



[REDACTED]

29 October 2021 – *By email only*

**Subject: Complaint reference CHAP(2020) 2159 – Additional information**

Dear [REDACTED]

On behalf of the Validity Foundation ('Validity') and the European Network on Independent Living ('ENIL'), we refer to your letter of 1 October 2021 with reference Ares(2021)5987544, in which you provide a belated response to our complaint of 31 July 2020 concerning eight projects co-financed by the European Regional Development Fund ('ERDF'), under the Regional Operational Programme for Łódzkie Voivodeship 2014-2020.

You propose to close investigations into seven out of eight projects complained. Our view remains that these projects clearly violate applicable Union law, and international human rights obligations arising from the Convention on the Rights of Persons with Disabilities ('CRPD'), to which the European Union ('EU') and Poland are both parties. The investigation thus far has been insufficient and should not be closed. We hereby advance the following additional information in support of our request to conduct a full and fresh review and evaluation of our complaint.

**Polish Commissioner for Human Rights**

We note with some concern that your investigation has taken an overly restrictive approach, in that your conclusions concerning the projects are overwhelmingly based upon information received from the Polish Managing Authority, while noticeable failing to give consideration to other key sources necessary for the proper analysis of our complaint.

Fundamentally, our complaint raises concerns regarding the compliance of investments such as these with binding human rights obligations. It is concerning, therefore, that you have not requested information from the Polish Commissioner for Human Rights who is mandated to conduct the functions of the national

human rights institution in the country. The Commissioner also acts as an independent equality body, is the designated national independent mechanism for monitoring implementation of the CRPD under Article 33(2) thereof, and is further mandated to perform the tasks of the National Preventive Mechanism ('NPM') under the Optional Protocol to the Convention against Torture ('OP-CAT'). The Commissioner for Human Rights has both the mandate and expertise to provide highly authoritative input into the investigation of complaints such as ours, and we regret that their opinion was not sought.

Following receipt of your pre-closure letter, ENIL and Validity formally approached the Commissioner for Human Rights in connection with this matter. We hereby attach his response, dated 27 October 2021. As is evident from the content of the letter, the Commissioner expresses serious concerns about the process of deinstitutionalisation in Poland and its compliance with Polish, European and international human rights standards. The Commissioner points out that it is essential to ensure that activities funded by the EU "*do not reinforce the segregation or isolation, discrimination of their target groups*", and that NHRIs such as his have the knowledge and mandate to conduct such assessments. These views have a direct bearing on the substance of our complaint. It is our view that the opinion of the Commissioner for Human Rights should have been sought and considered during your investigation.

### **European Union CRPD Framework**

In a similar vein, it appears that your investigation did not include any attempts to seek views from the EU's own independent monitoring framework under the CRPD. In our view, the EU CRPD Framework should have been consulted given its mandate to independently monitor implementation of the CRPD across all aspects of EU action, including in the disbursement, management and control of the ERDF.

### **Jurisprudence of the Committee on the Rights of Persons with Disabilities ('CRPD Committee')**

In Section 1 of your letter ("*General considerations*"), you state that "*there is no general and absolute prohibition for the ESI Funds to support long-stay residential institutions*", and that this position is "*also supported by General Comment No 5 of the UNCRPD*". You purport to have discerned a distinction between the concepts of residential care and institutional characteristics in your analysis of the jurisprudence of the CRPD Committee.

We respectfully submit that your general considerations reflect only a very partial reading and application of the text of General Comment No 5 ('GC5'), and a lack of engagement with the totality and substance of the CRPD Committee's jurisprudence concerning Article 19 CRPD. At a minimum, the following components of GC5 must also be considered in the analysis of our complaint:

- Paragraph 16(c) of GC5, which you quote only partially, goes on to state conclusively as follows: "*Both independent living and being included in the community refer to life settings outside residential institutions of all kinds.*" [emphasis added]
- Paragraph 21 of GC5: "*When persons with disabilities are assessed as requiring a high level of personal service, States parties often consider institutions as the only solution, especially when personal services are considered to be 'too costly' or the person with disabilities is considered to be 'unable' to live outside an institutional setting. Persons with intellectual disabilities, especially those with complex communication requirements, among others, are often assessed as being unable to live outside institutional settings. Such reasoning is contrary to article 19, which extends the right to live independently and be included in the community to all persons with disabilities,*

