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SENSITIVE (*): AGRI.I.1

Subject: Your complaint concerning a facility for children with disabilities in Carinthia cofinanced under the Austrian RDP 2014-2020

Ref.: CHAP(2022) 03039

Dear Mrs Feuerstein and Mrs Bulic Cojocariu,

I refer to your letter of 2.11.2022 which has been registered as a complaint under reference number CHAP(2022)03039. Your complaint concerns a residential facility for children with disabilities in Carinthia, a project cofinanced under the Austrian Development Programme 2014-2020 ('RDP') which according to your allegations perpetuate segregation and social exclusion of those persons.

Subject of the complaint

You allege that the approved project breaches Article 26 on integration of persons with disabilities and Article 21 on non-discrimination of the Charter of Fundamental Rights of the European Union ('the Charter'). You consider also that the project at stake breaches the United Nations Convention on the Rights of Persons with Disabilities ('the

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UNCRPD'), in particular Article 19 on living independently and being included in the community and Article 24 on the right of persons with disabilities to education, as well as the Convention on the Rights of the Child (CRC), in particular Article 2 prohibiting discrimination based on disability.

You also refer to the General Comment No 5 on living independently and being included in the community, adopted by the UN Committee on the Rights of Persons with Disabilities on 31 August 2017 and to the General Comment No 4 of the UNCRPD on the right to inclusive education.

You consider also that the project breaches Regulation (EU) No 1303/2013 ('the CPR') laying down common provisions on the European Structural and Investment Funds (ESI Funds) ⁽¹⁾, in particular Articles 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.

Analysis of the complaint

In general, it should be stressed that in the Commission's view, promoting the transition from institutional to community-based services might require in some cases transitory solutions aiming at securing healthy and secure living conditions all along this process without undermining the overall aim of Article 19 UNCRPD, as long as a transition process from institutional to community-based care has been put in place.

As regards your grievances regarding to the specific breaches of the EU and Austria's obligations under the UNCRPD and the Charter as well as of the provisions of the CPR, please note that 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 Regulation (EU) No 1305/2013 ('the Rural Development Regulation') ⁽²⁾ 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). In particular, 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 however 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. Nevertheless, -it has to be underlined- 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 ⁽³⁾. The question whether the operation of such an establishment

⁽¹⁾ OJ L 347, 20.12.2013, p. 320.

⁽²⁾ 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.

⁽³⁾ See, by analogy, case C-1 17/14, *Nisttahuz Podava*, point 42

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.

Therefore, my services asked the Managing Authority of the Austrian RDP to provide additional information as concerns the approved project concerned.

The national authorities stressed that Carinthia is continuously working on the implementation of the UNCRPD, taking into account the national strategy on deinstitutionalisation and the national action plan for persons with disabilities. According to these authorities, the implementation of the strategies should be seen as a process. The aim is to continuously develop services to establish independent living conditions for people with disabilities.

They explained that in the case of the facility in question, which is currently being implemented with a deadline for completion that is set for the end of 2023, this will be done by means of a new building for accessibility, modern fire safety and improvement of the space offered. The housing group of currently 15 inhabitants is divided into smaller groups. In addition, single and double rooms are offered, which was not possible in the existing facility. The project addresses also development gaps and contributes to inclusion in society of the children and young people with disabilities of compulsory school age. In the same spirit of deinstitutionalisation, the right to full participation in the community is being exercised. School attendance and leisure activities take place mostly outside the residence and most children and young people spend weekends and holidays with their families. Depending on the level of knowledge and the individual curriculum, children and young people required to attend school can either attend the Comenius Private School with Public Law or, alternatively, a public school. The facility is opened, according to the national authorities, to the outside world by inviting both the parents and relatives of the inhabitants.

Furthermore, in terms of the implementation of the RDP, the national authorities pointed out that members of disability organisations, specifically the Austrian Disability Council, are represented and have voting rights on the supervisory committee, 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.

Finally, it should be recalled that, like any international treaty, the primary responsibility to implement the UNCRPD lies with the State parties. Signing and ratifying the Convention obliges the State parties to ensure that all existing and future legislation, policies and programmes are aligned with its provisions.

Conclusion

As an outcome of the preliminary analysis of your allegations and taking into consideration the additional information received from the competent national authorities, 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, documents or new information that could alter our position.

Yours faithfully,

