



COMMISSIONER FOR HUMAN RIGHTS

Warsaw, 27-10-2021



XI.037.4.2021.MW/ASZ

**Mrs Ines Bulic Cojocariu**  
**European Network on**  
**Independent Living**

**Mr Steven Allen**  
**Validity Foundation**

[steven@validity.ngo](mailto:steven@validity.ngo)

*Dear Mrs Cojocariu and Mr Allen,*

Further to a complaint lodged to the European Commission by representatives of the European Network on Independent Living - ENIL and the Validity Foundation concerning the use of EU funding for construction, extension and renovation of eight nursing homes for individuals with disabilities in Łódź province in Poland (Complaint registered by EC under CHAP (2020) 2159), on the basis of article 11(1)(2) of the Act of 15 July 1987 on the Commissioner for Human Rights (Journal of Laws [Dz. U.] of 2020, item 627), below please find some general explanations on the matter.

### **1. Mandate of the Commissioner for Human Rights in Poland**

The Commissioner for Human Rights acts as national human rights institution (NHRI), but also performs additional duties. First of all the Commissioner is an independent body for supporting, protecting and monitoring the implementation of the Convention on the Rights of Persons with Disabilities executed in New York on 13 December 2006 (Journal of Laws [Dz. U.] of 2012, item 1169, as amended; further referred to also as the CRPD or Convention), pursuant to the CRPD's Article 33(2) and inter-institutional arrangements. The Commissioner acts also as an independent equality body. Therefore he safeguards the liberties and human and citizen's rights as set forth in the Constitution and other normative acts, including the guard of implementation of the principle of equal treatment. According to the Article 32(2) of the Constitution of the Republic of Poland „No

one shall be discriminated against in political, social or economic life for any reason”. The EU antidiscrimination law, as set forth in the secondary legislation with regards the scope, fields and tasks of an independent equality body, has been implemented in provisions of the above mentioned Act of Commissioner for Human Rights and the Act of 3 December 2010 to implement some EU regulations regarding equal treatment (Journal of Laws [Dz. U.] of 2020, item 2156).

## **2. Assessment of the implementation of the provisions of the Convention on the Rights of Persons with Disabilities in Poland**

The ratification of the CRPD by Poland confirmed the right of persons with disabilities to the full and equal enjoyment of all human rights and fundamental freedoms and respect for their inherent dignity. Declarations made at the level of international law should be followed by real action at the national and local levels.

At the outset, it should be noted that in 2018, the UN Committee on the Rights of Persons with Disabilities (further also as: Committee) considered reports on the implementation of the CRPD and made numerous recommendations to Poland<sup>1</sup>. In its Concluding observations, the Committee indicated that **in the area of deinstitutionalization in Poland we are dealing with “critical stagnation** and absence of determination in the process of deinstitutionalisation of persons with disabilities and their transition to independent living in community ensuring the right to choose where, with whom and how to live outside institutionalized facilities and group homes, including the absence of a strategy and action plan and targeted funding for the deinstitutionalisation process after the termination of the European Union funds allocated for this purpose”<sup>2</sup>. The Committee was also concerned about “spending of the European Union funds allocated for deinstitutionalisation on measures not consistent with the Convention as elaborated in the Committee’s General Comment no. 5, and the lack of monitoring of how these funds were used”<sup>3</sup>. Thus, a recommendation was made for Poland to “design and adopt concrete action plans for deinstitutionalization and time-bound transition to independent living schemes for persons with disabilities within the community, and ensure that adequate funding is allocated to this process after the termination of European Union funds allocated specifically to this purpose”<sup>4</sup>. The Committee also drew attention to the need to ensure the spending of European Union funds allocated to deinstitutionalization on measures that are consistent with the provisions of the Convention, and that such spending is monitored, with

---

<sup>1</sup> Concluding observations on the initial report of Poland (English), CRPD/C/POL/CO/1, 29 October 2018, <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6OkG1d%2fPPRiCAqhKb7yhsnLFjcXmd8Ilx1hLUlxYOlolN%89NMrEyKDrTPKg7T8aUMAwDVpc%2fx6%2fd5Qg%2bJxRYV2Gi33mW2TralO6fd4KvKjXpOp0ORybDY4RQBf5HB9>

<sup>2</sup> Concluding observations on the initial report of Poland (English), point 32(a).

<sup>3</sup> Concluding observations on the initial report of Poland (English), point 32(d).

