

European Commission

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By e-mail: [REDACTED]

Vienna, Brussels, August 10th 2021

Subject: Further information regarding the complaint submitted by the European Network on Independent Living and Independent Living Austria in July 2020

Ref.: CHAP(2020) 1883

Dear [REDACTED]

thank you for your letter dated 15th July 2021 (further referred to as “the letter”), in relation to the complaint by the European Network on Independent Living (ENIL) and Independent Living Austria (ILA) against the State Government of Upper Austria with regard to the segregation and social exclusion of women and men with disabilities in facilities which were co-financed by the European Agricultural Fund for Rural Development (EAFRD). We appreciate the efforts of the European Commission to examine the arguments brought forward by ENIL and ILA. However, to provide the European Commission with further evidence to evaluate a breach of EU law we would like to present the following additional information:

1. Lack of a strategy for deinstitutionalisation in Upper Austria

The European Commission argues that transitory solutions are necessary in a deinstitutionalisation process, which means that large institutions need to be closed and replaced by smaller facilities. For this to be justified, according to the European Commission, there needs to be a systematic and comprehensive strategy or plan for deinstitutionalisation in place. However, in Upper Austria, a strategy for deinstitutionalisation does not exist or has not been made public.

The lack of a systematic programme for deinstitutionalisation in Austria has been stated and criticised repeatedly:

Already in 2012, the then Commissioner for Human Rights of the Council of Europe, Nils Muižnieks, visited Austria and emphasized the importance of a systematic strategy for deinstitutionalisation: “The Commissioner notes that the draft National Action Plan for Persons with Disabilities covers the right to live independently and be included in the community and therefore also addresses the need for a progressive replacement of institutions for persons with disabilities with community-based alternatives (de-institutionalisation). However, concrete measures in this regard fall within the competencies of the Länder and are therefore not part of the current draft action plan. The Commissioner emphasises the crucial role of de-institutionalisation plans committing all competent authorities to a concrete timetable and the attainment of measurable targets, in order to achieve progress in this important field.”¹ [emphasis added]

In 2020, an evaluation of the National Action Plan on Disability was presented where the authors conclude: “No measures were planned for the area of de-institutionalization in the NAP Disability. The experts criticize that there has even been further construction of larger facilities during the implementation period of the NAP Disability 2012-2020. Attempts in the direction of de-institutionalization are considered to be too little effective.”² [emphasis added]

In 2013, the Committee on the Rights of Persons with Disabilities stated in para 36 of the Concluding Observations on Austria: “The Committee notes with concern reports that over the last twenty years the population of Austrians with disabilities, who are institutional dwellers, has increased. The Committee is particularly concerned by this phenomenon because institutions are contrary to article 19 of the Convention and leave persons vulnerable to violence and to abuse.” Consequently, the Committee recommended “that the Federal Government and the Governments of the Länder place greater efforts on de-institutionalisation and in allowing persons with disabilities to choose where they live.”³ [emphasis added]

¹ Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe. CommDH(2012)28, Strasbourg, 11 September 2012. p. 9.

² Bundesministerium für Soziales, Gesundheit, Pflege und Konsumentenschutz (2020). Endbericht. Evaluierung des Nationalen Aktionsplans Behinderung 2012-2020, Strategie der österreichischen Bundesregierung zu Umsetzung der UN-Behindertenrechtskonvention, 30. https://www.sozialministerium.at/dam/jcr:ec106d2c-7346-4360-8756-975de92d9576/Evaluierung_des_NAP_2012_2020.pdf

³ Committee on the Rights of Persons with Disabilities (2013). Concluding observations on the initial report of Austria, adopted by the Committee at its tenth session, 2-13 September 2013. CRPD/C/AUT/CO/1. https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/AUT/CO/1&Lang=En

In 2016, the Independent Monitoring Committee for the implementation of the UN CRPD in Austria published a comprehensive statement on deinstitutionalisation and stated that a strategy for the deinstitutionalisation of persons with disabilities is lacking in Austria.⁴

In its second state report on Austria, the Austrian Disability Council stated in July 2018: “There is no plan for comprehensive measures towards deinstitutionalization for the time being and as far as we know, there is no valid data available.”⁵ [emphasis added]