*regardless of their level of intellectual capacity, self-functioning or support requirements.”*  
[emphasis added]

In 2020, the CRPD Committee also released a report following an Inquiry concerning Hungary in which it found there to be grave and systematic violations of the Convention.<sup>1</sup> In connection with Article 19, the CRPD Committee made, among others, the following legal findings:

- At paragraph 100: *“Living independently and being included in the community precludes life in any type of institution, from small-scale group homes to large-scale institutions. Persons with disabilities should have access to a range of individualized support.”* [emphasis added]
- At paragraph 101(f): *“The strategy of moving persons with disabilities from large- to small-scale institutions perpetuates and expands institutionalization, and there are no measures in place to prevent their institutionalization from extending any further”*
- At paragraph 101(g): *“Public funds, including from the European structural and investment funds, continue to be invested in building, renovating and expanding large- and small-scale institutions, thus removing resources for support for independent living and the development of accessible, community-based services that foster inclusion”*

These legal findings, among others, are of direct significance to the evaluation of the present complaint but appear not to have been considered.

It is our view, therefore, that your investigation has been faulty to the extent that it has proceeded on the basis of a partial analysis of the relevant jurisprudence, a situation that could have been prevented through proper coordination with the relevant independent human rights authorities referred to above. We also wish to point out that, as a party to the CRPD, it is open to the EU to request dialogue with the CRPD Committee in questions related to implementation of the Convention under Article 37(2) CRPD, and that this course of action would have improved the quality of the investigation of our complaint.

### **Problems with the handling of this complaint**

Further to the above, we wish to express our concern that your reply to our complaint breached the one-year time limit for investigation of such complaints. Moreover, given that your investigation has been a purely paper-based review, we fail to see a reasonable justification for the extended period it has taken you to respond. We wish to remind you that the European Ombudsman has repeatedly called on the Commission to act in a timely manner, particularly in cases such as the present one which relate to the fundamental rights of persons with disabilities within EU action.<sup>2</sup>

We further note that, notwithstanding the insufficiencies of your investigation thus far, and the repeated delays we have seen, your pre-closure letter purports to impose a very short period of time on our organisations to provide additional information. Our view is that automatic decisions by the Commission to close complaints of this level of seriousness so quickly, as you propose in this case, are grossly disproportionate. Indeed, this strict time limit stands in contrast to the Commission’s own failure to abide

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<sup>1</sup> United Nations. Committee on the Rights of Persons with Disabilities. ‘Inquiry concerning Hungary carried out by the Committee under article 6 of the Optional Protocol to the Convention’, CRPD/C/HUN/IR/1, 17 September 2020.

<sup>2</sup> European Ombudsman. Decision in case 1233/2019/MMO on how the European Commission ensures that Member State governments spend European Structural and Investment Funds in line with the obligations stemming from the United Nations Convention on the Rights of Persons with Disabilities. 30 July 2020.

by the relevant timelines. The imposition of such a short response time in the present context places our organisations at a serious disadvantage and undermines our ability to pursue our charitable objectives as disability rights advocacy organisations registered and operating in the EU.

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For these reasons, we respectfully request the following:

1. That you consider the additional information contained herein and refrain from closure of the investigation of our complaint with reference CHAP(2020)2159.
2. That you conduct a fresh and thorough analysis of our complaint, requesting and taking into account information and opinions of relevant human rights bodies, including the Polish Commissioner for Human Rights, the EU CRPD Framework and the CRPD Committee.
3. That you conduct the next steps of your investigation in a timely fashion, in light of the already extended period that has elapsed since our complaint was submitted, in accordance with the principle of good administration.
4. That you provide us with a comprehensive update on the status of your further investigations no later than one month from the date of this letter, and that should your investigations not be concluded by that time, a clear indication of how much further time shall be required until final resolution of this complaint.

Yours sincerely,



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