<sup>4</sup> Concluding observations on the initial report of Poland (English), point 33(a).

the effective participation of persons with disabilities and/or their representative organizations, to ensure that such spending is in line with the requirements of persons with disabilities themselves<sup>5</sup>.

In view of the recommendations made, the role of the European Commission in the present proceedings appears to be extremely important. Committee's General Comment No. 5 should be treated in this case as a way of interpreting the norms contained in Article 19 of the CRPD. The National Programme for Controlling Poverty and Social Exclusion indicated by the government refers to individual areas of support for persons with disabilities, but the proposed activities have been limited to developing a system of assistance services and creating standards of accessibility. However, the aim of the document is to "provide friendly forms of care"<sup>6</sup> with an emphasis on the redevelopment of 24-hour institutions<sup>7</sup>. The aim of the deinstitutionalisation process is to create an alternative to institutional care, not to strengthen it. In light of the above, **the National Programme for Controlling Poverty and Social Exclusion 2020 cannot be treated as a strategy for deinstitutionalisation.**

### **3. The Convention on the Rights of Persons with Disabilities in the EU legal order**

The assessment of actions taken by Poland does not indicate sufficient general progress in providing independent living conditions and deinstitutionalisation. Although supporting 24-hours institutions with EU funds is not forbidden, actions taken by Member States in this respect shall be analysed in the wider perspective of relevant EU law protecting rights of people with disabilities. Therefore broader context than presented in the explanations by the Implementing Body is advisable.

Poland as well as the whole European Union are parties to the UN Convention on the Rights of Persons with Disabilities. Consequently, from the moment of its entry into force, **the CRPD forms an integral part of the legal order of the European Union.** Parties to the CRPD are bound **to adopt** all appropriate legislative, administrative and other measures to implement the rights recognized therein and, at the same time, **to refrain** from engaging in any act or practice which is inconsistent with the CRPD and **to ensure** that public authorities and institutions act in accordance with this Convention<sup>8</sup>.

The UN Committee on Persons with Disabilities has also assessed progress in implementing the CRPD by the European Union. Following the consideration, its own assessment of the EU's implementation of the CRPD and recommendations were published

---

<sup>5</sup>Concluding observations on the initial report of Poland (English), point 33(c).

<sup>6</sup>National Programme for Controlling Poverty and Social Exclusion 2014, <https://www.gov.pl/attachment/c481b45f-7eae-4ad3-bffb-737a6f871ff7>, objective no 5 on p. 47.

<sup>7</sup>Op. cit., p. 83.

<sup>8</sup>Art. 4 (a) and (d) of the Convention on the Rights of Persons with Disabilities.

in the form of Concluding observations in October 2015<sup>9</sup>. The Committee expressed concern that “across the European Union, persons with disabilities, especially persons with intellectual and/or psychosocial disabilities **still live in institutions rather than in their local communities**. It notes that, despite changes in regulations, the European Structural and Investment **Funds continue to be used in different Member States for the maintenance of residential institutions rather than for the development of support services for persons with disabilities in local communities**”. Thus, the Committee recommended to “**strengthen the monitoring of the use of the European Structural and Investment Funds** so as to ensure that they are used strictly for the development of support services for persons with disabilities in local communities and not for the redevelopment or expansion of institutions. The Committee also recommended that the European Union “suspend, withdraw and recover payments if the obligation to respect fundamental rights is breached”<sup>10</sup>.

#### **4. Deinstitutionalisation in the light of the principle of equality**

These recommendations of the Committee should be considered as a clarification of the relevant Convention standard, which the parties to the CRPD are obliged to ensure also in the context of the implementation of cohesion policy. This obligation with regard to the implementation of the European Structural and Investment Funds (hereinafter: “ESIF”) is further clarified by the European Commission's Guidelines on ensuring respect for the Charter of Fundamental Rights of the European Union when implementing European Structural and Investment Funds (2016/C 269/01). They confirm that the Convention on the Rights of Persons with Disabilities forms an „integral part of the EU legislation”<sup>11</sup>. As international agreements concluded by the European Union take precedence over instruments of secondary legislation, these instruments must be interpreted in a manner consistent with the Convention<sup>12</sup>. Due to the mixed nature of this international agreement, all provisions of the Convention that fall within EU competence are binding on the EU institutions. The Member States are obliged to implement the CRPD in so far as its provisions fall within EU competence. These include obviously the cohesion policy. In a declaration made at the time of ratification, the EU provided the UN with a list of the EU pieces of legislation that “illustrate the extent of the Community's competence under the Treaty establishing the European Community [...]”. The declaration includes a clear

---

<sup>9</sup>Concluding observations on the initial report of the European Union, CRPD/C/EU/CO/1, 2 October 2015, point 50, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2FEU%2FCO%2F1](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2FEU%2FCO%2F1).