Finally, in the Austrian country report on Living independently and being included in the community, published by the Academic Network of European Disability Experts in 2019, the authors state: “There is no planned and systematic approach for the independent living of persons with disabilities, neither on Federal level nor on the level of the Laender. There is no plan or coordinated strategy for de-institutionalisation either.”⁶ [emphasis added]

The lack of a systematic strategy in Upper Austria becomes obvious with a closer look at the six residential facilities co-funded by EAFRD:

Living facility 1 (as referred to in the written complaint of July 2020) was established within a large existing institution where about 200 disabled children and adults live. Thus, this new facility does not qualify as a small facility, which replaces a larger one, and where disabled persons moved to from a larger facility which is being closed. Adding a new living unit to an already existing large residential institution contravenes all concepts and measures aiming at deinstitutionalisation.

Living facility 2 (as referred to in the written complaint of July 2020) for a total of 21 disabled persons, which is directly linked to a new sheltered workshop for 32 disabled persons constitutes a so called “total institution” where living and occupation take place at the same facility. Disabled persons in such institutions have a high risk of being completely segregated and isolated from the general community and often do not leave the institution’s premises for long periods. Such concepts have not been State of the Art in the field of disability services for decades. Again, this indicates a lack of a theoretically well elaborated concept for deinstitutionalisation.

⁴ Unabhängiger Monitoringausschuss zur Umsetzung der UN-Konvention über die Rechte von Menschen mit Behinderungen. Stellungnahme De-Institutionalisierung. 28. November 2016. <https://www.monitoringausschuss.at/stellungnahmen/de-institutionalisierung-28-11-2016/>

⁵ Österreichischer Behindertenrat (2018). Second Alternative Report on the implementation of the UN Convention on the Rights of Persons with Disabilities in Austria. On the occasion of the second state report review before the UN Committee on the Rights of Persons with Disabilities, Vienna.

⁶ Country report on Living independently and being included in the community. Austria, p. 6.

<https://www.disability-europe.net/downloads/1015-year-4-2018-19-policy-theme-il>

Living facility 3 (as referred to in the written complaint of July 2020) is a new residential home which is part of a larger institution for care and attendance run by the State of Upper Austria.⁷ As such, living facility 3 is considered and named as a “branch” or “remote station” of the large State institution. The official website does not provide any information or reference regarding plans or steps for deinstitutionalisation. Thus, the 20 new places provided in living facility 3 do not replace places in the large institution, but must be considered an expansion of the existing residential care facility. It is extremely unlikely that 20 persons moved out from the existing residential facility as a transitory step towards deinstitutionalisation.

The same applies to living facility 4 (as referred to in the written complaint of July 2020): This is a new facility which – at least according to the information publicly available – does not replace a larger residential institution or could be considered as a transitory step towards deinstitutionalisation.

Living facility 5 is a new residential home for 16 persons living in a region with a high demand for disability services in the field of housing. The 16 new places do not substitute places in a large facility but are a new service in the region. Thus, instead of developing support services for independent living and inclusion in the community, the State Government of Upper Austria built a new residential facility which contributes to the segregation of disabled persons.

Finally, living facility 6 for a total of 16 disabled persons replaces an old living facility for a total of 8 disabled persons. Thus, instead of developing a deinstitutionalisation concept with effective participation of the 8 inhabitants of the old living facility, the State government of Upper Austria decided to build a new, much larger residential facility. This is in complete contradiction to any idea of deinstitutionalisation.

The background information on the living facilities at question makes the lack of a meaningful and effective strategy for deinstitutionalisation in the State of Upper Austria more than obvious. Thus, ENIL and ILA repeat their allegations that the co-funding of the six living facilities for disabled persons contribute to their social exclusion and segregation, and cannot be considered in compliance with the UN CRPD or the EU Fundamental Rights Charter.

