



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) 3555

Dear Ms Bulic Cojocariu,

In your letter sent to us on 12 December 2019, you complained 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'). You alleged that the projects selected under the call are in breach of Romania's and the European Union's obligations under the EU and international law.

In order to assess your complaint, the Directorate-General for Regional and Urban Policy (DG REGIO) contacted the Romanian Managing Authority ('MA') to ask for additional information and explanations. Following the clarifications provided by the MA, DG REGIO on 20 November 2020 sent you a letter (ARES(2020)6976726, 'pre-closure letter') concluding that there is no breach of the applicable Union law for the Commission to pursue. You were asked to provide us with additional and precise information that will establish a breach of EU law, within four weeks of the date of the pre-closure letter, otherwise DG REGIO would close the complaint. You sent us your reply on 17 December 2020 requesting the Commission not to close the complaint and to continue the investigation with a view of establishing a breach of EU law.

In your reply to the pre-closure letter, we did not identify any new information further to the allegations you already presented in your complaint.

I. General legal framework

1.1 Support for long-stay residential institutions

In your opinion, Articles 4, 6 and 7 of the Regulation (EU) No 1303/2013 ('CPR')¹, should not be interpreted in isolation but in the context of the EU's ratification of the UN

¹ 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

Convention on the Rights of Persons with Disabilities ('UNCRPD'). You stress that international agreements concluded by the European Union have primacy over instruments of secondary law. Thus, the latter must be interpreted in a manner that is consistent with the UNCRPD, which prohibits investments in institutions. The right to independent living, laid down in Article 19 UNCRPD and General Comment No 5 [adopted by the UN Committee on the Rights of Persons with Disabilities ('UN Committee')], would clearly entail an absolute prohibition to fund the development of institutions, to which the EU is bound. You also consider that the margin of appreciation of States parties, as referred to by us in the pre-closure letter when taking note of paragraph 42 in General Comment No 5, is related to the programmatic implementation and not to the replacement [of institutions with independent living support services].

As already explained in the pre-closure letter, according to our assessment, based on the existing legal framework of the European Structural and Investment (ESI) Funds, there is no general and absolute prohibition to support long-stay residential institutions.

Promoting the transition from institutional to community-based services is a process. Before (full) de-institutionalisation is achieved, the persons concerned have, however, to be cared for. Therefore, also investments into long-stay residential institutions may serve to achieve the aim to progress towards community-based living without undermining the overall aim of Article 19 UNCRPD. It cannot be concluded that each and every long-stay residential institution, irrespective of its characteristics and circumstances, is incompatible with the freedom of the residents to choose and control or may not be needed for certain kinds of services.

At the same time, the policy objective when implementing the ESI Funds is indeed to move away from investments in institutions and support a move towards community-based living. Therefore, Member States are being constantly reminded of the EU obligation and their obligation under the UNCRPD to progress on ensuring independent living arrangements and delivering de-institutionalisation.

This approach has been confirmed under the Estonian Presidency of the EU Council of Ministers, by the Council Conclusions on Enhancing Community-Based Support and Care for Independent Living that were adopted by the EPSCO Council of the EU at its meeting held on 7 December 2017. The text of the conclusions was tabled at the initiative of the Estonian Presidency after a Conference organised in October 2017 in Tallinn on the subject of Dignity and Independent Living.²

The UN Committee's General Comment No 5, which is not legally binding, interprets Article 19 UNCRPD in the light of ensuring independent living arrangements and restricting investments which are not aligned with this goal. However, as already stated in the pre-closure letter, also General Comment No 5 highlights that the right to access services and facilities is progressively applicable and requires structural changes, as well as to enter into strategic planning. It expressly recognises a margin of appreciation to State parties in relation to programmatic implementation while however highlighting their immediate obligation to adopt a strategy and a concrete plan of action to replace any institutionalized settings with independent living support services.

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).
[2https://data.consilium.europa.eu/doc/document/ST-15563-2017-INIT/en/pdf](https://data.consilium.europa.eu/doc/document/ST-15563-2017-INIT/en/pdf)

Therefore the General Comment No 5 recognises the progressive character of such changes and of the strategic planning/implementation.

Based on the above, as explained in the pre-closure letter, **Romania has put in place a national strategy for de-institutionalisation** ‘A society without barriers for persons with disabilities 2016-2020’³. The operational programme, under which the call has been financed, addresses the needs identified as priorities in this strategy.