<sup>10</sup>Op.cit. point 51.

<sup>11</sup> See e.g. Judgment of the Court of Justice of the European Union of 11 April 2013 in joint cases C-335/11 and C-337/11 HK Danmark, item 30.

<sup>12</sup> See e.g. Judgment of the Court of Justice of the European Union of 11 April 2013 in joint cases C-335/11 and C-337/11HK Danmark, item 29.

reference to the Council Regulation (EC) no 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999<sup>13</sup>. **Thus, Poland is obliged to reach the above mentioned standard of deinstitutionalization valid under the CRPD as a source of the EU primary law, by means of implementing the ESIF funds.**

To support Member States in meeting their obligations under the Convention, the European Commission services have developed two sets of guidelines<sup>14</sup> and a set of tools dedicated to deinstitutionalisation<sup>15</sup>. Those guidelines should be taken account of by Poland when developing and implementing cohesion policy actions at the national level in accordance with **the principle of loyal cooperation**. In light of Article 4(3) of Treaty on European Union (TEU), the EU and the Member States respect one another and support one another in implementing the tasks resulting from the Treaties. Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the EU institutions. The Member States shall also facilitate the achievement of the EU tasks and shall abstain from any measure which could jeopardise the attainment of the EU objectives.

These in the context of efforts to enhance economic, territorial and social cohesion – at all stages of implementation of the ESF – include a goal of eliminating inequalities and promoting equality between women and men as well as **combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation**, in accordance with Article TEU, Article 10 TFEU and Article 21 of the Charter of Fundamental Rights of the European Union (recital 13 of Regulation no 1303/2013<sup>16</sup>).

The principle of equality, including on the grounds of disability, is therefore a guiding principle for the process of preparing and implementing programmes, including in relation to monitoring, reporting and evaluation by both the Member States and the European Commission (Article 7 of Regulation 1303/2013). At the same time, it is not only about formal equality, i.e. treating similar entities according to one standard, but also about **substantive equality**. The latter refers to considerations of equity and has a corrective

---

<sup>13</sup>OJ L 210, 31.7.2006, p. 25.

<sup>14</sup>Common European Guidelines on the Transition from Institutional Care to Community-based Care, access at: <https://deinstitutionalisationdotcom.files.wordpress.com/2017/07/toolkit-10-22-2014-update-web.pdf> and Thematic guidance note on Transition from Institutional to Community-based Care (Deinstitutionalisation), access at: [https://ec.europa.eu/regional\\_policy/sources/docgener/informat/2014/guidance\\_deinstitutionalisation.pdf](https://ec.europa.eu/regional_policy/sources/docgener/informat/2014/guidance_deinstitutionalisation.pdf)

<sup>15</sup> The Use of EU Funds for the Transition from Institutionalised Care to Community-based Care – a set of tools, access at: [https://deinstitutionalisationdotcom.files.wordpress.com/2018/04/eeg-toolkit\\_polish.pdf](https://deinstitutionalisationdotcom.files.wordpress.com/2018/04/eeg-toolkit_polish.pdf)

<sup>16</sup>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 Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006

function. The fact that measures taken with the assistance of the EU funds should take into account the principle of substantive equality is confirmed by the wording of 196(7)(b) of Regulation 1303/2013. **In relation to persons with disabilities, this means that projects must take into account that their inclusion requires a transition from care provided in large institutionalised facilities to deinstitutionalised care in local community**<sup>17</sup>.

The obligation to respect the rights of persons with disabilities to benefit from measures designed to ensure their independence, social inclusion and participation in the life of the community is expressed in Article 26 of the EU Charter for Fundamental Rights. The function of the provision at issue, which is considered as a specification of the general principle of equality, is to strengthen the rights of persons with disabilities who belong to a social group which is particularly exposed to discrimination and social exclusion. Because Article 26 of the Charter does not codify a subjective right, but a principle, it cannot form the basis of individual claims. However, this does not deprive the provision under review of normative significance as Article 52(5) states that the provisions of the Charter, which contain principles, may be relied upon before a court to interpret and review the legality of legislative and implementing acts adopted by institutions, bodies, offices and agencies of the EU and of acts of Member States when they are implementing the EU law, in the exercise of their respective powers. Therefore, **Article 26 of the Charter for Fundamental Rights should be used as a benchmark** for interpretation and control of EU and national legislation on the ESIF, and its application should result in an assessment of the Member State's efforts in designing and implementing cohesion policy at the national level to ensure the independence and inclusion of persons with disabilities in line with the concept of deinstitutionalisation.

