

ANNEX TO THE LETTER

**Formal Observations on the officially submitted
Poland BMVI programme 2021-2027, CCI: 2021PL65BVPR001**

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SECTION 4 – Enabling conditions

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- (27) Regarding the fulfilment of the Charter enabling condition, the Commission welcomes the Polish reply to its letter of observations sent on 23/05/2022 (Ares(2022)5174263). In order to demonstrate the fulfilment of this horizontal enabling condition, clarifications regarding points raised by the Commission in its observations letter on 08/04/2022 (Ares(2022)2753140) remain necessary. The Commission would invite the Polish authorities to provide additional information regarding the following points:

In its observations, the Commissions has invited the Polish authorities to 1) provide concrete information about the arrangements in place to effectively ensure compliance with the Charter in all phases of programming and implementation, 2) clearly explain the roles and tasks of the different authorities and bodies (e.g. managing authorities, intermediate bodies and audit authorities) in relation to ensuring the compliance with the Charter in the implementation of the programme and 3) clarify which bodies or persons will provide assistance and expertise on fundamental rights matters and will have the ability to contribute to effectively ensuring compliance with the Charter.

In their reply, the Polish authorities gave further information on how compliance with the Charter will be ensured at all stages of programming and implementation, including in the development of project selection criteria and procedures, in the launch of calls for proposals, as well as in the selection of operations.

The Polish authorities have clarified that these arrangements will be set out in an annex to the Guidelines on the implementation of the principles of equality under EU funds for 2021-2027 and taken into account by individual MAs. This will be done notably when setting up the management, monitoring and control systems, when establishing the monitoring committees and adopting manuals of procedures and when obligations are imposed on authorities and other bodies (e.g. monitoring committee) in the framework of the relevant horizontal guidelines, i.e. equality, monitoring committees, information and publicity, guidelines on the partnership principle, guidelines on eligibility of expenditure in respect of general rules on eligibility of costs or allowing corrections of management costs in case of breaches of rules in projects, etc.

The material scope of the abovementioned guidelines is, however, very limited. The guidelines only cover the Articles 21 and 26 of the Charter, and not all the other rights and principles of the Charter of Fundamental Rights that are relevant for the implementation of the programme. The annex to the guidelines as it stands cannot therefore be considered an adequate vehicle for clarifying the arrangements for effectively ensuring compliance with the Charter.

The Polish authorities also recalled that the implementation of the principles resulting from the guidelines and procedures for complying with the Charter is mandatory for all institutions involved in the implementation of the programme and concerns, to a certain extent, the beneficiaries of the programme on the basis of the grant agreement.

The Commission welcomes that several tools have been developed to ensure Charter compliance notably at project selection stage, in the provisions of the grant agreements, through checklists for the control and verification of payment claims, via the possibility

of taking corrective action where infringements in this area are detected, the possibility to submit complaints concerning non-compliance of interventions/actions/projects with the Charter and the fact that Charter compliance will be taken into account in the evaluation process. The inclusion of specific provisions in this respect in each programme in the sections on the actions described under each of the specific non-discrimination objectives is also welcome.

However, it is unclear how these procedures and guidelines have been designed, and which bodies provided the expertise for their development. Moreover, when it comes to their actual application, expert bodies, e.g. the Human Rights Ombudsman, the State Labour Inspectorate, the Patients' Ombudsman, seem to be involved only in case of irregularities. This raises concerns about how Charter compliance will be ensured in practice as the bodies with the relevant expertise do not seem to be involved in the arrangements to ensure compliance throughout the implementation of the funds. Furthermore, the scope of the 'educational activities' seems to be limited to the principle of non-discrimination and does not encompass the other rights and principles enshrined in the Charter.

Moreover, it is also indicated that Managing Authorities (MAs) will be asked to indicate the specific articles of the Charter related to the scope of the funding support planned under the programme but that the MAs will have autonomy in indicating the relevant references to the Charter. The Commission notes that the inconsistency that might result from the different approaches adopted by the different MAs could lead to unequal treatment when implementing different programmes.

The roles and tasks of the different bodies were also not clarified. There is only a vague reference to the fact that both the authorities responsible for the implementation of the programmes (MA, IB, IB II) and the members of the Monitoring Committee, as well as project promoters, are aware of their role/tasks/responsibilities. Further, the Polish authorities explained that the roles and responsibilities of the authorities "*will derive from horizontal guidelines in specific areas and will be reflected in the relevant implementation documents at the level of each programme*". If the documents are not yet adopted, this information should be set forth in the self-assessment.

In order to demonstrate that this enabling condition is fulfilled, Poland would need to clarify the arrangements in place for all relevant rights and principles enshrined in the Charter and not only for the principle of non-discrimination, explain how compliance with all relevant Charter rights will be consistently ensured across all programmes, taking into account each programme's specificities, specify the role and tasks of the different bodies, and provide information as to how expertise on fundamental rights related matters will be provided to guarantee the effectiveness of the Charter compliance system.

In this context and, in particular, for the AMIF and the BMVI programmes, the Polish authorities are invited to provide concrete information on the arrangements that will be put in place in all phases of the implementation of the programmes to ensure compliance with the Charter and explain the roles and tasks of the different authorities and bodies in key areas such as access to international protection (asylum), return and border management. The Polish authorities are also invited to provide concrete information on the measures that effectively allow for the prevention and/or detection and remedy of

potential practices/actions contrary to the Charter within the framework of the implementation of the AMIF and the BMVI.