In addition, the MA informed us that the National Authority for Persons with Disabilities, Children and Adoptions (‘ANDPDCA’), in collaboration with the local authorities (cities/municipalities, which have agreed to be included in the de-institutionalisation process), conducted an analysis of de-institutionalisation needs which identified the priority public bodies for intervention. **The document containing the conclusions of this analysis sets out the de-institutionalisation concepts and the rules that the de-institutionalisation process must comply with**⁴. According to the MA, the analysis clearly affirmed that the transfer of an adult with disabilities in a residential institution must be conditional on the development of support services for independent living and autonomy.

According to the **text of the operational programme**, it is agreed that, “[...] to strengthen the transition from large residential institutions to community-based care, and in order to prevent institutionalisation, support will be given to the development of de-institutionalisation infrastructure; in particular for children and people with disabilities. [...] This **will involve investment in family homes and apartments, sheltered housing etc. as well as in the related facilities necessary to ensure their functionality.** [...] For the services related to the persons with disabilities, investments will focus on closing old institutions with a large number of beneficiaries (more than 120 beneficiaries), with inadequate living conditions, far away from the community, health services, education and rehabilitation. [...] The implementation of the project types described above will have positive results, both in terms of increasing the accessibility of vulnerable people to quality services as well as to the quality of life of individuals and their families.”.

As explained in the pre-closure letter, **the call falls within the scope of the operational programme and the objective of the call complies with the national de-institutionalisation strategy**. According to the Guide for Applicants for the call⁵, the investments eligible for co-financing under this call relate to the establishment of (a) sheltered housing which facilitates the integration of adults with disabilities in the community, making the transition from old residential institutions/centres, acquiring skills, competences and skills for integration; a protected dwelling **will be sized for up to 10 people**; (b) day-care centres for disabled adults who will be de-institutionalised from residential centres, as well as adults with disabilities from those communities, who are currently not offered services to prevent institutionalisation.

It was also noted in the pre-closure letter that ANDPDCA was involved in drawing up the Guide for Applicants for the call and was 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 de-institutionalisation process.

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

4 <http://anpd.gov.ro/web/dezinstitutionalizare/>

5 <http://www.inforegio.ro/ro/axa-prioritara-8/apeluri-lansate>

Furthermore, it was explained in the pre-closure letter that the operations selected under the call themselves contribute to the achievement of the objectives of the call and fall within the scope of the operational programme.

Based on the above and taking into account the information received from the MA, we consider that the call and the projects selected thereunder are in line with the de-institutionalisation strategy as well as with the programming documents and do not undermine the overall aim of Article 19 UNCRPD.

1.2 Role of the European Commission in shared management

You consider that the Commission has failed to comply with its obligations to prohibit discrimination pursuant to Article 21 of the Charter by (i) not intervening when national authorities infringe the right to independent living of persons with disabilities; and (ii) not performing its own supervisory role adequately, thereby infringing the right of persons with disabilities to effective legal protection.

You also state that, the fact that the institutions are not yet operational does not mean that the investment itself is not in breach of these provisions [Articles 4(2) and 7 of the CPR, Article 19 of the UNCRPD, and Article 26 of the Charter]. You stress that there is a clear and imminent risk that the rights of the persons assigned to these institutions will be violated. According to you, it is therefore sufficient to establish a breach and for the Commission to act accordingly. You then conclude that the potential of harm in this case provides the Commission with sufficient basis to intervene. Furthermore, according to you, with the very narrow interpretation of its supervisory role, the Commission has created “a legal vacuum”. Therefore, if the Commission fails to adequately investigate official complaints and intervene, it is *de facto* impossible for persons with disabilities in Romanian institutions to find legal protection for their rights.

As we have explained in the pre-closure letter, the ESI Funds are implemented in a shared management mode, which gives the responsibility for selection and monitoring of individual projects to Member State’s designated authorities. Under the shared management mode, it is not in the Commission’s competence to select the operations to be supported by the ESI Funds.

The above also applies to selecting the operations and funding projects related to persons with disabilities.

Moreover, it has to be noted that, in accordance with Article 143(1) of the CPR, it is the Member State who shall in the first instance investigate irregularities and make financial corrections. In the event of an alleged breach of the Charter or the UNCRPD as well as of other provisions of applicable Union law in relation to a Member State, which received support from the ESI Funds, the Commission may then apply an interruption or suspension of payments or make a financial correction if the irregular expenditure has not been corrected by the Member State. Such measures can only be applied if the Commission establishes that there is a breach of applicable law and that the breach has an impact on the Union budget.