## **5. The Commissioner for Human Rights in Poland as a national mechanism for the prevention of torture**

The Commissioner for Human Rights in Poland also performs tasks of the National Prevention Mechanism (NPM)<sup>18</sup>. The funds and staff resources at hand make it impossible to evaluate every EU-funded project implemented. In this context, however, it is worth quoting the Commissioner's 2017 study on the rights of residents of nursing homes<sup>19</sup>. In the course of visits conducted, the NPM representatives relatively often reveal problems related to limiting residents' ability to leave the premises of the institution. Additionally, very often

---

<sup>17</sup> See: Common European Guidelines on the Transition from Institutional Care to Community-based Care ..., op. cit.

<sup>18</sup> More information on National Preventive Mechanism in Poland at:  
<https://bip.brpo.gov.pl/en/content/national-preventive-mechanism>

<sup>19</sup> Prawa mieszkańców domów pomocy społecznej. Jak wspólnie zadbać o godne życie osób starszych, chorych i z niepełnosprawnościami? [Rights of nursing home residents. How to work together to ensure a dignified life for the elderly, sick and people with disabilities] Report on the activity of CHR National Mechanism for the Prevention of Torture, Warsaw 2017, access to the Report in Polish:  
<https://bip.brpo.gov.pl/sites/default/files/Prawa%20mieszka%C5%84c%C3%B3w%20dom%C3%B3w%20pomocy%20spo%C5%82ecznej%20202016.pdf>

before a person is placed in an institution, incapacitation proceedings are initiated. This action is particularly troubling because a person who is totally incapacitated and placed in a nursing home with the consent of his or her guardian is excluded from the group of entities entitled to petition the guardianship court to modify a nursing home admission order. On the other hand, the analysis of residents' individual records, carried out by representatives of the NPM in social welfare homes, not infrequently reveals that the placement of a given resident in an institution took place without the legal guardian making any attempt to support their ward in the place of residence, which could have been sufficient and prevented the necessity of transferring the resident from their own home to an institution.

The COVID-19 pandemic further highlighted a number of negative consequences of conducting mass institutional care for the elderly and people with disabilities<sup>20</sup>. For months, the recommendations and instructions for nursing homes announced on October 8 2020 were in effect<sup>21</sup>. According to these recommendations, only persons necessary for the proper operation of the institution and who did not show signs of infection were allowed to stay on the premises. Residents' activities outside the facilities were to be limited. Although a significant number of residents and staff of social welfare homes have already been vaccinated, a strict sanitary regime is still in place in many facilities. The Ministry of Family and Social Policy, in consultation with the Chief Sanitary Inspector and the Ministry of Health, has developed recommendations to increase the activity of residents outside the institutions. Recommendations ranged from allowing already vaccinated residents to be more active outside the facility to allowing visits by loved ones. Despite easing restrictions, facility managers are cautious and sceptical about lifting any restrictions.

The observations of the situation in nursing homes are incompatible with the content of the CRPD, which recognizes the equal right of all persons with disabilities to live independently and be included in society with freedom of choice and control over their own lives. Article 19 emphasizes that persons with disabilities are subjects of rights and holders of rights. The provision of adequate support to persons with disabilities should respect the inherent dignity, autonomy and independence of the person. In this context, the activities undertaken within the framework of EU funding require further analysis in terms of compliance with the applicable legislation in light of Article 6 of the Charter. Discretionary rights of the Member States cannot exclude them from seeking to achieve the goals expressed in the Chart of Fundamental Rights or in the Convention on the Rights of Persons with Disabilities.

