



EUROPEAN NETWORK ON INDEPENDENT LIVING

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In Brussels, 17 December 2020

**Subject: Complaint CHAT(2019) 3555**

Dear Ms Eveline Petrat-Charley,

Thank you for your letter dated 20 November (further referred to as "the letter"), in relation to the complaint by the European Network on Independent Living (ENIL) against the Ministry of Public Works, Development and Administration in Romania with regard to the call for tenders P.O.R./8/8.1/8.3/B/1.

I hereby enclose additional information to help the European Commission establish a breach of EU law in the complaint brought by ENIL.

### **I. Prohibition of investing in institutions**

1. In relation to legal provisions cited in the complaint, you state on page 6: *"However, these provisions do not establish a general and absolute prohibition to support long-stay residential institutions."*
2. The lack of an explicit prohibition does not mean that Regulation 1303/2013 allows investment of EU monies in residential institutions. Article 7 of Regulation 1303/2013 requires Member States and the Commission to **ensure the respect of the principles of equality between men and women and non-discrimination** throughout the preparation and implementation of programmes. This includes discrimination on the basis of disability. In turn, Article 4(2) of Regulation 1303/2013 requires the Commission and the Member States to ensure that **support of the ESI Funds is consistent with relevant policies and horizontal principles**, as referred to, inter alia, in Article 7 of Regulation 1303/2013 and Article 26 of the Charter of Fundamental Rights, *i.e.*, the integration of persons with disabilities in society.
3. Furthermore, these provisions, *i.e.* Articles 4, 6 and 7 of the Regulation 1303/2013, **should not be read in isolation, but should be considered in context** of EU's ratification of the UN Convention on the Rights of Persons with Disabilities (CRPD). As you yourself state on page 7: *"[s]igning and ratifying the Convention obliges the State parties to ensure that all existing and future legislation, policies and programmes are aligned with its provisions."*

4. In effect, 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 CRPD, which prohibits investments in institutions.
5. The right to independent living, laid down in Article 19 CRPD and General Comment No. 5, clearly entails **an absolute prohibition to fund the development of institutions, to which the EU is bound**. On page 6, you yourself cite paragraph 51 of the General Comment No. 5, which states that: “*State parties should ensure that public or private funds are not spent on maintaining, renovating, establishing, building or creating any form of institution or institutionalisation.*”
6. The analysis of the Committee on the Rights of Persons with Disabilities’ (further: “the Committee”) **jurisprudence**<sup>1</sup> further confirms the prohibition of investing any funds, including European Structural and Investment Funds, into institutions for persons with disabilities by the EU Member States. For example, in relation to Hungary, the Committee has urged the Government to: “*Reorient the investment of public funds – including the way in which funding from the European structural and investment funds is allocated – from institutions to support in the community by accelerating the development of a full range of in-home and other community services offering support in daily life, including personal assistance, and other forms of supported decision-making.*”<sup>2</sup>
7. In May 2020, the UN Special Rapporteur on the rights of persons with disabilities and the Special Rapporteur on adequate housing, addressed a communication<sup>3</sup> to the Commission President Ursula Von der Leyen, raising concerns about the “***inappropriate use of European Structural and Investment Funds (ESIFs) to maintain institutional care, including by replacing large institutions for persons with disabilities with smaller institutions in several countries of the European Union***” (emphasis added). The Special Rapporteurs refer specifically to the tender P.O.R./8/8.1/8.3/B/1 in Romania, as an example of such inappropriate use.
8. The UN Special Rapporteur on health also addressed a communication to the Commission in March 2020, in which he stated that “***the European Commission has a clear responsibility as a donor not to finance initiatives that are contrary to human rights***” (emphasis added).<sup>4</sup>
9. The **Commission itself committed to this interpretation in its own guidance**, saying that ESI Funds “*should as a basic principle not be used for building new residential institutions*” and that “*the size of the institution cannot be used in isolation as a criterion to judge whether the supported infrastructure can be considered as community-based service or simply a scaled-down institution.*”<sup>5</sup>

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<sup>1</sup> See, for example, the Concluding Observations of the Committee in relation to Bulgaria, the European Union, Hungary, Latvia, Lithuania, Poland and Slovakia, for reference to the use of ESI Funds, at:

<https://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx>

<sup>2</sup> Committee on the Rights of Persons with Disabilities, Inquiry concerning Hungary under article 6 of the Optional Protocol to the Convention, CRPD/C/HUN/IR/1, 17 September 2020, paragraph 112e. See:

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhnsbHatvuFkZ%2b%2f93Y3D%2baa2q6qfzOy0vc9Qie3KjjeH3GA0srJgyP8IRbCjW%2fiSqmYQHwGkfikC7stLHM9Yx54L8veT5tSkEU6ZD3ZYxFwEgh>