2. Shared management between the Member States and the Commission

The European Commission emphasizes the shared management between the Member States and Commission for the implementation of specific measures and projects within the ESIF partnership agreement. However, “shared management” does not imply shifting the sole responsibility for the projects co-financed by ESIF to the Member State. According to the ESIF Regulations, the European

⁷ See official website of the State residential facility for care and attendance: <https://www.lpbz-ooeg.at/schloss-haus>

Commission has a responsibility to monitor and control if ESIF is used according to the goals and standards defined in the respective partnership agreement and the Operational Programmes.

3. Sources of evidence referred to by the European Commission

According to the references included in the letter, the European Commission based its reply on the information provided by the State authorities which were responsible for implementing EAFRD in Upper Austria, namely the State Government of Upper Austria and the Federal Ministry for Agriculture, Regions and Tourism. However, to collect more comprehensive and less biased information, we would have expected the European Commission to ask respective and independent Human Right Bodies in Austria for their opinion and assessment of the facilities at question. This includes the Independent Monitoring Committee for the implementation of the UN CRPD, the Austrian Ombudsman Board and the Austrian Disability Ombudsman. This would also be in accordance with the ex-ante conditionality 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. According to this ex ante conditionality, in order to use ESIF, Member States must have in place: “Arrangements in accordance with the institutional and legal framework of Member States for the consultation and involvement of bodies in charge of protection of rights of persons with disabilities or representative organisations of persons with disabilities and other relevant stakeholders throughout the preparation and implementation of programmes.”⁸ The European Commission failed to make any attempt to verify whether such consultations were carried out by the State authorities in the decision to build the facilities at question.

4. Free choice of residence of disabled persons in Austria

The European Commission received the information that “the persons concerned are able to choose for themselves which housing and services they need.” ENIL and ILA strongly contest this statement. In practice, disabled persons have to accept a place in a facility which is available, often not in their community of origin, and do not have a choice among a variety of support services. This is particularly the case for persons with more profound disabilities and support needs to whom Personal Assistance is often not available.

This has been confirmed by a judicial review⁹ that focused on the right to choose one’s residence and place of stay for disabled and old persons in Austria. The report found that the right to choose where and

⁸ See: STRAT.AT 2020. Partnerschaftsvereinbarung Österreich 2014-2020 https://www.oerok.gv.at/fileadmin/user_upload/Bilder/3.Reiter-Regionalpolitik/2.EU-Kohaesionspolitik_2014_/Nationale_Strategie_STRAT.AT2020/STRAT_AT_2020_genehmigte_Fassung_vom_Oktober_2014.pdf

⁹ See Zapletal, Ilse (2020). Freie Wahl von Aufenthalt und Wohnsitz. Wien: Linde Verlag, p. 147f.

with whom one lives is structurally hindered by lack of or insufficient services for persons with disabilities and is only available to a small group of persons with disabilities. One central structural problem is that the place of residence tends to be linked to the provision of care or support. This is particularly true for persons with high needs of support, to whom personal assistance services are not available. In all six living facilities co-funded by EAFRD, the support service is directly linked to living in a particular facility, sometimes even specialised for a certain kind of impairment. If an individual was to refuse a particular living facility, or would want to move out, they would also lose all the support that comes with it. In practice, this takes away the choice from persons with disabilities about where they live.

This issue emphasizes the importance of asking independent and impartial stakeholders for an assessment of the co-funded facilities.

5. Participation of the Austrian Disability Council in the selection criteria of the projects

The European Commission received the information 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." However, the Austrian Disability Council contested this assertion when it was informed about it by ILA. The Austrian Disability Council never agreed to the use of funds as described in the complaint submitted by ENIL and ILA in July 2020. The Austrian Disability Council is neither a member of the "supervising committee" mentioned on page 5 of the letter nor provided for in the Upper Austrian State law. On the contrary, in 2019 the Austrian Disability Council together with the then member of the EAFRD Monitoring Committee submitted a complaint to the Ministry of Social Affairs regarding the use of funds for the construction of institutions. In a discussion with the Ministry of Social Affairs as well as with the Ministry of Agriculture the Austrian Disability Council handed over an information letter which shows how a UNCRPD-compliant use of funds would work. This document was then brought to the attention of the EAFRD Managing Authorities and the Laender by the Ministry of Social Affairs.

