



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, the Convention on the Rights of the Child and the EU Employment Directive concerning facilities for persons with disabilities in the State of Tyrol cofinanced under the Austrian RDP 2014-2020**

Ref.: CHAP(2021)01440

Dear Ms Feuerstein and Ms Kopic,

I refer to your complaint to the European Commission registered on 07.04.2021 in which you allege that the facilities for persons with disabilities in the State of Tyrol cofinanced under Measure 7 Basic services, specifically social services, of the Austrian RDP 2014-2020 perpetuate the segregation and social exclusion of those persons.

### **1. Subject of the complaint**

Your complaint relates to nine either newly built or renovated, adapted or enlarged facilities in Tyrol, one of which is an educational/residential institution for children with disabilities, five of which are residential facilities and three of which are sheltered workshops ('listed projects').

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You allege that the listed projects constitute a violation of the rights of persons with disabilities put forward by the UN Convention on the Rights of Persons with Disabilities ('UNCRPD')<sup>1</sup>, as well as the Convention on the Rights of the Child ('UNCRC')<sup>2</sup>, since according to you, they reinforce the segregation, isolation and discrimination of children and adults with disabilities in Tyrol.

You indicated in the complaint that Austria is a party to the UN Convention on the Rights of the Child, which in Article 2 prohibits discrimination based on disability. You argue further that since pursuant to Article 216(2) of the Treaty on the Functioning of the European Union (TFEU), Article 19 of the UNCRPD, as interpreted by General Comment 5, Article 27 and Article 5, as interpreted by General Comment 6, create legal obligations for the Union and the Member States, including the European Commission.

In your view, instead of supporting inclusive education in the children's community of origin and family support, EAFRD co-funded facility for children and young people with disabilities reinforce social exclusion of children with disabilities in a large specialised institution. As concerns the residential facilities for adults with disabilities, you claim that, instead of improving access to housing that is open to the general population, expanding the provision of mobile support and personal assistance services for persons with disabilities, the State of Tyrol invested additional substantial resources into renovating and improving special facilities, where only persons with disabilities may live. The same applies, according to you, to sheltered workshops, which are segregating, exclude persons with disabilities from the general labour market and keep individuals and families in poverty.

You allege further that the listed projects are in breach of the EU Charter of Fundamental Rights ('Charter'), and of the Council Directive 2000/78/EC on equal treatment in employment and occupation ('EU Employment Directive')<sup>3</sup>. You consider that the alleged breaches related to the Charter concern Article 26 on integration of persons with disabilities and Article 21 on non-discrimination.

As concerns the alleged breach of the EU Employment Directive, you highlight that the 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 point out 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 allege also that the projects listed breach Regulation (EU) No 1303/2013 laying down common provisions on the European Structural and Investment Funds (ESI Funds) ('the CPR')<sup>4</sup>, in particular Article 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.

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

2 [OHCHR | Convention on the Rights of the Child](#)

3 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).

4 OJ L 347, 20.12.2013, p. 320.

## **2. Analysis of the complaint**

### **2.1. 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 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 inclusion 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 person centred services, the planned closure of long-stay residential institutions and making social services (education, health care, accessible housing) available to persons with disabilities. Promoting the transition from institutional to community-based services often requires transitory solutions aiming at securing independent living and self-determination in accordance with Article 19 of the UNCRPD.

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

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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.

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>.

Therefore, 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. 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>7</sup>.

It has also to be underlined that in shared management mode, Member States' designated authorities will continue to have for the programming period 2023-2027 the main responsibility for the selection and monitoring of individual projects and enjoy discretion in setting up and selecting operations and funding projects including related to persons with disabilities. All operations shall be selected and implemented while respecting the Charter of Fundamental Rights of the European Union and in accordance with the relevant provisions of the new Regulation (EU) 2021/2115 on the CAP Strategic Plans<sup>8</sup>.

As concerns the EU Employment Equality Directive, it has to be stressed that it 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).

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*).

## **2.2. Assessment of your allegations**

- I. *As regards your grievances regarding to the specific breaches of the EU and Austria's obligations under the UNCRPD, the UNCRC and the Charter as well as of the provisions of the CPR:*

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<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> 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.

<sup>8</sup> Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No 1305/2013 and (EU) No 1307/2013 (OJ L 435, 6.12.2021, p. 1).

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.

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 and the UNCRC lies with the State parties. Signing and ratifying the Conventions obliges the State parties to ensure that all existing and future legislation, policies and programmes are aligned with their provisions.

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

The national authorities stressed that the listed projects have either carried out adaptation measures to ensure accessibility or to improve the spatial offer in existing facilities or new sites are dislocation measures, for example as a result of the reduction of facilities.

According to these authorities, all projects are in line with the Tyrol strategy for the development of disability assistance and with the quality standards of the Tyrolean Disability Assistance which in their turn are guided by the principles set out in UNCRPD. The Tyrol Participation Act lays down as a principle that mobile benefits take precedence over in-patient services. Thus, Tyrol is currently pursuing and implementing a series of strategies in the area of accommodation and mobile services for persons with disabilities, aiming to offer to those persons a variety of different services (personal assistance, mobile assistance and individual social psychiatric assistance) tailored to their personal needs in order to support them in their everyday life. The national authorities underlined that in Tyrol, persons with disabilities are in principle free to choose between mobile and in-patient services. There are numerous advisory services available to help find a tailor-made offer.

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<sup>9</sup> See, by analogy, case C-1 17/14, *Nisttahuz Podava*, point 42

The Managing authority confirmed that the listed projects are located in towns and cities, so they are easily accessible by means of public transport. The supported actions are essential to ensure barrier-free access to community and regional structures.

Finally these authorities informed us that the Austrian Disability Council can participate in all the discussions and decisions of the Austrian Committee for Monitoring the Implementation of the Austrian Rural Development Programme 2014-2020 ('Monitoring Committee') concerning both programme content and project selection criteria.

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, UNCRC 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 selection and implementation of the listed projects falls under the responsibility of the Member States, you might wish to seek solutions with the national administrative authorities and/or choose to seek judicial review at national level. .

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

The national authorities informed our services that the day-to-day services provided by the Tyrolean Disability Assistance are designed to help people with disabilities to find meaningful employment in accordance with their needs. They pointed out that in the field of work and day-to-day structure, there are many other services of disability assistance to enable participation in the first labour market.

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 national 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 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 [AGRI-CHAP@ec.europa.eu](mailto:AGRI-CHAP@ec.europa.eu), documents or new information that could alter our position.

Yours faithfully,

A large black rectangular redaction box covering the signature area of the letter.