<sup>3</sup> See: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25267>

<sup>4</sup> See: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25091>

<sup>5</sup> European Commission, *Report on the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union (SWD(2014)0182)*, 2014, paragraph 98; and European

10. On page 6, in continuation of the sentence challenging the prohibition of supporting long-stay residential institutions, you state: "*moving away from long-stay residential institutions to community-based services cannot simply take place from one day to the next. Instead, it is a process which requires the development of individualised services, the planned closure of long-stay residential institutions and making general services (education, health, housing) available to persons with disabilities.*" **If there is an ongoing gradual process to move away from institutions, it follows that ESI Funds cannot be used to maintain the institutions.** Continued investment in institutions takes resources away from individualised community-based services, such as personal assistance, and from inclusive housing solutions, and further delays transition from institutional to community-based care and support.
11. The European Ombudsman supports this position. In her decision in case 1233/2019/MMO, published on 30 July 2020, she stated: "*The Commission's statement that the current legal framework does not prevent Member States from using EU funds for residential institutions, as long as they do not obstruct the "progress on ensuring independent living arrangements and deinstitutionalisation" is difficult to comprehend. It seems obvious that EU funds spent maintaining, or worse still building, institutions cannot but obstruct progress on ensuring deinstitutionalisation*" (emphasis added).<sup>6</sup>
12. In conclusion, by stating that there is no general and absolute prohibition of investing ESI Funds in institutions, you are not only contradicting Article 19 and the General Comment No. 5, but also the Commission's own policy guidance, the CRPD Committee jurisprudence, the three different UN special mandate holders (on disability, housing and health) and the European Ombudsman, among other.

## II. Definition of institutional care settings

13. On page 6, you state: "*Thus, it is possible to conclude that the size of a facility is not key for assessing if it is a long-stay residential facility preventing the personal choice and autonomy or a community based care housing that is providing for independent living. Focus should rather be put on assessing the existence of an institutional character and the lack of independent living in a residential setting*" (emphasis added).
14. However, in our complaint, the size was just one of the characteristics we have referred to when alleging the said investments are in breach of EU law. In fact, we have referred to **eight additional institutional characteristics of the facilities supported with ESI Funds in Romania**: isolation and segregation from independent life in the community; obligatory sharing of assistants with others and no or limited influence over whom one has to accept assistance from; lack of control over day-to-day decisions; lack of choice over whom to live with; rigidity of routine irrespective of personal will and preferences; identical activities in the same place for a group of persons under a certain authority; a paternalistic approach in service provision; and supervision of living arrangements.
15. You further state that our allegations are hypothetical, i.e. "not based on actual factual situations". However, in our complaint, we have referred to **a report from Romania's National Preventative Mechanism** (under the Operational Protocol to the Convention against Torture), from 2016, in relation to the same type of service ("sheltered housing for

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Commission, *Draft thematic guidance fiche for desk officers: transition from institutional to community-based care (deinstitutionalisation) version 2*, p. 4.

<sup>6</sup> Case 1233/2019/MMO, see: <https://www.ombudsman.europa.eu/en/decision/en/119185>

adults with disabilities”), which found evidence of human rights violations (*Annex 1*). We also refer to the approved building plans (incl. a reference to an isolation room) and project descriptions, as well as locations for the new services, which are in small villages in some of the most deprived areas of the EU – all these details are factual, based on information that is available to the Commission, but also the general public (see *Annex 2* for examples).

16. In fact, you yourself confirm one of our concerns by stating on page 8: “[t]he activities planned in day care centres or sheltered housing will be **organised, carried out and monitored** in accordance with these standards that aim at ensuring respect for human rights and fundamental freedoms and constantly improving the quality of social services.” (emphasis added). This recognizes that the residents of the group housing will have limited agency to control their day-to-day lives, which is one of the institutional care characteristics and therefore fails to comply with Article 19 CRPD.
17. Thus, it is clear that the planned programme involves the creation of institutions. As explained above, this is in breach of Articles 4(2) and 7 of Regulation 1303/2013, Article 19 of the CRPD, and Article 26 of the Charter of Fundamental Rights.
18. The fact that the institutions are not already in operation does not mean that investment itself is not in breach of these provisions. This is because, as stated, there is a **clear and imminent risk** that the rights of the persons assigned to these institutions will be violated. It is, therefore, sufficient to create a breach, and for the Commission to act. This is confirmed by the Commission’s Notice on the use of ESI Funds, which includes as a key question that must be considered to check that a program is compliant with Regulation 1303/2013: “Would it entail **risks** in terms of torture and inhuman or degrading treatment or punishment?” (emphasis added).<sup>7</sup>
19. In conclusion, **the potential of harm in this case, which is near certain, provides the Commission sufficient basis to intervene**. It is also clear from the complaint form that the Commission intends to take future possibilities into account, by asking: “[d]oes the Country concerned receive (or could it receive in future) EU funding relating to the subject of your complaint?” (emphasis added).