With a view to establishing an irregularity according to Article 2(36) of the CPR, which could lead to a financial correction, three elements must be fulfilled: (1) a breach of Union law (or of national law relating to its application), (2) the breach stems from an act or omission by an economic operator, and (3) the breach has the effect of prejudicing the budget of the Union.

As explained in the pre-closure letter, the fact that a given infrastructure has been co-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. 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.

Moreover, the other two elements of an irregularity (i.e. an act or omission by an economic operator and that the breach has the effect of prejudicing the budget of the Union) should also be established in order to have the possibility to make a financial correction.

In addition, we would like to recall that the European Commission is not the body responsible for the assessment of the implementation of the UNCRPD, but the UN Committee on the Rights of Persons with Disabilities.

II. Repeated allegations

One of your concerns raised in the complaint was the location of the ESI funded facilities in small villages or towns, and the fact that they are combined with day care centres. You then refer to the approved building plans and project descriptions. You consider that one cannot claim that persons living there will benefit from a range of services, without any effort to verify (i.e. collect evidence) what services are available, where they are located, how the residents will access them, and how/whether they are able to cater for persons with disabilities, including those with complex needs.

According to the Guide for Applicants for the call, the call was non-competitive and addressed to traditional-type large residential centres and very large residential centres. The projects under the call were submitted by the General Directorate for Social Assistance and Child Protection (in Romanian - *Direcția Generală de Asistență Socială și Protecția Copilului*, DGASPC) or by the DGASPC in partnership with one or more Local Councils (in Romanian - *Unități administrative teritoriale*) which have expressed their willingness to provide the premises for the establishment of day centres or infrastructure (land and/or space) for the development of sheltered housing, as well as with NGOs and religious organisations.

As explained in the pre-closure letter, the 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. It was also said that the operating license may be issued to planned sheltered housing or day care centers financed under the call, only on the basis of the on-site assessment confirming that the minimum standards are met. Therefore, the MA believes that the sheltered housing and day care centers 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.

Furthermore, it has not been demonstrated for any of the operations selected under the call that there would be no access to community services and facilities available for the general population. The location of the operations in “small villages or small towns” *per se* cannot qualify as to undermine the overall aim of Article 19 UNCRPD.

You also restate your concern related to the “institutional characteristics” of the facilities supported with ESI Funds in Romania. Moreover, you refer to a report from Romania’s

National Preventive Mechanism from year 2016 which found evidence of human right violations.

As explained in the pre-closure letter, the MA clarified that there are national mandatory minimum quality standards put in place for social services for adults with disabilities⁶. Therefore the activities planned in day care centres or sheltered housing will be implemented in accordance with these standards aiming at ensuring respect for human rights and fundamental freedoms and constantly improving the quality of social services.

Furthermore, as we pointed out in the pre-closure letter, the facilities supported under the call are not yet functional. It is also important to note that services to be offered in these new facilities, financed under the European Social Fund ('ESF'), shall aim at the transition of their residents to the facilities assuring independent living. Currently, the ESF funding has been used by Romanian authorities to launch 2 calls for proposal for the amount of EUR 65 million to support this transition. It is not possible however to establish a breach of applicable legal provisions under the Charter or the UNCRPD, when it comes to the services that will be provided only in the future in those sheltered housing and day care centers.

III. Conclusion

In line with the above assessment, we conclude that no breach of the applicable Union law in relation to the ERDF financing has been demonstrated and therefore the complaint will be closed.

At the same time, the Commission supports the need to carefully monitor the operations supported under the call and also to ensure that their future development is compliant with the UNCRPD. The Commission will therefore undertake a number of follow-up actions for monitoring purposes as stated below.

The Commission will ask for reports on the implementation of the operations in the monitoring committee and ensure a continuous monitoring in a dialogue with the MA.

The Commission will also recommend to the MA to ask for a regular assessment by an independent human rights body so that any risk of or regression towards an institutionalisation mind-set or functioning would be avoided in the future, in compliance with the UNCRPD.

Furthermore, we would like to bring to your attention that Regulation laying down common provisions and financial rules for certain Funds for the 2021-2027 period⁷ includes provisions to ensure the transition from institutional to community- and family-based services under the scope of enabling conditions.