In this regard, the Polish authorities are invited to provide specific information on the mechanisms in place and the authorities competent to investigate alleged breaches, amongst others, of the prohibition of inhuman and degrading treatment (enshrined in Article 4 of the Charter), the right to asylum (enshrined in Article 18 of the Charter), the principle of non-refoulement (enshrined in Article 19(2) of the Charter), and the right to an effective remedy (enshrined in Article 47 of the Charter). The Polish authorities are invited to also explain how they will ensure that alleged breaches of the Charter in the implementation of the programme are properly investigated and how follow-up of the findings of the investigations will be effectively ensured.

In its observations, the Commission also raised concerns about the role and mandate of the European Funds Ombudsmen ('EFOs'). The Funds Ombudsmen are presented as actors to ensure effective application of the EU Charter under the CPR programmes. However, their role seems to focus mainly on the improvement of the administrative procedures for the funds and not on the actual protection of fundamental rights.

The Polish authorities mentioned in their reply that the proposed system based on European Fund Ombudsmen (EFO) does not replace but complements the system in place in Poland to ensure that any entity having a legal interest lodges a complaint against the bodies specified in the Code of Administrative Procedure and can lodge a complaint with the Human Rights Ombudsman in accordance with the applicable rules.

However, the Polish authorities have not clarified how the EFOs interlink with the general system for protection of fundamental rights in Poland. Moreover, it is unclear what the relationship is between the Human Rights Ombudsman and the European Funds Ombudsman in ensuring compliance with all the relevant rights and principles of the Charter in the implementation of the programme. There does not seem to be any communication or reporting channel between the EFOs and the Human Rights Ombudsman. Moreover, the Funds Implementing Law for 2021-2027 still focuses on the improvement of the administrative procedures for the funds and not the actual protection of fundamental rights.

Moreover, despite the presentation of these EFOs as the cornerstone of the Charter compliance system in the programme, the Polish authorities stated that *"it should be stressed that the role of the EF Ombudsmen is not to ensure the correct application of the fundamental rights and freedoms enshrined in the Charter of Fundamental Rights of the European Union in the implementation of the Funds, but to allow for an examination of whether the relevant procedures in the programmes were carried out in accordance with the Charter."* It is therefore unclear which body will have the responsibility of ensuring the correct application of the Charter fundamental rights in the implementation of the programmes. The Polish authorities should clarify which body will take up this role and whether this body will be able to provide assistance and expertise on fundamental rights matters and have the ability to contribute to effectively ensuring compliance with the Charter.

In addition, Poland has explained that the EFOs are 'indeed located within the Ministry of Funds and Regional Policies structure, but there is no functional link between the

Ombudsman and the different Managing Authorities (they are separate departments)'. In that respect, Poland is invited to provide more information on the independence of the EFOs during the implementation of the programme, for example their involvement in the Monitoring Committees.

In order to demonstrate that this enabling condition is fulfilled, Poland would need to indicate which body will be responsible for ensuring compliance with the Charter and provide an explicit mandate to this body.

In its observations, the Commission also asked the Polish authorities to clarify which arrangements will be put in place to address the concerns regarding guarantees for the independence of the judiciary and ensure that Article 47 of the Charter is complied with in the management, implementation and control of the CPR funds.

The Polish authorities were invited to clarify which arrangements will be put in place to address the risks identified in the Commission's first observations and ensure Article 47 of the Charter is complied with in the management, implementation and control of the CPR funds.

Firstly, the response of the Polish authorities referred to the ongoing discussions in the context of the RRP. The Commission invites the Polish authorities to explain the relevance of these discussions for the assessment of the Horizontal enabling condition.

Secondly, the Polish authorities' response did not address the Commission's concerns regarding the judicial appointment process.

The Polish authorities are invited to clarify the both sets of concerns.

In its observations, the Polish authorities were invited to clarify which arrangements will be put in place to prevent discrimination on the ground of sexual orientation (Article 21 of the Charter) by *powiats* (counties) and *gminas* (communes) that have adopted "LGBT-ideology free zone" resolutions.

The Commission considers that the inclusion of a provision in the Partnership Agreement that allows the exclusion of beneficiaries (either a local self-government unit or an entity controlled or dependent on it) that have adopted any kind of discriminatory acts going against principles referred to in Article 9 is a first guarantee. The Partnership Agreement does not cover the AMIF, the BMVI and the ISF programmes. This provision should, however, also be inserted in the text of all the programmes so that the risk be considered to be sufficiently mitigated. This assessment will be done programme by programme.

The Polish authorities are therefore, also invited to include such provision in their AMIF, BMVI and ISF programmes.

Finally, as regards criterion 2 of the Charter HEC, the Polish authorities were invited to provide more information about the reporting arrangements to the monitoring committee, such as the origin of the "notifications" mentioned and content (scope, remedial actions) of reporting on both complaints and cases of non-

compliance. They were also invited to clarify the deadlines for dealing with complaints as well as who can report suspicions of non-compliance and to whom.

The Polish authorities shared with the Commission two reports on the activities of the European Funds Ombudsman at the Ministry of Funds and Regional Policy. These reports clarify the types, means, and substance of complaints lodged in the past two years, however the content of the information to be reported to the Monitoring Committee (scope, remedial actions) on both complaints and cases of non-compliance is not mentioned.

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