### III. Assessment of the facts

20. On pages 7 to 8, you provide details of your contact with the Managing Authority. However, the only action that the Commission has undertaken in relation to our complaint is a **paper-based assessment, which is not sufficient to establish ongoing or potential human rights violations**. Human rights violations are never planned for in the strategic documents of national authorities, which you refer to in the letter. We note that there is no reference to any independent human rights body or institution in Romania, to provide an assessment of whether the Managing Authority has properly fulfilled its tasks. This includes the absence of any attempt by the European Commission to investigate allegations, set out in our complaint, that will give rise to serious human rights violations.
21. For example, on page 9 you state: “the Managing Authority trusts that the operations financed under the call will be able **to provide the conditions necessary for persons**

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<sup>7</sup> Commission Notice, Guidance on ensuring the respect for the Charter of Fundamental Rights of the European Union when implementing the European Structural and Investment Funds (‘ESI Funds’) (2016/C 269/01), page 17.

**with disabilities to benefit from everything that the communities in which they are located have to offer.** They also believe that residents of these houses will be able to benefit from the same services of general interest which are provided and offered by the community in the area in which they are built” (emphasis added). One of the concerns raised by ENIL in the complaint was the **location of the ESI funded facilities in small villages (13 facilities) or in small towns (5 facilities)**, and the fact that **they are combined with day care centres**. 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.

22. Pursuant to Article 21 of the Fundamental Rights Charter, the Commission has an **obligation to avoid discrimination**. This obligation is being violated on two levels: (i) by not intervening when national authorities infringe the right to independent living of persons with disabilities; and (ii) by not performing your own supervisory role adequately, thereby infringing the right of persons with disabilities to effective legal protection.
23. In conclusion, with this very narrow interpretation of its supervisory role, the Commission has created a **legal vacuum**. ENIL has already addressed its concerns about the use of ESI Funds for the construction of institutions with the national authorities in Romania 2,5 years ago, without any response. Previous experiences have shown that national and EU Courts are also unwilling to engage in judicial review of deinstitutionalisation reforms and the use of ESI Funds. In the case of *ENIL Brussels Office et al vs. the European Commission* (Case T-613/19), the General Court had found the application for annulment inadmissible. Thus, 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.

#### IV. Progressive realisation

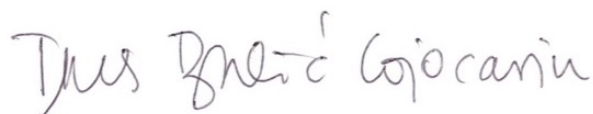
24. On page 6, you refer to the General Comment No. 5 to state: “*the right to access services and facilities is progressively applicable (see para. 39) and requires structural changes (para. 41), as well as to enter into strategic planning (para. 42). In this regard, it expressly recognises a margin of appreciation to State parties in relation to programmatic implementation (para. 42).*”
25. However, the General Comment No. 5 also states in that same para. 42 that: “*States parties have the **immediate obligation [...] to replace any institutionalized settings with independent living support services. The margin of appreciation of States parties is related to the programmatic implementation, but not to the question of replacement***” (emphasis added).
26. The General Comment No. 5 further makes it clear that paragraph (a) of Article 19, i.e. the right to choose one’s residence and where, how and with whom to live “is immediately applicable as it is a civil and political right.”
27. In addition, in order to achieve progressive realisation of paragraphs (b) and (c) of Article 19 CRPD, States parties must “takes steps to the maximum of their available resources”. In this case, Romania has resources in the form of state and ESI Funds, and therefore has an obligation under international law to develop support services in compliance with Article 19 CRPD, and to move away from institutional care provision.

## V. Implementation of EU law

28. On page 9, you state: "*[s]econdly, 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. 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.*"
29. With our complaint, we are contesting the role of the Commission and the Managing Authority, not the "establishment" (*i.e.* the authority running the housing services). Both the Commission and the Managing Authority are clearly bound by the EU law, including the CRPD, which you yourself recognise in the letter.
30. Furthermore, the case law you rely on - C-117/14, *Nisttahuz Podava* - cannot be applied by analogy. The case relates to the legislation of a specific type of employment contract. In the case, the Court found that the legislation on that specific type of employment contract was purely national and was not part of the implementation of EU secondary law. Thus, the Court found EU law was not being implemented. The factual background and substance of the case do not support an application by analogy.

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. Should you require any further information, please do not hesitate to contact me.

Yours sincerely,



Ines Bulić Cojocariu  
Deputy Director  
European Network on Independent Living

List of Annexes:

1. Annex 1 – Report from Romania's National Preventative Mechanism (see: [https://enil.eu/wp-content/uploads/2020/12/Annex-1\\_Complaint-CHAT2019-3555.pdf](https://enil.eu/wp-content/uploads/2020/12/Annex-1_Complaint-CHAT2019-3555.pdf))
2. Annex 2 – Extracts from building plans (enclosed)