The Austrian Disability Council emphasizes that due to the confidentiality status of the EU Commission document it is not possible to make an official statement to the letter. Thus, should the EU Commission lift the confidentiality of the letter, the Austrian Disability Council would be ready to repeat its position officially in a written statement.

6. Sheltered workshops not a part of the normal labour market

The European Commission argues that the two sheltered workshops co-financed by EAFRD are not a part of the normal labour market and that thus the EU Employment Equality Directive is not applicable. ENIL and ILA believe this argument discriminates against persons with disabilities and would like to provide the following additional information:

The Austrian Ombudsman Board published a comprehensive special report on the situation of disabled persons in sheltered workshops¹⁰ in Austria. The findings and conclusions in the report are based on 600 visits in sheltered workshops all over Austria. Activities in the sheltered workshops are described as follows: “People with disabilities perform a wide variety of tasks in sheltered workshops. In one facility, for example, after being commissioned by companies, they were crushing cardboard boxes, sorting vegetables according to quality or printing on objects. They also produce their own goods and sell them in a store. The work is sometimes physically very strenuous and working hours are strictly regulated. The monthly allowance for this work is less than 100 euros.”¹¹ “Many of these facilities take over production orders and promise the on-time performance to the customers. They produce industrial mass-products and manufactured goods. Some facilities also offer catering services, IT services and similar services.”¹² A study carried out in 2012 for the Ministry of Social Affairs showed that 62% of disabled persons in sheltered workshops were considered as receiving qualifications or as carrying out activities close to the labour market.¹³

Although working hours are regulated and compulsory and the work performed is often considerable, disabled persons are not covered by social insurance and only receive so-called pocket money depending on their performance. The pocket money “ranges from approx. 5 euros to 200 euros per month (in very rare cases). Financing a of a "normal" everyday life is thus by no means possible. A client interviewed by a commission reported, for example, that she could not afford a visit to the hairdresser.” Thus, it is concluded, “it is no longer possible to speak of an independent life.”¹⁴

The Austrian Ombudsman Board emphasizes that the current legal framework for sheltered workshops constitutes a violation of human rights obligations Austria has pledged to uphold. Among others, it also refers in detail to European Union Law: “Art. 10 of the Treaty on the Functioning of the European Union (TFEU) explicitly obliges the EU to combat discrimination on the grounds of disability in defining and

¹⁰Many different terms are used in Austria to describe services which provide occupation and daily structure for disabled persons who are not deemed capable of gainful employment in Austria. In Upper Austria, such facilities are called skill-oriented activity. ENIL and ILA prefer to use the term “sheltered workshop” which is widely used internationally.

¹¹Volksanwaltschaft (2019). Keine Chance auf Arbeit. Die Realität von Menschen mit Behinderung, p. 6 (translation ILA) <https://volksanwaltschaft.gv.at/downloads/30c01/Sonderbericht%20MmB%202019%2029.11.19.11>

¹²ibid., p. 8

¹³Deloitte / BMASK (2012). Studie Analyse des Investitionsvorhabens im Bereich sozialversicherungsrechtliche Absicherung von Menschen mit Behinderung in der Beschäftigungstherapie, p. 9f.

¹⁴Volksanwaltschaft (2019), p. 9

implementing its policies and measures to combat discrimination on the grounds of disability. In the general anti-discrimination clause of the EU Charter of Fundamental Rights (Art. 21), there is an explicit mention of discrimination on the grounds of disability. In Art. 26, on the "Integration of persons with disabilities", the Union recognizes the right of persons with disabilities to "measures to ensure their independence, social and occupational integration and participation in the life of the community." This strongly supports the arguments provided by ENIL and ILA in their written complaint about the co-financing of sheltered workshops by EAFRD.

Thus, contrary to the clear and distinct goal to reduce unemployment among disabled people and to develop measures for the inclusion into the regular labour market as was specified in the 2014-2020 partnership agreement, the Upper Austrian Government reinforced the dependence and inability to live independently of disabled persons by building two new sheltered workshops co-financed by EAFRD.

In light of the information provided above, we formally request that the Commission does not close the complaint at this stage, and that it continues with the investigation, with a view of establishing a breach of EU law.

Yours sincerely,

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