---

<sup>20</sup> Intervention to the Minister of Family, Labour and Social Policy of 28 September 2020, access at: <https://bip.brpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20MRPiPS%20ws.%20stanu%20prac%20nad%20Odeinstytucjonalizacj%C4%85,%2028.09.2020.pdf>

<sup>21</sup> Communication of 8 October 2020 posted on the website of the Ministry of Family and Social Policy: <https://www.gov.pl/web/rodzina/aktualne-rekomendacje-i-instrukcje-dla-domow-pomocy-spoecznej>

## 6. The action of the Member State towards the de-institutionalisation process

Further analysis should also take into account activities undertaken for people with disabilities in a broader context. The implementation of the recommendation indicated by the UN Committee on the Rights of Persons with Disabilities would be to adopt a strategy for the deinstitutionalization of social services in Poland. Currently, this task is among the key ones identified in the “Strategy for People with Disabilities 2021-2030” (further also as: the Strategy). As indicated in the Strategy, the sub-priority “Conducting deinstitutionalisation and introducing systemic solutions in the field of social services supporting independent living” includes a number of activities aimed at the implementation of the deinstitutionalisation process in the perspective of 2030. Comprehensive and detailed activities which help implement the whole of the discussed process together with a precise schedule and indicators are to be indicated in a separate, national strategic framework for deinstitutionalisation.

Currently work is underway on the draft “Strategy for the development of social services 2021-2035”<sup>22</sup>. During the pre-consultation, the Commissioner also made his comments on the document. The most important is to adopt **clear and precise schedule of activities**. The presented draft strategy of development of social services includes only end dates which assume implementation of particular actions and not full schedule which includes transition from project actions to systemic regulations. Simply indicating the end dates of individual actions in a list of indicators is insufficient. In the Commissioner’s view, it would be advisable to set out more detailed assumptions for changes to be made, while indicating which legal acts need to be amended or repealed and to what extent. It should also be noted that **the most significant deinstitutionalisation measures are not expected to be implemented until 2035**. Over the next 5 years, only activities related to the appointment of a person coordinating social services or conducting pilot programs in individual communes are planned (at this stage of work). The project does not take into account the recommendations addressed to Poland by the Committee in 2018. Neither do the authors indicate when the 24-hour institutions are going to be closed. In this context it has to be remembered that, in accordance with the Common European Guidelines on Transition from Institutional Care to Community-based Care<sup>23</sup>, it is recommended that national strategies include i.a. a target date of closing the institutions, a time-table listing measurable progress, prohibition of admissions to long-term care facilities and recognition of the need to develop unambiguous standards for all community-based services, as well as

---

<sup>22</sup> Draft resolution of the Council of Ministers establishing public policy titled “Strategy for the development of social services, public policy 2021–2035”, access in Polish: <https://www.gov.pl/web/rodzina/projekt-uchwaly-rady-ministrow-w-sprawie-ustanowienia-polityki-publicznej-pt-strategia-rozwoju-uslug-spoecznych-polityka-publiczna-na-lata-20212035?fbclid=IwAR1ZjLMf4OGlmD4hfjC7C6n14kMG8EIO-RSt17SdyKuQQaleQIzhwNypPvg>

<sup>23</sup> Common European Guidelines on the Transition from Institutional to Community-based Care, <https://deinstitutionalisationdotcom.files.wordpress.com/2017/07/guidelines-final-english.pdf>, p. 65.



a stipulation that such standards be developed in close collaboration with organizations representing people with disabilities and their families. It is important that the newly adopted document meets the following requirements.

### **7. Monitoring the operations supported by the EU funds**

It is crucial to ensure that the development of different activities financed by the EU funds is compliant with the CRPD, therefore EU law. In this regard projects shall be assessed in terms of their impact on the situation of their target groups, in particular whether they do not reinforce the segregation or isolation, discrimination of their target groups, as well as violate their fundamental and human rights. This action requires ensuring a continuous monitoring in a dialogue with the Managing Authority.

I need to underline that NHRIs have knowledge to assess whether the design and implementation of specific project remains consistent with the standard of human rights protection under national, EU and international law. But the availability of resources to effectively implement such a task remain a challenge. Therefore, both national and EU authorities should plan wisely and allocate funds adequate to the tasks at hand. NHRIs, as well as equality bodies, can be important partners in monitoring the implementation of appropriate solutions, provided they are equipped with the necessary tools.

I hope that the information presented will contribute to clarification of circumstances related to expenditure of funds by managing bodies in the past and the present EU financial perspective in accordance with the principle of equality. At the same time, I would like to stress that the main postulate in this respect is striving to implement the objectives expressed in the Convention on the Rights of Persons with Disabilities in accordance with the guidelines expressed in General Comment No. 5 to Article 19 of the CRPD.

*Kind regards,*

[Redacted signature]

[Redacted name]

[Redacted title]