilities with due respect to national and EU law.

### **3. Conclusion**

In conclusion, DG AGRI does not consider that there is any breach of the applicable Union law for the Commission to pursue. Since the issues highlighted in your complaint fall under the competence of the Member State at hand, we would like to advise you to seek a solution before the national administrative authorities and/or competent courts.

In the light of the above, I inform you that we intend to close your complaint unless we receive, within four weeks of the date of this letter, by airmail or by e-mail at the following address [REDACTED] documents or new information that could alter our position.

Yours faithfully,

[REDACTED]