The enabling conditions are the necessary prerequisites to ensure the effective and efficient use of EU Funds (Article⁸). There are two sets of relevant enabling conditions:

⁶ Order No 82/16.01.2019 of the Ministry of Labour and Social Justice of Romania

⁷ Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument – COM(2018) 75 final, 2018/0196 (COD).

⁸ Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument – COM(2018) 75 final, 2018/0196 (COD).

- Horizontal conditions⁹ that will be applicable to all EU funded operations in Cohesion Policy and include criteria to ensure the compliance with the Charter of Fundamental Rights of the EU and the implementation of the UNCRPD; and
- Thematic conditions¹⁰, relevant for the shift from institutional to community- and family-based care that will be included in national or regional strategic policy or legislative framework for social inclusion and poverty reduction and in national or regional strategic policy framework for health.

Horizontal conditions include:

- Arrangements to ensure compliance of the programmes supported by the Funds and their implementation with the relevant provisions of the Charter;
- National framework in place to ensure implementation of the UNCRPD including objectives with measurable goals, data collection and monitoring mechanisms;
- Arrangements to ensure that the accessibility policy, legislation and standards are properly reflected in the preparation and implementation of the programmes; as well as
- Reporting arrangements to the monitoring committee regarding cases of non-compliance of operations supported by the Funds with the Charter or the UNCRPD, as well as complaints regarding the Charter or the UNCRPD.

As for the thematic enabling conditions, the frameworks referred to should include measures to shift from institutional to community- and family-based care and to promote related services.

The fulfilment of enabling conditions and their application throughout the programming period will be closely monitored by the monitoring committees and discussed in review meetings with the Commission services. More concretely, the managing authorities must ensure that selected operations in the field of transition from institutional to community- and family-based services, that fall within the scope of an enabling condition, are consistent with the corresponding strategies and planning documents established for the fulfilment of that enabling condition.

Furthermore, the national implementation reports and concluding observations of the UN Committee would be used as one of the reference documents in the process of the assessment of the fulfilment of the horizontal enabling condition on the UNCRPD for the period 2021-2027.

The Member State shall ensure that the enabling conditions remain fulfilled and respected throughout the programming period. In the event of an enabling condition being no longer fulfilled, the Commission services will start a contradictory procedure, which may lead to financial consequences.

In addition, the partnership with all relevant stakeholders will remain a key principle to design and implement the EU Cohesion Policy. Relevant stakeholders, including bodies responsible for promoting fundamental rights and disability organisations, will need to be involved in the design and implementation of the programmes. Their expertise and input will be essential for the monitoring and implementation of the operations throughout the programming period.

⁹COM(2018) 375 final, 2018/0196 (COD), Annex III.

¹⁰COM(2018) 375 final, 2018/0196 (COD), Annex IV

Furthermore, the ERDF Regulation¹¹, as agreed by the co-legislators, will include provisions to ensure that the ERDF will support and promote transition from institutional to community- and family-based care, and that it will facilitate the integration of people in society and seek to ensure independent living conditions.

When negotiating the programmes for the 2021-2027 period, the Commission will put a strong focus on promoting investments that are in line with de-institutionalisation strategies and remind Member States on the need to ensure compliance with the UNCRPD.

It is also important to underline that the Commission has reinforced the EU commitment to ensure that the persons with disabilities can achieve the full participation in the society through the recently adopted ambitious “Strategy for the Rights of Persons with Disabilities 2021-2030”¹², which sets that the Commission will support national, regional and local authorities in their efforts for de-institutionalisation and independent living, including through the 2021-2027 shared management funds. The Strategy also foresees that the Commission will, by 2023, issue guidance recommending to Member States improvements on independent living and inclusion in the community.

Finally, we take note of your intention to publish this correspondence. I would like to draw your attention to the fact that in case of publication, the applicable data protection rules, notably Articles 5 and 6 of the General Data Protection Regulation¹³, should be adhered to, including the non-disclosure of personal data without any prior consent of the data subject. I would also ask you to ensure compliance with these requirements for the correspondence that has already been published on the website www.enil.eu, and, in particular, to redact my name from documents published.

e-signed

A black rectangular redaction box covering the signature area.

¹¹ Proposal for a Regulation of the European Parliament and of the Council laying on the European Regional Development Fund and on the Cohesion Fund – COM (2018) 372 final, 2018/0197 (COD).

¹² Strategy for the rights of persons with disabilities 2021-2030, 3.3.2021, COM(2021)101 final <https://ec.europa.eu/social/main.jsp?catId=1484&langId=en>

¹³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1–88.